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Constitutional Law—Administrative Inspections—RIght to Refuse Inspector Admittance Without a Warrant

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RECENT CASES

CONSTITUTIONAL LAW—ADMINISTRATIVE INSPECTIONS—RIGHT TO REFUSE INSPECTOR ADMITTANCE WITHOUT A WARRANT

On November 6, 1963 an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the city's housing code.[1] Upon being informed by the manager of the building that one Roland Camara was using the rear of his leasehold as a personal residence, the inspector demanded that he be permitted to inspect the premises on the ground that the occupancy permit did not allow residential use of the floor. Camara refused entry because the inspector did not have a search warrant. Two days later the inspector returned, again without a warrant, and was again refused permission to inspect. Subsequently a citation was mailed ordering Camara to appear at the District Attorney's office. When he failed to appear, two inspectors returned to Camara's dwelling and informed him that he was required by law to permit an inspection under section 503 of the housing code.[2] Again permission to inspect was refused. A complaint was filed charging Camara with refusing to permit a lawful inspection under section 507 of the Housing code.[3] On December 2. 1963 Camara was arrested and released on bail. His demurrer to the criminal complaint was denied causing him to seek a writ of prohibition. After properly exhausting his remedies in the state courts, an appeal was taken to the United States' Supreme Court. *Held*: administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by the fourth amendment, and such searches, when authorized and conducted without warrant procedure, lack traditional safeguards which the

1. San Francisco, Cal. Mun. Code § 86(3) provides that apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings. The inspections are to be made by the Bureau of Housing Inspection "at least once a year and as often thereafter as may be deemed necessary." The permit of occupancy, which prescribes the apartment units which a building may contain, is not issued until the license is obtained.

2. *Id.* Housing Code § 503 provides a right to enter building. Authorized employees of the 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. *Id.* Housing Code § 507 provides a penalty for violation: Any 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 provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue.

fourth amendment guarantees to individuals. *Camara v. Municipal Court of the City and County of San Francisco* 387 U.S. 523 (1967).

The basic purpose of the fourth amendment[4] is to secure the individual's right to privacy from unreasonable or arbitrary government intrusions into his home and personal effects.[5] The right of privacy first appeared in the Anglo-Saxon legal system as a right pertaining to civil interests, *e.g.*, a person's interest in his name, picture or reputation.[6] The House of Lords decision in *Entick v. Carrington*[7] was the first major recorded assertion of the right as a safeguard against abusive tactics of government. The action was in trespass. Plaintiff, accused of libel, alleged that defendant invaded his private dwelling and made an extensive search that lasted four hours. The defendant argued that the search was made pursuant to a warrant of the type that conferred power upon the holder to make a general search of the entire premises. Lord Camden, finding for the plaintiff, said, "The defendants have no right to avail themselves of the usage of these warrants . . . we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society. . . ."[8] Thus "upon the whole, we are all of the opinion that the warrant is wholly illegal and void."[9] This decision, grounded in the law of trespass and the notion of the sanctity of a man's property, declared every invasion of private property a trespass unless some excuse or justification provided for it in the common law or statutes. In *Boyd v. United States*[10] the principles that Lord Camden announced in *Entick* were applied in interpreting the substance of the fourth amendment. After discussing the rationale of *Entick*, it was stated that, "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case before the court . . . they apply to all invasion on the part of the government . . . of the sanctity of a man's home and the privacies of life."[11] Thus as early as 1886 the fourth

4. U.S. Const. amend. IV.

5. Mapp v. Ohio, 367, U.S. 643, 655 (1961); Silverman v. United States, 365 U.S. 505, 511 (1961); Boyd v. United States, 116 U.S. 616, 630 (1886).

6. *See generally* Annots., 14 A.L.R.2d 750 (1950), 168 A.L.R. 455 (1947); 138 A.L.R. 61 (1942).

7. 95 Eng. Rep. 810 (C.P. 1765). The cause of action was in tort, however, the ramifications of the decision reached beyond the civil area.

8. *Id.* at 817.

9. *Id.* at 818.

