

Supreme Court of the United States

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JAN 28 1970

OCTOBER TERM, 1969

In the Matter of:

THE COLONNADE CATERING CORPORATION

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

Docket No. 108

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE COLONNADE CATERING CORP.,)	
)	
Petitioner)	
)	
vs)	No. 108
)	
UNITED STATES OF AMERICA,)	
)	
Respondent)	
)	

The above-entitled matter came on for hearing at 10:10 o'clock a.m. on Thursday, January 15, 1970.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

O. JOHN ROGGE, ESQ.
 1501 Broadway
 New York, N. Y. 10036
 On behalf of Petitioner

JEROME FEIT, ESQ.
 Criminal Division
 Department of Justice
 Washington, D. C.
 On behalf of Respondent

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 103, The Colonnade
3 Catering Corporation against the United States.

4 Mr. Rogge, you may proceed whenever you are ready.

5 ORAL ARGUMENT BY O. JOHN ROGGE, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. ROGGE: Mr. Chief Justice and may it please the
8 Court: In this case the Court should have before it an addi-
9 tion to the single appendix of the Petitioner's brief and the
10 Government's brief, a blue-back Petitioner's reply brief.

11 This case presents the issue of whether the premises
12 of those whose services include the sale of alcoholic beverages,
13 are outside the protection of the Fourth Amendment. The govern-
14 ment says they are; we say they are not.

15 The government points to inspection statutes; we
16 point to the provisions for a warrant. The government points
17 to the age of the inspection provision; we point to the fact
18 that there has consistently been provision for a warrant pro-
19 cedure.

20 Now, as to the facts in this case there isn't a dis-
21 pute. On a Saturday afternoon a crew of four: three Internal
22 Revenue Agents and a Nassau County Policeman came into the
23 Petitioner's premises and demanded to inspect them.

24 Petitioner is the caterer who, as part of his service,
25 dispenses liquor, and therefore, has a Federal Occupational

1 Liquor Dealer's stamp that costs him \$54.

2 Q Was that annually renewable?

3 A Yes.

4 Q He has to get that every year?

5 A That's my understandin, if Your Honor please.

6 Now, after they had inspected the public premises
7 they demanded to see the nonpublic premises, and without per-
8 mission they did that, going into the basement and then this
9 crew of four --

10 Q You mean by this crew, the officers?

11 A Three officers of the Interl Revenue Service
12 and one Nassau County policeman.

13 Q Oh, I see. I'm just a little disturbed by
14 your reference to crews. I didn't think they worked on a ship.

15 A There were four people, Mr. Justice Black,
16 that I think in this case were engaged in kind of a general
17 exploratory search which was one of the factors involved in the
18 American Revolution and which subsequently led to the adoption
19 of the Fourth Amendment. That's what I think happened in this
20 case.

21 Now, after inspecting the public premises and going
22 into the basement they were later joined by a District Area
23 Supervisor. So you now have five individuals who demanded
24 entrance to a locked liquor storeroom which was 75 feet off the
25 main premises. They had no warrant; they claimed under the

1 inspection statutes they were entitled to go in. The Petitioner
2 refused. They then broke the lock and entered and seized 53
3 bottles of liquor, some filled, some partially filled. And two
4 pints.

5 Now, as to the 53 bottles of liquor they seized 38
6 of those and this, their own receipt states, which is at pages
7 11-A to 13-A, to determine if genuine. They seized 15 more
8 bottles, according to their own receipt, as a comparative
9 sample and they seized two funnels and they specifically stated
10 that they seized those for evidence. They said that in so many
11 words.

12 Now, they were not engaged in seeking to collect any
13 taxes because the Petitioner paid his \$54.

14 Q Was it a license to refill empty bottles?

15 A No, Mr. Chief Justice; it was not.

16 Q Well, then, what does the license have to do
17 with it?

18 A They weren't seeking to collect taxes.

19 Q I wondered what was the nexus between the
20 point you were making and the issue in the case.

21 A What I really want to emphasize all the way
22 through, is that this is a general, exploratory search for
23 evidence and it was done without a warrant.

24 Q But your point would be the same whether he had
25 a license or whether he didn't have a license?

1 A Well, I assume that he has to have a license
2 in the public premises and the premises were open and they
3 could walk in and if they came in to see did he have the
4 license, they didn't come in for that purpose, we wouldn't
5 have any objection about that.

6 Nor were they looking for a distillery.

7 Q Mr. Rogge, does the record show how they broke
8 the lock, what they used to break the lock with; was it some-
9 thing they had or something that was on the premises?

10 A That I can't answer because the record doesn't
11 show, but it does show that they broke the lock. Here what we
12 have to rely on is the Petitioner's affidavit. There is nothing
13 in the government's affidavit in opposition. It's simply a
14 general statement, to which it had added one thing: in
15 argument before District Judge Weinstein, government counsel,
16 and this is at pages 31-A and 32-A, states that one of these
17 very agents was a bar mitzvah there the week-end before and he
18 saw what looked to him to have been refilled bottles; and so he
19 went and put in a routine complaint, which was being acting on
20 this following Saturday.

