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# Comment

## ADMINISTRATIVE SEARCHES AND THE FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, . . ." The application of these words of the Fourth Amendment, cast in a 1789 agrarian society, to the needs and necessities of the mid-twentieth century industrial-urban complex continues to cause a high degree of consternation in our courts. Most of the attention has been drawn by the more dramatic problem of criminal law enforcement. However, there is perhaps a greater problem and a potentially greater conflict between the interests of society and the interests of the individual in the area of administrative regulation.<sup>1</sup> In the last seventy-five years our society has made a complete about face. Yesterday's village of a few merchants and tradesmen is today a teeming metropolis, complete with smoke belching factories and two million scrambling people. No longer does the merchant maintain a close personal relationship with his few customers; the merchant of today is a giant corporation with millions of customers, marketing innumerable potentially dangerous products. With this change has come problems. Society demanded and received regulation of and protection from the vices of these giants. Enforcement of regulations, however, requires inspections, and these inspections clash with more traditional notions of privacy under the Fourth Amendment.

The homes that were built in the rising new cities of seventy-five years ago are today falling into serious decay; decay that is a haven for disease and fire hazards. Cities only recently recognized the problem of sub-standard housing and the need for the eradication of present and future slum conditions. With the Federal Government's program of "urban renewal" serving as the driving impetus, minimum health, building, and zoning codes are increasingly familiar in the modern city. Here again, effective enforcement seems to require inspection, and inspections, particularly of private dwellings without warrants, clash with many persons' belief in privacy. These are but a few of the conflicts which the Supreme Court has had to face.

### I. INSPECTION OF BOOKS AND RECORDS

Almost a hundred years ago the courts first began coming to grips with the problem of governmental inspections of books and records in cases dealing with determination of tax liability. The citizen sought to resist these inspections by pleading that his "papers" were protected from warrantless inspection by the Fourth Amendment. The court nonetheless held that the tax official had the right

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1. Waters, *Rights of Entry in Administrative Officers*, 27 U. CHI. L. REV. 79 (1959).

to inspect the records of the individual taxpayer, saying, "the Fourth Amendment . . . is applicable to criminal cases only."<sup>2</sup> A few years later books of the corporate taxpayer were opened by the Supreme Court. In its syllabus the Court declared what continues to be the law today. "The unreasonable search and seizure provision of the Fourth Amendment does not prevent the Federal Government from requiring ordinary and reasonable tax returns. . . ."<sup>3</sup> Thus the courts long ago established that when the legislature has the power to tax the taxpayer may not shield his records behind the prohibitions of the Fourth Amendment. This premise is now carried to the point of requiring the professional gambler to disgorge his gaming records to the revenue inspectors.<sup>4</sup>

These first cases dealing with tax records merely broke the ground for the coming of the modern regulatory statutes. With their regulation, these statutes have increasingly opened the books and records of the corporation and certain unincorporated associations.<sup>5</sup> The extent of these regulatory statutes is a subject unto itself. It suffices to say that the regulations cover the major portion of our nation's commercial life. State as well as Federal regulations cover, to mention but a few, anti-trust, securities, marketing, transportation, quasi-public corporations, labor relations, as well as various forms of taxation. Pursuant to these regulations inspection of books, records, documents and even correspondence without authorization of a search warrant has been uniformly upheld by both Federal and state courts.<sup>6</sup> This broad power granted to executive and administrative officers to inspect also extends to inspection of non-corporate books, if such regulation is within the valid exercise of the police power.<sup>7</sup> Furthermore, this right of inspection has been upheld even though the records sought would tend to incriminate the organization or the persons associated with it.<sup>8</sup> Even a sole shareholder cannot stop the inspection of corporate books containing evidence that would incriminate him personally.<sup>9</sup> Furthermore, records that are required by law to be kept are not pro-

2. *In re Stouse*, 23 Fed. Cas. 261 (No. 13548) (D. Nev. 1871). See also *In re Meador*, 16 Fed. Cas. 1294 (No. 9375) (N.D. Ga. 1869).

3. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 112 (1910).

4. *United States v. Kahriger*, 345 U.S. 22 (1953); *United States v. Clancey*, 276 F.2d 617 (7th Cir. 1960).