10. 116 U.S. 616, 630 (1886). Here the Supreme Court took the first important step towards establishing, within the framework of the Bill of Rights, the right to be left alone, the right to be secure from officious meddling into personal affairs and to be free from the scrutiny of petty officials. Mr. Justice Bradley in delivering the opinion of the court stated:

> It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

11. *Id.* at 630.

amendment was recognized as establishing the individual's right to privacy and the freedom from unreasonable search and seizures. Four years after the *Boyd* decision, an article by Warren and Brandeis helped solidify the position of the right to privacy in our system of jurisprudence.[12] In 1894 the Supreme Court reaffirmed the Boyd principle.[13] However later cases have established a right of government inquiry into certain affairs of private citizens when demanded by the public interest.[14]

Aside from unusual circumstances,[15] the protections of the fourth amendment are established by the requirement that a valid search warrant[16] be issued only by a neutral magistrate[17] upon the presentation of affidavits[18] showing that the governmental officers presenting the affidavits have probable cause to believe that the objects to be seized or the condition thought to exist will be found on the premises to be searched.[19] The determination of whether sufficient probable cause existed for a valid warrant to issue is made in accordance with the knowledge of the officers at the time of making the affidavits and is not influenced by what they subsequently find when they enter the

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12. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

13. ICC v. Brimson, 154 U.S. 447 (1894). The Court did not reach the merits of the case but reiterated the limitations upon the government's power to compel the production of evidence.

14. *See, e.g.*, Flint v. Stone Tracy Co., 220 U.S. 107 (1911) (income tax returns); Baltimore & O.R.R. v. ICC, 221 U.S. 612 (1911) (reports of hours worked in excess of legally permitted limits); Wilson v. United States, 221 U.S. 361 (1911) (copy books before a grand jury); United States v. Sullivan, 274 U.S. 259 (1927) (income tax returns); United States v. Darby, 312 U.S. 100 (1941) (records required to be kept by statute); Shapiro v. United States, 335 U.S. 1 (1948) (records to be kept by statute).

15. Johnson v. United States, 333 U.S. 10, 15 (1948).

16. Historically, search warrant procedure is mandatory under the fourth amendment. McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Agnello v. United States, 269 U.S. 20 (1925); Boyd v. United States, 116 U.S. 616 (1886).

17. Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> The point of the fourth amendment, which often is not grasped by police officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that these inferences be drawn by a neutral magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of the police officer.

18. United States v. Ventresca, 380 U.S. 102, 108-09 (1965):

> This is not to say that probable cause can make out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubberstamp for the police.

However in Jones v. United States, 362 U.S. 257 (1960) a warrant based on a tip from a reliable informer, corroborated by other sources, was declared lawful.

19. Giordinello v. United States, 357 U.S. 480 (1958).

premises.[20] Good faith on the part of the officer is not sufficient nor is it necessarily relevant in determining the existence of probable cause.[21]

Probable cause exists where "the facts and circumstances within (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[22] Thus in dealing with probable cause, as the term implies, the police and courts are dealing with probabilities. The probabilities are not technical, but rather are the factual and practical considerations of every day life upon which reasonable, prudent men, not legal technicians, act.[23] With these considerations as a guideline, the Supreme Court has refused to attempt the task of establishing a fixed formula for the application of "reasonableness" to specific cases,[24] leaving each case to be decided on its own facts.[25]

Generally, searches of private dwellings for a specific object without a warrant[26] and searches of a general nature, with or without a warrant, have been held to be unreasonable and violative of the fourth amendment.[27] But there are exceptions to the general requirement of a warrant. In criminal matters a valid search may be made without a warrant persuant to a valid arrest,[28] in cases of emergency,[29] or when public officers are acting to control epidemics,

20. Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948).

21. Agnello v. United States, 269 U.S. 20 (1925).

22. Brinegar v. United States, 338 U.S. 160, 176 (1948):

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

23. Brinegar v. United States, 338 U.S. 160 (1948); Draper v. United States, 358 U.S. 307 (1959).

24. Mapp v. Ohio, 367 U.S. 643 (1961).

25. United States v. Rabinowitz, 339 U.S. 56 (1950).

26. Agnello v. United States, 269 U.S. 20, 32 (1925) ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant.").

27. Stanford v. Texas, 379 U.S. 476 (1964). (To be constitutional the warrant must describe particularly the place to be searched and the materials to be seized. Blanket authority to search is repugnant to the fourth amendment.). *See also* United States v. Lefkowitz, 285 U.S. 452 (1932); Marron v. United States, 275 U.S. 192 (1927).

In Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) the Court indicated that the emphasis of the fourth amendment, is to protect against all general searches. They are denounced in the constitutions or statutes in every state of the Union.

28. Preston v. United States, 376 U.S. 364 (1964). The rule allowing contemporaneous searches incident to lawful arrests is justified by the need to seize weapons and objects which might be used to assault the officer or to effect an escape and to prevent the destruction of evidence.

29. Johnson v. United States, 333 U.S. 10 (1948) (to prevent the removal or destruction of evidence); Naro v. United States, 148 F.2d 696 (9th Cir. 1942) (national security);

fires, floods and the consequences of other catastrophic events.[30] However, in these instances, the restraining force of the judicial interpretation of reasonableness is still applied[31] and the quantum of probable cause is still the same.[32] Additionally, a warrantless search may be made by governmental officers if the person whose premises are being searched consents to the search in a voluntary, unequivocal and intelligent manner, with full knowlege that he is giving up a legal right or privilege.[33]

Until recently the protections the fourth amendment afforded the individual and his home were never raised against the exercise of municipal power in the field of health and safety. During the 1850's a report of the Massachusetts Sanitary Commission articulated the concept[34] which has now become the basic philosophy of public health—preventative techniques.[35] These preventative measures were developed under private and government auspices first in the field of health and later in regard to building safety and fire prevention.[36] With the growth of such programs, increasing reliance has come to be placed on systems of preventative inspection to achieve correction of hazards to public health and safety. In effect the right to inspect for the welfare of the public has long been recognized as a valid exercise of a state's police power;[37] and, since the primary purpose of these inspections is to correct, not to punish, the public has generally accepted them as worthwhile intrusions into privacy. But this has resulted in an increasing number of municipal ordinances which have tended to dilute the individual's absolute right of privacy due to the government's concern for public health and safety.

Agnello v. United States, 269 U.S. 20 (1925) (search and seizure necessary to prevent the escape of a criminal or prevent destruction of evidence).

30. Dedrich v. Smith, 88 N.H. 63, 184 A. 595 (1936).

31. United States v. Rabinowitz, 339 U.S. 56 (1950). The test is that a warrantless search must be reasonable under the total circumstances of the case.

32. Wong Son v. United States, 371 U.S. 471 (1963); Jones v. United States, 362 U.S. 257 (1960).

33. Channel v. United States, 285 F.2d 217 (1960).

34. The fundamental concept of Shattuck and the other members of the sanitary commission has determined the approach that public health officials have taken in the past 100 years. Shattuck stated it as follows:

> We Believe that the conditions of perfect health, either public or personal, are seldom or never attained, though attainable;-that the average length of human life may be very much extended, and its physical power greatly augmented;-that in every year, within this Commonwealth, thousands of lives are lost which might have been saved;-that tens of thousands of cases of sickness occur, which might have been prevented;-that a vast amount of unnecessarily impaired health, and physical disability exists among those not actually confined by sickness;-that these preventable evils require an enormous expenditure and loss of money, and impose upon the people unnumbered and immeasurable calamities, pecuniary, social, physical, mental, and moral, which might be avoided;-that means exist, within our reach, for their mitigation or removal;-and that measures for prevention will effect infinitely more, than remedies for the cure of disease.

L. Shattuck, Report of the Sanitary Commission of Massachusetts 10 (reprinted 1948).

35. L. Shattuck, *supra* note 34.

36. E. Trull, The Administration of Regulatory Inspectional Services in Americar Cities 2 (1932).

37. New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

Until *District of Columbia v. Little*[38] there was little significant litigation on the point, but of the recorded cases dealing with such municipal ordinances, the police power of the state consistently prevailed over the asserted right to privacy of the individual.[39] The state's police power was sustained by a balancing process weighing public need against private substantive rights.[40] In order for an inspection statute to be sustained as a valid exercise of police power it had to be demonstrated that the objective of the act tended to prevent some manifest evil or the preservation of the public health and welfare.[41]

38. 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950). The case involved a health inspector responding to a complaint of an occupant of the house. Defendant denied the officer access to the house on the ground that her constitutional rights would be violated since the inspector did not have a warrant. The lower court upheld this position and Judge Prettyman maintained for the majority of the court, that "health officers without a warrant cannot invade a private home to inspect it to see that it is clean and wholesome, or to search for garbage upon a complaint that garbage is there, or to see whether the occupants have failed to avail themselves of the toilet facilities therein." *Id.* at 20. This conclusion was based on an analysis of cases involving searches and seizures by the police.

