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Constitutional Law: Segregation in the Schools - Statute Enabling Governor of Arkansas to Close Integrated Schools

Richard C. Ninneman

causes should and in the near future probably will apply to such situations. Under this law, the courts would consider the magnitude of the risk involved, and even though the defect is discoverable, the contractor would be responsible if he could reasonably forsee that the intermediate party would fail to inspect the work for defects. It is anticipated that the general rule will eventually be that a contractor is to be relieved of liability for injuries to third parties only when he is not at fault in creating the situation. DAVID L. WALTHER

Constitutional Law: Health Inspections Without a Warrant—An inspector of the Baltimore City Health Department, acting on a complaint of rodent infestation, inspected the area to determine its source. He discovered a pile, later identified as, "rodent feces mixed with straw and trash and debris to approximately half a ton," in the rear of petitioner's house. Although he had no warrant to gain entry, the inspector sought permission to inspect the basement area . The petitioner refused. Therefore, the following afternoon the petitioner was arrested and found guilty of refusing entry to a health inspector in violation of Section 120 of Article 12 of the Baltimore City Code.[1] The petitioner appealed to the United States Supreme Court on the grounds that Section 120 denied him due process of law as guaranteed by the Fourteenth Amedment in that it violated the search and seizure clause of the Fourth Amendment. *Held:* The conviction was affirmed in a five-four decision.[2]

The court recognized that "the 'security of one's privacy against arbitrary intrusion by the police' is fundamental to a free society and as such protected by the Fourteenth Amendment,"[3] but went on to say: "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 need on which the demand rests."[4]

Examing the background of the constitutional amendments, the Court declared that two protections emerged from the Fourth Amendment.[5] The first of these is the right to personal privacy—the right to be secure from intrusions without proper authority of law. The second is "self-protection"—the right to be secure from searches for evidence

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[1] Baltimore, Md., Code Art. 12, §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 the same and admit a free examination, he shall forfeit and pay for every such refusal or delay the sum of Twenty Dollars."

[2] Frank v. Maryland, 79 S.Ct. 804 (1959).

[3] *Id.* at 807, citing Wolf v. Colorado, 338 U.S. 25, 27 (1948).

[4] *Ibid.*

[5] *Id.* at 808.

to be used in criminal actions without a judicially issued search warrant.[6] The Court concluded 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 liberty was fought."[7] Thus, the traditional restrictions against searches and seizures did not apply to the constitutional right of privacy, and this right must then be weighed against the state's obligation to protect the health of the community. Considering the importance of control over sanitary conditions and the fact situation under which the demand for entry was made, the Court then decided that the petitioner's claim to privacy had to give way to this exercise of the state's police power.

It appears to be rather doubtful whether the dispensation of the warrant requirement is justified in this case on the grounds of protecting the public health. There has been a growing tendency to allow greater latitude in the exercise of the police power in this area, but this has been in exceptional situations which required instant action by health authorities.[8] Certainly it is difficult to conclude that the slight delay in procuring a warrant to inspect a private dwelling, involved such a functional hinderance in an emergency so as to dispense with a constitutional safeguard.

Perhaps then a constitutional analysis of the scope of the Fourth Amendment, as applied through the Fourteenth Amendment to the states, would indicate the foundation upon which the *Frank* decision rests. The Fourth Amendment was written in a period of general warrants and writs of assistence, and declared that unreasonable searches and seizures were prohibited. After asserting the principle that the Fourth Amendment was to be liberally construed to prevent impairment of its protections,[9] the Court decided that no test of reasonableness could be formulated in rigid and absolute terms, but rather in each case, reasonableness had to be determined from the facts and circum-

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[6] See Davis v. United States, 328 U.S. 582, 587 (1946): "The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two [Fourth and Fifth Amendments] constitutional provisions. . . It reflects a dual purpose — protection of the privacy of the individual, his right to be left alone; protection of the individual against compulsory production of evidence to be used against him."

[7] Frank v. Maryland, *supra* note 2, at 808.

[8] See Annot., 25 A.L.R. 2d 1415 (1952) (Requiring submissions to physical examinations); Annot., 43 A.L.R. 2d 453 (1955) (Sanctioning the chemical treatment of public water supply); Annot. 22 A.L.R. 2d 774 (1952) (Approving health regulations regarding tourist and trailer camps); Annot. 140 A.L.R. 127 (1942) (The power to require closing of places of amusement or other places of public assembly because of fire hazard or unsanitary conditions); and Annot., 121 A.L.R. 732 (1939) (Validating of statutes, ordinances, and other regulations relating to the transportation or disposal of carcasses of dead animals).

[9] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Grau v. United States, 287 U.S. 124 (1932): and Sgro v. United States, 287 U.S. 206 (1932).

stances.[10] The requirement that reasonableness be determined by the judiciary in the issuance of warrants was waived only in circumstances of extreme impracticality. Meanwhile, the Court struck down attempted invasions of the Fourth Amendment's sacred rights with strong language.[11]

However, the Fourteenth Amendment did not automatically incorporate all the principles of the Fourth Amendment.[12] Yet the basic protection—security of one's privacy—was declared to be embraced by the Fourteenth Amendment.[13] Therefore, the Court could state: "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police intrusion into privacy it would run counter to the guaranty of the Fourteenth Amendment."[14] How then is this affirmative sanction of the intrusion of one's privacy justified in *Frank v. Maryland?*

The answer may be found in the judicial disagreement in the federal courts over the scope of the Fourth Amendment. The question is whether the search and seizure clause applies to both criminal and civil proceedings. Since the issue is more sharply defined in the lower courts, perhaps the problem can better be understood by beginning there.

