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Search and Seizure—Due Process of Law—Municipal Health Inspections—Frank v. Maryland, 79 Sup. Ct. 804 (1959)

William B. Stoebuck
University of Washington School of Law

RECENT FEDERAL CASE

Search and Seizure—Due Process of Law—Municipal Health Inspections— *Frank v. Maryland,* 79 Sup.Ct. 804 (1959).

Answering a complaint, an inspector from the Baltimore health department searched defendant's neighborhood. After finding evidence behind defendant's home that suggested rats were inside, the inspector requested entry of defendant, which was refused. The inspector left and returned the next day for further exterior examination of the home but, not finding defendant there, again made no entry. Within a few days defendant was arrested, tried by a magistrate, convicted, and fined twenty dollars for violation of a Baltimore health ordinance[1] requiring householders to admit health inspectors. The Baltimore Criminal Court affirmed the conviction, the Maryland Supreme Court denied certiorari, and defendant brought the case to the United States Supreme Court on certiorari. The issue, never before decided by the Supreme Court, was whether Maryland could, consistently with the due process clause of the Constitution,[2] require dwellers of private homes to admit health inspectors without search warrants. In an opinion by Justice Frankfurter,[3] the Court held such requirement constitutional. Repeating its famous dictum in *Wolf v. Colorado*[4] that the due process clause protects a right of "privacy," the Court then made it plainer than it did in the *Wolf* case that this right is the freedom from "unreasonable searches and seizures" guaranteed by the fourth amendment.[5] On this base it found the Baltimore ordinance to impose a "reasonable" search, mainly because no evidence of crime was sought,[6] and also because there had to be

[1] BALTIMORE, MD., CITY CODE, art. XII, § 120: "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." Other sections of the code require dwellings to be kept clean and sanitary and free of vermin and rodent infestation and impose penalties for failing to do so.

[2] U.S. CONST., Amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

[3] The decision was 5-4, with Chief Justice Warren and Justices Black and Brennan joining the dissent written by Justice Douglas. Justice Whittaker wrote a brief concurring opinion.

[4] 338 U.S. 25 (1949).

[5] *N.B.* that the *Frank* case does not, any more than the *Wolf* case, indicate that the entire fourth amendment is read into the due process clause. Nor does it give any hint of extension of any other of the first eight amendments into the fourteenth.

[6] If unhealthy conditions are found, the occupant is informed of that fact and asked to correct them. If he fails to do so, he is then subject to criminal prosecution. This raises a point upon which the *Frank* case is not clear. The criminal prosecution would be for maintaining the unhealthy condition, which is a nuisance. Apparently evidence for this prosecution would have to be obtained by a separate second search under a search warrant. If the health inspector could testify as to the conditions he observed on the first inspection, this would seem to be the obtaining of evidence of crime without a warrant. However, the Court's statement that no evidence of crime was sought to be seized appears to have been intended to mean the only testimony or other evidence admissible would have been that produced by a second search. Those who wish to rely on the case should by all means assume that to be the fact.

A related issue not discussed by the majority or dissenting opinions arises from the fact that knowledge of unsanitary conditions discovered during the inspection might

valid reason to suspect a health nuisance, the inspection had to be in the daytime, and the inspector could not use force to enter. Justice Douglas, in his dissenting opinion, argued that the fourth amendment guarantee against unreasonable searches and seizures insured absolute privacy in one's home, subject only to the power of police to enter under a valid warrant in an emergency in their duty, such as to continue hot pursuit of a felon.

In 1950 the Supreme Court was faced with the same health inspection issue in *District of Columbia v. Little*[7] but, as it frankly stated, purposely avoided the constitutional question by deciding the case on a collateral ground.[8] However, if it is any indication of the Court's feeling at that time, the practical effect of the case was to leave intact the decision of the District of Columbia Circuit,[9] which had denied validity to the inspection statute.

