Tabbaa v. Chertoff, 509 F.3d 89 (2nd Cir. 2007)

Sawsaan Tabbaa was a Muslim-American who attended the Reviving the Islamic Spirit [RIS] conference in Toronto, Canada, from December 24 to 26, 2004. The U.S. Bureau of Customs and Border Protection (CBP) received information that terrorists might attend that conference and obtain the passports necessary to enter the United States. Acting on this intelligence, the CBP detained Tabbaa for four to six hours when she attempted to return to the United States. While detained, Tabbaa was questioned, patted-down, fingerprinted, and photographed. After being released, Tabbaa and other Muslim-Americans who had been similarly treated filed a lawsuit in federal court against Michael Chertoff, the director of Homeland Security. They claimed that their detention and treatment violated the First and Fourth Amendments. The federal district court dismissed their claims. Tabbaa appealed to the Court of Appeals for the Second Circuit.

The Second Circuit sustained the lower federal court. Judge Straub's unanimous opinion held that the Fourth Amendment permitted routine, suspicionless searches at the border, and that the CBP search was routine. He also concluded that the federal government had a compelling interest in searching attendees at religious conferences when intelligence existed that some attendees might be terrorists. Why did Justice Straub believe the searches were routine? Was he correct? Suppose this was a case involving drugs rather than terrorism. Would the same result be justified as a legal matter? As a matter of politics, would you predict federal courts would make the same decision?

STRAUB, CIRCUIT JUDGE:

OXFORD
UNIVERSITY PRESS

. . .

It is well established that the government has broad powers to conduct searches at the border even where, as here, there is no reasonable suspicion that the prospective entrant has committed a crime. . . . Accordingly, a suspicionless search at the border is permissible under the Fourth Amendment so long as it is considered to be "routine." . . .

The precise line between what is routine and what is not routine, however, has not been clearly delineated. . . . The determining factor is not how ordinary or commonplace a search is, but rather "the level of intrusion into a person's privacy." . . .

. . .

Plaintiffs focus on three aspects of the searches in question, which we address in turn. First, plaintiffs urge us to find that their treatment, when considered in its entirety, was not routine because of the combined effect of the various measures employed, including intrusive questioning, photographing, and fingerprinting. We are sympathetic to plaintiffs' argument because there arguably was a stigma associated with being subject to the IDSO procedures. . . . Here, plaintiffs were gathered into a separate building along with several other Muslims who had attended the RIS Conference—and all of these attendees were subject to a form of border processing normally reserved for suspected terrorists. As a result, it is not unreasonable for plaintiffs to have felt there was a stigma attached to the searches. . . .

On the other hand, none of the specific measures taken by CBP was more invasive than the types of searches at the border that courts have regularly held to be routine. Plaintiffs complain that they were

Copyright OUP 2013

required to answer intrusive questions about their activities at the conference, the content of the lectures they attended, and their reasons for attending. But these questions are not materially different than the types of questions border officers typically ask prospective entrants in an effort to determine the places they have visited and the purpose and duration of their trip. . . .

The forcing open of plaintiffs' feet that we assume to have occurred here in at least two instances, while perhaps marginally more invasive than the lifting of a shirt, is not so invasive of plaintiffs' privacy as to be distinguishable from our holdings that pat-down searches are routine.

We also conclude that the fingerprinting and photographing of plaintiffs does not take the searches out of the realm of what is considered routine because, at least in the context of a border search, being fingerprinted (even forcibly) and photographed is not particularly invasive, especially considering that the photographs and fingerprints were used solely to verify plaintiffs' identities and then were discarded from the government's databases. . . .

. . . While plaintiffs were undoubtedly made uncomfortable and angry by the searches, and they may understandably have felt stigmatized, their personal privacy was not invaded in the same way as it would have been had they been subject to a body cavity or strip search, or involuntary x-ray. Because the decisive factor in the analysis is invasiveness of privacy—not overall inconvenience—we find that CBP's searches of plaintiffs, considered in their entirety, were routine in the border context, albeit near the outer limits of what is permissible absent reasonable suspicion.

