Constitutional Law - Search and Seizure - Regulatory Inspections

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state's interest in life and the interest of the hospital and its staff outweigh the religiously motivated refusal of the patient to accept a blood transfusion. Constitutional rights do not exist in a vacuum—clashes between separate constitutional principles are unavoidable. However, the balance struck by the Heston court reflects a humane step that the courts have seemed intuitively led to take.

W. Robert Ament

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—REGULATORY INSPECTIONS—The Supreme Court of the United States has held that a warrantless search and seizure, if authorized by a valid inspection statute limited in scope, time, and place, does not violate fourth amendment principles.


Biswell, a pawnshop owner, was convicted in federal district court for violating firearms laws. His contention, throughout his trial and appeal, was that the Gun Control Act of 1968, as it applied to him, was unconstitutional. He based his argument on two beliefs. First, the apparent authorization to search, as contained in the Act, was invalid without a warrant. Second, since such authorization was invalid, any subsequent acquiescence in a search could not be deemed voluntary. The Court of Appeals for the Tenth Circuit sustained both of Biswell's contentions.

The Supreme Court granted certiorari to consider the allegations of the U.S. Attorney's office that the authorization to search was valid. In the alternative, the government argued that Biswell consented to a search of his storeroom.

Accepting the government's argument, thereby reversing the court of appeals, the Supreme Court held that consent is not an issue where

1. 18 U.S.C. § 923(g) (1970) provides, in part:
The Secretary may enter during business hours the premises (including places of storage) of any firearms . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept by such . . . dealer . . . under the provisions of this chapter, and (2) any firearms . . . kept or stored by such . . . dealer . . . at such premises.
2. Id.
3. United States v. Biswell, 442 F.2d 1189 (10th Cir. 1971). The opinion of the court was written by Clark, J., Associate Justice of the Supreme Court, retired, sitting by designation.
the legality of a search is based on authority of a valid statute, i.e., one that is carefully limited in scope, time, and place. Justice Douglas dis-ssented from the opinion of the Court, challenging the majority’s interpret-ation of the precedent cases it used to support its conclusions.

When a federal treasury agent visited Biswell at his pawnshop, he rou-tinly allowed an examination of his books. When, however, he was asked by the agent to open a locked storeroom, Biswell immediately requested to see a warrant. The agent, when asked if he had such a warrant in his possession, replied “no” but advised Biswell that the Gun Control Act authorized such a request and subsequent search. A copy of the statute was produced for examination. Biswell then allowed the search, stating, “[i]f that is the law, I guess it is all right.” The agent found two sawed off rifles that undisputedly fell within the pur-view of the Gun Control Act and various other federal statutes. These stat-utes eventually formed the basis of a criminal complaint. Hence, a warrantless search, accompanied by questionable consent, took place on Biswell’s business property.

The field of regulatory inspections has historically been in a state of flux. It appeared, in 1959, however, to have culminated in Frank v. Maryland. Frank was convicted and fined pursuant to a Baltimore health and nuisance statute after refusing to allow inspection of his home without a warrant. The Court upheld his conviction. It reasoned that regulatory inspections “touch at most upon the periphery of . . . interests” that must be safeguarded, causing only “the slightest re-striction on [petitioner’s] claims of privacy.”

The Frank opinion, like most before it, related exhaustively the history behind the adaption of the fourth amendment, beginning with

6. The opinion of the Court uses only three cases to reinforce its rationale. All were distinguished or held to be inapposite to the case at bar. The reader, of course, may draw his own conclusion but to this writer, any opinion that distinguishes cases without correspondingly formulating a holding based on some judicial precedent is substantially weakened (unless, of course, the case is so unique as to lead a court to the conclusion that the subject matter has never before been treated).
7. 442 F.2d 1189, 1191 (1971).
11. 359 U.S. at 367.
12. Id. Only once prior to 1959 did the federal courts decide otherwise. See District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), aff’d on other grounds, 339 U.S. 1 (1950).
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the abhorrence toward the English general warrant that was finally discarded in the landmark case of *Entick v. Carrington*,\(^4\) through the colonial Writs of Assistance,\(^5\) to the founding fathers' drafting of the fourth amendment.\(^6\) The majority in *Frank* spoke of the individual's right "to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law."\(^7\) Both *Frank* and *Biswell* challenged a warrantless regulatory inspection as violative of the fourth amendment,\(^8\) primarily because no consent was given to search. Although lip service was paid to the underlying doctrine of the right to privacy, *Frank*, in effect, lay to rest any notion that private interests outweigh the public need for regulatory inspections conducted in the manner described by the Court.\(^9\)

