Bound By Oath | Season 3, Episode 11 | Everything You Eat, Drink, and Wear

John: In 1963, a man named Roland Camara was in his apartment in San Francisco when a city health inspector knocked on the door and asked if he could come inside and have a look around. The inspector did not have a warrant, but he was there to make sure that the city's housing code, which required residents to maintain clean and safe conditions in their homes, was being followed. Roland refused. In the United States of America, government officials cannot enter a home – absent consent or some kind of emergency – without a warrant signed by a judge. Nevertheless, the inspector returned twice more over the course of the next several weeks – each time without a warrant. And each time Roland declined to let him in. For that, he was arrested and charged with refusing to submit to an inspection. In 1967, his case arrived at the U.S. Supreme Court, where the city argued that the Fourth Amendment, and its protections against warrantless invasions of the home, did not apply. Because the purpose of the inspection was, the city said, not to search for evidence of a crime. Rather, it was to promote health and safety.

> **Lawyer for San Francisco**: In order to bring about a better city, in order to bring about better housing, in order to prevent blight, in order to bring about a tolerable place for people to live, and that is what this case is about.

John: Roland's lawyer, on the other hand, argued that it doesn't matter why an official is demanding entry into a home. If there's no emergency, a warrant is required.

Marshall Krause: Just look at the wording of the Fourth Amendment. It does not indicate at all that it's only for criminal situations. It says the right of the people to be secure in their persons, houses, effects, etc. It doesn't say against criminal cases. It's just the right of the people to be

secure.

John: That is Marshall Warren Krause, who argued Roland Camara's case at the Supreme Court. Marshall was a renowned civil rights litigator who won six cases before the Supreme Court, and we were honored to sit down with him before he passed away last December at the age of 91. On this episode, we'll tell the story of *Camara v. San Francisco* and its legacy. The ruling was a victory for the right of privacy in the home. But even so, today the protections of the Fourth Amendment are less robust when it's a code inspector rather than a police officer knocking at the door.

John Wrench: *Camara* overturned a bad precedent and was an important victory for Roland Camara. But in declining to provide full Fourth Amendment protections, the Court blessed what's called an administrative warrant, which does not require traditional probable cause.

John: Also on this episode, we'll head to Pottstown, Pennsylvania, where our clients, who have done nothing wrong and whose homes are perfectly safe, are trying to keep the borough's inspectors out of their homes.

Rob Peccola: Once an inspector is inside the home, there's really no limits to where and what they can look at. They're searching every nook and cranny. We're talking about being able to open up closet doors, viewing things inside bedrooms, seeing medications, medical devices, seeing their mail, moving furniture.

John: I'm John Ross, and this is Episode 11 of Season 3 of Bound By Oath, a podcast on legal and constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. Thanks for listening. And, if you feel that it's the right thing for you, please do

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Fourth Amendment montage: 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 persons or things to be seized.

John: That is the text of the Fourth Amendment, the roots of which go back before the Founding. For instance, in 1604, in a case about whether a sheriff had violated the law by breaking into a house in London to seize goods to satisfy a private debt, the judge, Edward Coke, wrote that quote: “The house of every one is to him as his castle and fortress, as well as for his defense against injury and violence, as for his repose.” The creditor, Coke wrote, was certainly permitted to make good on what was owed, but proper procedures had to be followed before the sheriff could break down doors. In 1761, that very same principle – that your home is your castle – was invoked by the Massachusetts lawyer James Otis, who we talked about in Episode 1, and whose oration in opposition to British officials entering colonists’ homes without following proper procedures marked the beginning of the American Revolution, according to President John Adams. Later, when the Constitution was being debated, the Virginia delegate Patrick Henry declared that he would not support it if lacked a Bill of Rights. Because without one, he said, quote: “excisemen … may … go into your cellars and rooms, and search and ransack, and measure, every thing you eat, drink, and wear.” In 1886, in its first opinion interpreting the meaning of the Fourth Amendment, the Supreme Court ruled that the Founders intended to protect against quote “all invasions on the part of the Government and its employees[] of the sanctity of a man’s home and the privacies of life.” Which is all to say that if there is anything more deeply rooted in the law than the command that the search of a home requires a warrant, it’s hard to imagine what it might be. It’s a rule that everyone knows,

including each of the people whose cases we'll talk about on this episode: a bookstore owner, two plumbers, a stay-at-home mom, and a factory worker. Nevertheless, starting in the 1940s, courts began to embrace a new and ahistorical exception to the warrant requirement.

John Wrench: Between 1948 and 1967, the Supreme Court took up four cases about whether housing inspectors can demand entry into homes without a warrant.

John: That is my colleague at the Center for Judicial Engagement, John Wrench.

John Wrench: This was the era of urban renewal where the federal government was encouraging cities to knock down old buildings and neighborhoods and rebuild according to what experts thought was most healthy and logical. And one of the measures that cities had to adopt if they wanted to get federal urban renewal money was a housing code and a program to enforce that code.

John: About 50 cities across the country had housing codes prior to urban renewal; that number ballooned to over 1,000 within a few decades.[1] And if cities wanted federal funding they were required to document blight, a task which usually fell to city health departments. So while inspectors were checking for fire hazards and plumbing issues, their visits were also very much a precursor to eminent domain.[2]

John Wrench: This kicks off a new era in terms of government officials trying to get access to the inside of the home. And cities begin to argue that the Fourth Amendment simply doesn't apply to these housing inspection programs. There's an amicus brief filed at the Supreme Court

[1] Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, Columbia Law Review, 1966
[2] Lopez, Public Health, the APHA, and Urban Renewal, American Journal of Public Health, 2009.

in 1959 by the National Institute of Municipal Law Officers, on behalf of over a thousand cities across the country, that says the Fourth Amendment only prohibits unreasonable searches. And very simply, they say a code inspection is not unreasonable.