Plaintiffs' second argument is that the searches were not routine because CBP [Bureau of Customs and Border Protection] agents threatened to detain plaintiffs until they cooperated. We have not previously considered whether a threat of continued detention can turn an otherwise routine search into one requiring reasonable suspicion. However, as noted above, has clear statutory authority to detain persons at the border in order to, inter alia, confirm their citizenship or ensure that they are not bringing illicit goods into the country. Thus, it would no doubt be considered routine for customs officials to continue to detain prospective entrants if, for example, they did not willingly turn over their passports or permit their vehicles to be searched. It is, quite reasonably, not the practice of CBP to allow prospective entrants who fail to comply with inspection to freely leave the checkpoint, as that would enable smugglers, terrorists, and others not entitled to enter the country to continuously try other checkpoints until they find one that provides a less rigorous screening. Thus, CBP's ability to threaten with extended detention those who do not comply with lawful screening measures is an important aspect of the "longstanding right of the sovereign to protect itself" at the border, and therefore is "reasonable simply by virtue of the fact that [it] occur[s] at the border. . ." . . .

Finally, plaintiffs argue that the duration of their detentions—between four and six hours—cannot be considered routine because U.S. citizens do not expect to be held at the border for that length of time. . . .

While a delay of four, five, or six hours is obviously of more serious magnitude than a delay of "one to two hours," "common sense and ordinary human experience" suggest that it may take up to six hours for CBP to complete the various steps at issue here, including vehicle searches, questioning, and identity verification, all of which we have already found to be routine. The additional four hours, while certainly inconvenient, thus cannot be considered an unexpected "level of intrusion into a person's privacy," . . . that by itself would render the searches non-routine. Accordingly, the searches and detention of plaintiffs were routine in the border context and thus did not violate the Fourth Amendment.

Plaintiffs next argue that the searches and detentions violated their First Amendment right of freedom of expressive association. Plaintiffs unquestionably had a protected right to express themselves through association at the RIS Conference. . . . Participation in the RIS Conference—a social, religious, and cultural gathering—falls squarely within the forms of associational activity protected by the First Amendment.

. . .

. . . Government action can constitute a direct and substantial interference with associational rights even if there is no prior restraint and no clear chilling of future expressive activity. For example, when government action substantially penalizes members of a group for exercising their First

Copyright OUP 2013

Amendment rights, that penalty in itself can constitute a substantial burden, even if the government did not prevent the group from associating and regardless of any future chilling effect. . . .

Here, plaintiffs suffered a significant penalty, or disability, solely by virtue of associating at the RIS Conference: they were detained for a lengthy period of time, interrogated, fingerprinted, and photographed when others, who had not attended the conference, did not have to endure these measures. Moreover, even though some of the plaintiffs expressed a willingness to attend future RIS conferences, the prospect of being singled out for such extensive processing could reasonably deter others from associating at similar conferences. . . .

Having found a cognizable burden, we must next determine the appropriate level of scrutiny to employ in evaluating defendants' actions. The District Court applied the test established in *Roberts v. United States Jaycees* [1984]: an infringement on associational rights is not unconstitutional so long as it "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." . . . . [W]e believe this test to be appropriate here.

It is undisputed that the government's interest in protecting the nation from terrorism constitutes a compelling state interest unrelated to the suppression of ideas, and that the IDSO was instituted to serve this compelling state interest. The only question, therefore, is whether this interest could have been "achieved through means significantly less restrictive of [plaintiffs'] associational freedoms."

The government has established that it could not have been. As the District Court observed, "[i]nterception and detection at international border crossings is likely the most effective way to protect the United States from terrorists and instruments of terrorism." . . .

. . . Importantly, the IDSO's reach was carefully circumscribed: it applied only to those conferences about which the government had specific intelligence regarding the possible congregation of suspected terrorists, it was limited to routine screening measures, and it was confined to those individuals, regardless of their religion, whom CBP could establish had attended the conferences in question.

. . .

. . . [T]he government did not make attendance at or participation in the RIS Conference unlawful, and the purpose of the government's actions was not to prevent people from associating at the conference, but rather to prevent terrorists from entering the country. Defendants' actions are not per se unconstitutional simply because innocent U.S. citizens such as plaintiffs were subject to enhanced processing techniques and thus experienced an indirect burden on their right to associate.