5. See FLETCHER, *CYCLOPEDIA CORPORATIONS* §§ 2215, 2237 (1952) and Chapter 59 (1945).

6. Representative federal decisions: *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1914); *Hale v. Henkel*, 201 U.S. 43 (1906); *Oliver v. United States*, 239 F.2d 818 (8th Cir. 1957); *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963). Representative state decisions: *City of St. Louis v. Baskowitz*, 273 Mo. 543, 201 S.W. 870 (1918); *City of St. Joseph v. Levin*, 128 Mo. 588, 31 S.W. 101 (1895); *Vissering Mercantile Co. v. Annunzio*, 1 Ill.2d 108, 115 N.E.2d 306 (1953); *Parker v. State*, 383 S.W.2d 869 (Tex. Civ. App. 1964).

7. *Uphaus v. Wyman*, 360 U.S. 72 (1959) (subversive organizations); *United States v. Morton Salt Co.*, 338 U.S. 632, 651 (1950) (dictum); *United States v. White*, 322 U.S. 694 (1944) (labor unions); *McPhanl v. United States*, 272 F.2d 627 (5th Cir. 1959) (subversive organization); *Kelleher v. Minshull*, 11 Wash.2d 380, 119 P.2d 302 (1941) (individual proprietors).

8. *United States v. White*, *supra* note 7; *Essgee Co. of China v. United States*, 262 U.S. 151 (1923); *Peel v. United States*, 316 F.2d 907 (5th Cir. 1963); *Menzies v. FTC*, 241 F.2d 81 (4th Cir. 1957).

9. *United States v. Carroll*, 144 F. Supp. 959 (S.D.N.Y. 1956).

ected by the attorney-client privilege and may be reached while in the hands of the attorney.<sup>10</sup> Personal records of the individual, however, even while in the possession of the association will still be carefully protected.<sup>11</sup>

Even while granting these extremely liberal powers of administrative inspection, the courts have consistently said that the corporation and its records are protected from *unreasonable* searches and seizures by the Fourth Amendment.<sup>12</sup> The catch comes in the definition of an unreasonable search. As pointed out, a warrantless inspection is not in itself considered unreasonable. This does not mean that the powers of inspection are completely unlimited. Some early cases demanded a showing of relevancy of the inspection, condemning "fishing expedition."<sup>13</sup> Though not overruled, these decisions have been undercut by more recent decisions holding that warrantless inspection is not unreasonable so long as the inspection is relevant to a valid power of the investigatory agency.<sup>14</sup> The empowering statute, regulation or even the particular subpoena may be so broad, indefinite, or sweeping that the enforcement would be deemed unreasonable.<sup>15</sup> Particular facts of the case may arise that would make a particular inspection or demand oppressive and unreasonable.<sup>16</sup> Finally, the inspection may infringe substantially upon First Amendment freedom of speech and association, and for this reason be denied.<sup>17</sup> As a general proposition however, absent undue breadth or oppressiveness, if the agency has power to investigate it can validly demand inspection of books and records relevant to that power.

A number of reasons are commonly given for this full range of investigatory power over books, papers, and records: (1) records required to be kept by an association subject to governmental regulation "assume the characteristic of quasi-public documents and their disclosure may be compelled without violating the Fourth Amendment";<sup>18</sup> (2) corporations, being artificial creatures, are not entitled

10. *Grant v. United States*, 227 U.S. 74 (1913); *United States v. Bouschor*, 200 F. Supp. 541 (D. Minn. 1961).

11. *Wilson v. United States*, 221 U.S. 361 (1911); *United States v. Guterma*, 174 F. Supp. 581 (E.D.N.Y. 1959).

12. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Peel v. United States*, *supra* note 8; *United States v. Kanan*, 225 F. Supp. 711 (D. Ariz. 1963).

13. See, e.g., *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924).

14. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Pope & Talbot, Inc. v. State Tax Comm'n*, 216 Ore. 605, 340 P.2d 960 (1959). See DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.06 (1958).

15. *Kansas City v. Markham*, 339 Mo. 753, 99 S.W.2d 28 (1937); *United States v. Hopps*, 331 F.2d 332 (4th Cir. 1964); *Cudahy Packing Co. v. United States*, 15 F.2d 133 (7th Cir. 1926); *United States v. Culver*, 224 F. Supp. 419 (D. Md. 1963); *Smith v. Faubus*, 230 Ark. 831, 327 S.W.2d 562 (1959); *Red Star Labs. Co. v. Pabst*, 359 Ill. 451, 194 N.E. 734 (1935).