John: The brief, filed in a case we're going to talk about shortly, declares that housing inspections play a quote "vital role" in urban renewal and slum clearance. And while it doesn't cite any precedent at all in support of the argument that an housing inspection was always understood to be outside the warrant requirement, it does cite some precedent we know well on this podcast, *Berman v. Parker*, which upheld urban renewal in 1954.

John Wrench: And the argument is that because officials are trying to protect public health, the courts should defer to legislators and public health experts.

John: Which was an argument that had worked with zoning and with eminent domain. If other constitutional protections could be relaxed or even eliminated, why not the warrant requirement? Even so, that might have seemed like a tough sell because up until that point, the Supreme Court had consistently upheld the warrant requirement without any qualifications. For example, in 1925, in a unanimous decision reversing a man's conviction for dealing in untaxed cocaine, the Supreme Court ruled that quote: "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."[3]

John Wrench: The Court's first look at housing inspections came in 1948. And the case involved a woman named Geraldine Little in Washington D.C. who had refused to let an

[3] Also: Johnson v. US (1948) "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

inspector, who was accompanied by a police officer, inside her house.[4] And she was arrested on the spot and eventually convicted of hindering a health inspector in the course of his duties and given a $25 fine.

John: For our D.C. listeners, you may be interested to know that Mrs. Little's house[5], which she shared with her husband, who was a city transit worker, once stood between Logan Circle and the Convention Center in northwest. It's now a parking lot surrounded by stately and expensive townhomes. Anyway, the Littles also shared their home with tenants, one of whom had complained to the city that quote: "there was an accumulation of loose and uncovered garbage and trash in the halls of said premises and that certain of the persons residing therein had failed to avail themselves of the toilet facilities." Yuck.

John Wrench: So just right off the bat, that is probable cause. There is a complaint about unsanitary conditions. There is individualized suspicion. That's enough to go to a judge to ask for a warrant.

John: But the city's position was that that would be too much of an inconvenience. According to the head of the department, quote "If our health inspectors have to wait each time to make an inspection until they get a search warrant, their work will be slowed up considerably."[6] In any case, Mrs. Little appealed the conviction, and the case – as it happens – wound up in the court of our friend from the urban renewal episode, Judge Barrett Prettyman, who you will recall ruled that seizing property and transferring it to private developers could only be constitutional if individuals were given a chance to show that their properties were not blighted – and, moreover, that blight had to mean truly bad conditions, not just that just city officials could imagine

[4] Respondent's brief
[5] 1317 10th St NW
[6] Washington Daily News, Appeals court bars health inspections [without warrants, Dec. 23, 1948.

something nicer. And just as he did with urban renewal, in his opinion in the *Little* case, Judge Prettyman stuck up for the little guy. Quote:

> **Little v. D.C.**: It is said to us that [] there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of crime, they must get a search warrant, but that if they are searching for something else or are just searching, they need not get a search warrant. ... The argument is wholly without merit, preposterous in fact. 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, a right which is one of the indispensable ultimate essentials of our concept of civilization.

John: Additionally, Judge Prettyman said that as important as housing codes and sanitation requirements are they are not more important than enforcing criminal laws and they can be enforced subject to the same constitutional restrictions. But, as with urban renewal, Judge Prettyman's decision was not the final word on the issue. When the *Little* case got to the Supreme Court, it affirmed. But the Court did not reach the constitutional question. Rather, it said that technically Geraldine Little hadn't actually violated D.C.'s health ordinance. Because, it said, refusing to submit to an inspection wasn't necessarily "interfering" with the inspector's duties. But with thousands of inspections ordinances on the books around the country, the issue did not go away. A few years later, in Dayton, Ohio, three inspectors came to the door of a Mr. Earl Taylor. He was a plumber in his 60s, and he'd never been in trouble with the law. His house, where he lived with his wife, was a modest, one-story cottage. The inspectors were not wearing uniforms. They did not have badges. They had not received a complaint, and they had no reason to suspect anything was wrong. Nor did they not have a warrant. Which led to this exchange of views:

> **Taylor**: “You have nothing to show me you have got a right to go through my house.”
>
> **Inspector**: “We don't have to have, according to the law passed four years ago.”
>
> **Taylor**: … “I don't have nothing in my house that has to be inspected.”
>
> **Inspector**: “Well, [] according to this ordinance, [] we got a right to go through your house and inspect your house.”
>
> **Taylor**: “No, I don't think you have, unless you got a search warrant.”

John: At which point, the inspectors left, but then they came back a few days later – again without a warrant.

> **Taylor**: “I don't see what right that you got coming into my house. Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in.”

John: At which point, the inspectors left, but then they came back a few days later – for a third time without a warrant.

> **Inspector**: "If you ain't going to let us in, … I am going to leave it up to the prosecutor."

John: Rather than submit to an inspection, Earl Taylor went to jail. Where he stayed because he could not make bail, which was set at $1,000 dollars not adjusted for inflation, until a trial court struck down the ordinance as unconstitutional. However, the Ohio Supreme Court reversed and upheld the ordinance. So in 1959, Earl Taylor appealed to the United States Supreme Court. But then a bit of bad news. Two weeks after he filed his petition, the Supreme Court released another decision on the very same question. And this time, in the case of *Frank v. Maryland*, the

Supreme Court did reach the merits.

> **Chief Justice Warren**: Number 278. Aaron D. Frank, appellant, versus State of Maryland. Mr. Lipsitz, you may proceed.
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> **Lawyer for Frank**: May it please Your Honors, ... on February 27th, 1958, … an officer of the Bureau of Rodent Control of the Baltimore City Health Department received a complaint of rats in the cellar of person who lived in the 4300 block of Reisterstown Road in Baltimore, Maryland.

John: Aaron Frank was also plumber, but unlike Earl Taylor, he did not keep his home in good order. In fact, the house was in a quote “extreme state of decay” with half a ton of trash, debris, and rodent feces in the yard. But when the inspector asked to look inside the house, Aaron Frank said: come back with a warrant.