21 Now, that's all there is in the record. The petition
22 does say they broke in. Now, what particular implement they
23 used to break it, they did break the lock. There is no dispute
24 about that. As a matter of fact, the government admits in
25 its brief that this is the only case, to their knowledge, and

1 this is in their brief, page 30, note 26. This is the only
2 case to their knowledge where force has been used to gain entry
3 to the premises of a retail liquor dealer. So, force was used,
4 but whether it was a hammer or crow bar, that I can't tell you,
5 Mr. Justice.

6 Q Well, my problem is as to whether they brought
7 the weapon in with them, the crow bar or whatever it was to
8 break it. That's the only reason I was asking.

9 A Well, that I don't know, whether they picked
10 up a chair or something there to break it open. There isn't
11 any dispute but what force was used to break the lock; break
12 open the door.

13 Now, they weren't seeking to look for an illicit
14 distillery, because if they had been doing that there's an
15 express statutory provision which says that it shall be lawful
16 for them to use such force to gain entry as may be necessary.
17 Now, whatever may be the constitutional status of that pro-
18 vision, they weren't operating under that.

19 They were simply, as I have stated, and I can't
20 emphasize it too much, they were engaged in a general, explora-
21 tory search of the kind that was one of the factors involved
22 in the American Revolution, which was the kind of thing that
23 led to the adoption of the Fourth Amendment. Now, the Fourth
24 Amendment contains no exceptions.

25 Q There was a little bit more, or perhaps, more

1 accurately, a little bit less than an exploratory search;
2 wasn't it, Mr. Rogge? Hadn't one of the agents been on the
3 premises a week earlier and observed what he thought were
4 violations of the --

5 A This was stated in argument before Judge
6 Weinstein and I'm prepared to say that that's part of the
7 record, but there is nothing in the government's affidavit in
8 opposition which say anything about that. That's simply a
9 statement that government counsel, before Judge Weinstein, and
10 if true, then I say the government had a whole week to get a
11 warrant.

12 Q To get a warrant. These premises were owned
13 by the catering company?

14 A Yes

15 Q This wasn't a catering company that went into
16 a home or a club?

17 A Well, it does that too, but --

18 Q These premises were the property of the
19 catering company.

20 A Right. And they had a public part of the
21 premises and there was a bar mitzvah the Saturday before and
22 there was a bar mitzvah the Saturday afternoon when these agents
23 and the patrolman and still a group of four, however I charac-
24 terize them. I tried to find a word that was as mild as
25 possible and that's why I called them a crew of four, but there

1 was a group of four and they were going by a supervisor, so at
2 the time they broke open the door there were five of them
3 demanding entry and without a warrant.

4 Q Do you in any way urge here that there was not
5 probable cause? I know you say there should have been a
6 warrant even if there was probable cause, but is part of your
7 case that there was not probable cause?

8 A No. I'm not saying that. I don't get into
9 that part. The way I have handled that is in the reply brief
10 in which I quote from Camara against Municipal Court. I did
11 hear the government counsel say that warrant procedure couldn't
12 be used because -- well, they go into various reasons for that;
13 one of them is that they have been advised by the North
14 Atlantic and Mid-Atlantic Regions that these inspections are
15 based on some reason to believe or suspect less than probable
16 cause. I don't think that's in here.

17 I, in response to that, point out from a paragraph
18 in the Court's opinion in Camara that the standard of reason-
19 ableness for probable cause will vary with the type of case
20 involved.

21 Q Well, do you -- you just don't raise the issue
22 here?

23 A No, I don't.

24 Q So, we should take the case on the assumption
25 that there was probable cause for this search?

1 A Yes. In other words, and again, I'm taking
2 it, not from any affidavit, but from a statement in argument
3 before Judge Weinstein that one of the agents had been there
4 the preceding Saturday and had seen what looked to him like
5 refilled bottles. Now, neither side has gone into what amounts
6 to probable cause, but that certainly seems to me to be enough
7 probable cause to get a warrant.

8 Q Well, even without that incident, would you
9 say that there was probable cause. Would there have to be
10 some specific evidence about a specific establishment to
11 justify an entry?

12 A Well, if there is a public part of the
13 premises in the daytime they could walk in, but if they wanted
14 to break into something, I would say yes, there has to be
15 probable cause, varying with the type of case which would have
16 been enough for a warrant to issue; yes, Your Honor.

17 Q You wouldn't say that liquor inspectors could
18 get a warrant to justify telling the judge that "We want to
19 inspect."

20 A No; that's not enough.

21 Q You wouldn't think that they were justified in
22 having a routine inspection of private quarters in a liquor
23 dispenser's establishment?

24 A If the premises are open they can walk in,
25 but if they --

1 Q Well, I know, but --

2 A -- if they make a search, which is what these
3 gentlemen, five in number, wanted to do; yes, they have to go
4 before a judge which satisfies detached official, rather than
5 the agent in the field, and get a warrant to do that.

6 Q Well, that isn't what Camara and See said,
7 is it, Mr. Rogge? Camara and See didn't require that to get a
8 warrant you had to have a specific information about an estab-
9 lishment which led you to believe that there was a violation on
10 the property.

11 A Well, as I read Camara against Municipal Court,
12 was that the standard of reasonableness would vary with the
13 particular type of case and that would surely be true of the
14 administrative inspections that agents of the Internal Revenue
15 Service engaged in this inspection would have to supply.

16 Now, neither brief has gone into just how that would
17 be spelled out in this particular case. I haven't spelled it
18 out and neither has the government.