16. *In re Eastman Kodak Co.*, 7 F.R.D. 760 (W.D.N.Y. 1947); *In re United Shoe Mach. Co.*, 7 F.R.D. 756 (D. Mass. 1947).

17. *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

18. *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 340 (1st Cir. 1964). See also *State v. Stein*, 215 Minn. 308, 9 N.W.2d 763 (1943).

to the full measure of Fourth Amendment protection;<sup>19</sup> (3) production of records under subpoena duces tecum involves "no question of actual search and seizure";<sup>20</sup> and (4) constitutional immunities are waived to a limited extent by those engaged in a business regulated by law.<sup>21</sup>

## II. INSPECTION OF BUSINESS PREMISES

The right of the government to inspect for the proper enforcement of regulatory statutes may go far beyond looking at the records of the business. Many statutes, especially in the area of food and drug regulation, authorize administrative officials to search the physical premises of the business.<sup>22</sup> The Federal courts have consistently allowed such visitation when so authorized by a valid statute or regulation.<sup>23</sup> Likewise, seizure of any foods or drugs found to be in violation of the regulation need not be supported by a judicial warrant. In upholding the validity of the seizure courts have said: "the Fourth Amendment does not apply to the issue of the writ of attachment in forfeiture cases under . . . the Food and Drugs Act."<sup>24</sup> "This is a civil action as distinguished from a criminal action. It is a proceeding in rem and need not be supported by oath or affirmation."<sup>25</sup>

The states, too, have been very active in the area of regulation for public health and welfare. The result is a wide range of statutes and ordinances providing for all manner of regulation. Many of these regulatory statutes provide, as do their Federal cousins, for inspection of business premises. Again, uniformly, the right of inspection has been upheld. In enforcement of regulations, state officials without warrants may inspect hotel premises,<sup>26</sup> multi-family dwellings,<sup>27</sup> orphanages,<sup>28</sup> hospitals,<sup>29</sup> and other places of public lodging.<sup>30</sup> In exercise of the police power to prevent the marketing of impure foods, a city may provide for inspection of such foods and their place of sale.<sup>31</sup> This right of inspection extends, predictably, to the food processor, carrier,<sup>32</sup> and storer.<sup>33</sup> Also in the valid area of police power is the control over intoxicating liquors, and the state may inspect premises licensed

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19. *Essgee Co. of China v. United States*, 262 U.S. 151 (1922); *Smith v. United States*, 254 F.2d 751 (D.C. Cir. 1958).

20. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195 (1946).

21. *Bowles v. Curtiss Candy Co.*, 55 F. Supp. 527 (W.D. Mo. 1944).

22. See, e.g., Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-92 (1958).

23. See, e.g., *United States v. Crescent-Kelvan Co.*, 164 F.2d 582 (3d Cir. 1948); *United States v. 935 Cases*, 136 F.2d 523 (6th Cir. 1943).

24. *United States v. Eighteen Cases of Tuna Fish*, 5 F.2d 979, 980 (W.D. Va. 1925).

25. *United States v. 62 Packages*, 48 F. Supp. 878, 884 (W.D. Wis. 1943).

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

27. *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960).

28. *Sister Felicitas v. Hartridge*, 148 Ga. 832, 98 S.E. 582 (1919).

29. *Reinhart v. State*, 193 Tenn. 15, 241 S.W.2d 854 (1951).

30. *People v. Harley*, 230 Mich. 676, 203 N.W. 531 (1925).

31. *Keiper v. City of Louisville*, 152 Ky. 691, 154 S.W. 18 (1913).

32. *Albert v. Milk Control Board*, 210 Ind. 283, 200 N.E. 688 (1936); *Commonwealth v. Carter*, 132 Mass. 12 (1882).

