1981

Recent Development, Constitutional Law: Protection Against Illegal Search and Seizure--Blackie's House of Beef, Inc. v. Castillo, No. 79-1057 & 79-2358 (D.C. Cir. July 22, 1981)

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CONSTITUTIONAL LAW: PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE — *Blackie's House of Beef, Inc. v. Castillo,* No. 79-1057 & 79-2358 (D.C. Cir. July 22, 1981).

The United States Court of Appeals for the District of Columbia has held that, in conducting searches for illegal aliens, Immigration and Naturalization Service (INS) officials need not meet the standard of probable cause applicable in criminal cases. This holding narrows considerably the protection against unreasonable searches guaranteed by the fourth amendment for those individuals suspected of either being or harboring illegal aliens.

On November 17, 1978, INS agents searched the public and private areas of Blackie's House of Beef (Blackie's), a Washington, D.C. restaurant, and found fourteen "illegal" aliens.[1] The search was conducted pursuant to a warrant issued by a federal magistrate, who prior to issuing the warrant held that the INS had established probable cause to believe that illegal aliens were on the premises of the restaurant.[2] The magistrate based this decision on information obtained by the INS from several sources. In particular, the magistrate considered (1) affidavits executed in 1976 by two illegal aliens who were in the custody of the INS in which they stated that, having worked at Blackie's, they knew of other illegal aliens currently employed there;[3] (2) an affidavit executed by a third party in October, 1978 that made a similar allegation;[4] and (3) the sworn statement of an

1. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 8 (D.C. Cir. July 22, 1981). This case consolidated, on appeal, two district court cases, Blackie's House of Beef, Inc. v. Castillo, No. 78-0787 (D.D.C., filed October 5, 1978), and Blackie's House of Beef, Inc. v. Castillo, No. 78-2338 (D.D.C., filed October 5, 1979). Each case addressed the validity of a warrant permitting INS agents to search for illegal aliens at Blackie's. The district court in the first case ruled the warrant invalid because it was issued pursuant to FED. R. CRIM. P. 41, using the standard form warrant. The district court interpreted Rule 41, as well as the language of the form warrant used, as authorizing only searches to seize property. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 6 (citing Blackie's House of Beef, Inc. v. Castillo, No. 78-0787 (D.D.C., filed October 5, 1978). The court of appeals upheld the district court's decision, but it did so on the grounds that INS activity is not criminal law enforcement activity. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 34–35. Since the court's opinion in the second case details the premises for that first decision, see note 21 and accompanying text *infra*, and since the most significant aspects of the court of appeals' opinion concern its treatment of the second case, this article discusses the facts and rulings in the second case, which was based on an INS search of Blackie's on November 17, 1978.

The court of appeals interpreted the term "illegal alien" as referring to a foreign national who enters or remains in the United States in violation of 8 U.S.C. §§ 1101–1503 (Supp. III 1979). Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 3 n.2.

2. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 8 (D.C. Cir. July 22, 1981).

3. *Id.* at 4. While these affidavits were used only to secure the first warrant, one can infer that the information they contained was relevant to the second warrant.

4. *Id.* at 7. The court of appeals characterized this affidavit as being "quite specific" since

INS agent that during a two-day period he had observed numerous persons of "apparent Hispanic descent" working at Blackie's[5] and that Blackie's was a known employer of illegal aliens.[6] The warrant[7] directed the INS to enter the restaurant "in order to search for persons believed to be aliens in the United States without legal authority." [8]

Blackie's subsequently filed suit for injunctive, declaratory, and compensatory relief.[9] The plaintiff alleged that the warrant was issued without the INS having established probable cause as required by the fourth amendment and that the search, as executed, was disruptive and beyond all reasonable limits.[10] The United States District Court for the District of Columbia found the warrant invalid, ruling that, because the warrant failed to describe with particularity each alien sought, it fell short of the fourth amendment requirement that "no Warrant shall issue, but upon probable cause . . . particularly describing . . . the persons or things to be seized." [11]

The issue presented on appeal, then, was whether the warrant satisfied the fourth amendment probable cause requirement. The court held that the INS had indeed met the burden established under the fourth amendment for this particular type of search.[12] The court

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it named several suspected illegal aliens, explained how the affiant knew them to be illegal aliens, and identified where they might be hiding.

5. *Id.*

6. *Id.* This assertion was based upon INS records that showed that, since 1974, the INS had apprehended 48 illegal aliens employed by the restaurant.

7. Unlike the first warrant, this warrant was not a form warrant and FED. R. CRIM. P. 41 was nowhere mentioned. Rather, the authority to search was premised upon 8 U.S.C. §§ 1103, 1357 (1976) of the Immigration and Naturalization Act. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 8 (D.C. Cir. July 22, 1981). See notes 14–19 and accompanying text *infra*.

8. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 8 (D.C. Cir. July 22, 1981). The warrant limited the INS's search to daylight hours and within ten days of the order and specified that the area of search included locked rooms. The INS's search occurred on the day after the issuance of the warrant and began at 11:12 a.m. The agents searched the public dining area, kitchen and second floor offices of the restaurant. The search lasted a total of 23 minutes, during which time INS agents observed ten patrons in the restaurant. Four more patrons entered during the course of the search. *Id.* at 8–9.

9. *Id.* at 5.

10. *Id.*; see note 8 *supra*.

11. *Id.* at 12 (citing U.S. CONST. amend. IV). The district court also objected to the magistrate's failure to indicate, on the face of the warrant, that he had balanced the enforcement interests of the INS against the privacy interest of Blackie's, its employees, and its patrons. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 12 (D.C. Cir. July 22, 1981).

12. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 11 (D.C. Cir. July 22, 1981). The court did not address the question of whether the warrant sufficiently protected the fourth amendment rights of the individuals who were the actual target of the investigation. See notes 38–41 and accompanying text *supra*. The court, however, did allude to the existence of such rights. In a footnote, the court refuted the government's position that Blackie's did not have standing to challenge the entry onto its premises because it was not the target of the investigation. *Id.* at 10 n.5. The court cites Zurcher v. Stanford Daily, 436 U.S. 547 (1978), where the Supreme Court flatly rejected the argument that the fourth amendment

distinguished the particularized description necessary to justify a criminal search warrant from that required in the present case on the ground that the INS activity leading to the detention of illegal aliens was not criminal law enforcement activity.[13] Rather, the court concluded, the appropriate standard of probable cause for INS searches was that enunciated in *Delaware v. Prouse:*[14] sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials.[15] The court found that the warrant in question, being as descriptive as was reasonably possible with respect to the person sought and the place to be searched, did in fact meet the requirements of *Delaware v. Prouse.*[16] In addition, the court held that, overall, the warrant was reasonable, and that, for the purposes of the fourth amendment, it reflected a fair balance between the right to individual privacy and the public need for effective enforcement of immigration laws.

The court began its analysis by noting that the INS derives its authority to search commercial premises, pursuant to a valid warrant, from its general statutory authority to investigate possible violations

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is less protective of the interests of third parties than of the actual target of an investigation. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 10, n.5.

Neither party challenged the proposition that a warrant was necessary to support the INS search of Blackie's. The court noted that, "in light of *Almeida-Sanchez v. United States,* 431 U.S. 266 (1973), the applicability of the warrant clause of the fourth amendment to INS enforcement activities can no longer be doubted." Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 11.

13. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 14 (D.C. Cir. July 22, 1981), (citing Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952)). However, the Supreme Court in *Harisiades* states only that deportation is a civil rather than a criminal procedure; it says nothing about activity leading to the detention of illegal aliens. Moreover, *Harisiades* deals only with the deportation of legal immigrants who had become members of the communist party and not with any violation of the immigration laws. 342 U.S. at 594.

The *Blackie's* court further argued that "[t]here are no sanctions of any kind, criminal or otherwise, upon a knowing employer of illegal aliens." Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 14. The court overlooked the criminal and other sanctions which threaten illegal aliens. The first warrant issued by the magistrate authorized the INS to search Blackie's on the basis that aliens were then "in violation of . . . Title 8, Section 1325 and Section 241(a)(2)." 8 U.S.C. § 1325 reads:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by willfully false or misleading representations or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

14. 440 U.S. 648 (1979).

15. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 28 (D.C. Cir. July 22, 1981) (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

16. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 30 (D.C. Cir. July 22, 1981).

of the Immigration and Naturalization Act (Act).[17] The court stated that the Act reflects Congress's strong interest in effectively enforcing the immigration laws; that is, it is more than a scheme of normative prohibitions devoid of any means of enforcement.[18] Noting that the Act itself does not authorize INS entry into dwellings or commercial premises, the court nevertheless concluded that such searches are permissable under certain circumstances.[19] This conclusion, it noted, was supported by *Almeida-Sanchez v. United States,*[20] which held that a warrantless, random search of an automobile, not qualifying as a border search, is violative of the fourth amendment except in exigent circumstances.[21] The court inferred from *Almeida* that under some circumstances and after a limited showing of probable cause, the INS could obtain a warrant to conduct a search of a specific private area in furtherance of its general statutory powers to question and detain illegal aliens.[22]

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17. *Id.* at 15 (citing Immigration and Naturalization Act, 8 U.S.C. § 1251 (Supp. III 1979)). The Act specifies the requirements for legal immigration into the United States. The court referred specifically to section 287 of the Act, 8 U.S.C. § 1357(a) (1976):

> (a) Any officer or employee of the Service under regulations prescribed by the Attorney General shall have power without a warrant —
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> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
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> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation.

Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 17 (D.C. Cir. July 22, 1981).

18. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 17 (D.C. Cir. July 22, 1981). To support this assertion, the court pointed to the fact that Congress never has tried to reduce the INS's powers or to undercut the effectiveness of its enforcement program. *Id.* Further, as Supreme Court recognition of the public interest in enforcement of the immigration laws, the court cited, *inter alia,* United States v. Martinez Fuerte, 428 U.S. 543 (1976) (border patrol's routine stopping for questioning of vehicles located on a highway held to be legitimate exercise of INS powers and not violative of fourth amendment); United States v. Brignoni-Ponce, 422 U.S. 872 (1975) (border patrol may stop vehicles in general vicinity of border for brief questioning as to residential status). Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 19.

19. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 22 (D.C. Cir. July 22, 1981) (citing 8 U.S.C. § 1357(a) (1976)).

20. 413 U.S. 266 (1973).

21. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 21 (D.C. Cir. July 22, 1981) (citing Almeida-Sanchez v. United States, 413 U.S. 266 (1973)).

22. This inference appears to be a rather attenuated reading of the *Almeida* decision. There, the Supreme Court held that the provision of the Act which authorizes warrantless searches of vehicles within a reasonable distance from the border, 8 U.S.C. § 1357(a)(3), was inapplicable to an automobile search which occurred 25 miles from the border. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The power to search which was in question was based upon explicit statutory language. The Court's decision considered only the extent of that particular statutory power. The Court nowhere discussed the authority of the INS to obtain warrants to conduct searches of a type for which the Act does not specifically provide. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *See also* 8 U.S.C. § 1357(a)(1)-(3) (1976).

Having determined that in certain situations the INS is authorized to search commercial premises pursuant to a valid warrant, the court characterized such searches as administrative law enforcement activity, which, according to the Supreme Court decisions in *Marshall v. Barlow's Inc.*[23] and *Camara v. Municipal Court,*[24] calls for a probable cause standard more flexible than that required for criminal matters.[25] The court rejected the argument that the *Marshall* and *Camara* formulation of probable cause, which departs from the traditional requirement of a particularized description,[26] is appropriate only in the context of routine inspections.[27] Instead, where administrative investigations are involved, the court argued, probable cause may be established by specific evidence of an existing violation as well as by

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However, it is arguable that the Seventh Circuit implicitly has recognized such authority. In Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), the court upheld a preliminary injunction which prohibited INS officials from entering private dwellings occupied by persons of Mexican ancestry unless the officials possessed a valid warrant to search or arrest. A search of a private dwelling, although pursuant to a valid warrant, is nonetheless not a search for which the Act specifically provides.

Also, in United States v. Rodriguez, 532 F.2d 834 (2d Cir. 1976), the Second Circuit ruled that, where INS agents lawfully entered a house suspected of housing illegal aliens and found them there, the agents were justified only in doing the best they could to maintain custody of the aliens and were not justified in searching the house until a search warrant was obtained.

23. 436 U.S. 307 (1978).

24. 387 U.S. 523 (1967).

25. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 23 (D.C. Cir. July 22, 1981) (citing Marshall v. Barlow's Inc., 436 U.S. 307 (1978), and Camara v. Municipal Court, 387 U.S. 523 (1967)). In *Camara* the rule was laid down that "where consideration of Health and Safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." 387 U.S. at 538 (quoting Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)). The Supreme Court in *Camara* determined that the ultimate question, for the purposes of adhering to the fourth amendment, is the reasonableness *vel non* of a particular warrant. 387 U.S. at 536–37. The Supreme Court in *Marshall*, resting on the *Camara* rule, held that "[a] warrant showing that a specific business has been chosen for a search [pursuant to the Occupational Health and Safety Act] on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, would protect an employer's Fourth Amendment rights." 436 U.S. at 307.

However, the language of the Court's opinions in these cases appears to be limited to the particular administrative scheme in question and is not necessarily applicable to all searches deemed to be administrative. This is particularly clear in the *Marshall* opinion. The Court stated that "[t]he reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute. . . ." "In short, we base today's opinion on the facts and law concerned with [the Occupational Health and Safety Act] and do not retreat from a holding appropriate to that Statute because of its real or imagined effect on other, different administrative schemes." *Id.* at 306. For a discussion of the distinctive characteristics of searches conducted pursuant to the Occupational Health and Safety Act, *see* Rothstein, *OSHA Inspections After Marshall v. Barlow's Inc.*, 1979 DUKE L. J. 63, 91.