19 Q So, we will assume, then, that there was
20 probable cause?

21 A Yes.

22 Q Mr. Rogge, while we have you stopped for a
23 minute, let me suggest a possible hypothetical, possibly a
24 parallel. Government grants licenses on a very limited basis,
25 as we know, for the production of atomic energy, privately.

1 Somewhere in that statutory scheme there are broad provisions
2 for inspection of the premises producing the atomic energy,
3 obviously, on a safety basis -- I would assume that's the basis.
4 Would you say that the government inspectors, with a statute
5 permitting them to inspect any time, must have a warrant before
6 they can enter any part of the premises where atomic energy is
7 being produced?

8 A Well, Mr. Justice, I answer that by calling
9 attention to the fact that there is a comparable provision in
10 the case of distilleries where the statute provides that agents
11 may enter -- government agents are supposed to have a key to
12 distilleries and they go in at any time and the statute
13 specifically provides that if entry is denied they may use
14 necessary force without a warrant, to get in.

15 Now, entirely apart from the question -- if you would
16 add to your case that the statute also says in the case of
17 these atomic plants that agents may enter. I mean, if you
18 make the case comparable to that of distilleries and say that
19 the statute specifically provides that if entry is denied they
20 may use force to enter. I would say that I would have a great
21 deal of doubt about the constitutionality of that, but I would
22 equally say in this case if you look at the statutory structure,
23 you would have to come to the conclusion that under this inspec-
24 tion statute that result wouldn't follow, because, under this
25 inspection statute there are provisions for the forfeiture of

1 \$500 for each refusal; there is another provision making it a
2 felony to obstruct Internal Revenue Agents in carrying out
3 their duties, but where the Congress had in mind a warrant
4 procedure, it specifically so provided and so it provided, and
5 this provision goes back -- it was in the 1791 Act; it's in
6 revised statutes and it's in the current Internal Revenue Code
7 of 1954; it's in 26 U.S.S. Sec. 7302, which provides that if
8 the property is used, or may be used, or has been used in
9 violation of the revenue laws, specifically provides a search
10 warrant be issued as provided in Chapter 205 of Title 18 of the
11 United States Code and Federal Rules of Criminal Procedure.
12 Also a provision in two instances for the use of force in the
13 Congressional standards. There is one in the Criminal Code,
14 18 U.S.C. Sec. 3109 which provides for the use of necessary
15 force in the execution of a warrant and there is another pro-
16 vision, one with reference to distilleries, which provides for
17 the use of necessary force without a warrant for the entry of
18 a distillery. But there is no such provision with reference to
19 these inspection statutes. And I say,

20 And I say, just as a matter of statutory construction,
21 this is now apart from the Fourth Amendment, but it's a matter
22 of statutory construction. If you look at this statutory scheme,
23 Congress never intended the use of force if entry was denied.
24 They intended the use of a warrant procedure and there is
25 specific provision for a warrant procedure.

1 Now, I'm not familiar with the atomic energy pro-
2 visions, but I would say this: that if there was a specific
3 provision for entry without a warrant by the use of force if
4 necessary, you have something that's comparable to what we
5 have with reference to distilleries. I would doubt its
6 constitutionality under the Fourth Amendment and I'll explain
7 in a moment why.

8 And if you have also in that statute, a provision for
9 warrant procedure, I might form an opinion, looking at the
10 statutory scheme. I would, if I could, come out by saying that
11 the Fourth Amendment protected it, I would. And I would do
12 that for this reason: For the past 300 years or more, this
13 people have built a right of privacy which Mr. Justice Brandeis
14 in his dissenting opinion in Homestead called the "right to be
15 let alone."

16 Q Well, does this right of privacy extend with
17 the same force to people who are granted a special license to
18 engage in activities that the generality of people are denied,
19 as it does to private homes and other circumstances?

20 A I would say yes, if possible, unless I found
21 in the statutory scheme as I do with reference to distilleries,
22 a specific provision that they may enter without a warrant, by
23 force if necessary.

24 But I would look for a provision like that and not
25 only because we have built up this right of privacy

1 of which the Fourth Amendment, as this Court has repeatedly
2 pointed out is an expression, but you have had another develop-
3 ment, which began, really, in 1864 and that is giving to
4 administrative officials -- it began with a Federal tax assessor
5 in 1864 -- giving them power to issue a subpoena or power to
6 make inspection or both. There are now over two dozen Federal
7 administrative agencies which have either the power of subpoena
8 or the power of inspection or both. And I say, in the face of
9 that trend it is necessary not to make an exception to the
10 Fourth Amendment, where all that you have are inspection
11 statutes and where, in that same statutory scheme you have a
12 provision for a warrant procedure, as you do. You have a pro-
13 vision for a forfeiture if there is a refusal; and you have
14 two provisions for the use of force: one in the execution of a
15 warrant and one where you want to enter a distillery. Neither
16 of which are applicable to this case.

17 Q What is the statutory scheme with respect to
18 inspections by Food and Drug Administration Agents of the
19 premises of producers of food covered by that Federal Law?