33. *Mazanec v. Flannery*, 176 Tenn. 125, 138 S.W.2d 441 (1940).

to sell liquor for evidence of any violation, even though a violation could result in a severe penalty.<sup>34</sup> For purposes of taxation, places of tobacco storage may be visited by the assessor.<sup>35</sup> The barber<sup>36</sup> as well as the optometrist<sup>37</sup> may come under the eye of the health inspector. Even the premises of the lowly junk dealer are subject to the inquisitive eyes of the governmental visitor.<sup>38</sup>

The courts in the different cases, even though unanimous in their result, have given different reasons for their allowance of inspection of the physical premises. Four reasons seem most prevalent. First, when 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.<sup>39</sup> This reason, of course, cannot be applied in many situations. Second, 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 inspection.<sup>40</sup> Third, it is within the general police powers to regulate the health and public welfare, and a search enforcing such a statute is likewise within the police powers of the state and is not unreasonable.<sup>41</sup> Fourth, 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.<sup>42</sup>

Even though the administrative search in this area is very broad, it is not unlimited. The courts have placed certain bounds on its use. It would seem that the search must first be authorized by a valid statute.<sup>43</sup> The search must be made within reasonable hours, usually stated as the hours of doing business.<sup>44</sup> The place of the inspection also has definite bounds. The authority to search licensed premises extends only to the parts of the premises that are under the control of the licensee and are being used by him for the licensed activity.<sup>45</sup> There also must be a sufficient relationship between a search and the regulation that is being promoted, and under certain circumstances there must be some showing of cause. "Fishing expeditions"

34. *Mutchall v. City of Kalamazoo*, 323 Mich. 215, 35 N.W.2d 245 (1948); *Jackson Supper Club v. City of Norman*, 361 P.2d 291 (Okla. 1961); *Silber v. Bloodgood*, 177 Wis. 608, 188 N.W. 84 (1922).

35. *Johnson v. Halpin*, 413 Ill. 257, 108 N.E.2d 429 (1952).

36. *State v. Nolan*, 161 Tenn. 293, 30 S.W.2d 601 (1930).

37. *Ritholz v. Indiana State Board of Registration & Examination in Optometry*, 45 F. Supp. 423 (D. Ind. 1937).

38. *Mansbach Scrap Iron Co. v. City of Ashland*, 235 Ky. 265, 30 S.W.2d 968 (1930).

39. *Reinhart v. State*, *supra* note 29; *DAHL & BOYLE, ARREST, SEARCH AND SEIZURE* 172 (1961).

40. *Silber v. Bloodgood*, *supra* note 34; *City of St. Louis v. Evans*, *supra* note 27.

41. *Keiper v. City of Louisville*, *supra* note 31; *City of St. Louis v. Evans*, *supra* note 27.

42. *Boyd v. United States*, 116 U.S. 616 (1885); *City of St. Louis v. Evans*, *supra* note 27.

43. *Silber v. Bloodgood*, *supra* note 34.

44. *United States v. Crescent-Kelvan Co.*, *supra* note 23; *St. Louis v. Claspil*, (City Court of St. Louis, First Division, April 29, 1959) cited in 44 MINN. L. REV. 528-29 n.58(4) (1960).

45. *State v. Becker*, 201 Wis. 230, 229 N.W. 837 (1930).

may be condemned.<sup>46</sup> Finally, there is authority that the search may not be used for the enforcement of the criminal law. The case of *State v. Buxton*<sup>47</sup> illustrates this premise. While inspecting the burned out premises occupied by the defendant, the inspector began to uncover evidence of the crime of arson. His suspicions aroused, he continued his inspection and seized certain evidence of the crime. At the criminal trial the evidence so seized was ruled not admissible. The court said that even though the inspection began as a legal administrative enforcement procedure, it became a search pursuant to enforcement of the criminal law, when the inspector became suspicious that a crime had been committed. The inspector, once he begins searching for evidence of crime, must obtain a search warrant before he can legally continue.

### III. MISCELLANEOUS NON-BUSINESS SEARCHES

Although more in the nature of judicial than administrative action, "entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment. . . ."<sup>48</sup> Likewise, discovery devices in civil actions<sup>49</sup> and creditor examination of judgment debtors are outside the scope of the Fourth Amendment.<sup>50</sup> These are examples of the purely civil search and seizure which do not require special warrants.

The case of *Abel v. United States*<sup>51</sup> presented a situation in which a person was searched under an administrative warrant for deportation by virtue of the Immigration and Naturalization Act of 1952.<sup>52</sup> Petitioner was arrested on the administrative warrant and incident to this arrest his person, luggage, and the room in which he was living were searched and certain evidence of espionage was seized. The legality of this search and the admissibility of the evidence in the criminal prosecution were affirmed by a divided court. Thus a rather complete power of administrative search of person, effects, and residence was allowed by this decision, and a definite possibility of "cooperation" by police and inspectors was opened by the Court as it adroitly sidestepped the constitutional issue.

