

C.1

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,)
)
 Petitioner,)
)
 vs.)
)
 LOARN ANTHONY BISWELL,)
)
 Respondent.)

No. 71-81

Washington, D. C.
March 28, 1972

Pages 1 thru 38

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
APR 11 11 53 AM '72

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

----- X
UNITED STATES OF AMERICA, :
 :
 Petitioner, :
 :
 v. : No. 71-81
 :
 LOARN ANTHONY BISWELL, :
 :
 Respondent. :
 :
----- X

Washington, D. C.,

Tuesday, March 28, 1972.

The above-entitled matter came on for argument at
10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

R. KENT GREENAWALT, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.
20530; for the Petitioner.

WARREN F. REYNOLDS, ESQ., Easley & Reynolds, Post
Office Box 638, Hobbs, New Mexico 88240; for the
Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
R. Kent Greenawalt, Esq., on behalf of the Petitioner	3
In rebuttal	33
Warren F. Reynolds, Esq., on behalf of the Respondent	21

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in No. 71-81, United States against Biswell.

Mr. Greenawalt, you may proceed whenever you're ready.

ORAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENAWALT: Mr. Chief Justice, and may it please the Court:

This case is on review of the decision of the Court of Appeals for the Tenth Circuit, that an agent of the Alcohol, Tobacco and Firearms Division of the Treasury Department searched Respondent Biswell's business premises in violation of the Fourth Amendment.

The issue involved is a narrow one: whether Congress, in regulating the distribution of firearms, may authorize Treasury agents to make routine inspections during business hours of the business premises of licensed dealers in firearms, and whether Congress may impose upon these licensed dealers a duty to admit the agents even though the agents do not possess a warrant.

Putting the question somewhat differently: does the congressional authorization of such inspection and the imposition of a duty upon licensed dealers to admit the agents without warrants conflict with the Fourth Amendment?

We believe the constitutionality of the authorization and the duty Congress has imposed is plain under Colonnade Catering Corporation vs. United States, and that therefore the court below erred.

The relevant facts in this case are quite straightforward. Loarn Anthony Biswell is a pawnbroker in Hobbs, New Mexico. A substantial number of the items pawned with him, as security for loans, are firearms. At the time of the inspection here he held some 444 firearms. Biswell was a licensed dealer in firearms. Under Section 923 of Title 18, dealers in firearms must be licensed, and dealers are specifically defined to include pawnbrokers.

Special investigator Hupp of the Alcohol, Tobacco and Firearms Division made a routine compliance visit to Biswell's pawnshop. According to Hupp, such visits to dealers are made about once a year. Hupp identified himself, and first inquired about Biswell's records.

He ascertained that Biswell was not keeping records in the form required of all firearms dealers. Hupp then indicated that he wished to see the storerooms where the firearms were kept. Biswell kept these, along with other pawned items, in a locked storage room.

Biswell inquired if Hupp had a search warrant, and Hupp said no. But he showed Biswell a copy of the statute authorizing Treasury agents to search the business premises of

firearms dealers without warrants.

At that point, Biswell said: Well, that's what it says, so I guess it's okay. And he unlocked the storeroom. Inside the storeroom Hupp saw a rifle with an 11-3/4-inch barrel. Any rifle with a barrel of less than 16 inches is an illegal firearm under the National Firearms Act of 1968. That Act does not absolutely forbid possession of such firearms, but sharply constricts rifle possession and commerce in such firearms.

Each such firearm must have a serial number, each dealer in such firearms must pay a special occupational tax, and be specially registered with the Secretary of the Treasury. And whenever any such firearm is transferred, the transferrer must pay a \$200 transfer tax and obtain approval of the Secretary of the Treasury.

It was clear to Agent Hupp that Biswell did not legally possess the sawed-off rifle he saw. There was no required serial number on the rifle. Biswell indicated that he had no idea such weapons had to be specially registered. Finally, it was obvious that no owner would pay a transfer tax of \$200 to get a three-dollar loan, although, of course, Hupp didn't know the amount of the loan, but he knew it was much less than the \$200, from a pawnbroker.

Soon after seeing this rifle, Hupp noticed another with a short barrel, and he seized both rifles.

The district judge denied a motion to suppress the two sawed-off rifles, and they were introduced at Biswell's trial. They and the observations of them by Agent Hupp were relevant to the count for which Biswell was convicted, engaging as a dealer in illegal firearms without having paid the special occupational tax.

Among other claims on appeal, Biswell claimed that the search leading to the seizure of the rifles was unconstitutional. The Court of Appeals agreed that the search was unconstitutional and that the evidence should have been suppressed, and it reversed the conviction.