Other than the *Little* case, only two American cases, both state decisions rendered after that case, seem to have squarely faced the *Frank* issue.[10] Both expressly repudiated the circuit court opinion in the *Little* case and reached the result of the *Frank* case on parallel reasoning. *Givner v. State of Maryland*[11] is an identical prologue to the *Frank* case, involving a similar violation of the same Baltimore ordinance. *State ex rel. Eaton v. Price,*[12] a 1958 Ohio decision involving a comparable fact situation arising from the refusal of a householder to admit a Dayton health inspector, mirrors the *Givner* case, relying on it implicitly. Both *Givner* and *Price,* like *Frank,* operate on the principle that health inspections are "reasonable" searches.

Interestingly, the Supreme Court in *Frank v. Maryland* based no part of its decision upon *Little, Givner,* or *Price* and did not even discuss them.[13] Whether its failure to seek support from the *Givner* and *Price* cases, which certainly could well have been cited, since their rationale is like that used by the Supreme Court, indicates a desire not to give a broad sanction to health inspection statutes not before the Court, may be worth speculation. As for the circuit court decision in the *Little* case, it is difficult to see how it can stand, even though not expressly disposed of, in the face of the diametrically opposed result in the *Frank* case.

In assessing the *Frank* decision, two separate lines of inquiry can be made: the judicial precedents on search and seizure, and the historical

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be used as the basis for obtaining a warrant for a second search. Thus, even if the first inspection did not produce evidence, it would be connected with a later search which would do so. The *Frank* case does not indicate defendant attacked the inspection ordinance on this ground, and clearly the Court did not examine the question.

[7] 339 U.S. 1 (1950) (defendant arrested for refusing admittance to D.C. health inspector who had no warrant).

[8] It held Mrs. Little's resistance did not constitute refusal of entry within the meaning of the D.C. statute.

[9] 178 F.2d 13 (1949). This decision, relied on by Justice Douglas in his dissent in *Frank,* held it was an unreasonable search for a health inspector to enter a private home without a warrant.

[10] See also Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955), which discusses the issue in dictum, agreeing with the *Frank* result.

[11] 210 Md. 484, 124 A.2d 764 (1956).

[12] 168 Ohio St. 123, 151 N.E.2d 523 (1958).

[13] The majority did not cite *Little* or *Price* and only cited *Givner* in a footnote for a minor collateral proposition. Justice Douglas dealt with *Little* at length in his dissent.

antecedents to the fourth amendment guarantee against unreasonable search and seizure. The investigation of prior cases will be made first.

Since *Wolf v. Colorado, supra,* it has been accepted that the fourteenth amendment due process clause imposes upon states a duty not to engage in invasions of privacy, similar to the fourth amendment restraints on the federal government. Despite broad language in some cases,[14] it is clear that the freedom from search and seizure is far from absolute, even as to searches of dwellings. Further, statements made about it have, without exception, been in cases where the search or seizure was for criminal or quasi-criminal evidence. The farthest extension of fourth amendment protection has been in connection with searches of homes, perhaps the outermost limit being *McDonald v. United States,*[15] holding that a suspect's apartment could not be searched incident to his valid arrest there when the arrest was without a warrant. It has, however, been repeatedly held that the premises within a suspect's control may be searched without a warrant when he is arrested there on a valid arrest warrant,[16] though this is of course not so when the arrest is invalid.[17] And the arrest must actually occur at the home.[18] Apparently the search may be for evidence of crimes other than that for which the arrest was made, though this should not be stated dogmatically.[19] Nevertheless, the point is made that the fourth amendment allows some latitude in searches of private homes without warrants.

The language of the fourth amendment—the people secure in their "persons, houses, papers, and effects"—does not itself indicate any preferential protection of the home. Nor does it seem the Supreme Court intended such a preference when it began its series of great interpretive cases around the turn of this century. For instance, *Gouled v. United States,*[20] which held a search of an office invalid, was made the basis of the decision in *Amos v. United States,*[21] decided the same day, which similarly dealt with a search

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[14] See for example: Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("the security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society"); 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 . . .").