In a short time, the dissenting justices in *Frank* saw their position accepted. Only eight years elapsed between *Frank* and the landmark decision of *Camara v. Municipal Court*\(^20\) which held that under most circumstances\(^21\) a non-consensual, warrantless, regulatory search was unreasonable per se. Thus, the *Camara* Court expressly repudiated much of the *Frank* rationale. The Court reasoned, over a strong dissenting opinion,\(^22\) that there was no overriding public interest to be protected, at the expense of fourth amendment guarantees, through the exemption of regulatory inspections from the warrant requirement. Most regulatory inspections historically have been looked upon by the public as necessary and, hence, an overwhelming percentage of the populace has always consented: To those few who refused, the Court stated that the warrant, as a tool, could be used, if necessary, to gain forcible entry.

Although *Camara* dealt with invasion of the privacy of the home, the Court, in a companion case, *See v. Seattle*,\(^23\) extended the *Camara*

\(^{15}\) 359 U.S. at 364 nn.2 & 3.
\(^{16}\) U.S. Const. amend. IV.
\(^{17}\) 359 U.S. at 365.
\(^{18}\) Although the *Frank* case as a whole was treated as a fourth amendment case, there were portions devoted to a due process argument which, because *Biswell* deals solely with the former, do not concern us here.
\(^{19}\) 359 U.S. at 361-62.
\(^{21}\) See part III of the majority opinion in *Camara v. Municipal Court*, 387 U.S. at 539. All exceptions noted were considered emergency situations and hence immune from the warrant requirement.
\(^{22}\) 387 U.S. at 546 (dissenting opinion).
\(^{23}\) 387 U.S. 541 (1967).
holding to commercial property. Unlike *Camara*, however, *See* was not specific in delimiting the areas where a warrant was not required. Nevertheless, the common thread of "consent" laced its way through both decisions.

Consent, although spoken of in *Camara* and *See*, was not defined. A year later, in *Bumper v. North Carolina*, the Court held that the burden of proving consent cannot be discharged "by showing no more than acquiescence to a claim of lawful authority . . . [Such a] situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Bumper* dealt with a peace officer's statement to a private citizen that he possessed a warrant to enter the citizen's home. Since no warrant was produced at trial, the groundwork was laid for a decision based on the issue of consent. Although *Bumper* is factually distinguishable from *Biswell*, Justice Douglas noted in his dissenting opinion in *Biswell* that the holding of *Bumper* should apply. He also relied heavily on *Colonnade Catering Corp. v. United States* as did the court of appeals in *Biswell* when it reversed the conviction.

*Colonnade* seems virtually identical to *Biswell*, yet the Court managed to distinguish each from the other. The majority in *Biswell* felt that the distinguishing feature was the use of force in *Colonnade*. *Bumper*, however, tells us that force can take the form of coercion and need not be physical. Although it would have been disturbing if the *Biswell* Court considered this issue and then proceeded to reject the *Bumper* rationale, it is indeed perplexing that it brushed the argument aside without comment. *Colonnade* concerned a warrantless search of the premises of a liquor dealer—more specifically his refusal to unlock his storeroom to allow inspection by federal agents. After repeated efforts to obtain consent, physical force was used to break a lock and seize improperly bottled liquor. The Court held that gain-

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25. *Id.* at 548-50.
26. 406 U.S. at 319 (dissenting opinion).
28. 442 F.2d 1189 (10th Cir. 1971).
30. 397 U.S. at 73. The liquor inspection statute used as colorable authority in *Colonnade* was virtually identical to that before the Court in *Biswell*. 26 U.S.C. § 5146(b) (1970) provides:

The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter.

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ing a warrant or commencing prosecution were the only alternatives open when consent was not forthcoming from a proprietor.\textsuperscript{31} As noted above, the Supreme Court in \textit{Biswell} disagreed.