I think it may be useful at the outset to put aside which is not involved in this case. There is no assertion by Biswell that Hupp performed other than routine actions under the statute. It is not disputed that he was engaged in the periodic compliance visit. It is not disputed that such visits typically involve inspection of the firearms on the premises. And if the entry into the storeroom was valid, the appropriateness of the seizure of the two truly contraband weapons is not challenged.

At the same time it is clear that Biswell unlocked the door to the storeroom because he acquiesced in an apparent show of lawful authority.

In an ordinary criminal investigation his action would not have constituted consent to an otherwise unauthorized

search. Thus we do not argue that this search was consented to in the ordinary sense of consent. The case thus presents very clearly the power of Congress to authorize Treasury agents responsible for enforcement of the firearms laws, to authorize those agents to inspect the business premises of firearms dealers without warrant.

Both the criminal code and the Internal Revenue Code contain a multiplicity of regulations governing the sale and distribution of firearms.

I take it there can be no question of the importance of close regulation of the gun industry. Approximately 60 percent of the murders in the country are by use of firearms, as are 95 percent of the killings of police officers on duty. The power of Congress to require licenses and registration and to tax incidents of the gun industry has been consistently upheld. That power is not questioned in this case.

As a central aspect of the regulatory scheme, Section 923(g) of Title 18 provides for inspection. The relevant language for this case is "The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition ... dealer .. for the purpose of inspecting ... any firearms or ammunition kept or stored by such ... dealer ... at such premises."

The clear import of this section is that Treasury agents need not have a warrant to inspect, and that licensed

dealers have a duty under the statute to permit inspection. This section is virtually identical with the section considered by this Court in Colonnade Catering Corporation vs. United States.

In Colonnade, this Court held, with three dissents, that Congress had not authorized entry by physical force without a warrant. The significance of this case for this one, however, is in the Court's reasoning.

The Court acknowledged that Treasury agents have been given broad authority to enter and inspect the premises of liquor dealers, and it determined that this authority is constitutional. Both the majority and the dissenters agreed that the rule of Camara vs. Municipal Court and See vs. City of Seattle was inapplicable to that case; that rule, of course, is the one that requires a warrant for an administrative search that has not been consented to.

But, as I said, all of the Justices agreed that that rule was inapplicable.

Q But there is a little difference between liquor and a gun search.

MR. GREENAWALT: There is, Your Honor.

Q Unless you could flush a gun down a toilet.

MR. GREENAWALT: I believe, Your Honor, that for all relevant purposes, if that kind of search is -- or inspection is sustainable with respect to the liquor industry, it should

be sustainable with respect to regulation of the gun industry.

Q Historically; historically, certainly my brother Marshall is correct that government regulation of the production, sale, and distribution of alcoholic spirits has been pervasive, almost from the beginning, through the history of the Eighteenth Amendment and the Twenty-first Amendment, and long before then, by contrast with firearms which has not been regulated until a very relatively recent day. Isn't that correct? Regulated by the States of the nation, you have the --

MR. GREENAWALT: Yes, that is essentially correct.

Q -- constitutional amendment in the Bill of Rights on firearms which runs the other way.

MR. GREENAWALT: Well, I do not think it runs the other way, because that amendment has not been interpreted to protect the right of individuals to --

Q I know that it's not comparable with respect to alcoholic spirits.

MR. GREENAWALT: That's right. It certainly is true that the history of close regulation of the liquor industry is a much older one than close regulation of the gun industry.

Q And has been pervasive throughout our history.

MR. GREENAWALT: It has been pervasive.

There were --

Q The close regulation, by contrast, with firearms.

MR. GREENAWALT: Yes, Your Honor. There were old statutes before the Constitution was adopted that prohibited concealed weapons, and State regulation of the gun industry has proceeded in this century, and there were federal laws on the books as early as 1934. So when you say recent, it isn't the last few years, but it certainly -- it isn't the long history; the history isn't of such close regulation as existed with respect to the liquor industry.

It's our contention, however, that reasonableness under the Fourth Amendment in this context, in determining what kinds of inspections require warrants, it has to be determined with a view toward an evolving society and the needs of the society at this time. And we do not see how it can be said that despite the greater history of regulation of the liquor industry, that the need for inspections is greater with regard to liquor than it is with respect to lethal weapons.

So our -- and I think that's borne out by the findings of Congress in passing the most recent legislation in 1968, the --

Q Mr. Greenawalt, what in your view, what protection, in your view, does the constitutional right to bear arms reach and protect a dealer in arms?

MR. GREENAWALT: As I understand the way the Court has interpreted that constitutional protection, it essentially

relates to the State's militia, and I think that it doesn't foreclose close regulation of dealers in firearms any more than it forecloses the forbidding of the carrying of certain, or possessing of certain kinds of firearms. So essentially it's our contention that it has no relevance.