> **Lawyer for Frank**: Appellant informed him, according to the sanitarian's testimony, that he would not let him in the house. The language that he used was … you will have to get a search warrant if you want to get in this house.

John: If you’ll permit a small aside, in good conscience I must tell you that while the inspector was looking for rats and the case has become known to history as one about rat poop in the yard, Mr. Frank himself said the poop came from chinchillas, which he bred and which some naughty children in the neighborhood had let loose. The issue was never definitively resolved. In any case, he was arrested, tried, and fined $20. Maryland state courts sustained the conviction. At the Supreme Court, Frank’s lawyer echoed Judge Prettyman.

> **Lawyer for Frank**: I say let the health inspectors, let the fire inspectors, let any of these

> government officials have the same right of entry that a policeman would have, that any other law officer would have. If he has cause, let him go to a magistrate with it. … And I say to Your Honors that the health laws are important, but they are no more important than the protection of the people against crime. And they should be subject to the same sort of limitation.

John: The lawyer for Baltimore, on the other hand, argued that it would be just be too hard to come up with probable cause an overwhelming amount of the time.

> **Lawyer for Baltimore**: In the overwhelming cases, it would be impossible for a health inspector to show probable cause … and would be kind of hard to – for a health inspector to obtain that information before making an entry.

John: And he said, we certainly respect the fundamental right to privacy. But times change, and the Constitution has to change with the times.

> **Lawyer for Baltimore**: They say a man's house may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern castle is connected to a central water system, a sewage system, a garbage collection system and frequently to the houses on either side and I think that really points out the need for these inspections in modern times.

John: Also he argued that refusing to let inspectors in the home without warrant was tantamount to human sacrifice.

> **Lawyer for Baltimore**: Individual freedom must yield in some cases to the enforcement of reasonable regulations for public welfare. The right of privacy should not give the right to refuse entry to a health inspector anymore than the right to free speech gives the right

> to falsely shout fire in a theater. … It would give the right to offer a human sacrifice.

John Wrench: What he means by bringing up human sacrifice is that the warrant requirement might hypothetically frustrate government efforts to deal with an epidemic. But really the meat of the argument is the citation to Justice Oliver Wendell Holmes that there is no right to shout fire in a crowded theater. And what Holmes meant by that is just that even when a right is fundamental that doesn't mean it's absolute.

John: Which is a bad argument. Aaron Frank was not claiming an absolute right to keep the government out of his house under any circumstances. Rather, he was insisting that proper procedures had to be followed. And while there are indeed times when the government doesn't need a warrant to get in a house that doesn't mean the government can make up new exceptions to warrant requirement on a whim. Nevertheless, by a vote of 5 to 4, the Supreme Court ruled that officials looking for civil infractions do not need a warrant.

John Wrench: The majority opinion is written by Justice Felix Frankfurter. And it holds that the warrant requirement does not apply. And he says what the Court is doing is not creating a new exception to the warrant requirement, rather it is recognizing an old one. And he says that inspections pursuant to some kind of regulatory scheme have deep roots in history. And as evidence of that he points to a bunch of laws from before and immediately after the Founding that he says establishes this tradition that people generally just knew and understood that warrants weren't required for non-criminal searches of the home.

John: The statutes do not come from the briefing, so it looks like Justice Frankfurter did his own research.

John Wrench: The first set of laws that he points to are colonial statutes from different states

before the Founding. And they allow different kinds of searches of different places – not just homes but ships, carriages, shops, and stores to look for a broad variety of different things like untaxed liquor. To enforce standards for packing and shipping tobacco, and meat, and the weight of flour, and things of that nature. But in the middle of the same long footnote, he admits that some of those statutes did in fact require warrants for search people's homes. He just drops that in there and doesn't discuss it further.

John: The best you can say is that there were some laws on the books before the Founding which would have violated the Fourth Amendment.

John Wrench: And to the extent these laws enabled searches of homes without judicial approval, they are exactly the kind of oppressive searches that led to Independence and eventually led to the Fourth Amendment.

John: So that's a bad start. But then Justice Frankfurter points to a second set of statutes passed after Independence.

John Wrench: And here he points to several statutes, all of them from Maryland, that authorized government officials to go onto private property without a warrant. But for the most part they don't have anything to do with inspections of homes.

John: One law involved going onto private property to repair common sewage systems, which, in the era before indoor plumbing, hardly implies entry into the home. Another law involved going onto private property to repair a public road.

John Wrench: Another law allowed the clerk of the market to examine and weigh bread, and that did allow the clerk to go into a home but it's not a general warrant to rove around the home. And the law only applies to bakers, so he can't go into everyone's home.

John: Of the many statutes that Frankfurter cited, only one really squarely has anything to do with the matter at hand.

John Wrench: Baltimore did pass a law in 1801 that allowed warrantless home inspections to look for nuisances. And that ordinance is actually the antecedent to the very same ordinance that is being challenged in *Frank*.

John: Justice Frankfurter wrote that because of all the other laws that he had listed, by 1801 when Baltimore officials passed a home inspection ordinance, quote "no novel or untried procedures were being invoked." But given that all those other statutes weren't really on point, novel and untried is exactly what the ordinance was.[7]

John Wrench: As the dissent points out, the ordinance was never challenged. There are no judicial opinions saying it was constitutional.

John: Possibly no one challenged the ordinance because everyone thought it was fine. But there is the possibility that it just wasn't enforced and no one thought to challenge it. Justice Frankfurter asserted that it was the former, and that citizens had acquiesced to thousands and thousands of home inspections over the years. And his evidence for that is a book written by a physician on the history of public health efforts in Baltimore, which says, indeed thousands of inspections took place. But when you go to the source, the inspections the book talks about include alleys that had to be regraded and paved, yards and vacant lots and outhouses that had to be cleaned up, and inspections of slaughterhouses. The only mention of the inside of homes involves the installation of plumbing and some orders to clean and bail out cellars. Which is to say there's no evidence at all that inspectors were going through every room of people's homes. So it sure seems like Justice Frankfurter pulled a fast one.