20 A I have the impression that they resort to a
21 warrant procedure, but I haven't covered that field.

22 Q You haven't covered it?

23 A No. But I do want to make another point in
24 that connection. With reference to applying the warrant pro-
25 cedure in this case, which the government says would be

1 so burdensome, according to the government's own brief the
2 government conducts thousands of inspections. According to the
3 government's brief there are some 300,000 liquor dealers in the
4 country. In 1963 they made 24,000 inspections; in 1964 they
5 made 23,000; in 1965 they made 13,000. Apparently the number
6 of inspections are going down. That's still more than 60,000
7 inspections over a three-year period and what does the govern-
8 ment say in its own brief? They say very few of these dealers
9 refuse consent to an inspection.

10 They go on to point out in a footnote that the
11 estimate of the refusal rate in the North Atlantic Region was
12 one out of 75. They say that the area supervisors of the
13 Mid-Atlantic Region could not recall any refusals or objections.

14 Now, they don't tell us what happens in that one out of
15 75. They don't tell us whether they went and got a warrant, but
16 they do say this in footnote 26, on page 30: that this is the
17 only case, to their knowledge, in which force has been used.

18 Now, it can't be so important to have an inspection
19 procedure without a warrant procedure if that's what the picture
20 is. They don't need to convert warrants into -- they don't
21 need to convert inspection procedures into general warrants in
22 order to carry out their duties.

23 Q We don't have any -- if it were decided that
24 they didn't have to let them in?

25 Q Up to now they have been confronted with

1 committing a felony if they refused.

2 A Yes.

3 Q And that perhaps had a tendency to induce
4 cooperation?

5 A I don't know about that, Mr. Justice. I
6 don't know how many knew this -- I didn't know this until I
7 saw the government's reply, until I saw the government's brief,
8 that it was a felony, but there are ample tools to deal with
9 those who refuse access to private premises. And what I'm
10 really asking for here is not to make an exception to the
11 Fourth Amendment. I don't think the framers intended it. The
12 framers, in just so many words, said, "The right of the people
13 to be secure as against unreasonable searches and seizures,
14 shall not be violated. "

15 Now, I say, if they wanted to make an exception for
16 liquor dealers or for distilleries, they would have said so.
17 They didn't.

18 And then they go on to provide --

19 Q You don't think that had anything to do with
20 determining whether a search was reasonable?

21 A That they were liquor dealers?

22 Q Yes.

23 A If Your Honor please, I see no such exception
24 in the Fourth Amendment.

25 Q I'm not talking about exceptions; I'm talking

1 about the interpretation of the word "unreasonable searches."
2 Can you see no difference in searching a private home, far
3 removed from anybody else and the searching of a place where
4 they sell liquor?

5 A Well, the reasonableness would vary, if Your
6 Honor please.

7 Q Well, that's what I was asking.

8 A Yes, but if it was at night, for instance, and
9 those premises were closed, the fact that liquor is sold there,
10 I don't think gives them a warrant to go in, or if the owner
11 should close his establishment, he has a public place to dis-
12 pense liquor and he's closed his establishment. I don't think
13 that the agents without a warrant can go in.

14 Q The language of the amendment that you were
15 paraphrasing, I don't suggest you were undertaking to quote it,
16 refers to the right of people to be secure in their houses and
17 persons, and as Mr. Justice Black suggests, that might be quite
18 different from a factory or other places.

19 A It says "persons, houses, papers and effects."
20 But Mr. Justice, I now have See against Seattle, which says that
21 the Fourth Amendment protects commercial premises, and what I'm
22 urging is -- what I'm urging in the first place is that this
23 Court at this late date should not read an exception into the
24 Fourth Amendment which says that those who, as part of their
25 services, dispense liquor, their premises are without the

1 protection of the Fourth Amendment.

2 But, I say, in the second place, as a matter of
3 statutory construction, this statutory scheme in this case,
4 provided merely for going in and inspecting. The same statu-
5 tory procedure also had a warrant procedure and that procedure
6 could be held applicable, particularly in this day of the great
7 number of administrative agencies, they should be told likewise:
8 "You must abide by the Fourth Amendment."

9 I wish to reserve a few minutes for rebuttal.

10 MR. CHIEF JUSTICE BURGER: Mr. Feit.

11 ORAL ARGUMENT BY JEROME FEIT, ESQ.

12 ON BEHALF OF THE RESPONDENT

13 MR. FEIT: Mr. Chief Justice, and may it please the
14 Court; I'd like at the outset to point to the specific
15 statutory framework under which the agents proceeded in this
16 case. That's set forth in page 37 of our appendix. Title
17 26.5146(b) of the Code. It says:

18 "Entry of premises for inspection the Secretary or
19 his delegate may enter during business hours, the premises,
20 including places of storage of any dealer for the purpose of
21 inspecting or examining any records or other documents required
22 to be kept by such dealer under this chapter and any distilled
23 spirits, wines or beer kept or stored by such dealer on such
24 premises."

25 Two things clearly emerge from this statute. We are

1 not here talking about breaking of outer doors at all. These
2 are premises which are open to the public. The excise tax or
3 the occupational stamp tax as paid by the bar owner, the pack-
4 age store in Colonnade Catering Corporation, services parties
5 and the actual inspection here occurred when the officers
6 entered the premises with the consent of the employees there in
7 charge; made an inspection of the public area, and what we're
8 talking about here is the breaking of a storeroom in the base-
9 ment, which is admitted no one was in there, except liquor
10 bottles.