Q Mr. Greenawalt, supposing this were the securities industry, which I take it was not regulated at all in 1789, but as of 30 to 40 years ago it is now very heavily regulated. Would you feel an administrative search of this type could be justified of a securities dealer just as well as of a gun dealer?

MR. GREENAWALT: Mr. Justice Rehnquist, we think that you have to look at each area to see whether the test of Camara should apply or the test of Colonnade. We do not think the fact that there is not a long history dating back to the time of the Constitution of inspection without warrants is determinative. But it might well be that the securities industry would be different from the gun industry.

Q Why?

MR. GREENAWALT: Well, I think the -- maybe it would be useful if I say why I think the gun industry, like the liquor industry, is appropriately subject to this kind of inspection. First of all, unlike the ordinary homeowner or the person who had business premises in See, this is not a citizen who is just subject to searches that happen to every

homeowner or every owner of a business office. This is someone who is licensed in a particular industry, in a very closely regulated industry, who knows who the authorities are that have power to inspect, what agency it is that's regulating the gun industry.

So that, first of all, when an agent of the Alcohol, Tobacco and Firearms Division shows up at his premises, he is virtually certain that there is proper authority in that officer to inspect, assuming that there isn't the problem, I think, that there was in Camara or in See that somebody might show up and the homeowner or the warehouse owner wouldn't know whether this fellow really had the power to make a search.

Secondly, and I suppose this is quite crucial, this is not like an ordinary administrative inspection. If there is a fire hazard, faulty wiring, or defective elevators, and the inspector shows up and says, "I want to check your wiring; I want to look at your elevators", if entry is refused, it's unlikely that the condition is going to be corrected within three or four hours, or however long it would take to get a warrant.

If the condition is corrected, the substantial purpose of the administrative regulation is achieved, since the substantial purpose is to correct the wiring or to get the elevator in proper working order. And that just isn't true here in respect to these inspections.

When the inspector shows up, if he has to go for a couple of hours to get a warrant, a gun dealer can just put aside whatever weapons may be illegal; the inspector comes back with his warrant, he makes the inspection, he doesn't find the guns, and then the gun dealer puts the weapons back in their place. I mean, the entire purpose of the inspection would be thwarted.

Well, I think I'll stop there.

Q Is this statute somewhat analogous to the provisions of the National Banking Act that authorized bank examiners to swoop in on a bank without any notice, or without any warrant, and examine the books and count the money in the cash drawer and securities in the safe?

MR. GREENAWALT: It is essentially similar to that, yes.

Q Has that ever been -- has the right of the bank examiner ever been challenged in any federal case that you're aware of? I know of none in this Court. Has it ever been challenged?

MR. GREENAWALT: Not so far as I'm aware, Your Honor. There are a great many statutes of this kind, and I did inquire about some of them. For instance, the Federal Aviation Agency has the power to inspect airports and so on. And I gather that in most instances, that in those activities there is fairly close cooperation and a desire not to upset the

federal agency that's governing, and so the searches are consented to as a matter of course.

That seems to be the typical experience.

Q Mr. Greenawalt, factually there was reference, and you made it, to the fact that this man said, "Well, if that's the law, then of course you can come in."

In the licensing process itself, when one obtains a license of this kind, is he given a copy of the statute?

MR. GREENAWALT: Yes, I believe so. It appears in the record that copies of the statute were mailed to Biswell, and that Agent Hupp saw on his desk or at some point there was a warrant to seize the rest of the rifles the next day, and he returned to the pawnshop, I think at that point he saw a copy of the regulations that certainly Biswell had been notified of the content of the statute and had received the regulations, indicating both what the substantive regulations were and the power of the agents of the division to search his premises; inspect his premises.

Q So your position is that there wasn't any surprise on his part?

MR. GREENAWALT: Well, he did make the claim at trial that he subjectively was surprised, that these weapons were outlawed. But they have been outlawed since 1934, and in fact, although we believe that it was not necessary under Freed vs. United States, the district judge gave a rather

favorable instruction which I think the jury would not have -- under which I think the jury would not have convicted unless he believed that Biswell did know that these firearms were illegal firearms under the National Firearms Act.

Q Mr. Greenawalt, if Biswell had refused Hupp's entry to the locked vault, what then would have been the position?

MR. GREENAWALT: Well, as we think the clear implication of Colonnade is, that if the liquor dealer had refused entry he could appropriately be punished. In fact, the opinion says: whether the imposition of a fine for refusal to permit entry is under the statutory scheme the exclusive sanction, absent a warrant to break and enter.