[7] This point cribbed from Frank's request for rehearing

John Wrench: It is just one statute in one city and that hardly defines the scope of a constitutional right. And there's a real danger when you're doing this kind of historical analysis of cherry picking and finding a tradition that isn't really there.

John: The opinion in *Frank* also invokes urban renewal, citing *Berman v. Parker* and including lofty language about the need to promote civilized living and to prevent the breakdown of moral fiber.

John Wrench: Interestingly, the dissent is written by Justice Douglas, who wrote the Court's opinion *Berman*. And Justice Douglas expresses what I think most people's initial impression of these cases would be, which is just frustration that in a case where the inspector in fact had probable cause, which was conceded by counsel at oral argument, the court jettisoned the warrant requirement instead of just insisting on it. The dissent also raises the specter of police colluding with health inspectors to get inside homes they wouldn't otherwise be able to get into. And that turns out to have been prescient. Within a year of the Court's decision, it's discovered that police in Baltimore are doing exactly that.

John: In the case of *State v. Pettiford*, from 1959, a Baltimore police officer had a housing inspector to go into a home on the pretext of inspecting it and give a signal if he found evidence of crime. And he did indeed find that a Ms. Vera Pettiford was involved in a numbers racket, leading to her arrest and prosecution.[8] Ultimately, her conviction was overturned on appeal, but the case showed that the temptation is there. In any case, the outcome in the *Frank* case was also bad news for Earl Taylor in Dayton, Ohio, whose case was dispensed with soon after.

John Wrench: Earl Taylor's case from Dayton, Ohio is actually significantly different factually from *Frank v. Maryland* and *D.C. v. Little* in that there hadn't been a complaint or any reason to

[8] Police-sanitation link charged in home entry, *The Evening Sun*, Nov. 3, 1959.

suspect that there were unsanitary conditions in his house. The inspectors probably could not have gotten a warrant. And the Court makes clear when it disposes of his case that whether inspectors are doing random inspections or more programmatic, area-by-area inspections, that's all perfectly okay.

John: Which evidently did not sit well with some of the justices, and in 1967, after there had been some turnover, the Court returned to the issue for the fourth and final time. In the case of *Roland Camara v. Municipal Court of the City and County of San Francisco*.

Marshall Krause: Just look at the wording of the Fourth Amendment. It does not indicate at all that it's only for criminal situations. It says the right of the people to be secure in their persons, houses, effects, etc. It doesn't say against criminal cases. It's just the right of the people to be secure.

John: That is Marshall Krause, who argued the case before the Supreme Court on behalf of the ACLU of Northern California.

Marshall Krause 2: The Founders were very conscious of their privacy rights, not just their rights in the event of a criminal prosecution. They were talking about the invasions of the British troops into homes. That wasn't a criminal situation. They were more interested in the whole concept of privacy. And so that was my argument, and I think it has gradually been accepted.

John: Going back to the Founding, British customs officials and troops were invading homes not to look for criminal evidence, for the most part, but to generate revenue and seize goods. So the argument that constitutional protection against intrusion into the home disappears depending on whether the search can be characterized as criminal, quasi-criminal, regulatory, or something else probably would not have made much sense to the Founders. What they wanted to protect

was privacy. As did Roland Camara.

Marshall Krause: He was a denizen of the Tenderloin of San Francisco. There were lots of drug addicts and sex workers and very low rent people, and it's always been a subject of careful police scrutiny. He dressed like a Tenderloin person all in black and shabby clothes.

John: Roland was a Korean War veteran.[9] And he ran a bookstore in San Francisco's Tenderloin district.

Marshall Krause: He lived in the back of the bookstore, and he didn't want the inspectors to be in the private residence part of the bookstore.

John: The building was and is an apartment building with commercial space on the ground floor. When it was constructed in the 1920s, the space where Roland lived was designed to be an apartment. But for whatever reason, the city hadn't certified it as such, and the ground floor was by law meant to be commercial use only. When an inspector came to his apartment, Roland admitted as much.

Marshall Krause: They could have gotten a warrant pretty easily. I'm pretty sure that some judge would have signed a warrant for them, but they never applied. You know, people naturally try to avoid work. But he wanted it kept private. And I think I know why, because I've been in there, and I know how it was decorated, and it would be exposing him to a certain criticism, perhaps.

John: If you are curious how it was decorated, you and me both will just have to keep being

[9] Declaration of candidacy for Board of Supervisors, 1967. On file with author.

curious, because that is a confidence that Marshall laudably was still keeping all these years later. Anyway, after Roland refused to let the inspector in – on three occasions over the course of several weeks – he was arrested. He made bail and went to the offices of the ACLU of Northern California.

Marshall Krause: Roland Camara walked into the office and just went to the complaint desk and then the complaint desk told me. I think that Roland Camara was a very brave man, and he was kind of, as I said, a denizen of the Tenderloin, had no real political power in his reach, and he stood up there all alone and defied the health inspectors, and they were mad at him. They really didn't want to go have to get a warrant for them, it was just an extra imposition and a meaningless thing. They didn't see the point of it at all. They they knew that they weren't bad people, and they weren't bad people. They were just trying to protect the public health. But they have to protect the public health in a way that's consistent with our Constitution, and our Constitution has a great grant of power to the individual citizen to have privacy in his own home and personal possessions.

John: And Marshall, with his colleagues, took the case all the way to the Supreme Court. Where, the day before the argument, Marshall got a chance to meet with the Chief Justice.

Marshall Krause: I associated as co-counsel in the case with a classmate of mine named Donald Cahen who had been a clerk for Chief Justice Warren. And Donald decided that he would take me in to meet Chief Justice Warren the day before the argument. So I got to go into Warren's office, and we had about a 15 minute very personable, happy chat. We joked and had a really nice time. So when I first got up there to open the case, I thought I was going to get a very cordial reception from the chief. Instead, he was tough. He was tough the whole time.