The Supreme Court found it possible and desirable to decide this case on other grounds, because "a decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions not now before [the Court]." This is therefore an appropriate case to apply . . . sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds. *See* Rescue Army v. Municipal Court, 331 U.S. 549, 568-75." District of Columbia v. Little, 339 U.S. at 3-4.

39. *See, e.g.,* Dederich v. Smith 88 N.H. 63, 184 A. 595, *appeal dismissed,* 229 U.S. 506 (1936) (A state veterinarian pursuant to a statute providing for inspection of domestic animals for tuberculosis forcibly entered a locked barn without a search warrant against plaintiff's protest and interference.); Richards v. City of Columbas, 227 S.C. 538, 88 S.E.2d 683 (1955) (A municipal ordinance providing for the alteration, repair or destruction of substandard dwellings without a search warrant, and authority to make an inspection thereof, does not violate constitutional rights against unreasonable searches and seizures.); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956) (An ordinance authorizing inspections without a warrant for the purpose of combating slum conditions is not unconstitutional when the inspections were to be made at reasonable daylight hours and were of routine nature.); State *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *aff'd by an equally divided court,* 364 U.S. 263 (1960) (An ordinance permitting the city housing inspector to make inspections without a search warrant to determine the condition of dwellings held not violative of the federal constitution.); *See also* United States v. Crescent-Kelvan, 164 F.2d 582 (3d cir. 1948); Sister Felicitas v. Hatridge, 148 Ga. 832, 98 S.E. 538 (1919); Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910); Reinhart v. State, 193 Tenn. 15, 241 S.W.2d 854 (1954) established that states and municipalities may inspect private institutions and business premises for health reasons and that statutes authorizing such inspections do not contravene constitutional provisions against unreasonable searches and seizures. The *Dederich, Richards, Givner* and *Price* cases established that this proposition extended to the inspection of a private home.

40. Southern Pacific Co. v. Arizona, 325 U.S. 761, (1945); *See* Note, 45 Iowa L. Rev. 419, 423 n.19 (1960):

> When a statute enacted in the exercise of police power is challenged as violative of the guarantee of due process, it will be set aside if it is found to have no reasonable relation to the public good. The benefits accruing from the statute are weighed by the court as against the amount of deprivation of the private right. Suggested factors to be considered in analysis of the reasonableness of the statute are, the conditions existing prior to the legislation, the effectiveness of the new rule, and the possibility of achieving the same benefits at a lower price.
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> Police power is the power inherent in a government to enact laws, within constitutional limits, to promote order, safety, health and general welfare of society. Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S.D. Calif. 1946).

41. Tyson & Brother United Theatre Ticket Office v. Banton, 273 U.S. 418 (1927). Holden v. Hardy, 169 U.S. 366 (1897).

In many municipalities warrantless searches are authorized in particular kinds of housing codes such as health and fire ordinances.[42] In the enforcement of these codes officials have inspected, without warrants, hotel premises,[43] multi-family dwellings and private homes,[44] orphanages,[45] hospitals,[46] and other places of public lodging and business establishments.[47] Three state courts have found that community interests in investigations by fire and health inspectors justified a search without a warrant.[48] The constitutionality of these invasions of privacy was soon questioned in the courts since refusal to allow inspection was a criminal offense punishable by fines[49] and imprisonments.[50] The first case of this type to reach the Supreme Court was decided on other grounds, as the Court found it unnecessary to reach the constitutional question of whether or not the fourth amendment prohibited the health officer from inspecting the premises without a search warrant.[51] Nine years later in *Frank v. Maryland*,[52] the Supreme Court upheld a fine levied against a homeowner for refusing to permit a warrantless inspection pursuant to a regulatory statute seeking to preserve health standards.[53] Mr. Justice Frankfurter argued: "The attempted inspection of appellant's home was merely to ascertain the existence of evils, [if found], to be corrected upon due notification or, in default of such correction, to be made the basis of punishment."[54] Asserting 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

42. Guandolo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1, 29 (of the 57 Housing Codes covered by Urban Renewal Bull. No. 3 (1956), 38 authorized the entry of the premises and 44 provided for inspection).