11 Now, contrasting that situation with See and Camara,
12 as this Court will recall, both See and Camara dealt with broad
13 housing and fire code provisions. We have set out some of these
14 provisions on page 18 of our brief, note 16, which gave wide
15 discretion to the agent in the field.

16 As this Court pointed out, neither the resident in
17 Camara nor the owner in See, had any way of knowing whether the
18 inspection of the premises was required to enforce the ord-
19 inance, did not know the nature of the limits of the inspector's
20 authority, did not know when the inspectors attempted to gain
21 entry stemming from proper authorization.

22 Indeed, it is only by facing criminal prosecution,
23 the Court went on, that the validity of the entry could be
24 put to a test, and even then the owner of the premises or the
25 occupant might never learn the reason for the entry. And this

1 Court rule that was precisely the kind of unfettered expres-
2 sion of the officer in the field to invade private premises
3 that required antecedent justification by a mutual judicial
4 officer, as to the limit and make precise and give official
5 sanction to the entry.

6 The Court went on in *Camara* to say "broad statutory
7 safeguards were no substitute for individualized review in this
8 context." As we have noted, this statute is clearly the
9 opposite end of the spectrum. It is as specific as the Fourth
10 Amendment, itself, can require it under the warrant procedure.
11 It specifically describes the place to be inspected, "business
12 premises during business hours" and the things to be inspected:
13 liquor bottles.

14 These agents have no authority to roam at large for
15 anything else, but liquor bottles and to examine the specific
16 records which the dealer has to keep.

17 As a matter of fact, in the 1791 statute, which was
18 enacted the year the Fourth Amendment, which authorized inspec-
19 tion of the premises of breweries and importers. There was in
20 that provision the right to inspect, as well as the right to
21 look at records.

22 The Court, in *Camara* and *See*, noted further that
23 there was no showing or even any argument in those cases that a
24 warrant system would in any way hamper effective implementation
25 of these municipal codes.

1 And finally, it observed, "there were manageable,
2 broad standard for these types of area inspection warrants, by
3 which the magistrate could determine a particular area inspec-
4 tion at a particular time was warranted."

5 Consideration for these very same factors, the scope
6 of the inspection authority, the knowledge of the owner of the
7 premises, the public interest in this inspection and the stan-
8 dards to be applied by the magistrate, all point, we submit, to
9 a contrary ruling in this case.

10 Q You indicated that these premises were open to
11 the public. That has not been my understanding and while, in
12 Fourth Amendment cases, so often the factual framework is very
13 significant.

14 I had understood that these were owned by the
15 catering company, that people who wanted to have a party, whether
16 it be a bar mitzvah or whether a wedding reception or some other
17 kind of a party, could rent the premises, plus the services and
18 so on, and that this was a private party. This wasn't an open to
19 the-public bar or grill or restaurant? Is that correct, or am
20 I wrong?

21 A Well, the record doesn't spell it out pre-
22 cisely, but I think, generally speaking you're correct, that in
23 this type of situation whatever the type of party, they rented
24 it for a specific period of time. There was a party in this
25 one, for example, from 4:30 to 6:00.

1 Q So, it wasn't open to the public. The people
2 rightly there were the respondent and his employees, plus the
3 host and the guests of the party, period. This wasn't open to
4 the public, was it?

5 A What was open was the entranceway. What I
6 meant to say was that these places, which I have had some
7 occasion to see, have an initial kind of entry area where coats
8 are hung, and then they have -- you walk down a hall to this
9 large ballroom. What I am suggesting is that in this case the
10 agents entered this entry hall. The record shows that at that
11 time they were authorized and permitted to inspect the general
12 area of the ballroom. They didn't walk into the ballroom, as
13 a matter of fact; they just looked inside.

14 They then wanted to look at the basement and they
15 made clear what their purpose was: to inspect for liquor. They
16 said, "We are not going to consent to your looking in the
17 basement." Nevertheless, they went down and looked in the
18 basement and cellar. There was, 75 feet away from the ballroom,
19 was this storeroom which the Colonnade kept its liquor. It
20 was this that was broken into.

21 May I suggest to Your Honors, that the extent that
22 there was privacy, it was the privacy within the ballroom. The
23 cloakroom area, the initial entry area, was clearly open and
24 there is no claim here that these premises were not open to the
25 public or that this wasn't during business hours.

1 Q Well, that's quite a different issue; dif-
2 ferent question, whether it's during business hours. Whether
3 or not it is open to the general public, whether or not it --

4 A There was no inspection made in the ballroom
5 at all. There was no attempt to interfere with the activities
6 in the ballroom at all.

7 Q Apart from the use of this for parties, was
8 this open to the public? Was there a bar there where you could
9 walk in?

10 A The record does not show and I understand
11 that these places are generally set up for parties. I do not
12 think that this type of catering establishment has a public
13 bar which you can walk into from the street.

14 Q Does it have its office there? Is the
15 proprietor there?

16 A Yes, again, the record doesn't spell this out
17 and I must go from my own experience. They have an office
18 there, someone generally an employee, as in this case, several
19 employees, who are there to answer the telephone, perhaps
20 people calling in for other reservations, to see that things
21 are kept in order, to help out during a party. There are a
22 number of parties during the day and apparently here there was
23 one from 4:00 to 6:00 and one from 7:00 to 9:00.