Q Yes, but a different offense than the one on which he was convicted.

MR. GREENAWALT: That's correct. Yes, we believe that there's general language --

Q Well, Hupp could not have broken in.

MR. GREENAWALT: That's correct. And under Colonnade, he --

Q But if he had broken in and seized, then Colonnade would have made it --

MR. GREENAWALT: Absolutely. Yes.

Q But you rely on "If that's the law, then I guess it's all right"?

MR. GREENAWALT: Well, we rely on that, in that it --

Q Is what?

MR. GREENAWALT: Not as consent in the ordinary sense. Now, I say in the ordinary sense, because there is a qualification that I'd like to make.

Q Well, I notice that Justice Clark's opinion below says that the government argued in that court the appellant consented. You're not making that argument here?

MR. GREENAWALT: I'm certainly not making the argument that this is consent in the ordinary Fourth Amendment sense. It is arguable that it is either consent in the sense that he got a license knowing what the regulatory scheme was, and since it was reasonable he sort of undertook this kind of obligation. There is that argument.

And there is also an argument that can be drawn from the opinion in Davis vs. United States, which suggests that the standard of consent may be different if there is a duty to admit someone or, in that case it was public property, rationing stamps that were involved.

Q Well, Mr. Greenawalt, it is consent in the sense that it serves to negative the use of force.

MR. GREENAWALT: That's correct. It was an acquiescence on lawful authority. That's the position. Yes.

Q That's the point that gets you around Colonnade.

MR. GREENAWALT: Absolutely.

Q I mean if he hadn't acquiesced, you would have had some problems.

MR. GREENAWALT: Absolutely.

Q So it is a critical point.

MR. GREENAWALT: It's a critical point, the fact that he unlocked the warehouse himself.

Q Well, what do you do with Justice Clark's disposition of it on Bumper?

MR. GREENAWALT: Well, we just think that Bumper is not applicable. Bumper is an ordinary Fourth Amendment case, the kind of consent that's involved there is the free, voluntary agreement to do something that you're not legally required to do.

I mean this is the key point in the case, can Congress legally require the licensed firearm dealer to open up his storage room? If it can legally require it, then that eliminates the problem of physical entry that was posed in Colonnade, and it --

Q Well, you're saying, can Congress give the dealer a choice between going to jail and letting people in?

MR. GREENAWALT: That's correct.

Q I mean, you say to him: Either you let us in, or you'll go to jail. But you have your choice; you can go to jail if you don't want to let us in. And we can't break in.

MR. GREENAWALT: That's why we argue that it's not

consent in the ordinary sense.

But again, I return to Mr. Justice Douglas's opinion in Colonnade. It was assumed in that case that he could be punished for refusing to open the storeroom.

Q Was it also assumed in that case that Congress could even authorize the agent to break in?

MR. GREENAWALT: No, it was assumed that it couldn't -- well, as to whether it could, I would say yes, that the implication in the opinion is that Congress could. But that of course is not involved here. We don't argue that Congress has done that.

Assuming that --

Q Well, is it clear to you that if he said, "Yes, I read the law here that you're showing me; but I'm not going to let you in" that he would have been guilty of a criminal violation then and there?

MR. GREENAWALT: Yes. I think one could make an argument on the other side, but that is our position, that 924 -- you don't have the kind of specific language that you had in Colonnade about refusal to enter. But 924 does make it a crime to violate any provision of this chapter.

Now, we believe that the inspection provision gives a pure right to the agent to enter and that therefore, if that entry is refused, that that's a violation of the chapter.

Q Well, it doesn't explicitly, at least, impose

an obligation?

MR. GREENAWALT: There is --

Q There's none of that. It just says Internal Revenue officers may enter. It doesn't say all licensees must permit agents to enter.

MR. GREENAWALT: That's correct, Mr. Justice Stewart. It's --

Q That makes the difference: permitting.

MR. GREENAWALT: Well, you do not have the specific language that you had in Colonnade, but we think that that worry is surplusage, that the clear implication of that provision is that the agents have authority to enter and that therefore the dealer had the duty to allow them to enter.

Even if we were wrong about that, in terms of whether it's criminally punishable, whether 924 spells out the criminal sanction with such clarity that a refusal to allow entry would be a criminal violation, we still think it's clear that the import of the statute is that under the statute dealers are supposed to allow entry. And so then we give up by saying that you have a duty which might result in loss of license, might not result in criminal sanctions. But, nevertheless, a duty legally imposed by Congress.

So that once you do allow the entry, that's an acquiescence of the lawful duty imposed by Congress and that makes the inspection proper, and that the fruits of the

inspection therefore are admissible in evidence in a criminal trial.