A New Hampshire case allowed a state veterinarian to forceably break down the doors of plaintiff's private barn in order to test her cattle for infectious disease.<sup>53</sup>

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46. *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924).

47. 238 Ind. 93, 148 N.E.2d 547 (1958). However, *United States v. Rabicoff*, 55 F. Supp. 88 (W.D. Mo. 1944), is contra, and the holding in *Abel v. United States* discussed *infra* may cast additional doubt on this proposition.

48. *Boyd v. United States*, 116 U.S. 616, 624 (1886).

49. *State ex rel. Kansas City Pub. Serv. Co. v. Cowan*, 356 Mo. 674, 203 S.W.2d 407 (En Banc 1947); *State ex rel. Chicago R.I. & P. Ry. v. Woods*, 316 Mo. 1032, 292 S.W. 1033 (1927); *State ex rel. American Mfg. Co. v. Anderson*, 270 Mo. 533, 194 S.W. 268 (En Banc 1917).

50. *Fithian v. Centanni*, 159 La. 831, 106 So. 321 (1925).

51. 362 U.S. 217 (1960).

52. 8 U.S.C. § 1252(a) (1958).

53. *Dederick v. Smith*, 88 N.H. 63, 184 Atl. 595 (1936).

Louisiana allowed an impounding of tick-infested cattle.<sup>54</sup> These warrantless invasions of non-business premises were justified as a valid enforcement of quarantine statutes under the state's police powers.

In other areas, warrantless searches are allowed of persons and motor vehicles entering this country from abroad.<sup>55</sup> Certain rights of limited inspection are given over motor vehicles to see that they are equipped with proper safety devices<sup>56</sup> and are not violating weight regulations.<sup>57</sup> Broad powers of search given to game wardens authorizing warrantless inspection of the sportsman has met with judicial disapproval as allowing unreasonable search and seizure.<sup>58</sup>

#### IV. SEARCH OF PRIVATE HOMES

Even though there is a long and rather complete authorization of governmental inspection of records, business premises, and sundry areas of historical police power, judicial authority for administrative searches of the private home is incomplete and of more recent origin. In only relatively recent times have private dwellings been generally recognized as a threat to the public welfare and, therefore, the proper subject of governmental regulation and consequent inspection.

Not only is the inspection of private dwellings relatively new, this inspection is considerably more offensive to the general citizenry than are inspections of a relatively few business establishments. A high percentage of the population, never before bothered by governmental visits, will be subjected to these inspections. The lower-middle class, who have long clamored for regulation of the "big fellow," will receive the brunt of this new breed of inspection, and they may not like what they have been so enthusiastically urging for others. Even the businessman who may grudgingly consent to the inspector looking through his plant may be outraged when he must open the doors of his home to periodic prying. The problem of the so-called "midnight search" by government welfare agents is a problem growing with the welfare state. Even though there is a dearth of legal precedent in the area, the problem is receiving ever increasing attention by the public and the writers.<sup>59</sup>

Regardless of one's station, there seems to be a certain aura of sanctity about the home in the Anglo-American mind that abhors uninvited intrusions:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.<sup>60</sup>

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54. *Rapp v. Police Jury of Tensas Parish*, 171 La. 329, 131 So. 36 (1930).

55. *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959).

56. *People v. Fidler*, 280 App. Div. 698, 117 N.Y.S.2d 313 (1952).

57. *People v. Munziato*, 24 Ill.2d 432, 182 N.E.2d 199 (1962).

58. *People ex rel. Attorney Gen. v. Lansing Municipal Judge*, 327 Mich. 410, 42 N.W.2d 120 (1950).

59. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

60. *Frank v. Maryland*, 359 U.S. 360 (1959), quoted in the dissenting opinion at 378-79.

A nation suckled on this belief is not likely to yield willingly to invasions by government inspectors.