24 So, they have employees and people constantly on the
25 premises.

1 Q I suppose what might be important in the area
2 that Justice Stewart was probing at, is whether, if a potential
3 customer, who wanted to make an arrangement for a party to be
4 catered a week later, would walk in the door without ringing or
5 knocking and negotiate with someone to arrange that affair.

6 A To that extent, I think that is quite clear
7 that that is the practice. That this is, in fact, usually
8 done. As a matter of fact, many times to see how well they run
9 their establishment the caterer will take in a prospective
10 customer to look at how the party is being run. This is a very
11 normal procedure in these types of catering establishments.

12 Q Well, it is my understanding that the only
13 thing Petitioner complains about his privacy is the one locked
14 room.

15 A As far as I understand it that is the only
16 claim of privacy.

17 Q And that was not open to the public.

18 A That was not open to the public, but our
19 position is that a retail dealer in liquor in an industry that's
20 been regulated since much before the foundation of this
21 Republic, who, under New York law, must be licensed under a
22 comprehensive system, who pays an annual occupational tax of
23 \$54 and receives each year a booklet which indicates precisely
24 the authority of the Internal Revenue Agents to inspect his
25 premises during business hours for liquor.

1 It's our position that he assumes a reasonable risk
2 by entering that business that, during business hours his
3 liquor would be open to inspection, for example. And he has
4 an obligation in a bar. It seems to us that the same argument
5 could be made that a barkeeper who keeps his liquor in a cabinet
6 over the bar could simply lock his bar cabinet and say to the
7 inspector, "You cannot look at the liquor."

8 We think, under the tax rationale that the assump-
9 tion that he assumes, contemplates that that inspection would
10 take place.

11 Q Why does the same series of statutes provide
12 for a warrant?

13 A I think the warrant procedure relates to some-
14 thing different. For example, 26 U.S.C. 5301, the refilling
15 provisions which are set forth in the appendix of our brief.
16 We talk about the refilled bottles which are on other premises.
17 It may well be that a refilled bottle is not on the premises
18 of a retail liquor dealer; it may be taken elsewhere.

19 Quite clearly, the statute gives no authority to
20 the office to inspect that type of a -- whether a private home
21 or anywhere else, a search warrant applies there.

22 Q Suppose, in this case the Colonnade said, "As
23 of that locked door that's my home.

24 A It seems to me that Colonnade just can't say
25 that and be in the liquor business. If Colonnade wants that

1 to be its home, it seems to me that it gets out of the liquor
2 business.

3 Q You had all this information a week before;
4 am I right?

5 A The question -- the record reference to the
6 information, set forth at page 26, 45 and 38 of the appendix,
7 are not clear. The question of probable cause was never de-
8 veloped, because no one, or atleast the Government's position
9 was that there was no need for a warrant procedure.

10 Q Do you think that this was a routine inspection;
11 there wasn't any probable cause?

12 A No; no. It wasn't a routine inspection.
13 Whathappened was that one of the agents had been to a party on
14 the Saturday before. He had seen what he thought or suspected
15 was refilling, as a guest. He then filed a complaint with his
16 supervisor. The following Saturday they proceeded to inspect
17 the premises. It is not clear -- inthe first place it is not
18 clear from this record whether they did or did not have
19 probable cause.

20 And in any event, it is our position that we're
21 talking about an inspection scheme where the magistrate really
22 can serve no significant purpose to defend or protect privacy.
23 The statute is precisely narrow, unlike Camara and See. There
24 is no similar standard for area inspections. We're not deal-
25 ing with rats or safety or fire ordinances. The Court in

1 Camara and See pointed out in those situations there is
2 general agreement --

3 Q Are there periodic inspections of the premises
4 in this case?

5 A As I understand it, it operates depending upon
6 manpower. At the present time in the North Atlantic and
7 Regions are divided into regions. They act on tips, which is
8 less than probable cause.

9 Q They don't, in other words, have any routine
10 inspections?

11 A There is no routine inspection. It's varied
12 from area to area, depending, essentially, upon their manpower.
13 Of course, unlike the area inspection situation, where
14 ritualistic or periodic inspection the owner knows that on
15 March 13 he's going to clear up the violation here. These are
16 ongoing violations. An inspection may have occurred two weeks
17 before and the dealer three weeks later may still be refilling
18 bottles.

19 So, in our view, there is really nothing the magis-
20 trate can do except accept the word of the agent, and indicate
21 to the agent that "what you say is correct." And we think this
22 is both a waste of the magistrate's time --

23 Q When you seek a search warrant for heroin, is
24 there anything else they can do, rather than take the agent's
25 word?