Q It's not, therefore, a necessary part of your argument at all that his refusal to permit entry would be a criminal offense under the statute?

MR. GREENAWALT: No. I would say it is a necessary part of our argument that he has a duty that he --

Q That Congress authorized the agents to enter.

MR. GREENAWALT: Yes. And the implication is that you're not supposed to keep the storeroom locked if the agents want to enter. Yes.

Q Right.

MR. GREENAWALT: That is necessary. But the criminal sanction is not.

Q Right.

MR. GREENAWALT: While I deal briefly with a point that is raised in the amicus brief by the Civil Liberties Union, if the inspection was lawful, we think it is clear that the evidence is admissible in a criminal trial. Again going back to Colonnade, that evidence presumably would have been admissible in a criminal trial. The evidence was suppressed in that case. There were criminal sanctions, as there are here, for the violation of the regulation in Colonnade as well as here; and this Court has always assumed that contraband found in the course of a lawful inspection can properly be

introduced in evidence.

In short, in summar, it's our position that Colonnade dictates reversal of the decision below, unless the major reasoning in that opinion is to be repudiated, or the regulation of the gun industry is to be distinguished from the regulation of the liquor industry; and we urge very strongly that in light of present social conditions, it must be that Congress has as much power over the gun industry in these terms as it does over the liquor industry.

I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Reynolds.

ORAL ARGUMENT OF WARREN F. REYNOLDS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. REYNOLDS: Mr. Chief Justice, and if it please the Court:

Our position, as far as Issue One is concerned in the petitioner's brief, is that not only does the gun inspection statute violate the Fifth Amendment rights of the respondent -- I mean the Fourth Amendment, it also violates the Fifth, thereby forcing upon him the obligation to allow inspection he thereby incriminates himself with any criminal act of discovery.

At the outset, I would like to point out to the Court

that this came up, I don't believe that it was relevant to the argument before the Court, but I would like to point out that Mr. Biswell was found innocent of four possession charges of the guns, and found guilty of not being licensed, so, query: What did the jury believe?

I believe we're all confused about that opportunity. But getting to the constitutional question, actually what the petitioner is advocating here is the same thing that Frank did, which this Court overruled later, that is, create an additional exception to general rule, under the constitution, that there must be a search warrant with probable cause before you can search not only private homes but the private portions of the premises of businessmen.

And in Frank, as the Court recalls, the Court in that case said, Well, if this is an administrative search which is essentially civil in nature, no criminal investigation, there are safeguards, then we will allow such a search and call it to be constitutional.

This Court, in the Colonnade case, which See followed, as far as commercial premises are concerned, indicated otherwise.

At the outset I would like to point out that it is the respondent's feeling that there is a much greater issue facing this Court today, other than just the gun statute, which is the subject of this case. As the petitioner cited in

his brief, in his footnotes, there are some dozen pieces of federal legislation existing today which call for inspection of premises of businessmen, all the way from poultry, drugs, on to a new Act, which we have now, the National Safety and Health Practices Act.

Now, prior to the enactment of this Act, most of these Acts were a specialized area of business. And probably didn't step on the toes of as many people as this new Act will. This Act covers all employers whose businesses are engaged in commerce, and it contains penalties of up to \$20,000 in one year for violations.

So I think that --

Q What's this new Act directed to? Is it on pollution?

MR. REYNOLDS: This is the Safety and Health Practices Act, Mr. Justice, it's pointed at unsafe practices on business premises that are injuring employees. And they have an inspection provision in there, no call for a search warrant, and they have very heavy penalties.

Q Is that in your brief? Do you make reference to that?

MR. REYNOLDS: The reference to the statute is in the petitioner's brief, Your Honor.

Q What do you mean, it's a safe-place-to-work concept? Is this it?

MR. REYNOLDS: Yes. Yes, it is, Your Honor.

And there's a reference --

Q That is, if there are facts of unrepaired broken stairways, and things like that?

MR. REYNOLDS: I think it goes to machinery, almost any type of unsafe practice. And the statute calls for inspections, in fact it calls for surprise inspections. It's similar in nature to your banking statute.

But it has far-reaching effects, and I think that --

Q Are we to take it that what you're suggesting is that all of those statutes, like the present one before the Court, violate the Fourth or Fifth Amendment, or both?

MR. REYNOLDS: To please the Court, I think they violate both Amendments. First, they violate the Fourth Amendment because they invade the privacy right that we have under the Fourth; and they also invade our self protection right. But not only that they also invade the Fifth Amendment whereby we're guaranteed a right not to be self-incriminated. And the large thrust of the --

Q Well, what is their testimonial about finding improper guns?

