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Recommended Citation

John Michener, *Health Inspections of Private Homes - Frank v. Maryland*, 20 Md. L. Rev. 345 (1960)

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Health Inspections Of Private Homes

*Frank v. Maryland*¹

Because of a large quantity of debris and rat droppings outside Frank's decaying house, a Baltimore health inspector searching for the source of a neighborhood rat infestation demanded to examine Frank's basement. Frank refused to admit the inspector until he obtained a search warrant. Subsequently Frank was tried and convicted before a Police Justice for violating Article 12, Section 120, of the Baltimore City Code, which imposes a fine on any homeowner who refuses to admit a health inspector having reason to suspect a nuisance exists in the house.² Failing to gain acquittal on appeal to the Criminal Court of Baltimore and certiorari being denied by the Maryland Court of Appeals, Frank appealed his case to the Supreme Court. Since *Wolf v. Colorado*³ settled that the prohibition against unreasonable searches and seizures afforded by the Fourth Amendment⁴ to the Constitution of the United States ex-

¹ Senator Keating, on January 19, 1960, introduced Senate Resolution 235, which proposed a select committee to investigate and recommend new legislation in this area relating to the jurisdiction of federal courts over civilians employed by or accompanying our armed forces overseas. At this writing, the resolution is in the hands of the Committee on the Judiciary.

² 359 U.S. 360 (1959).

³ (Flack, 1950) :

"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."

⁴ 338 U.S. 25 (1949), noted 38 Calif. L. Rev. 498 (1950).

⁵ "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

tends to the States through the due process clause of the Fourteenth Amendment,⁵ the precise issue presented to the Supreme Court was whether a State health inspection of a private home at a reasonable time without a search warrant constituted a prohibited search. The Court, in a five to four decision, held that it did not.

The Court, speaking through Mr. Justice Frankfurter, analyzed the background and implementation of the Fourth Amendment and concluded that the constitutional protection against unreasonable searches and seizures arose historically as a safeguard against the police search for evidence of crime; and, although it may be used to protect more broadly than its history indicates, it nevertheless does not pertain to health inspections made to protect the general welfare as distinguished from enforcing the criminal law, if the intrusion on privacy is slight and conducted within reasonable limits.⁶ Finally, the Court concluded that if search warrants were required for health inspections, the rigorous constitutional requirements for their issue would prevent the making of many needed inspections.⁷

Mr. Justice Douglas, joined by the Chief Justice and Justices Black and Brennan, dissented on the ground that any search of a private home without a search warrant is unreasonable, absent exceptional circumstances such as fire, or police observation of the entry of a fugitive. The dissent also maintained that requiring search warrants for health inspections would not interfere with enforcement of modern health standards.

The question of the applicability of the Fourth Amendment to a health inspection of a private home by a Federal officer without a warrant was considered for the first time in 1949 by the Court of Appeals, District of Columbia Circuit, in *District of Columbia v. Little*.⁸ The Court held that

⁵ "No. State shall . . . deprive any person of life, liberty, or property, without due process of law."

⁶ By holding that the protection against unreasonable searches and seizures does not extend to such health inspections, the Court did not have to decide whether an inspection is a search. *District of Columbia v. Little*, 178 F. 2d 13, 13 A.L.R. 2d 954 (D.C. Cir. 1949), noted 38 Geo. L.J. 139 (1949), held that it is. *Contra*, *Sunderman v. Warnken*, 251 Wis. 471, 29 N.W. 2d 496 (1947).

⁷ Mr. Justice Whittaker, one of the majority Justices, filed a separate one paragraph opinion stating that he concurred in the Court's opinion with the understanding it held the Fourth Amendment prohibition against unreasonable searches applied to the States through the Fourteenth Amendment, but that in the instant case the search was reasonable.

⁸ 178 F. 2d 13, 13 A.L.R. 2d 954 (D.C. Cir. 1949), noted 38 Geo. L.J. 139 (1949).

the protection of the Fourth Amendment applies to health inspections made by Federal officers to protect the general welfare and, applying the exceptional circumstances test as a test of reasonableness, concluded that health inspections of private homes without a warrant were unreasonable.⁹

In the *Frank* case, the first case construing the applicability of the due process clause of the Fourteenth Amendment to health inspections of private homes without a warrant, the Court refused to adopt the holding of the *Little* case. This refusal was based, in part, on a belief that the history behind the Fourth Amendment established that although it was intended both to protect privacy and afford self-protection, it was the self-protection, the right to be secure from searches for evidence to be used in criminal prosecutions, that inspired the struggles against unrestricted searches. The protection the Fourth Amendment gives to privacy was held to be outweighed by the need of the community for health inspections.