[15] 335 U.S. 451 (1948). CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 825 (1953), advances the view that *United States v. Rabinowitz,* 339 U.S. 56 (1950), may have overruled *McDonald* by implication. This may not be necessarily so, since the arrest in *Rabinowitz* was with a valid arrest warrant. Further, the *Rabinowitz* case involved a search of an office, which, as this Casenote attempts to develop, may be a distinction of some current vitality.

[16] Harris v. United States, 331 U.S. 145 (1947).

[17] Johnson v. United States, 333 U.S. 10 (1948).

[18] Agnello v. United States, 269 U.S. 20 (1925).

[19] Harris v. United States, 331 U.S. 145 (1947). The arrest was for forgery, and the search, held valid, uncovered illegally held draft cards, which became the basis of a criminal charge. The Court said, at 150, "This Court has pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict." However, the Court dwelt on the fact that the draft cards were government property, which its agents had a right to recover; thus, there may be a special reason, not likely to be repeated, for the "reasonableness" of the search.

[20] 255 U.S. 298 (1921) (search of office under subterfuge of friendly visit).

[21] 255 U.S. 313 (1921) (search of home for bootleg whisky without warrant).

of a home. The patriarch in this area is *Boyd v. United States,*[22] decided in 1885 and cited in nearly every fourth amendment case since. It held that compulsory production of business records amounted to a search and seizure, which, in a quasi-criminal forfeiture action, was violative of the fourth amendment. However, the Court has for a number of years allowed police much broader powers in searching vehicles than in searching homes or offices, it being the rule that an automobile may be searched without a warrant if there is probable cause to suspect it contains evidence of a crime.[23] Of more importance to the present discussion, there has been a recent trend in the Court toward lessening the protection given businesses and business records. A proponent of this is Justice Douglas, his views being shown clearly in his opinion in *Davis v. United States,*[24] which upheld a seizure of gasoline rationing coupons, a major argument relied upon being that the search was of a business, not a private home. A more important aspect of this picture is brought out by *News Printing Co. v. Walling,*[25] which, stripped of its trappings, held a federal agency could conduct a fishing expedition to uncover evidence of criminal violation of wage and hour laws by compelling production of corporate records, even though it had no probable cause to suspect the crime had occurred. It was said that, "if applicable" to corporations, the fourth amendment did not prohibit this kind of search, it being a reasonable balancing of public interest against the company's protection against searches and seizures. The spirit and language of the case raise doubts as to what it did to *Boyd v. United States, supra,* and to cases such as *Silverthorne Lumber Co. v. United States,*[26] which clearly hold corporations are protected by the fourth amendment.

The most obvious difference between *Frank v. Maryland* and the fourth amendment cases just discussed is that it does not involve a search for criminal evidence, while they do. That fact suggests it may have more affinity to cases involving the abatement of health nuisances by public officials. The Supreme Court has suggested that the power of organs of state or local government to seize and destroy nuisances preceded the fourth amendment.[27] So it has been held states or their subdivisions sum-

[22] 116 U.S. 616 (1885).

[23] Carroll v. United States, 267 U.S. 132 (1925) (search of known bootleggers' car for whisky).

[24] 328 U.S. 582 (1946). Compare the language Justice Douglas used there in playing down the sanctity of searches of businesses with the adamant stand he took against searches of private homes in the *Frank* case.

[25] Printed together with Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Though the *Oklahoma Press* case is more often cited, *News Printing* actually extends federal inquisitory power further, because there was no probable cause to suspect a violation of federal law in *News Printing,* while there was probable cause in *Oklahoma Press.* The opinion is by Justice Rutledge, with both Justices Frankfurter and Douglas joining.

[26] 251 U.S. 385 (1920) (search of corporate office after officers had been arrested at home held unlawful search).