MR. REYNOLDS: If it please the Court, it's evidence against a licensee in this situation, and if, according to --

Q Of course, the guns are evidence against him?

MR. REYNOLDS: Yes. Yes.

Q But how do you get the -- how does that become testimonial? I thought we drew a distinction in Smerber in that line of cases between testimonial and non-testimonial.

MR. REYNOLDS: If it please the Court, I know that this Court overruled Frank, but Frank did indicate that there was also the Fifth Amendment danger in this sort of situation, in that if I, as a condition of a license, have a duty to inspect, which the government contends, then I, in essence, have submitted myself to the government obtaining evidence against me which would be incriminating.

This is what the government is arguing, that actually there's an implied consent here to the search. And that as a requirement of the license, in the giving of a privilege, the government requires that I give up my Fourth and Fifth Amendment rights.

Q What I don't understand is that we've said that handwriting, fingerprints, things of that nature are not testimonial and therefore not involved in the privilege against self-incrimination. Now, I don't quite understand how this issues.

MR. REYNOLDS: Well, I think it's a broad proposition, Your Honor.

Q You're relying, I gather, on Mr. Justice Black's view, that he expressed in --

MR. REYNOLDS: Yes.

Q -- Mapp v. Ohio, and without his view, Mapp v. Ohio could not or would not have been decided the way it was.

MR. REYNOLDS: And I think the Court recognized this in Frank, where they indicated that they recognized the fact that in almost all these search and seizures that were condemned under the Fourth Amendment, they were also condemnable under the Fifth Amendment, in forcing a man to have his premises searched without consent so that he would be incriminated.

Q So you're saying every illegal search is a violation of the Fifth Amendment as well as the Fourth?

MR. REYNOLDS: I believe it is, Your Honor. I think it's more aptly pointed out in this case --

Q At least if it turns up something that tends to prove a criminal violation --

Q And that is introduced against him.

Q -- by the owner of the premises, and that is introduced against him?

MR. REYNOLDS: Yes. And it's introduced against him.

Q Does that apply to all the liquor laws?

MR. REYNOLDS: I think it would, Your Honor, and --

Q Well, that upsets some pretty old cases.

MR. REYNOLDS: I realize that, but I think that the safeguards -- I mean, this is my feeling, there's no specific

language, but I believe that the safeguards that were spoken of in Colonnade were more broad than just the mere procedure that an inspector went through. I think the safeguards, and the only safeguards that any person in this position, who is a licensee, and whose premises must be inspected and if the courts feel that it's in the public interest they must be inspected, then there should be a provision in that Act that any infractions found of a criminal nature would not be used as evidence against him in a criminal proceeding.

This would be similar to the Hayes, the legislation that arose out of the Hayes decision, -- the Haines decision in 1968, the Congress, in the Federal Firearms Act, enacted a statute specifically to overcome the effect in that case.

Q Well, your point is whether or not they can be licensed; is that your point?

MR. REYNOLDS: I beg your pardon?

Q Whether or not they can be required to have a license?

MR. REYNOLDS: No, I'm not disputing the fact that the requirement to have a license is unconstitutional.

Q Well, what would be the purpose of the license?

MR. REYNOLDS: The purpose of the license would be to insure compliance with the Act, insure that a proper person --

Q How could that be found out without inspection?

MR. REYNOLDS: Well, I -- what I am not saying, per se,

is that inspection would not be in these statutes. What I am saying is that on a case-by-case basis this Court and the lower courts look at the situation, that if the public interest is not deterred by requiring a search warrant, then let's protect the privacy interests of the businessman.

These statutes are rapidly encroaching upon all areas of our life, and, on the other hand, if as in Colonnade and if the government is correct --

Q Well, if in Colonnade they had found poisoned whiskey, it's your position that there's nothing the government could do?

MR. REYNOLDS: My suggestion is that they should have gotten a search warrant in that case, Your Honor.

Q But just suppose the poisoned whiskey was sitting on the counter outside.

MR. REYNOLDS: On the counter outside? Well, I think there have been decisions that if it's in a public area, then it certainly can be inspected.

Q Which you're saying in this area?

MR. REYNOLDS: Well, this wasn't a public area.

Q That's what I'm saying.

MR. REYNOLDS: Yes.

Q There's no objection to that. But now if they go in the back there and they find poisoned whiskey, they can't use it?

MR. REYNOLDS: Not unless they have a search warrant.

Q And by the time you got to the door, to get ready to go to get the search warrant, where would you think the poisoned whiskey would be?

MR. REYNOLDS: Well, I believe that we've had several cases, I've cited in my brief, that said there's no problem if one of the officers was hanging around keeping them from disposing of these.