26. See note 25 *supra.*

27. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 26 (D.C. Cir. July 22, 1981).

a showing of a reasonable legislative or administrative plan requiring routine searches.[28] Thus, the *Marshall* and *Camara* formulations of probable cause were found applicable to situations where the INS seeks a search warrant on the strength of a specific violation of the Act.[29]

The court, in addition, stated that a flexible standard of probable cause was appropriate in this setting because an illegal alien is essentially a "fugitive outside the law," and it is doubtful that his vital statistics will be on record in the United States or that he will use his real name.[30] Thus, the court reasoned, it would be difficult to obtain a more particularized description than that provided to the magistrate in this instance.[31] The court criticized the district court's stringent probable cause requirement as having a highly ironic effect; that is, since the INS could meet the criminal law standard of probable cause only in the rare instance when an INS informer supplies the name and description of a specific violator, the INS would be free to combat isolated cases of illegal immigration but powerless to combat the more serious problem of illegal alien employees congregating at a single place.[32] The court further noted that, even with a more particularized warrant, the INS agents' conduct during the search — the questioning of those employees appearing to be aliens and found in nonpublic areas of the restaurant — would not have differed.[33]

Although the court's opinion arguably protects Blackie's fourth amendment rights, it fails to consider adequately the fourth amendment rights of the individuals who were the actual object of the search.[34] The court's association of INS searches with other administrative searches places the suspected illegal alien on a par with the suspected fire hazard in *Camara* or the suspected safety violations in *Marshall*.[35] Just as the Supreme Court determined in *Marshall* that it is reasonable for the purposes of the fourth amendment to subject businesses to safety inspections based upon less than traditional prob-

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28. *Id.* at 27 (citing Burkhart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1317 (7th Cir. 1980)). As in *Marshall* and *Camara*, the ruling in *Burkhart* also appears to be limited in its applicability. The *Burkhart* opinion, which also dealt with Occupational Health and Safety Act searches, was framed in terms of the particular administrative needs of that Act. *See id.* at 1316–19.

29. Blackie's House of Beef, Inc. v. Castillo, Nos. 79-1057 & 79-2358, slip op. at 27 (D.C. Cir. July 22, 1981).

30. *Id.* at 28.

31. *Id.*

32. *Id.* at 29.

33. *Id.* at 28.

34. See note 12 *supra*.

35. *See generally* Camara v. Municipal Court, 387 U.S. 523 (1967); Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

able cause, the Court of Appeals for the District of Columbia Circuit in *Blackie's* apparently found it reasonable to subject a restaurant owner to INS searches based upon less than traditional probable cause.[36]

The ruling in *United States v. Karathanos*[37] appears to be more consistent with the purpose of the fourth amendment. Faced with a fact situation very similar to that of *Blackie's,* the court in *Karathanos* rejected the notion that the powers granted to the INS by the Immigration and Naturalization Act diminish the standard of probable cause required when a search warrant is sought in connection with a search for illegal aliens.[38] The court held that the standard of probable cause necessary to search for illegal aliens is no less rigorous than that applicable to searches in criminal matters.[39] It also rejected any analogy between INS searches and the type of administrative searches that were found reasonable in *Camara.*[40]

The court of appeals' holding represents a potential move towards the narrowing of fourth amendment rights in the area of INS activity. However, inasmuch as the court did not consider the fourth amendment rights of the individuals who are the actual targets of INS investigations in reaching its decision, the court's opinion does not represent a complete analysis of the scope of the fourth amendment as applied to INS searches.

Stephen James Anaya

ENVIRONMENTAL RESTRICTIONS: EXTRATERRITORIAL REACH OF UNITED STATES ENVIRONMENTAL QUALITY STANDARDS — *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 647 F.2d 1345 (D.C. Cir. 1981).

The United States Court of Appeals for the District of Columbia Circuit has ruled that neither the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act, nor the National Environmental

36. In distinghing between warrantless searches of commercial enterprises and the warrantless INS search of a vehicle 25 miles north of the Mexican border, the Court in *Almeida* stated that "businessmen engaged in federally licensed and regulated enterprises accept the burdens as well as the benefits of the trade, whereas the petitioner here was not engaged in any regulated or licensed business." Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973).

37. 399 F. Supp. 185 (D.C.N.Y. 1975), *aff'd,* 531 F.2d 26 (2d Cir. 1976). This case involved an INS search of a restaurant pursuant to a warrant issued on the strength of an affidavit which was held not sufficient to provide the magistrate with a basis for a finding of probable cause.

38. *Id.* at 188.

39. *Id.*

40. *Id.*