[27] Lawton v. Steele, 152 U.S. 133, 142 (1894) (seizure in public waters of illegally maintained fish nets): "So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law prior to the adoption of the constitution, and it has never been supposed that the constitutional provision in question in this case [due process clause of fourteenth amendment] was intended to interfere with the established principles in that regard."

marily may seize fish nets illegally maintained in public waters,[28] seize and destroy allegedly spoiled poultry from a cold storage plant,[29] and forcibly enter a barn to test cows for tuberculosis.[30] Despite the similarity of these situations, the *Frank* case does not reason from the abatement-of-nuisance ground, preferring to discuss the health inspection issue in a pure search and seizure framework. For this reason, because the abatement cases cited were handed down before the fourteenth amendment was held to guarantee against searches and seizures, and also because the cases did not involve dwelling houses, nothing of much value to the present discussion seems to turn on them.

Aside from the fact that the *Frank* case differs from other fourth amendment cases by not involving a search for criminal evidence, it may manifest for students of constitutional law another facet, more elusive but of more potential power. Many observers could agree that the *News Publishing Co.* case, *supra,* is at least as restrictive of corporate freedom as *Frank* is of personal freedom. Some of the Court, spoken for by Justice Douglas, would seemingly use different standards as respects protecting businesses and private homes. Perhaps then the case represents a swing toward equal treatment, though it may be wished that both businesses and individuals could have been accorded the level of protection Justice Douglas sought for individuals in his dissent in the *Frank* case. The time for that, however, was when *News Publishing* was decided.

The second line of inquiry in assessing *Frank v. Maryland* is the search for historical antecedents to the fourth amendment. Since no Supreme Court decision prior to the *Frank* case passed on the constitutionality of health inspections, did the drafters of the fourth amendment intend to include them within the appellation "unreasonable searches and seizures"?

Justice Murphy once ventured the opinion that the fourth amendment was inspired by general warrants, writs of assistance, and *lettres de cachet.*[31] No doubt these played the lead role in bringing about the amendment, though it might be supposed that *lettres de cachet* contributed more to the sixth amendment than the fourth.[32] In England general warrants[33] were of some frequency up to about 1765.[34] In that year two great cases, *Leach v.*

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[28] *Ibid.*

[29] North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[30] Dederick v. Smith, 88 N.H. 63, 184 Atl. 595, appeal dismissed on ground of no substantial federal question, 299 U.S. 506 (1936).

[31] Dissent in Goldman v. United States, 316 U.S. 129, 139 n. 5 (1942).

[32] One form of *lettre de cachet* was more than a warrant and was actually an order for criminal sentencing, specifying no particular offense and having a blank space, to be filled in by some officer, for the name of the accused. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 50 n. 125 (Johns Hopkins University Studies in Historical and Political Science, Ser. LV, No. 2, 1937).

[33] General warrants authorized the arrest of any person and the seizure of any evidence having to do with a specified crime. They were returnable to the official who issued them. For an example, see Wilkes' Case, 19 How. St. Tr. 982 (1763).

[34] LASSON, *supra* note 32, at 13-50; Leach v. Money, 19 How. St. Tr. 1002, 1027 (1765).

Money[35] and *Entick v. Carrington*,[36] spelled the end of their use. Dryden Leach, a writer suspected of authoring a "seditious libel" on George III, was arrested on a general warrant, taken into custody, and held four days. In Leach's action of false imprisonment against the arresting officers, the court held only that the arrest was illegal because Leach did not actually write the libel and hence was not the person described in the warrant. But the court left no doubt it disapproved of general warrants. Soon *Entick v. Carrington, supra,* an action of trespass against officers who seized papers from a private home on a general warrant, gave a direct holding to that effect. It stated the fundamental proposition that search warrants must describe precisely the place to be searched and the criminal evidence sought.[37]