The problem does not end with the political considerations of how far the government should invade the historical sanctuary of the home, but continues into deeper problems of constitutional law. In the areas of inspections of records and business premises, as discussed earlier, the courts had various "pegs" on which they could hang a decision. Many of these "pegs," while perfectly valid when applied to businesses, simply have no application in the case of a private home. Unlike hotels or hospitals, private homes are not open to the public. No one needs a license to own a home, nor should the choice of a dwelling be sufficient to imply consent to inspection.<sup>61</sup> A private homeowner, unlike the corporation, is not threatening the existence of the competitive economic system, his privacy is not jeopardizing the government's method of finance, nor is he making a profit from the sale of impure foods or dangerous drugs. Thus, the compelling necessity to use the police power cannot be found with ease. The only remaining "peg" on which the court can easily hang a decision is the distinction between the civil and criminal search, a distinction that harks back to the earliest cases in this area.<sup>62</sup>

Not only are most of the time-tried "pegs" removed, but the Court must contend with its own words which have now come back to haunt their authors. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society,"<sup>63</sup> said the Court in declaring that the protection of the Fourth Amendment was applicable to the actions of states under the due process clause of the Fourteenth Amendment. A few years earlier the Court said in *United States v. Lefkowitz*: "the Fourth Amendment . . . is construed liberally to safeguard the right of privacy. . . . Its protection extends to offenders as well as to the law-abiding."<sup>64</sup> Eloquenty, the Court repeated the same theme: "this guarantee of protection against unreasonable searches . . . marks the right of privacy as one of the unique values of our civilization. . . ."<sup>65</sup> Even though all of these cases dealt with the problem of the criminal search, the dicta still sounded in terms of near absolute right of privacy of the home.

To this backdrop came the first case involving the inspection of a private home by an administrative official. The case was *District of Columbia v. Little*,<sup>66</sup> and in it Judge Prettyman handed down a scathing opinion that would have made many an inspector fear for the future of his job. The facts are simple. A complaint was directed to the District of Columbia Health Department, stating that defendant was violating certain city health regulations. When the inspector presented himself at defendant's door, he was refused admittance. The homeowner was subsequently arrested and convicted under the ordinance for hindering and obstructing an in-

61. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949).

62. *Boyd v. United States*, *supra* note 48; *In re Stouse*, 23 Fed. Cas. 261 (No. 13548) (D. Nev. 1871).

63. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

64. 285 U.S. 452, 464 (1932).

65. *McDonald v. United States*, 335 U.S. 451, 453 (1948). See also *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Weeks v. United States*, 232 U.S. 83 (1941).

66. 178 F.2d 13 (D.C. Cir. 1949).

spector in the performance of his inspecting duties. The conviction was reversed by the Municipal Court of Appeals and the court of appeals affirmed.

The question was pinpointed, "can a health officer . . . inspect a private home without a warrant if the owner objects?" In answering the question in the negative, Judge Prettyman said:

Democratic government has distinguishing features. One of them is freedom of speech for the individual; another is freedom of religion. Another is the right of privacy of the home from intrusion by government officials. These characteristics are not mere hallmarks. They are the beams and pillars about which the structure was built and upon which it depends. If private homes are open to the intrusion of government enforcement officials, at the wish of those officials, without the intervening mind and hand of a magistrate, one prop of the structure of our system is gone and an outstanding characteristic of another form of government will have been substituted.<sup>67</sup>

The opinion continued by stressing the point that, "health laws are enforced by the police power and are subject to the same constitutional limitations as are other police powers. It is wholly fallacious to say that any particular police power is immune from constitutional restrictions."<sup>68</sup> The court refused to recognize the old "peg" that inspections can be valid exercises of the police power.

The court then stressed the ease of obtaining a warrant:

There is nothing about an accumulation of garbage . . . which makes it difficult to obtain a warrant to search for it. It is noticeable and as apt to complaint as are gaming equipment or stolen goods. Health officers may chafe at the inconvenience, but so do police officers.<sup>69</sup>

Finally, the court knocked down the last "peg" on which inspection decisions in other areas have been upheld, the very old distinction between civil and criminal searches:

There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not.

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. . . . It was not related to crime or to suspicion of crime. It belonged to all men, not merely criminals, real or suspected. . . . To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but a man not suspected of crime has no such protection is a fantastic absurdity.<sup>70</sup>

These arguments sounded rather convincing and the Supreme Court decided, in its elusive way, not to question this logic at this time. On appeal, the Court affirmed on grounds that the failure to admit the inspector did not amount to an

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67. *Id.* at 16.