43. Hubbell v. Higgins, 148 Iowa 36, 126 N.W. 914 (1910).

44. Frank v. Maryland, 359 U.S. 360 (1959); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956); City of St. Louis v. Evans, 337 S.W.2d 948 (Mo. 1960); Ohio *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d (1958) *aff'd by an equally divided court*, 364 U.S. 263 (1960).

45. Sister Felicitas v. Hatridge, 148 Ga. 832, 98 S.E. 582 (1919).

46. Reinhart v. State, 193 Tenn. 15, 241 S.W. 854 (1951).

47. People v. Haley, 230 Mich. 676, 203 N.W. 531 (1925).

48. McGuire v. Todd, 198 F.2d 60 (5th Cir. 1952) (No action against a fire chief who inspected without a warrant.); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956) (Fine for refusal to permit entry upheld.); State *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958) (Fine upheld where defendant refused entry to inspector.).

49. In Frank v. Maryland, 359 U.S. 360 (1960) the defendant was arrested and fined. In the instant case the refusal of entry met with a fine and was deemed a misdemeanor.

50. In Ohio *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d (1958), *aff'd*, 364 U.S. 263 (1960) (The defendant could not obtain the necessary bail bond.).

51. District of Columbia v. Little, 178 F.2d. 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). The Court decided that the constitutional question for such a decision might have effects upon issues not before the Court. The decision was on other grounds involving statutory interpretation, *viz.*, that Little's action was not within the statute.

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

53. Baltimore, Md., City Code art. 12, § 120 provides that:

> 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.

54. Frank v. Maryland, 359 U.S. 360, 362 (1959).

liberty was fought,"[55] he concluded that the passage from *Entick*[56] and *Boyd*,[57] restricting warrantless searches, refer to searches for evidence of criminal action and that this is the protection afforded by the fourth amendment. Even admitting that the constitutional restrictions need not be limited by historical precedent, Mr. Justice Frankfurter contended that, "giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked."[58] He based his justification for this opinion on the facts that "the attempted inspection . . . [was] merely to determine whether conditions exist . . . no evidence for criminal prosecution [was] sought to be seized [and that] appellant was simply directed to do what he could have been ordered to do without any inspection and what he [could not have properly resisted]."[59] To show the validity and reasonableness of the statute in *Frank* he pointed out that probable cause was implicitly required,[60] that "the inspection must be made in the day time and that the inspector [had] no power to force entry. . . . "[61] Moreover the "least possible demand [was made] on the individual occupant and [there was] only the slightest restriction on his claims of privacy."[62] Mr Justice Frankfurter suggested that the inspections touch at most upon "the periphery of the important interests safeguards by the Fourteenth amendments protection against official intrusion. . . . "[63] To support this contention the point was stressed that such inspections, "as an adjunct to a regulatory scheme for the general welfare of the community and not as a means for enforcing the criminal law,"[64] have lengthy historical acceptance, and society needs preventive action to maintain housing standards. His opinion concludes with the observation:

> that there is a "total unlikeliness" between "official acts and proceedings" . . . for which the legal protection of privacy requires a search warrant under the fourteenth amendment, and the [present] situation . . . is laid bare by the suggestion that the kind of inspection by a health officer with which we are concerned may be satisfied by what is, in effect, a synthetic search warrant, an authorization "for periodic inspections."[65]

Mr. Justice Douglas, in an energetic dissent concluded that a substantial part of the fourth amendment had been eroded. He contended the majority's decision "greatly [diluted] . . . the right to privacy"[66] and that the fourth amendment applied to cases whether criminal or civil. It was charged, "the

55. *Id.* at 365.
56. 95 Eng. Rep. 815 (C.P. 1765).
57. 116 U.S. 616 (1886).
58. Frank v. Maryland, 359 U.S. at 366.
59. *Id.*
60. *Id.*
61. *Id.* at 367.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 372-73.
66. *Id.* at 374.

court misreads history, when relating [the fourth amendment only] . . . to searches for evidence to be used in criminal prosecutions."[67] The argument that the imposition of warrant procedure would hinder the enforcement of city codes was dismissed by Justice Douglas, who explained past experience indicated a vast majority of citizens accept such intrusions realizing their value and importance. He concluded the fourth amendment was applicable to health and housing inspections since they were an intrusion into privacy and that, if refused entry, an inspector must procure a search warrant in order to lawfully gain entry.