The court of appeals\textsuperscript{32} equated the liquor statute in \textit{Colonnade} with the Gun Control Act in \textit{Biswell}.\textsuperscript{33} Also, it recognized the similarity in the coercion techniques, \textit{when compared with} the \textit{Bumper} guidelines. It could see no exigent circumstances that might cause the case, factually, to fall within the \textit{Camara} exception.\textsuperscript{34} Yet, as noted, the Supreme Court felt constrained to reverse without considering whether the federal agent, instead of demanding entry while flashing a statute before Biswell's eyes, had told him that if he did not consent, a warrant could be obtained or prosecution commenced, Biswell would not have allowed the agent to enter his locked storeroom.\textsuperscript{35} Consent becomes a major issue and the Court's attempt to brush it aside (by stating that in the field of regulatory inspections, which are limited by statute in scope, time, and place, the legality of the search depends on the authority of a valid statute and not consent) makes for bad law, for it plainly puts "the horse before the cart." The holdings of \textit{Camara} and \textit{Bumper}, when read in light of \textit{Colonnade}, point to the importance of "knowing" consent as it relates to a valid search where a warrant is absent and/or a statute is used as authority.

The \textit{Biswell} Court, by having distinguished, rather than relying on, these cases, arrived at what it felt was the desired result—to place the public's need for warrantless regulatory inspections (regardless of the

or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

In \textit{Biswell} and \textit{Colonnade}, the Court noted that in neither statute had Congress formulated procedures for the agents to follow when attempting to get on the premises or into storage space thereon. Rather, a penalty was to be imposed on the proprietor for not allowing entry, causing the holding in \textit{Colonnade} that Congress selected a standard that does \textit{not} include forcible entry without a warrant. Why this inescapable conclusion was never reached by the Court in \textit{Biswell} must rest on its own mistaken assumption that entry was not forcible. \textit{But see} \textit{Bumper} v. North Carolina, 391 U.S. 543 (1968).

31. 397 U.S. at 74.
32. 442 F.2d at 1191.
33. \textit{See} note 30 \textit{supra}.
34. \textit{See} note 21 \textit{supra}.
35. The Court stated:

Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry.

406 U.S. at 315. This analogy, whatever its validity, is inapplicable to the facts as presented in the Court's opinion. It must be assumed that Biswell was not made aware of the holding in \textit{Colonnade} and apparently stepped aside because of the mistaken belief that he \textit{must}, rather than, as the Court assumed, that he \textit{should}.
procedure followed) ahead of the individual citizen's right not to have his privacy invaded. In doing so, it rejected judicial precedent for judicial expediency. Had the Court taken the cases cited and attempted to arrive at a conclusion within their boundaries, then the decision of the court of appeals would have been upheld.

Ronald Carl Weingrad

Municipal Corporations—Statutory Abolition of Sovereign Immunity—City Not Liable for Good Faith Enactment of Ordinance Later Held to Be Unconstitutional—The Court of Appeals of Washington has held that liability for damages against a municipality must be predicated upon the tortious conduct of the municipality, and that the good faith enactment of an ordinance is a legislative act which cannot be characterized as tortious, no matter how mistaken or unwise the municipality's legislative action may have been.


The appellant, the operator of a sauna massage parlor, commenced an action to have declared unlawful a city ordinance\(^1\) regulating the operation of massage parlors to restrain the city from enforcing the ordinance and to seek damages for interfering with the operation of his business. The court held that the ordinance, which prohibited massagists not licensed under one of the other healing arts\(^2\) from performing massages upon the opposite sex, constituted an unreasonable exercise of police power that went beyond the objective of protecting the public from lewd acts in sauna massage parlors.\(^3\) The court further held that the ordinance was unduly oppressive to massagists and their patients and constituted discrimination on the basis of sex in contra-

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1. Lacey, Wash., Ordinance 139, April 23, 1970.
2. 18 WASH. REV. CODE §§ 18.01-.104.920 (1971) (relates to businesses or professions, but massage or massotherapy is not specifically included in the healing arts covered in those sections although it is utilized in varying degrees by several classifications which are licensed).
3. J.S.K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (1972). The acts complained of in this case were that sexually provocative advertising was carried in the classified advertising columns of the Daily Olympian, that masseuses wore mini-skirts and low cut blouses, and talked and acted in a sexually provocative manner. For a fee of twenty dollars, undercover agents received what the police chief modestly referred to as a "lower abdominal massage."