Q Well, actually, the only purpose was -- you don't oppose the licensing, you're not opposed to that?

MR. REYNOLDS: No, I'm not opposed to licensing. I'm not opposed to inspection.

Q You're not opposed to them being licensed under the statute which says you shall let them in?

MR. REYNOLDS: I am opposed to inspections in two, in the alternative: No. 1, --

Q I thought you said you didn't mind inspection, so long as they didn't use it?

MR. REYNOLDS: So long as they -- well, No. 1, I think we have to first look at the area of the businessman's privacy. Now, I think on a case-by-case basis the Court should balance the interest of the privacy guarantee under the Fourth Amendment and --

Q Well, there are a number of reports that a businessman has to file with the Federal and State government.

How much privacy has he got left?

MR. REYNOLDS: He doesn't have much, Your Honor.

But what I'm trying to say is that actually there has to be a balance, on a case-by-case basis: the privacy of the businessman versus the interest of the public for the particular Act to be implemented.

Now, if this Court sees fit to say that the interest of the public is greater than the Fourth Amendment interest of privacy, then at that point it is our position that anything discovered during such an inspection should not be used in a criminal prosecution against him. Revoke his license. Put him out of the business. But let's not force him, as a privilege of doing business, to be subject to criminal prosecution.

This is what happened, as a parallel like I said, in the Haines case. This is what happened with subsequent legislation. They said: From now on, you still have to register guns, but we aren't going to use that evidence against you in a criminal prosecution.

And there's no reason why we can't do that in these inspection statutes. We still accomplish the purpose. We inspect, we see that there is no illegal activity, we are able to trace guns to clear up criminal activity; on the other hand, we don't take away this man's constitutional right to the privilege of doing business. And this Court has condemned that in other cases.

On the other hand, if he doesn't fulfill his obligations as a gun dealer, let's take his license away from him. But let's not throw him in jail because we have granted him a privilege and in turn took away his constitutional right.

This could be done in lots of areas.

Q Well, wouldn't you make this same argument if this had been a proceeding to cancel his license, on the basis of the search that was made?

MR. REYNOLDS: I probably would, Your Honor, but I don't think it would be as strong.

[Laughter.]

There we're dealing with a civil right, here we're dealing with criminal prosecution. We're dealing with sentences up to five years in jail.

Incidentally, he received a two-year sentence.

Q Mr. Reynolds, it seems to me a fair implication from the Court's opinion in the Colonnade case that if your client had been in the liquor business and this same thing had happened, that the search would have been permissible. Do you disagree with that as a statement of the holding or at least the dicta in the Colonnade case?

MR. REYNOLDS: If it please the Court, there seems to be two areas of dicta in that case. On the one hand, the Court seems to attempt to distinguish Colonnade from See and the other case; but, on the other hand, the Court did make a

broad statement that there were not reasonable safeguards in the statute and that, as a consequence, they were going to hold that the Fourth Amendment had to apply.

Then they went on and stated that the Congress did not authorize a remedy of forcible entry when consent was refused, merely a criminal penalty.

But I think that the issue is really narrow in Colonnade, and I think there's enough dicta there to indicate that this Court would look at it on a case-by-case basis. And I don't think that --

Q When you say that, you mean the liquor industry being one case and the gun industry being another?

MR. REYNOLDS: Yes, but I don't think the Court even went as far as to say that even in the Colonnade case, I don't think it went as far as to say that the government has an absolute right to inspect, but you can't bust in the door. They did talk about safeguards in there. They didn't tell us what safeguards, but they did talk about them. And they said there were no safeguards.

And this certainly isn't contradictory to Camara and See.

Q Don't you read Colonnade as permitting an examination, an inventory of every bottle of liquor that was in sight of the agent in the Colonnade case?

MR. REYNOLDS: I don't -- I don't read it quite that

narrowly, Your Honor. I think it's a broader holding. It's unfortunate that it was a forced entry; maybe we'd have a clearer decision today.

But I think that this Court should look at Camara and See, and go over the factors that were gone over by this Court in that case, and determine this case on a case-by-case basis.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reynolds.

Do you have anything further, Mr. Greenawalt?

REBUTTAL ARGUMENT OF R. KENT GREENAWALT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENAWALT: Just very briefly, Your Honor, Mr. Chief Justice. We don't expect the Court or ask the Court in this case to uphold the inspection provisions of every federal statute that provides for inspection without a warrant. We do think that there may be differences and there are differences in the practices now.

For instance, I'm told that in regard to inspections of food, that there's never been any problem because they would simply stop inspecting the food if the inspections weren't permitted. And then, I suppose, the food would be harder to sell.