The third case to reach the Supreme Court decided, by a split vote, indicating that the *Frank* case was controlling.[68]

The Court in the instant case began its analysis with an inquiry into the protections afforded by the fourth amendment. It noted the right to be free from unreasonable searches and seizures and that generally a search of private property was unreasonable unless made pursuant to a valid search warrant. Although the inspection[69] in the instant case was to ascertain the building's condition, and not to seize evidence or instrumentalities of a crime,[70] the Court ruled the fourth amendment interests at stake were substantial and worthy of protection. The Court recognized that even the most law-abiding citizen has an interest in limiting the circumstances under which the sanctity of his home may be broken and noted the fourth amendment was not designed to protect solely those suspected of criminal behavior.[71] Additionally, it was noted that criminal complaints and prosecutions may result from these inspections, and therefore the fourth amendment could apply in its traditional manner.

The Court held that a search warrant based upon probable cause is necessary to insure the individual's rights under the fourth amendment, the warrant procedure protecting against the abuse of discretion by an inspector. Further, it failed to see any purpose of the government that would be frustrated

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67. *Id.* at 376.

68. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1958). Mr. Justice Stewart who had been in the majority in *Frank* did not participate.

69. The inspection was conducted pursuant to San Francisco, Cal., Mun. Code § 86 which provides that apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings. The inspections are to be made by the Bureau of Housing Inspection "at least once a year and as often thereafter as may be deemed necessary." The permit of occupancy, which prescribes the apartment units which a building may contain, is not issued until the license is obtained.

70. The Court was unimpressed by the fact that this inspection was not for evidence of a crime.

> We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, Frank, differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake are merely "peripheral."

Camara v. Municipal Court of San Francisco, 387 U.S. at 530.

71. *See* Douglas J., dissenting in Frank v. Maryland, 359 U.S. at 374-77.

by the requirement of a warrant so as to create an exception to the fourth amendment mandate.

The Court, however, recognized the unique character of these inspections[72] and provided for an accommodation between the public need and the individual rights involved. In departing from the normal amendment strictures, it was ruled that issuance of an area warrant for inspections would be upheld as an adjunct to a regulatory scheme. But more significantly, there was developed a unique concept of probable cause for the health inspection warrant by holding that the factors which give rise to the existence of probable cause must be tempered and viewed in light of government interest and the goals of code enforcement. The determination of whether there is sufficient probable cause for a warrant to issue must take into account the nature of the search attempted and whether the contemplated intrusion of an individual's privacy is justified by a reasonable public interest. Hence, such factors as the passage of time since last inspection, the nature of the building, or the condition of the entire area may give rise to the existence of probable cause, but specific knowledge of a building's condition is not necessary.

The Court concluded that its interpretation of the factors giving rise to probable cause does not endanger the time-honored concepts applicable to criminal investigations but rather is a balance resulting from a recognition of the competing public and private interests.

The expansion of the fourth amendment's protection from arbitrary government invasion of one's privacy is the purported consequence of the court's holding in the instant case. As a result, when a city health or fire inspector is refused permission to inspect by the occupant he must upon a showing of probable cause, obtain a search warrant, authorizing entry and inspection. Thus, according to the court, the private citizen is declared to be more secure in his home as a result of a dilation of the scope of the fourth amendment. Previous fourth amendment search and seizure cases generally dealt with protecting individuals from unreasonable intrusion relating to searches for evidence to be used in criminal proceedings. Here there has been an attempt to strengthen the individual's right to privacy by applying the fourth amendment's protection to an area which, up to this time, was governed solely by the police power of the states. In effect, it was held that the state's police power no longer justifies warrantless housing inspections.

In the instant case the Court limited the power of the inspectors by imposing the restraints of the fourth amendment and at the same time concluded that area inspections are reasonable. This necessarily compels a change in the notions of probable cause resulting in a double standard. For a warrant to issue,

72. The unique problems involved in maintaining and enforcing health standards were spelled out in Frank v. Maryland, 359 U.S. at 367-73. The nature of the problem required that the inspections made periodically as preventative medicine is the only effective antidote.

in health and housing inspections, there need not be a reasonable belief, as in searches for the fruits and instrumentalities of crime, that a specific violation exists within a particular dwelling; rather, it seems the warrant may be issued on factors which only indicate that a violation *might* exist *e.g.*, the passage of time, the general condition of the area or the nature of the building. These criteria appear to require substantially less than the reasonable belief traditionally necessary to establish probable cause. The warrant may be issued before the inspector goes into the field, since the factors giving rise to the existence of probable cause, as outlined by the Court, will exist before the inspection is made. Accordingly, the dichotomy of probable cause is exposed, revealing on the one hand, the traditional notion, that would have been couched in terms of reasonable belief of the existence of certain factors in a particular dwelling, and on the other, the *Camara* notion, based upon factors which merely imply that a violation might exist in any one of the dwellings to be inspected. Thus the Court has articulated a second theory of probable cause applicable to the area of administrative health inspections.