68. *Id.* at 20.

69. *Id.* at 18.

70. *Id.* at 16-17.

obstruction in the enforcement of the ordinance.<sup>71</sup> The constitutional question, begging to be answered, was put off until a later date.

This date arrived some ten years later. Two cases, both coming from state supreme courts deciding in favor of the inspections, reached the court at the same time. The first to be decided was *Frank v. Maryland*.<sup>72</sup> Its facts are very similar to the *Little* case. Defendant was suspected of having a rat infested, unsanitary home contrary to the provisions of the Baltimore City Code. After glancing about the exterior, the inspector requested admittance for the purpose of inspecting the interior. Defendant refused to allow the inspector to enter and was consequently fined under the ordinance for the refusal.

The Supreme Court in a five to four decision upheld the conviction in an opinion written by Justice Frankfurter. The basis for the decision is, to say the least, unclear. The Court relied heavily upon the case of *Boyd v. United States*<sup>73</sup> and the English decision in *Entick v. Carrington*,<sup>74</sup> citing them for the proposition that freedom from search without a warrant is confined to criminal actions.<sup>75</sup> Thus the old distinction between criminal search and civil search was revived. The decision seems to rest on a version of the well known balancing test: "application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social needs on which the demand rests."<sup>76</sup> The Court first considered the individual's interest in his privacy, and examined the statutory safeguards available. Against this it weighed the governmental interest in having a warrantless inspection. The Court ended with a warning against issuance of warrants for light cause, a situation the Court feared would arise from issuance in inspection cases.<sup>77</sup>

The decision leaves the reader confused. The decision begins as if inspections, being only civil, are completely without restraint from the Fourth and Fourteenth Amendments. The decision ends, however, with the thought that the Fourth and Fourteenth Amendments do cover civil, administrative searches. However, these Amendments only forbid unreasonable searches, and whether or not a search is unreasonable depends upon the facts of each case.<sup>78</sup> So this decision leaves the question, does the reasonableness criterion of the Fourth Amendment apply to searches in criminal cases only, or does it apply in all cases, civil and criminal with the qualification that civil inspection under a statute with proper safeguards will not be deemed unreasonable? There seem to be elements of both of these approaches in the majority opinion, but the latter probably reflects the correct interpretation.

Justice Whittaker was perhaps equally confused as to the basis of the majority opinion. In a concurring opinion he clearly stated his view that inspections

71. *District of Columbia v. Little*, 339 U.S. 1 (1950).

72. 359 U.S. 360 (1959).

73. 116 U.S. 616 (1886).

74. 19 HOWELL'S STATE TRIALS 1029, 95 Eng. Rep. 807 (K.B. 1765).

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

76. *Id.* at 363.

77. *Id.* at 370.

78. See *United States v. Rabinowitz*, 339 U.S. 56 (1950).

come under the auspices of the Fourth and Fourteenth Amendments, but that these particular inspections were reasonable.<sup>79</sup>

Justice Douglas wrote a strong dissent in which Chief Justice Warren and Justices Black and Brennan concurred. Their argument followed the basic reasoning of Judge Prettyman in the *Little* case: it is the right to privacy that is protected, not the right to be free from criminal prosecutions.<sup>80</sup>

The sister case, *State ex rel. Eaton v. Price*,<sup>81</sup> involving inspection of the home, came from the courts of Ohio. The action arose on a habeas corpus proceeding in which defendant was testing his conviction resulting in a fine and imprisonment for failure to admit an inspector as required by a city ordinance. Justice Stewart not sitting, the denial of the writ was affirmed on a four-four split. Somewhat unusual for the Court, the dissenters in *Frank* filed an opinion which briefly reiterated their views in that case. In addition they attempted to distinguish the two cases on their facts.

The Ohio case goes much further than did the *Frank* decision. The ordinance in *Frank* only called for a \$20.00 fine and the inspector had to have cause before he could demand admission. The Ohio ordinance imposed a considerable fine as well as a jail sentence. Furthermore, it allowed inspections on a systematic spot-check basis without the least necessity of showing cause to enter.