Marshall Krause: May it please the Court, Mr. Chief Justice and Associate Justices. … The appellant in this case believes the Fourth Amendment is more than mere words. … It was written, as its very words state, to protect the security of the citizens and residents of this country. It was not meant to be a nose of wax to be twisted at the convenience of petty government officials.

Chief Justice Warren: Suppose the fire department found that a defective wiring was the cause of many devastating fires and the people have been losing their lives. … Would you say that the magistrate could not in those circumstances issue a warrant for the inspection just on those facts and no more?

Marshall Krause: Yes. I would say that. That the magistrate has -- would have no sworn facts before him indicating that the wiring in this house was in any way defective.

John: The chief and the other justices asked a lot of hypotheticals, and Marshall stuck to his guns. If there's a specific reason the city is worried a specific house has faulty wiring, or some other problem, by all means, go and get a warrant.

Chief Justice Warren: Wouldn't you concede that if a city had bubonic plague for instance … and the owner, resident of the property refused to let the inspector to come in, that the magistrate could issue a warrant for this inspection. Would you say that couldn't be done? … Wouldn't that be sufficient cause to get a warrant?

Marshall Krause: In that situation, I don't think they could get a warrant allowing them to inspect every home in the city unless they can show that there's some specific reason why every home in the city should be inspected. I know that's an extreme example and you're backing me to the wall. But I have to be consistent here and say that they should be able to come up with some facts that they can give in an affidavit to a magistrate. And

if they can't, they're not very good health inspectors.

John: The city, on the other hand, argued that if inspectors had to get a warrant, the ability to conduct an inspections program at all would be quote "destroyed."

Lawyer for San Francisco: The magnitude of an effective inspection program is such that I think any requirement of a search warrant would be abs -- would in effect mean you couldn't conduct the program.

John: And he said, that there had been no abuses.

Lawyer for San Francisco: There's been no abuse of that power by the cities of this -- in this land. Where are the cases?

John: Which is not really true. In addition to the *Pettiford* case in Baltimore that we mentioned, Marshall included other examples in the ACLU's brief.[10] And we're going to talk about some modern-day abuses very soon. Notably, neither San Francisco nor the National Institute of Municipal Law Officers, representing over 1,000 other cities, which again filed an amicus brief, made any attempt to defend Justice Frankfurter's appeal to history and tradition. Rather, they just argued that inspections are important.

Lawyer for San Francisco: In order to bring about a better city, in order to bring about better housing, in order to prevent blight, in order to bring about a tolerable place for people to live, and that is what this case is about.

John: City leaders acting on behalf of voters had enacted the ordinance, so what right did judges have to strike it down?

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[10] See FN 18 Appellant opening brief

Lawyer for San Francisco: The case is about the right of the people of the City and County of San Francisco to enact the ordinance that they did enact here. And to in effect divest themselves of the absolute right of property to a minor degree in order to accommodate what they felt, not what I feel, but what they felt was the primary interest of protecting the health and safety of the people of that city.

John: And both Marshall and the lawyer for the city made clear that the case wasn't just about health department inspections. The government conducts all kinds of inspections. Fire inspections, elevator inspections, zoning code enforcement, welfare inspections, tax inspections, and on and on.

Lawyer for San Francisco: And this is a -- this is in San Francisco was only one of several hundred inspection codes and only one of several hundred programs.

John: And the lawyer for the city said: our inspectors are professionals. They're not interested in prying into people's personal lives – their only concern is protecting the public.

Lawyer for San Francisco: The whole purpose of this is to determine what the situation is in respect to those buildings, not whether somebody has something tucked away in a trunk or a chest some place but to find out what's going on in there.

John: Nevertheless, the chief justice was troubled. He did not like the idea of an inspector demanding to enter a house when a woman was alone or alone with children.

Chief Justice Warren: Well, let's deal with the question I asked you a little awhile ago that for a moment there's a woman in her home alone with her children and a man

> comes to her door and says, “I want to come in and inspect your house.” … And she just feels … that she’s afraid for both her children and herself … and she says to him, “I won't let you come in unless you have a search warrant. … And what are you going to do with that woman now? You're going to put her in jail?

Marshall Krause: I think he was trying to get at the idea that there certainly could be good reasons why a person would be suspicious of someone knocking on the door, and just because that someone said I am the police or I am a building inspector doesn't mean you have to obey them. They could be fraudsters. They they could be crooks. And I think it's it's better that a judge agree beforehand.

John: The city’s lawyer, in his answer to the chief’s question, said no, of course, we wouldn’t go around arresting housewives. That’s why inspectors come back two or three times, so that eventually they show up at a time that’s convenient. But at some point, you have to comply. And if you don’t trust a policeman’s badge or a health inspectors credentials, why would you trust a warrant? But the Supreme Court was not persuaded. By a vote of 6 to 3, it ruled that *Frank v. Maryland* had to be overturned and that all government officials, regardless of their job title or their purpose, need a warrant to enter a home.

Marshall Krause: I had a lot of good phone calls saying, Thank goodness you have done this. That is a good step for preserving our privacy.