The Fourth Amendment protection against unreasonable searches can be traced back to the English case of *Entick v. Carrington*,¹⁰ on which the Court in the *Frank* case relied heavily. In that case, officers of the Crown broke into Entick's home under authority of a general executive warrant to search for evidence of utterance of libel, a criminal offense. The Court, in a landmark decision in English constitutional development, held the search unlawful. The precise holding of the *Entick* case was thus limited to criminal actions, but the basis for the decision was the common law right of a man to privacy in his home. That the Court would have been equally willing to apply its holding to searches for evidence to be used in civil actions is indicated by Lord Camden's opinion, for he stated that there was no way for the processes of a court to be used in civil cases to force evidence out of the owner's custody.¹¹ Certainly if processes could not be used in a civil case to require the production of evidence known to be in a person's possession, a search of his home could not be based upon cause to believe that such evidence might be discovered. The truth of the matter is that Lord Camden apparently never contemplated the possibility

⁹ The decision was affirmed on other grounds, 339 U.S. 1 (1950).

¹⁰ 19 Howell's State Trials, col. 1029 (1765).

¹¹ "There is no process against papers in civil causes. It has often been tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action." *Ibid.*, 1073.

that a search could be made other than for evidence for use in a criminal prosecution. Yet the principles and reasoning of the *Entick* case are applicable to all searches, no matter what the motive. It is a distortion of the *Entick* case to regard it, as did the Court, as authority for the proposition that special warrants for searches need not be required when the search is not for evidence to be used in a criminal prosecution.

Equal difficulties attend the Court's reliance on *Boyd v. United States*.¹² The Court quoted an excerpt from the *Boyd* decision to the effect that the unreasonable searches against which the Fourth Amendment gives protection are almost always made in criminal cases.¹³ That factual statement made in 1886 reflected the situation theretofore prevailing and should not be regarded as an authoritative guide on the applicability of the Amendment to the vastly different and more complex situation existing today. Moreover, the qualification that the searches covered by the protection are "almost always" made in criminal cases is itself an explicit recognition that at least some other searches are also covered. Careful use of the *Boyd* case thus calls for an examination to determine whether the general statement or the exception is applicable. The *Boyd* case itself involved a civil action. The Court there held that compulsory production of papers under civil process to forfeit property is the equivalent of an unreasonable search and seizure. The opinion regarded the protection of the Fourth Amendment as extending primarily to criminal cases, but civil proceedings of a quasi-criminal nature were held to be within its ambit. It would have been consonant with such application to civil proceedings of a quasi-criminal nature to include inspections of private homes where refusal to admit an inspector or to abate a nuisance as directed by an inspector after admission constitutes a crime and can lead to a fine or imprisonment.

The Court cited no other cases in support of its conclusion that the Fourth Amendment does not apply to health inspections. The dissent cited the *Little* case¹⁴ and *Federal Trade Commission v. American Tobacco Co.*¹⁵ in support of the wide application of the Fourth Amendment to civil cases. In the *American Tobacco* case, the Court narrowly

¹² 116 U.S. 616 (1886).

¹³ *Ibid.*, 634.

¹⁴ *District of Columbia v. Little*, 178 F. 2d 13, 13 A.L.R. 2d 954 (D.C. Cir. 1949), noted 38 Geo. L.J. 139 (1949).