However, in the Court's concern with increasing the right to privacy it may have defeated its purpose by failing to recognize the effects of its holding in practical application. The problem is manifested by the factors which may give rise to an inference of probable cause as delineated in the instant case. Under its holding, an inspector may obtain a warrant for a particular dwelling or an entire area before the inspection program begins by simply presenting to the examining magistrate proof, for example, that an inspection has not been made for a specific period of time. As a matter of practice these warrants might soon degenerate into the rubber stamp class predicted by the *Frank* court. Hence, the purpose of the warrant, will be defeated as the examination of the facts and the issuance of the warrant become merely a perfunctory exercise by the magistrate.

One of the gravest problems engendered by the holding of the instant case is the fact that criminal processes may be applied as a result of an administrative inspection. The inspection is made under a warrant issued upon the strength of factors that would not have been sufficient to support such issuance if the search was to be used directly in a criminal process. Thus the inspection is carried out, the violation is discovered and if unmitigated the recalcitrant individual punished criminally. Although he is punished for the violation, the fact remains that this process was imposed upon him as a result of evidence obtained persuant to a warrant that would not be legally sufficient to support a search for evidence of crime. Basically the violations are crimes and are treated as such; therefore the fourth amendment should have been applied in its traditional manner or not at all. But the Court appeared to have thought it necessary to expand the right of privacy so as to cover the instant situation. In so doing, however, the concept of probable cause was diluted by the Court in its attempt to justify the imposition of such protection. Hence,

although probable cause in the traditional sense may be absent, citizens might nevertheless be subjected to criminal processes as a result of evidence acquired by a search pursuant to a warrant issued for inspection purposes.

A return to a modified *Frank* doctrine seems desirable. There, warrantless inspections, justified by a public need and carried out persuant to city health and housing ordinances, were deemed constitutional as a valid exercise of the state's police power. Since the justification for these inspections was not premised upon considerations requiring immediate entry, a system whereby notice would be given to an individual advising him that if an excuse was tendered inspection might be made at a later, more convenient, but definite date, seems workable. Under this system the right of privacy would be afforded some extra measure of protection against obnoxious government intrusion, while at the same time, the tampering with probable cause as seen in the instant case would be avoided.

MICHAEL P. COUTURE

CONSTITUTIONAL LAW—INVOLUNTARY LOSS OF CITIZENSHIP FOR VOTING IN A FOREIGN ELECTION DECLARED UNCONSTITUTIONAL

Petitioner, born in Poland, emigrated to this country in 1912 and became a naturalized American citizen in 1926. He emigrated to Israel in 1950, and in 1951 voted in an election for the Israeli Knesset, the legislative body of Israel. In 1960, in preparation for return to this country, petitioner applied to the United States Consulate in Haifa for a passport. His application was rejected, and the American Vice Consul issued a Certificate of Loss of Nationality to the petitioner[1] on the ground that he had expatriated himself by casting a ballot in a foreign political election in contravention of section 401(e) of the Nationality Act of 1940.[2] The Vice Consul's decision was affirmed by appropriate administrative appeals.[3] Petitioner then sought declaratory relief in a federal

1. 8 U.S.C. § 1501 (1964) provides that:

> Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality . . . , he shall certify the facts upon which such belief is based to the Department of State . . . . If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, . . . and the diplomatic or consular office in which the report was made shall . . . forward a copy of the certificate to the person to whom it relates.

2. Nationality Act, § 401, 54 Stat. 1137 (1940), *as amended*, 58 Stat. 746 (1944), 8 U.S.C. § 801 (1946):

> [A] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision was re-enacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267, 8 U.S.C. § 1481(a)(5) (1964).

3. The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Petitioner then appealed to the State Department's Board of