John: And it was. At IJ, we have won several cases under the rule laid out in *Camara*. For instance, in 1995, we challenged an ordinance in the Village of Park Forest, Illinois, that imposed a mandatory, warrantless inspection requirement on single-family rental homes – but not apartments or any other kind of rentals homes and not owner-occupied homes. In 1998, a federal judge declared that quote: “this court can find nothing in the record to indicate why the

Village undertook such an intrusive inspection program solely for rented single-family homes and can find nothing that limits in any way the scope of the inspections." The judge also declared that the Fourth Amendment requires the Village to obtain the explicit consent of tenants before conducting the inspections, rather than relying on the consent of a landlord. Moreover, the judge also held that the $60 fee the Village charged when a tenant insists on a search warrant to be an unconstitutional condition on the exercise of Fourth Amendment rights. More recently, the City of Zion, Illinois imposed a warrantless inspection regime on all rental properties. Not only did that violate tenants' rights, but if a landlord was unable or unwilling to coerce their tenants into allowing an inspection, the landlord could lose their certificate to rent property. And they could receive fines of up to $750 per day with total fines in some cases reaching over $100,000. And there's some evidence that the purpose of the inspections was not so much to protect health and safety as it was to harass renters, of whom the mayor said there were too many and that he had been elected with a mandate to quote "change what the town looked like." We argued that ran afoul of *Camara*. And in 2022, after a federal trial court denied the city's motion to dismiss the case, the city backed down and repealed the offending provisions. Nevertheless, the *Camara* decision was only half a victory. The first half of the opinion is a stirring defense of liberty, individual rights, and the warrant requirement. But then there's the second half.

Marshall Krause: Earl Warren did not want to have the inspectors limited by the same limitations on police when they're looking for evidence. He wanted a much looser standard. So he kept trying to push me into accepting a looser standard. And I don't think I was pushed into accepting a looser standard, but they imposed one anyway. They ruled that, yes, Roland had a right to privacy, but if the health inspectors had actual evidence of something going wrong, it didn't have to be the same seriousness as in a criminal case.

John: The Court, in an opinion by Justice White, said that although a warrant is required, the kind of evidence a code inspector needs to show to the judge is something less than what a police officer needs to show.

Marshall Krause: I was disappointed. I wanted them to say that there was the same Fourth Amendment rights whether they were health inspectors or police or building inspectors or architectural inspectors, or any kind of inspectors. The concept was protect privacy. That's what I wanted them to say about the Fourth Amendment, but they didn't. They said that as a practical matter, we have to loosen the standards of the Fourth Amendment.

John: And while the Court said in no uncertain terms that *Frank v. Maryland* was overruled, it cited several parts of it with approval. For instance, it said that code-enforcement inspections quote: “have a long history of judicial and public acceptance.” As evidence of that, the Court cited only to Justice Frankfurter’s list of laws. Which, as we have said, contains zero evidence of judicial acceptance, and only very scant history of public acceptance. Moreover, while the Court said that something less than the usual probable cause was required going forward, it didn’t really say what that meant.

Marshall Krause: It's kind of vague as to what the *Camara* decision allowed as sufficient for the warrant. They weren't specific about what would have to be shown to get a warrant, but they were clear that they wanted it to be less specific than in a criminal case.

John: The Court did say a few things, however, about what makes a search reasonable. If you will recall back to Episode 1 of this season, we discussed the case of *Katz v. United States*, about the recording of a conversation in a phone both without a warrant, which was decided six months after *Camara* – also in 1967.

Marshall Krause 2: *Camara* and *United States versus Katz* have a couple things in common. They pushed the frontier of what we understood as privacy, and they made it into a Fourth Amendment issue by saying that, no, we're not going to limit the Fourth Amendment to criminal cases only, like in *Camara*. Or no, we are not going to limit the Fourth Amendment to invasions of property interests only, like they did in *Katz*. So both of those pushed out the frontiers of the Fourth Amendment and started enveloping it with privacy.

John: *Camara* and *Katz* are very much of a piece in that they both held upheld and restored the right of privacy but were a bit shaky on when that right would apply. It applies in a phone booth, but not in an open field. It applies in the home, but less so depending the purpose of the search. In one sense, the two decisions definitely extended privacy rights but arguably at the cost of watering down those rights at the same time. And, both decisions contributed to a new understanding of the meaning of the word reasonable in the Fourth Amendment, which was: whatever might seem reasonable to at least five of the justices.

Laura Donohue: The problem, of course, is that reasonable in this interpretation is like more or less reasonable. Which puts the Court in the position of policymaking. They get to decide what's more or less reasonable. That's very different than the original concept of what was reasonable as against the reason of the common law.

John: That, from Episode 1, was Prof. Laura Donohue of Georgetown Law, who argues that the Supreme Court’s current understanding of what makes a search reasonable is unrooted from history and tradition.

Laura Donohue: It means actions that go against the reason of the common law, which means

actions that are reflecting a general warrant.

John Wrench: The Court in *Camara* essentially reduces the entire Amendment to reasonableness, which means that you have to ignore many other words in the Fourth Amendment. You have to ignore the right of the people to be secure. You have to ignore no warrant shall issue, but on probable cause. You narrow your view down to one word: reasonableness.

John: In *Camara*, the Court said that what was reasonable was to balance, on the one hand, an individual's right of privacy with, on the other, the goals of code enforcement. Code enforcement, it said, was very important. And like with zoning and urban renewal, the Court said it was relying on the best judgments of the experts. Quote: "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." On the other side of the ledger, however, the Court did not think individual rights were all that important.

John Wrench: The majority refers to a nonconsensual, suspicionless search of someone's home as a quote, "limited invasion of the urban citizen's privacy," which is a shocking way to describe something that is a forced invasion of someone's home. So in sum in *Camara* you have the concept reasonableness that is unmoored from the original meaning of that term. You have a balancing test which can effectively balance out of existence explicit protections in the Fourth Amendment. And you have an endorsement of *Frank*'s version of the history. And you have an endorsement of the distinction between criminal and civil law enforcement.

John: All of which, we submit is not good. But the most important legacy of *Camara* for our

purposes is that it blessed a new type of warrant, the so-called administrative warrant, which officials can obtain without any specific facts or individualized suspicion.

John Wrench: The *Camara* majority literally invents a new kind of warrant to reach the outcome that it wants to reach. And what that eventually is going to mean in practice is that all inspectors are going to need to bring to a judge is evidence that the city has an inspection program in place. There are certain things that the program tells the inspector to look for. And that the property that the inspector wants to go into is subject to that inspection program. And that's probable cause. Probable cause that there is something in the home subject to an inspection program. And that's not probable cause as it had ever been understood historically.