1 A No, but when you seek --

2 Q Is that true?

3 A No, he is --

4 Q He still has to get it.

5 A My answer is: "Yes, he still has to get it."

6 Q Well, why is there an exception with whisky?

7 A The exception is that in order -- it's a

8 historical notion. It has always been deemed reasonable, be-

9 cause of the significant, pervasive, governmental interest in

10 the liquor industry since 1300 in England, that the government

11 is, in fact -- the Federal Government is, in fact, the senior

12 partner. At the time liquor is produced at the distilling

13 plant, a government inspector is there; when a vat is finished,

14 it's under lock and key controlled by the government --

15 Q Is that all by statute?

16 A That is all by statute.

17 Q And there is no statute here that gives you

18 the right to break and enter; is

19 A There is no statute -- the breaking and enter-

20 ing, however, was not out-of-doors; not of residences. This

21 Court in Kerr, and Your Honor's opinion in Sabbath, and in

22 Miller, talked to the problem of breaking in terms of the

23 historical reasons for the rule, mainly that: if you break out

24 of doors, without first seeking to gain consent -- entry by

25 consent --

1 Q Is it your position that if you come into a
2 man's home with the information you can then break doors in-
3 side?

4 A That is not this case, obviously.

5 Q Is that your position?

6 A My position -- if one has a search warrant to
7 search a private home, for example, for stolen furs, and we
8 have probable cause to believe there are stolen furs, and one
9 walks into the apartment with the warrant; the bedroom door is
10 locked; the clothes are in the closet of the storeroom -- in
11 the bedroom; and he asks the occupant: "Here is my warrant. I
12 have the authority; I want to open the door." And he says,
13 "No, I will not."

14 Yes, our position is you can break down that door.

15 Q My case says he has no warrant, and he goes to
16 the door and he says, "May I come in?" And he says, "Fine,
17 come on in." And he says, "Open the bedroom door." And he
18 says, "I won't." That's my case I'm talking about.

19 A I would say that in the case you give me,
20 where an agent or officer proceeds with no warrant, and of
21 course, under Schimmel, even incident to an arrest, one cannot
22 go beyond the limits of the arresting area.

23 In the case that you give me, private resident, I
24 would agree with your Honor's conclusion that in order to go
25 and break the door one must have probable cause or one must

1 have a warrant. What I'm saying here --

2 Q Suppose this agent went into a private home
3 and says, "I want to come in, since you are the owner of the
4 Colonnade Company, and see if you've got any whisky bottles
5 in here." And the man says, "Come on in." And there is a
6 nice closet with a label on it: "Whisky Bottles." And he
7 says, "I won't let you in there." He can break that?

8 A No; he can't.

9 Q What's the difference?

10 A Because the authority comes under the statute.
11 The statute says, "Entry of premises during business hours."
12 The agent has no --

13 Q It has to be --

14 A It has to be his place of business. For
15 example, there is a case in the Court of Appeals, the Frisch
16 case, which we cite in our brief. WE have a situation of a
17 retail establishment and they live upstairs, and the Court,
18 quite correctly, ruled that if an individual keeps his liquor
19 on his private premises, the inspector has to have probable
20 cause. We take no other position.

21 This case is precisely our --

22 Q This case is limited to people who hold a
23 license; is it not?

24 A The Federal Government issues no license; the
25 State issues the licenses.

1 Q The statute, the operation of this statute
2 is limited to licensed operators and has nothing to do with
3 private homes; does it?

4 A Exactly; exactly.

5 Q Did anybody live in this cellar downstairs?

6 A The record certainly suggests no such con-
7 clusion, nor is there any claim made, as far as I have been
8 able to ascertain. This was a storeroom which contained
9 liquor.

10 Q Well, isn't it a little difficult to compare
11 what's reasonable in connection with a private home and what
12 is necessary and reasonable in connection with a place of
13 business, where they are selling liquor or dope?

14 A I agree, and See itself, while it does
15 recognize the protection of commercial -- locked commercial
16 premises, points out that commercial premises may be entered
17 in many more cases than homes.

18 This Court has long recognized that what may be
19 reasonable in terms of a commercial factory or business, may
20 not be reasonable in terms of a home.

21 It is true, Your Honor, precisely, that the Fourth
22 Amendment's protection is "the reasonableness of the inspection
23 which depends upon the particular circumstances.

24 Our position here is that in these particular cir-
25 cumstances, the officers acted reasonably.

1 Q Well, there is no reason on earth to talk
2 about a home in connection with this place of business?

3 A None at all; and that's precisely our position.

4 Q I notice that in your brief you have not made
5 any analogy of bank examiners, and I suppose it's a matter of
6 the official notice that the bank examiner systems exist all
7 over and when the bank examiners come into the bank during
8 banking hours, usually they come in in teams; one of them goes
9 to the main cash drawer and one of them goes somewhere else;
10 and they immediately move in and take over. Now, is there
11 any holding anywhere that says that they have to have a
12 warrant to do that?

13 A I know of none.

14 Q A substitute for the warrant is the statute
15 giving him the authority to inspect licensed banks, charter
16 banks.

17 A And I might call to Your Honor's attention,
18 under the Department of Agriculture it has statutory authority
19 to inspect in regard to slaughtering chickens, and I spoke to
20 them under their statute, which is 21 U.S.C. 74. And they
21 have an inspector there without a warrant who watches the
22 actual physical action of slaughtering take place.

23 It is our position, in short, that this case is
24 entirely unlike and dissimilar, clearly, from Camara and
25 certainly SEe, and that both the general inspection scheme

1 here involved, which is narrow and specific, limited in its
2 authority, and the actual method of enforcing that inspection
3 scheme in this case, by the forcing open of a storage room
4 containing liquor bottles, was reasonable in all the circum-
5 stances, and we respectfully that the judgment of the Court
6 of Appeals should be affirmed.

7 MR. CHIEF JUSTICE BURGER: Mr. Rogge, would you care
8 to comment on the possible analogy, the validity of any
9 analogy between the bank examiner walking in and the liquor
10 examiner walking in here?