¹⁵ 264 U.S. 298, 32 A.L.R. 786 (1924).

construed the statutory powers of the Federal Trade Commission in order to avoid having to decide whether any of its powers conflicted with the Fourth Amendment. This avoidance of the constitutional issue is not authority for application of the Fourth Amendment to civil cases generally. Not only is it not authority, but there has been a long and extensive line of cases holding the Fourth Amendment not applicable to particular types of civil cases, such as the issue of warrants in certain revenue cases,¹⁶ attachments under the Food and Drug Act,¹⁷ and seizures under the Food, Drug, and Cosmetic Act,¹⁸ but none of these are comparable to a search of a private home. Reliance should be placed on interpretation of the intent behind the Amendment, not on cases. The Court chose to interpret the intent as conterminous with the evils prompting the Amendment, while the dissent chose to interpret the intent as the general one to protect privacy which motivated the fight leading to the constitutional protections. Historically and analytically, the position of the dissent that the protection of the Fourth Amendment should reach health inspections, even though made only to protect the general welfare, is sound.

Having concluded that the social need for health inspections had to be balanced only against a restricted right of privacy, the extent of the infringement of Frank's privacy was considered by the Court. Frank, of course, had asked only that the inspector return with a search warrant. The Court construed this request to be not "admissible self-protection" but a "denial of any official justification" for an inspection and an assertion of an "absolute right to refuse consent for an inspection." How a request that an inspector have a search warrant is a denial of "any official justification" for an inspection is difficult to see. A lesser claim to privacy would be hard to imagine. In effect the Court held that assertions of a right to privacy are unjustifiable in an area in which the community has an interest even though the right is constitutionally protected.

In upholding the reasonableness of health inspections made without a warrant, the Court also relied on the fact that Maryland has sanctioned such inspections for over 200 years. However, the early Maryland statutes authoriz-

¹⁶ In re Meador, 16 Fed. Cas. 1294 (N.D. Ga. 1869).

¹⁷ United States v. Eighteen Cases of Tuna Fish, 5 F. 2d 979 (W.D. Va. 1925).

¹⁸ United States v. 62 Packages, Etc., 48 F. Supp. 878 (W.D. Wis. 1943), *aff'd.*, 142 F. 2d 107 (7th Cir. 1944).

ing entry upon or inspection of ships, carriages, stores, etc. without a warrant are not in point. The Baltimore City Code provision under challenge itself derives from an 1801 ordinance.¹⁹ Thousands of inspections without warrants were made under this ordinance and its successors, most of them being after ratification of the Fourteenth Amendment. However, the Supreme Court in *Murray's Lessee v. Hoboken Land and Improvement Co.*²⁰ called for repeated judicial acceptance before long practice would indicate compatibility with due process, and Maryland has no body of judicial opinion sanctioning health inspections of private homes without a warrant. Without judicial approval, Maryland's history may not indicate common acceptance or compatibility with due process.

Analysis of the Court's opinion indicates that the controlling factor was the imperative modern need for health inspections. With modern knowledge of how diseases and infections are spread, it is incontestable that adequate control is impossible if inspections are delayed until there are complaints or positive grounds for suspicion that a nuisance exists.²¹ We are not faced, though, as the Court seemed to feel, with the sole alternatives of allowing inspections without warrants or requiring warrants to issue in all cases where needed. As the dissent pointed out, the test of "probable cause" could even include the lapse of a set period without a premise being inspected. This would not, as the Court charged, represent use of "synthetic search warrants." The requirement for a search warrant in criminal cases is not designed to shield criminals or to protect illegal activities, but to interpose an objective mind between a possibly power-heavy official and individual privacy.²² That need would seem to exist as much in relation to health inspections as in detection of crime. A magistrate, for example, could ensure that health inspections were not used to harass or as a means for looking for evidence of crime without the need to meet the probable cause test for a search warrant.²³ There is a vast difference

¹⁹ BALTIMORE ORDINANCES, 1801-1802, No. 23, § 6.

²⁰ 18 How. 272 (U.S. 1855).

²¹ For an excellent discussion of the issue, see Stahl and Kuhn, *Inspections and the Fourth Amendment*, 11 U. Pitts. L. Rev. 256 (1950).

²² *McDonald v. United States*, 335 U.S. 451 (1948), noted 62 Harv. L. Rev. 1229 (1949); *Trupiano v. United States*, 334 U.S. 699 (1948), noted 37 Geo. L.J. 270 (1949).