In colonial America it was the writ of assistance[38] which generated popular indignation, especially in Massachusetts.[39] This form of writ was considerably worse than the general warrant used in England and, to salt the colonists' wounds, was directed chiefly at stamping out the important industry—for it really was such—of molasses smuggling.[40] It is a fact of American history that these writs of assistance were a major incitement to the War of Independence.[41] This is not to say they were the only evil at which the fourth amendment was aimed, because its language is in two clauses, one guaranteeing protection against unreasonable searches and seizures and the other specifying the kind of warrants to issue.[42] But the historical events just preceding its adoption are a strong indication these writs were poignantly in the drafters' minds. It is interesting to note that article 14 of the 1780 Declaration of Rights of Massachusetts, the state which had the worst experience with the writs, is very similar to the fourth amendment, using the words "unreasonable searches and seizures."[43]

Nowhere has any evidence been found directly connecting the fourth amendment with health inspections or other similar entries. Indeed the

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[35] *Ibid.*

[36] 19 How. St. Tr. 1030 (1765).

[37] "If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution." *Id.* at 1071.

[38] This writ enabled the holder, generally a revenue officer looking for smuggled goods, to search anywhere anytime for evidence of crime. The writ was good for the life of the then king plus six months and did not require return of seized goods to a magistrate. It directed local constables to assist the holder; hence the term "assistance" or "assistants." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 610-636 (8th ed. 1927).

[39] A courtroom speech against writs of assistance delivered by James Otis, Jr., in Boston in 1761 was apparently the thing that prompted John Adams to join the struggle for liberty. 2 ADAMS, THE WORKS OF JOHN ADAMS 124 n. 1 and 521-525 (1850).

[40] 1 MORISON AND COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 147 and 155 (1942).

[41] BEARD AND BEARD, THE RISE OF AMERICAN CIVILIZATION 217-219 (1946).

[42] This came about in an interesting way. When the fourth amendment was being drafted, the House had originally approved a one-clause form merely specifying the contents of warrants. Then Benson of New York, chairman of a committee, redrafted it in its present form, in which it was enacted by both House and Senate and ratified by the states. LASSON, *supra* note 32, at 101-103.

[43] *Id.* at 82 n. 15.

history of general warrants and writs of assistance, against which the fourth amendment is obviously directed, is heady stuff, beside which the Baltimore health inspection in the *Frank* case hardly casts a shadow. Dryden Leach was pulled from his bed at night and hustled away.[44] Entick was carried out of his home sitting in his chair, followed by his personal papers, including his will and pocketbook, in a sack.[45] The tumult of the events leading up to the American Revolution does not need recounting. The historical background to the fourth amendment does not directly rule out the possibility that the framers aimed it against health inspections. But neither does it show they did, and it suggests they had several other worse infractions of liberty in mind.

To summarize, some conclusions, believed warranted by the foregoing discussion, will be drawn. *Frank v. Maryland* should be viewed as an original contribution to American constitutional law. Though it may not be said for sure that the case correctly interprets history, it probably does and at least cannot be said to be wrong on this score. It is connected by analogy with other fourth amendment cases but is not governed by any one of them. Perhaps it represents a Supreme Court trend toward less emphasis on private, as compared with business, freedom from unreasonable searches. The distinguishing fact seems to be that there was no search for criminal evidence, but those who would rely on the case must be cautioned not to think it establishes any general rule that all searches not intended to produce evidence are valid. The Court also pointed out that regulation of health is an area of great public interest,[46] and the search was in a reasonable manner and in the daytime. Other state court cases *(Givner* and *Price, supra)* which might have been relied upon were not cited and so not expressly sanctioned. And finally the decision was by a sharply divided court. This is new law, and, though the issue is squarely decided, caution would require the assumption for the present that it may not be extended beyond the facts of the *Frank* case.

WILLIAM B. STOEBUCK

[44] 2 MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 246 (1886).
[45] *Id.* at 247.
[46] For articles giving a picture of the need for municipal control in this area, see Guandolo, *Housing Codes in Urban Renewal*, 25 GEO. WASH. L. REV. 1 (1956), and Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1956).