The FDA has informed people that they have a right not to consent to a search without a warrant, and goes out and

gets warrants. It's acting in accord with the holding of Camara and See. And the considerations there may be quite different than they are in the gun industry.

Q What, Mr. Greenawalt -- do you have the citation of the statute that your colleague mentioned, the more recent statute, the more general one? Is that in the brief anywhere?

MR. GREENAWALT: I'm not sure, Your Honor.

Q He said it was in your brief.

MR. GREENAWALT: Yes.

Q And on Roman iii of your brief there -- ii and iii there are three or four dozen statutory citations.

MR. GREENAWALT: I'm not -- it's footnote 5 on page 10; but I'm not sure precisely which statute he's referring to.

Q Well, this one -- excuse me.

Q The citation is there, I take it, somewhere; if it is, why, that's all right. It will be helpful to get it.

MR. GREENAWALT: It seems to be Title 29, Section 657. I'm not sure whether that's in this footnote or not.

Q 29, 657. That's the one that purports to authorize inspections of any employer engaged in commerce?

MR. GREENAWALT: I'm not sure whether that's an accurate statement of the statute.

In any event, we think that the relevant factors are whether somebody has, namely, undertaken an obligation as a licensee, the reasonableness of the regulation, whether there

is a narrow and closely regulated industry, so that the authority of the inspector is known and the person knows the area to be inspected, how great the invasion of privacy is. Here it reached only business premises. And whether there is a need for surprise, as there is in this case.

Q Was he on notice that if an inspection is made, which comes out as a search, that the material found can be used against him? He hasn't consented to that, has he?

MR. GREENAWALT: I think, Mr. Justice Marshall, he is effectively on notice of that, and I presume that's why he was hesitant to consent to the inspection in this case. He certainly must have viewed it that way.

Q You say the only reason he consented was because he assumed the fact, but there's nothing in that statute that says this information can be used against him.

MR. GREENAWALT: There is nothing, there is not such specific language to that effect, that --

Q There is no language. Well, show me any language to that effect.

MR. GREENAWALT: The only language -- there is no language to that effect, but there are very substantial criminal penalties for a variety of acts, and there is a provision that the Secretary can enter the premises during business hours to inspect. Now, I would think that an ordinary reasonable businessman would know that if a criminal

violation is found during that inspection, that he's in serious trouble and may be prosecuted. And that the agent is going to testify as to what he found in the inspection and is going to produce any contraband that was seized at that point.

Q Mr. Greenawalt, if these guns were inadmissible in evidence in a criminal prosecution, under our cases would it also follow that they could not have been seized at the time?

MR. GREENAWALT: Well, I would move it backwards and say if they can be seized, they can be introduced in a criminal prosecution, yes.

Q Yes.

MR. GREENAWALT: It would be a novel rule to say that contraband which is properly seized cannot be introduced in a criminal prosecution.

Q Well, what if it were held that they couldn't be introduced in a criminal prosecution, could you nevertheless permit their seizure?

MR. GREENAWALT: Well, the ACLU accepts that rule in its amicus brief, it says that you can seize them because they're contraband, but because of the self-protection interest you can't admit them in a criminal prosecution. That, as far as I know, is without support in any opinion that has been written in the Court, in the majority or in the dissent.

Q And how about if you couldn't seize them either, could you use them -- could you use what you saw as a basis for

revoking a license?

MR. GREENAWALT: Well, I would think you would run into the same problem there. Why should you be able to use it to revoke a license if you can't use it in a criminal prosecution? So again I would think the logic of the Court's Fourth Amendment rulings is that if --

Q You don't think really that you could distinguish between permitting a search for the purpose of enforcing the obligations of a licensee as against the evidence to be used in a criminal prosecution?

MR. GREENAWALT: Well, first of all, that would be inconsistent with anything this Court has ever said about the Fourth Amendment. And the Zap case, which is cited in our brief, is an example of inspection without a warrant, they are consented to by contract, which was introduced in a criminal trial; and that's in the assumption of every holding.

Practically, the result of the rule, that kind of rule in this area, would be to require the government to get warrants, I think. It would, since these are very serious violations of the criminal law. Most of the weapons that are forbidden under the National Firearms Act are things like machine guns and bombs and hand grenades, in addition to the sawed-off rifles and shotguns, and if the government, upon finding that, could not use it as evidence in a criminal trial, it would certainly defeat the purpose of the inspection.

I might -- just one point in answer to Mr. Justice Marshall's point, the Colonnade statute did not contain any language of the kind that you suggested, either. And so I again would say this case is governed by Colonnade on that.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenawalt.

Thank you, Mr. Reynolds.

The case is submitted.

[Whereupon, at 10:54 o'clock, a.m., the case was submitted.]

- - -