The few state decisions on this subject are in clear agreement with the majority decision in *Frank*.<sup>82</sup>

#### V. THE FUTURE

There is no longer much discussion about the legality of inspections of books and records and business premises pursuant to a valid regulatory statute. The battle ground is now centered about administrative inspections of the individual as in the *Abel* case, and administrative visits to the private home as in the *Frank* decision. The outcome of this conflict cannot be considered decided by these cases. The *Abel* court avoided the constitutional issue. The *Frank* court, while meeting the constitutional question, established a very ambiguous precedent, a precedent which answers few, if any, of the future problems. Will *Frank* be limited to its facts? The decision in *Eaton* indicates that it will not. Extending beyond either of these cases, what if the inspector's findings can be used to assess immediate sanctions? What if the inspector is only worried about structural design or some other ordinance that is only remotely related to the public health? What if the inspector makes his rounds at night with authority to break down the door? Will the *Frank* decision be extended to cover these situations? These questions must be decided in the future.

Will *Frank* live long enough to decide these questions? Perhaps not, because there is a possibility that it will be overruled the next time the problem is before

79. *Frank v. Maryland*, *supra* note 75, at 373 (concurring opinion).

80. *Frank v. Maryland*, *supra* note 75, at 374 (dissenting opinion).

81. 364 U.S. 263 (1960).

82. *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956); *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958); *De Pass v. City of Spartanburg*, 234 S.C. 198, 107 S.E.2d 350 (1959).

the Court. These are the indications: (1) the decision has come under considerable criticism; (2) the Court seems to be on a trend that protects the individual from governmental encroachments; and (3) the decision was by a one vote margin. Since that time the minority has remained on the Court, while two members of the majority have been replaced by men with known libertarian principles.

This much can be said for the decision allowing warrantless inspection of private homes. There appears to be at least some need for inspection of homes in a modern society.<sup>83</sup> There is precedent for inspections in the area of civil administration, precedent that the Court seemed to ignore.<sup>84</sup> These ordinances require nearly 100% enforcement to be effective, while administration of criminal justice does not depend on this high a degree of enforcement to be effective.<sup>85</sup> These inspections, too, are less obnoxious than are criminal searches in that they are less time consuming, there is less handling of personal effects, less social stigma attaches, there is less danger of brutality by the officer, and the absence of a uniformed policeman will relieve the tension of the inspection.<sup>86</sup> Finally, there is a vast difference in the penalties involved.

The decisions allowing the search of one's person and home are open to many valid attacks. The best job to date of attacking the inspector and defending the homeowner was done by Judge Prettyman in the *Little* case. To many people the present position of the Court seems to have no true historical basis. It is an illogical erosion of already vanishing freedoms.<sup>87</sup> There is also grave danger of "cooperation" between administrative officials and the police, and critics cite the *Abel* case as an illustration of this "cooperation" in action.<sup>88</sup> Granting that they are less obnoxious than a thorough criminal search, nonetheless, inspections are an invasion of privacy and are distasteful to many persons. And further granting that 100% enforcement is needed and inspections are necessary, statistics cited by the majority in *Frank* indicate that most persons, the vast majority, allow entry with no protest. For those who do not allow entry willingly, if there is probable cause to suspect they are violating the law, a warrant is easily available.

From the point of view of this writer, these attacks on the *Frank* decision are valid. If it is our belief that citizens are to be protected in their privacy by the impartial intervening mind and hand of the magistrate, that no governmental power has the right to enter save by authorization by an informed and independent third party for good cause shown, then *Frank* must be overruled. For if the government can take it upon itself to enter and search the home of the individual against his will without proper cause or authorization, our freedoms are indeed placed in a precarious position. It makes no real difference whether the search is for garbage or guns.

MACK PLAYER

83. Stahl & Kuhn, *Inspections and the 4th Amendment*, 11 U. PITT. L. REV. 256 (1950).

84. See cases cited *supra* notes 2-7.

85. Comment, 108 U. PA. L. REV. 265 (1959).

86. *Ibid.*

87. See, e.g., Barrett, *Personal Rights, Property Rights and the 4th Amendment*, 1960 SUP. CT. REV. 46.

88. Scurlock, *Searches and Seizures in Missouri*, 29 U. KAN. CITY L. REV. 301 n.23 (1961); Comment, 20 MD. L. REV. 350 (1960); Comment, 44 MINN. L. REV. 513, 519 (1960).