

The Constitutionality of Border Searches

by Scott Forsyth

(From *The Daily Record*)

You approach the border at Lewiston, New York, returning from Toronto. The booth officer motions you to the adjacent building for a “secondary inspection.” You are apprehensive. What can you expect? Under the law, just a “routine” search, if the border patrol does not have reasonable suspicion that you are committing a crime.

What might a “routine” search consist of? A dismantling of your car. Up to a six-hour detention in the building. An on-and-off interrogation about where you have been and with whom you have associated. A fingerprinting. A mug shot. No sleep. A pat down. A kick of your feet to spread your legs wider. Not giving you an explanation for your detention. Finally, your release without charges. Welcome home!

All of the above occurred on December 26 and 27, 2004. The Department of Homeland Security determined that terrorists might use an annual mainstream Muslim religious conference in Toronto to meet to plan operations and raise money. The Department alerted the border patrol at the major crossings to check all attendees. Many were stopped and interrogated. All were released.

Incensed, five attendees, American citizens, sued the Department. They claimed that the government violated their rights to be free from unreasonable searches and their rights to associate. In particular, they asserted that they were less willing to attend future conferences for fear of rough border treatment upon their return. *Tabbaa v. Chertoff*, 2005 WL 3531828 (W.D.N.Y.).

The NYCLU represented the plaintiffs.

Just before Christmas, the federal judge hearing the case in Buffalo dismissed the lawsuit. He bemoaned the length of the stop and the poor communication by the border patrol. However, he pointed out that at the border the power of the government to conduct searches expands to protect our “territorial integrity.” *Id.* at 9. This power is grounded in the Constitution, which gives Congress the authority “(t)o regulate commerce with foreign Nations.” Art. 1, §8, cl.3. Since 1790 Congress has directed “that all persons coming into the United States from foreign countries shall be liable to detention and search” 19 U.S.C. §1582. Consequently, “the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.” *U.S. v. Montoya De Hernandez*, 473 US 531, 538 (1985).

“Qualitatively different” means that the balance leans heavily toward the government. When the border patrol lacks reasonable suspicion, its behavior must be very egregious to be censured. Examples are strip searches, cavity searches, and involuntary x-ray searches. *Id.* at 541. What ties together these searches, in the mind of the judge in Buffalo, is their “high degree of intrusiveness.” *Tabbaa v. Chertoff, supra* at 9-10.

Using this standard of unreasonableness, the judge did not find any aspect of the searches of the attendees to be invalid. He even upheld the six-hour detention. He cited two Supreme Court decisions that “rejected hard-and-fast time limits” for obtaining warrants to continue (but not initiate) detentions. *Id.* at 10.

The judge had greater difficulty with the First Amendment claim. He acknowledged that the plaintiffs’ attendance at the conferences is “constitutionally protected activit(y) that cannot be unduly burdened by the government.” *Id.* at 12, citing *Roberts v. United States Jaycees*, 468

US 609 (1984). But a valid burden can occur. It must “serve (a) compelling state interest . . . that cannot be achieved through means less restrictive of associational freedoms.” *Roberts v. United States Jaycees*, supra at 623.

The plaintiffs conceded that protecting the nation from terrorism was a compelling state interest. In dispute was the availability of less restrictive means.

In a first the judge held that the border environment tilts the less restrictive analysis under the First Amendment in favor of the government just as it does the reasonableness analysis under the Fourth Amendment. He stated that the Department could have targeted for secondary inspection on those two December days all travelers or all Muslim travelers. *Tabbaa v. Chertoff*, supra at 14. The Department did not, somehow making this stop the least restrictive.

Never mind the manpower necessary to widen the scope of the stops. Never mind the massive backup on the Queen Elizabeth Way in Canada that a stop of all travelers would have generated. And never mind the religious and ethnic profiling complaints that would have followed a stop of all Muslim travelers or all those appearing to be Muslim.

The judge also observed that the border patrol limited the means chosen “to routine searches, as opposed to implementing more invasive measures.” *Id.* at 14. He happens to overlook what it said earlier about the border patrol lacking reasonable suspicion that the plaintiffs had committed any crime. The border patrol did not have the constitutional right to engage in “more invasive measures.”

The plaintiffs are appealing the decision. In the meantime, be careful of what foreign conferences you attend. You may face an intimidating “routine” search upon your return.