11 MR. ROGGE: May it please the Court: Mr. Chief
12 Justice Burger, I was going to address myself to that. I was
13 going to do it last, but I will do it first.

14 Let us suppose that the president of that bank has
15 locked in his desk in his office certain papers, and those
16 bank examiners want to go in that locked desk. I would say
17 there they would have to go and get a warrant based on probable
18 cause.

19 Q Let's confine it to the big vault which almost
20 every bank has, where they keep the cash, which is the business
21 function and the banker refuses to let them go into the vault.

22 A I would have a great deal of difficulty in
23 answering that without further study, because I feel that we
24 should extend the right of privacy, rather than restrict it.
25 I would look for ways -- I would look at the statutes and if

1 there was anything in the statutes, as much as there are in
2 these statutes where there is a warrant procedure. I haven't
3 studied these bank statutes, but if I found that there was any
4 indication in any of the statutory provisions relating to them
5 that they should get a warrant, then I should say the warrant
6 procedure should be applicable. But, I haven't studied them
7 enough so that I can answer Your Honor's question.

8 Q As you know, the whole statutory scheme pro-
9 viding for bank examinations is that the examiners must take
10 the banker by surprise.

11 A Absolutely; absolutely correct. And it's the
12 same way with distilleries, where there is a specific provision
13 they may use force. I would have to study the banking statutes

14 Now, Mr. Justice Stewart, you asked about the Food
15 and Drug Administration and I find in the Government's brief
16 -- my associate called my attention to it, but I remembered
17 that I had read it -- in footnote 23 in the second paragraph,
18 where they say, "We are advised that when Food and Drug Ad-
19 ministration inspectors are denied entry, they simply obtain
20 a warrant before returning to the premises sought to be in-
21 spected."

22 Now, you also asked about the premises. I think we
23 have given you as much help as we can on that, although I did
24 notice, in looking at the petition, in paragraph 1, the
25 Petitioner does allege that this is his principal place of

1 business and it's engaged in the catering business. And I
2 think that does mean that you come and engage -- this is his
3 private property and the people are there in a private party.

4 Now, Mr. Justice Marshall, you asked specifically
5 how they broke in and I went through the record again while
6 I was listening to the Government's argument, and I see on
7 page 21 --

8 Q Of what?

9 A 21-A of the appendix. It says "The investi-
10 gators forcibly broke into the storeroom, actually tearing the
11 door-latch from the door frame." That's as specific as I can
12 be on that.

13 Mr. Chief Justice, I do want to come back to your
14 example of the bank. I know that bank examiners are supposed
15 to take the bank by surprise, but I would have to look at the
16 whole statutory scheme and if there is some way that I could
17 argue that the Fourth Amendment's warrant procedure should be
18 applicable, I would do so, but I think in accordance with our
19 own course of the people, or, to borrow the phrase of Mr.
20 Chief Justice Warren, "if we continue as a material society."
21 which he used in Trapp against Dulles.

22 In this day of these proliferating administrative
23 agencies, if I could find an argument that I could make with
24 my heart, I would make it that there should be a certain area
25 that's safeguarded to the individual free from intrusion by

1 the state unless there is a specific provision for it and that
2 surely doesn't exist in this case.

3 Q But if you were investing that and relating it
4 to the bank examiner the bank examiner's function, as you
5 agree, is to catch the banker by surprise.

6 A Yes.

7 Q And to see if the bookd and the money and all
8 of these things, balance out in order to protect the depositor

9 A Correct. And I repeat the case that I put to
10 you, Your Honor. Suppose he had some locked things in his
11 desk. Now, it's on the bank premises. Could they break in
12 there? They say, "Well, we want to examine; we're entitled to
13 examine."

14 Q I was confining my hypothetical case to the
15 main vault. Now, if you were to suggest that a warrant had to
16 be obtained, what would the bank examiner present to the
17 magistrate for justification for the warrant, except for the
18 authority to make the inspection.

19 A In that instance he might not have any. In
20 this instance, he did; so they say. He said he was there the
21 week before.

22 Q You don't think that 5146 in itself would be
23 enough if the revenue agents went to the magistrate and said,
24 "Here is your statute that allows us to inspect anytime during
25 business hours and we want a warrant to examine these premises

1 between 10:00 o'clock in the morning and 4:00 o'clock in the
2 afternoon on a business day. Would that be enough to get a
3 warrant?

4 A No, if Your Honor please, and it wouldn't
5 be necessary to enforce this statutory scheme and certainly
6 not in this particular case for an agent, where the government
7 states, in argument before the trial judge here: "One of our
8 very agents -- and this is at the bottom of 31-a and the top
9 of 32-A -- "was at a bar mitzvah there the week-end before and
10 saw what looked to him to have been refilled bottles, and so
11 he went and put in a routine complaint." Now, if this is
12 true, and this is the statement of the United States Attorney,
13 then I say he had probable cause and week in which to get a
14 warrant.

15 Q Well, I will come back to my other question.
16 Suppose he had no tip, no information at all and merely
17 presented to the magistrate this statutory provision and says,
18 under this statute, "We want to examine the premises; please
19 give us a warrant." Would the magistrate be justified in
20 giving a warrant?

21 A No, if Your Honor please.

22 MR. CHIEF JUSTICE BURGER: Thank you. The case is
23 submitted, gentlemen. Thank you for your submission.
24
25