John: According to the dissenters in *Camara*, who ironically wanted to uphold *Frank* and just say a warrant is not required, such administrative warrants were little more than a rubber stamp. Today, residential inspection programs persist throughout the country. And, although the Court in *Camara* envisioned, as we said, “universal compliance” for “all structures,” that is not how things have played out. Rather, typically cities will target rental homes for inspections but not owner-occupied homes.

Dottie Rivera: I’m a private person. I’ve done nothing wrong. And I don’t want people snooping around my house.

John: That is IJ client Dottie Rivera, who lives and rents in the Borough of Pottstown, Pennsylvania with her husband Eddy.

Dorothy Rivera: I have nothing to hide. It's just a violation of my privacy.

John: Pottstown has a rental inspection ordinance, adopted in 2015. If a tenant objects to an inspection, the borough can force their way inside after obtaining a mere suspicionless, rubber stamp administrative warrant.

Dorothy Rivera: Bringing a case against the borough is important because it's important to me that I have the same rights as the guy across the street that owns his home.

John: Dottie and her family have been subjected to an inspection in the past. And the behavior of the inspectors on that occasion was less than professional. Their adolescent daughter had left a bra lying on her bed, and the inspectors laughed out loud about it.

Rob Peccola: When we spoke to the Riveras, they were sincerely distraught at this concrete, real life invasion of their privacy not just because of their prior experience where inspectors had laughed about their daughter's bra size but also because they have everything about who they are in their home, religious iconography on the walls, many images of Jesus Christ, for example, family photos, keepsakes that are deeply intimate and personal, and things they just don't think were the government's business to view them, because it's about their private family life.

John: That is my colleague, Rob Peccola, a litigator at the Institute for Justice.

Robert Peccola: Once an inspector is inside the home, there's really no limits to where and what they can look at. They're searching every nook and cranny. We're talking about being able to open up closet doors, viewing things inside bedrooms, seeing medications, medical devices, seeing their mail, moving furniture. It really brought home to us why people were uncomfortable with these inspections. When we deposed the actual inspectors to ask them about this process, they said that there are people who are angry enough to curse at them because they feel

invaded.

John: People really don’t like having their lives being examined by strangers, who, as you can imagine, routinely come upon things of a very private nature.

Rob Peccola: The inspectors said they have seen sex toys. That they've seen nude photographs of the very residents they are inspecting. They learn about people's sexual orientation and gender identity that unfortunately, as is human nature, inspectors do not keep to themselves. We learned through these depositions that they swap stories with each other, other borough employees, even family and friends. This is not a large town, and you can be sure that this is how information gets around. And that's really what the core of privacy is, is control. Who has control over the information about you?

John: Inspectors also routinely share information with law enforcement. Indeed, during discovery, we found a directive from the police instructing inspectors to report what they see.

> **Lawyer for San Francisco**: There's been no abuse of that power by the cities of this -- in this land. Where are the cases?

Rob Peccola: Every home inspection in Pottstown has the potential to become a criminal search. They are on speed dial with the police cell phones to describe what they think might be evidence of criminal activity. And the police also have inspection results at their fingertips because they have access to the database. And that alone is plenty bad, but it can also lead to mistakes. Say, for example, if an inspector misidentifies a syringe used to treat diabetes as being evidence of opioid abuse or a hookah having cultural significance being drug paraphernalia. We know for a fact, these inspections have led to criminal charges for things like

marijuana possession. And we know that inspectors and police communicate with each other entirely over cell phones, which doesn't get recorded in police reports, not subject to public records requests. So it was really only through our long, hard fight for depositions, and the court-ordered discovery that we were able to delve into what actually happens in these searches in connection with law enforcement.

John: The inspections regime is lucrative. Landlords have to pay $100 for the pleasure of having their tenants inspected. And there are all sorts of fines associated with the program, which can run up to $600 a month. For instance, on pain of such fines, landlords must give the borough a list of their tenants' names as well as those tenants' previous addresses. Or they can lose their rental licenses.

Rob Peccola: So it's very much a method of tracking and surveilling renters that is not widely known to the Pottstown public.

John: And while the borough's policy on paper is that a property will be inspected once every two years, it turns out some unlucky tenants get visited much more frequently – not because the borough is following up on a code violation but just because. In it's ruling in *Camara* of course, the Supreme Court said that all these privacy concerns we just mentioned are rather slight compared to the government's interest in code enforcement. But in Pottstown, there's no evidence that inspections do anything to promote health and safety.

Rob Peccola: These inspections are not necessary to enforce the borough's building and housing codes. The program has never once turned up a serious safety issue. No one's home has been condemned. No tenant has been forced to evacuate dangerous conditions.

John: We have data from nearly 15,000 inspections, and at most what they turn up is things like electrical outlets that need to be updated or smoke detectors that need batteries.

Rob Peccola: This is, I think, a good opportunity for fire department engagement. When you look at the scope of a huge inspection program like this, think of those resources going toward door-to-door battery handouts for people. There's just no pressing reason why the borough couldn't wait for this kind of interior inspection until residents move out and in between the next person moving in come in and inspect an empty unit. There are 1000s of municipalities across the country that don't have these kind of inspections, and there's just no evidence that they're any less safe.

John: The only evidence that the borough has put forward to show that the program is necessary is that renters call 911 more often than owner-occupied residences.

Rob Peccola: The city's only empirical justification for imposing this program is a report that the borough paid for that basically just disparages renters as a class on the grounds that they use 911 more frequently. But when you read the report, it shows that calls for emergency services were actually decreasing in the period between the report and when the inspection requirement came out. There's no connection at all between calls for emergency services and housing code violations. People don't call 911 for a leaky sink. And I would say there's no evidence that these inspections are protecting tenants from unscrupulous landlords. Tenants can request inspections, and there's no problem with that, because it's consensual. What the record shows is that tenants can and do make complaints – that they feel comfortable doing so and aren't intimidated against doing so.