²³ See *State v. Pettiford*, Daily Record, December 16, 1959 (Md. 1959). A police officer assigned to make sanitation inspections gained entry to a private home under the guise of making a health inspection. His actual purpose was to look for evidence of a lottery violation without having to obtain a search warrant. Lottery slips were found and seized. Sub-

between broadening the grounds upon which a magistrate may find probable cause to issue a warrant and dispensing with a warrant altogether. Administrative agencies and officers are constantly playing a larger and larger role in our lives. It would appear sagacious not to unnecessarily loosen constitutional restrictions on them at this date when the full impact on our lives is yet to be seen.

Due to the reliance on Maryland history and to Mr. Justice Whittaker's concurrence on the basis that the instant search was reasonable, the *Frank* case does not clarify the position the Court may take in deciding where the Court will draw the line between allowed and prohibited inspections without a warrant in future cases. Indeed, just five weeks after the *Frank* decision, the Court by a four to four vote noted probable jurisdiction in *Ohio v. Price*²⁴ to review on the merits an Ohio case sustaining the constitutionality of health inspections of private homes without a warrant. Mr. Justice Stewart excused himself because his father had participated in the decision on the Ohio Supreme Court. Justices Frankfurter, Clark, Harlan, and Whittaker recorded their votes against noting jurisdiction to make clear that they thought the case was clearly controlled by the *Frank* case and that there was no retreat from the *Frank* decision. Mr. Justice Brennan noted his view that plenary consideration might disclose a fact situation so that the *Frank* case would not be controlling.

In the Ohio case, Taylor refused to admit housing inspectors to his home until they obtained a search warrant. Taylor was thereafter charged with violating Section 806-30(a) of the Dayton, Ohio, Code of General Ordinances and, in the absence of bail, held in jail awaiting trial. Section 806-30(a) authorizes health inspections without any requirement that the inspector even suspect the existence of a proscribed condition.²⁵ Acting on a

sequently the defendant was convicted of a lottery violation in a trial in which the lottery slips were introduced as evidence. The Supreme Bench granted a new trial on the grounds that a principal purpose of the entry of the health inspector was to search for evidence of a crime without obtaining a warrant and that health inspections were not to be used as a cover for such searches. A requirement of a warrant from a magistrate could have prevented this abuse of health inspections and, incidentally, saved the community from the expense of an invalid trial.

²⁴ 360 U.S. 246 (1959).

²⁵ "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings . . . located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is

petition for habeas corpus filed on Taylor's behalf, the State Common Pleas Court found the ordinance unconstitutional. The Court of Appeals reversed, and this reversal was affirmed by the Ohio Supreme Court. Appeal was taken to the Supreme Court. The jurisdictional statement, filed in February, 1959, stated the case was similar to the *Frank* case and involved substantially the same problems. The case was therefore held awaiting the decision of the *Frank* case. Following that decision, jurisdiction was noted on June 8, 1959. Three memorandums were filed with the order noting probable jurisdiction, one in support of the order and two opposing the order. The supporting memorandum indicated the justices voting to note probable jurisdiction thought a factual situation might be involved that varied sufficiently from the situation in the *Frank* case as to make the latter inapplicable, while the opposing memorandums maintained that the court was being asked in effect to reconsider its decision in the *Frank* case. This unusual filing of memorandums in connection with an order setting an appeal for argument demonstrated the sharp and bitter division of the Court.

Subsequently, the decision of the Ohio Supreme Court was affirmed by an equally divided Court.²⁶ Mr. Justice Brennan was joined by the Chief Justice and Justices Black and Douglas in a dissenting opinion which sought to distinguish the Ohio case on the facts. Specifically, the opinion pointed out that in the Ohio case there was no obvious unsanitary condition such as existed in the *Frank* case. There was no showing, either, of suspicion or of probable cause to believe a proscribed condition existed or of a desire by the inspectors to make either a spot check or a blanket check of homes in the vicinity. Thus it remains to be seen whether the *Frank* case marks out a new area in the interpretation of the Fourth Amendment or whether it will be distinguished and limited in application.

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hereby authorized to enter, examine and survey at any reasonable hour all dwellings. . . . The owner or occupant of every dwelling . . . or the person in charge thereof, shall give the Housing Inspector free access to such dwelling . . . at any reasonable hour for the purpose of such inspection, examination and survey."

²⁶ *Ohio v. Price*, . . . U.S. . . . , 80 S. Ct. 1463 (1960).