As early as 1869, the Fourth Amendment was unequivocally declared to apply only to criminal prosecutions.[15] In 1949, this position was challenged by the Circuit Court of Appeals for the District of Columbia in the case of *District of Columbia v. Little.*[16] An issue, similar to that of the *Frank* case was raised, namely, the right of a

[10] Go-Bart Importing Co. v. United States, *supra,* note 9; and Harris v. United States, 331 U.S. 145 (1947).

[11] "The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws." Agnello v. United States, 269 U.S. 20, 32 (1925). *Accord,* Harris v. United States, *supra,* note 10, at 150, citing Gouled v. United States, 255 U.S. 298, 304 (1921): "This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is important and as imperative as are the guarantees of the other fundamental rights of the individual citizen.'"

[12] Weeks v. United States, 232 U.S. 383 (1914).

[13] Wolf v. Colorado, *supra,* note 3.

[14] *Id.* at 28.

[15] "The objection made to the power given to the supervisor by the statute is, as here just mentioned, that it is forbidden by the fourth amendment to the constitution. But this is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against Meadors. Therefore in this proceeding, the fourth amendment is not violated." *In re* Meador, 16 Fed. Cas. 1294, 1298-1299 (No. 9375) (N.D. Ga. 1869). *Accord, In re* Strouse, 23 Fed. Cas. 261, 261-262 (No. 13548) (D. Nev. 1871): "Upon the second ground that this requirement to produce the books is an unreasonable search, it need only be remarked that the fourth amendment, supposed to be violated, like the clause of the fifth referred to above, is applicable to criminal cases only." *Cf.* United States v. 62 Packages, Etc., 48 F. Supp. 878, 884 (W.D. Wis. 1943): "The Fourth Amendment to the United States Constitution does not apply to a seizure process in civil actions. The sections of the act here in question do not provide for unreasonable searches and seizures. This is a civil action as distinguished from a criminal action."

[16] District of Columbia v. Little, 178 F. 2d 13 (D.C. Cir. 1949).

health official to inspect the premises for unsanitary conditions without a warrant and over the protests of the occupant . The Court concluded that the Fourth Amendment was applicable to both civil and criminal situations, and was not limited solely to criminal actions as was the Fifth Amendment which prohibits self-incrimination. Therefore, the search of a private home without a warrant for the purpose of protecting the public health was not distinguishable from the search for the purpose of gathering evidence of crime. The justification for this position is the interpretation that the constitutional prohibition of the Fourth Amendment, against unreasonable searches is a derivation of the common law right to privacy in one's home.[17] Indeed, the *Little* decision appears to be an attempt to clarify the words of Mr. Chief Justice Vinson: "Although the IVth Amendment was written against the background of the general warrants in England and the writs of assistence in the American colonies," it "gives a protection far greater than those abuses."[18]

The limitation on the scope of the search and seizure clause has been previously implied by the Supreme Court itself. In deciding the constitutionality of a civil statute in the case of *Boyd v. United States*, the Court said:

> Reverting then to the particular phraseology of the Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth.[19]

The *Frank* decision now represents a further step toward restricting the Fourth Amendment, as applied through the Fourteenth, to criminal proceedings only. As Mr. Justice Douglas stated: "We witness indeed an inquest over a substantial part of the Fourth Amendment. . . . The Court now casts a shadow over the guarantee as respects searches and seizures in civil cases."[20] By separating the Fourth Amendment into a civil protection (personal privacy) and a criminal protection (self-protection in criminal proceedings), the majority allowed the civil safeguard to yield to the health inspection laws. This implication is further strengthened by the Court's quotation from the *Boyd* case which states that:

> . . . the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of

[17] *Ibid.*
[18] Nueslein v. District of Columbia, 115 F. 2d 690, 692 (D.C. Cir. 1940).
[19] Boyd v. United States, 116 U.S. 616, 633 (1885).
[20] Frank v. Maryland, *supra*, note 2, at 812-813 (Dissent).

> compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment.[21]

Therefore, by impyling that the Fourth Amendment which regulates federal action, applied only to criminal proceedings, the Court was then able to decide that the civil health laws were likewise not protected by the due process clause of the Fourteenth Amndment.

Coinciding with this constitutional trend, a new problem will probably present itself—the need for a clearer deliniation between civil and criminal proceedings. The *Boyd* case, cited by the majority opinion in the *Frank* decision, held that the proceedings involved, though civil in name, were criminal in nature and that the Fourth Amendment was still applicable to this "quasi criminal" action.[22] Therefore, it is likely that civil actions which provide for penalties and forfeitures, will be given a "quasi criminal" label in order to secure the traditional protection of the search and seizure clause of the Fourth Amendment as embraced in the Fourteenth Amendment.

RICHARD C. NINNEMAN

Labor Law: Authority of Arbitrator to Determine Remedy for Violation of Collective Bargaining Agreement—The union sued under Section 301 of the Labor Management Relations Act[1] for specific performance of the arbitration clause of the collective bargaining agreement. The basic grievance resulted from a foreman's denial to an employee of four hours' overtime work to which the employee was allegedly entitled by reason of his job classification. The company offered to give the aggrieved employee four hours' overtime work but refused, in accordance with its established policy, to pay for work not performed. The company proposal was unsatisfactory to the union, which invoked arbitration. The company agreed to arbitrate the issue of whether a contract violation occurred, provided that the remedy for the violation be the subject of negotiation between the company and the union and not fixed by the arbitrator. On appeal to the court of Appeals for the Fifth Circuit, *held:* com-

[21] *Id.* at 808, citing Boyd v. United States, *supra,* note 19, at 633.

[22] "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, . . ." Boyd v. United States, *supra,* note 19, at 633-634.

[1] 61 Stat. 156 (1947), 29 U.S.C.A. §185 (1952).