John: Another interesting thing about this lawsuit is the borough's intransigence during litigation.

They did not want the world to know what they are doing.

Rob Peccola: The borough did not want to give us discovery that we asked for and the court ultimately ordered we have a right to. So much so that we went all the way up to the appellate court on this issue. We won. We went back down and then had to seek sanctions. The judge held an eight-hour evidentiary hearing on that sanctions motion. And we prevailed, and the borough was sanctioned. And part and parcel of this sanctions order is this very unusual step, which is that the judge appointed an independent computer forensic mirror imaging firm to go into the borough's files, copy them to an independent server, and then run search terms and my, my what we learned when we finally got the information was a complete revelation. So in any event, we filed this case in 2017, almost eight years ago. It's been a long road getting to the merits, but we are confident now that this record shows not just what can happen in an inspection like this, but the actual, real world consequences.

John: One issue that can cause delay in challenges in housing inspections cases is that people like our clients very understandably want to be able to sue *before* an inspection takes place to prevent the invasion of their privacy. But courts sometimes say that, even if there is an ordinance on the books that authorizes suspicionless inspections, you have to wait until an administrative warrant has actually been issued before you have standing to challenge the ordinance. For example, IJ recently challenged an inspection regime in Orange City, Iowa under the state constitution. And we won at the trial court, which struck down the ordinance. But last month, the Iowa Supreme Court reversed.

> **John Wrench**: In this case, Orange City is asking this court to revive general warrants. This time so that it can forcefully enter and search renter's homes for potential code violations using warrants that the city admits are not based on any evidence.

John: That's my colleague John Wrench, who we heard from earlier this episode, arguing at the Iowa Supreme Court.

> **Justice May**: Doesn't that leave open the possibility that it would also be used for situations where there are – where there is probable cause? Some warrants would be issued on probable cause, correct?
> **John Wrench**: What happens once there has been a warrant application to a judge – whether in that particular there is no evidence or there is probable cause – has never been an obstacle to this court invalidating a law on its face when that law gives the government the authority to seek to seek a suspicionless warrant. I have a couple examples of that.

John: Unfortunately, the court said it was too soon to bring the case because Orange City had not yet obtained a warrant. Just because city officials understood the ordinance to mean they didn't need any suspicion, maybe in actual fact it would turn out that the city really could show traditional probable cause, and it would be better to wait and sort it out at that point. But here's the rub. Warrants are typically issued in secret. Which makes sense in a criminal situation where you don't want to tip off the subject of the investigation. But for people in our clients' shoes what that means is that they won't know about the warrant until an official shows up at their door demanding entry. By the time they learn about the warrant, it's too late to prevent the harm they are trying to avoid in the first place. Unless they have a lawyer on standby ready to run to the courthouse. Which, actually, is what happened back in Pottstown, Pennsylvania.

Rob Peccola: We actually did a stake out. We learned when the inspectors truck would come by to drop off the warrant application at the courthouse. But being sticklers for standing there

was yet another step, which was for the judge to come in and sign the search warrant. Fortunately, his parking spot had his name on it, so he pulled in. We waited, I guess, about 15-20 minutes – long enough for him to sign it, which he did. So we went in and filed the lawsuit to challenge this active search warrant.

John: IJ is pursuing the case in state court under the Pennsylvania Constitution.

Rob Peccola: The Pennsylvania Supreme Court has consistently ruled that Article One, Section Eight, which is the search and seizure provision of the state constitution, is more protective than the federal Fourth Amendment. On at least 11 occasions, that court has said that Article One, Section Eight protects something that the US Supreme Court has said the Fourth Amendment does not. So there's this long history of robust enforcement of those guarantees, and the unhesitating decision by the Pennsylvania Supreme Court to reject both the holding and the reasoning of U.S. Supreme Court cases. And one of the ways this has manifested itself is that the state Supreme Court has held, contrary to the U.S. Supreme Court, that warrantless searches are per se unreasonable. We did as much research as we possibly could. And interestingly, we even found that during the height of prohibition in the 20s, magistrates in Pennsylvania were very reluctant to issue search warrants even when, suffice it to say, there was probable cause in a lot of houses throughout Pennsylvania. And the reason they had that hesitation is because they felt it was just too out of keeping with those paramount privacy concerns in Article One Section Eight. So we think that there is a strong, unbroken historical predicate for saying an administrative search warrant is just not acceptable in Pennsylvania.

Conclusion:

John: Next month, that’s the argument that Rob is going to make to the Pennsylvania appeals

court. And he's going to urge the judges to stop Pottstown from treating renters like second-class citizens and to force the borough to respect not only their privacy rights, but also their property rights. For the duration of a lease, an apartment or a rental home is the property of the tenant. The landlord must respect the property rights and privacy of the tenant during that time – and so too should the government. And one day, perhaps when a few more state courts have weighed in, we hope to attack *Camara* directly. Indeed, the Supreme Court says, and as recently as 2012, that when it comes to the home the Fourth Amendment's protections are at their absolute apex.

> **Justice Scalia**: In our law of search and seizure, the home is first among equals. At the amendment's absolute core is the right of a man to retreat into his own home and there be free from the state's gaze.

John: At IJ, we say the code inspector is no less the state than the police officer, and the state's gaze is no less an intrusion. And with that, until next time, thank you for listening, and we will be back soon.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali, Charles Lipper, and Aaron Wold at Volubility Podcasting. This episode was produced by John Ross and Anya Bidwell. The theme music is by Patrick Jaicomo. Audio from the Supreme Court comes from Oyez. With research help from Jeff Rowes and voice work by Dick Carpenter and Paul Sherman. And with much thanks to the ACLU of Northern California for putting us in touch with Marshall Krause.