. . . According to plaintiffs, rather than instituting the IDSO, the government could have surveilled the individuals identified in the intelligence as being associated with terrorism, or stopped at the border only those conference attendees whom the government had reason to believe had personally interacted with suspected terrorists. These are plainly not viable alternatives. As defendants point out, the U.S. government cannot freely conduct surveillance on private individuals in Canada, and, given that approximately 13,000 people attended the RIS Conference, it is entirely unrealistic to expect the government to have been able to identify and keep track of all those who personally interacted with suspected terrorists who attended the conference. Indeed, the IDSO was necessary precisely because of the infeasibility of knowing who at the conference may have interacted, and potentially exchanged identification or travel documents, with suspected terrorists.

Plaintiffs also suggest that CBP could have instituted a graduated process of inspection such that only those conference attendees about whom the government had individualized suspicion of a terrorist link or other criminal activity would have been subject to fingerprinting and photographing. Plaintiffs place great emphasis on the fact that in February 2005—two months after the searches at issue here—CBP modified its fingerprinting policy "to clarify that fingerprint checks should be run if there is at least one articulable fact concerning whether a traveler may lawfully enter the United States. . ." . . .

Plaintiffs' argument fails for three reasons. First, CBP could have modified its fingerprinting policy for a host of reasons—such as political pressure or fear of litigation—unrelated to the policy's effectiveness in preventing terrorism. Second, even assuming that plaintiffs are correct about how the revised policy would be implemented, that does not mean it was unnecessary for CBP to fingerprint and

OXFORD UNIVERSITY PRESS

Copyright OUP 2013

photograph plaintiffs when they crossed the border in late 2004, especially given the nature of the intelligence the government received in advance of the RIS Conference. That intelligence gave rise to a reasonable concern that terrorists might use the conference to exchange "travel or identification documents such as passports or driver's licenses." . . .

Finally, *Roberts* does not require the government to exhaust every possible means of furthering its interest; rather, the government must show only that its interest "cannot be achieved through means significantly less restrictive of associational freedoms." . . . Plaintiffs' argument supposes that it would have been acceptable for CBP to have segregated conference attendees into the secondary search area, rigorously searched and questioned them, and detained them for a considerable period of time while running their names through various government databases—so long as plaintiffs were not also fingerprinted and photographed absent individualized suspicion. We do not believe the extra hassle of being fingerprinted and photographed-for the sole purpose of having their identities verified—is a "significant[]" additional burden that turns an otherwise constitutional policy into one that is unconstitutional.

. . .

We conclude that defendants have made this necessary showing [of the compelling interest needed to justify restrictions on free exercise rights] for substantially the same reasons that their actions satisfied the Roberts test: given the intelligence the government received, subjecting RIS Conference attendees to enhanced processing at the border-including fingerprinting and photographing—was a narrowly tailored means of achieving the government's compelling interest in protecting against terrorism.

Our conclusion in this regard is informed, in part, by our belief that some measure of deference is owed to CBP due to its considered expertise in carrying out its mission of protecting the border. In the prison context, it is well established that courts, when applying strict scrutiny under RFRA (Religious Freedom Restoration Act), "must give due deference to the judgment of prison officials, given their expertise and the significant security concerns implicated by prison regulations." . . . While the border context is admittedly far from analogous to the concerns faced by prison officials, in the circumstances present in this case—in which border officials potentially faced a highly significant security issue based on the intelligence they received—we believe that some measure of deference is owed to CBP's administrative decisionmaking. CBP officials believed that because there was a potential that conference attendees would exchange passports or other identification documents with suspected terrorists, an enhanced screening process, including fingerprinting and photographing, was necessary to confirm the identities of conference attendees attempting to cross the border. Given CBP's extensive expertise in securing the border, and the fact that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border[,]" we are unwilling to conclude, as plaintiffs would have it, that fingerprinting and photographing were not actually necessary to ensure that suspected terrorists leaving the RIS Conference did not enter the United States. . . . Rather, we find that given the compelling governmental interest at issue here (i.e., the prevention of potential terrorists from entering the United States), and the use of routine procedures by CBP to confirm the identities of people entering the United States, CBP's actions did not violate plaintiffs' rights, even under heightened scrutiny.

Accordingly, the District Court was correct in finding that plaintiffs' claims under RFRA and the free exercise clause of the First Amendment fail.

. . .

OXFORD UNIVERSITY PRESS

Copyright OUP 2013