

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: STEVEN DEWAYNE BOND, Petitioner v. UNITED  
STATES

CASE NO: 98-9349 c-2

PLACE: Washington, D.C.

DATE: Tuesday, February 29, 2000

PAGES: 1-60

**REVISED**

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY  
MAY 11 2000  
Supreme Court U.S.

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

2000 MAY 11 A 9:20

RECEIVED  
MAY 11 2000  
9:20 AM  
MARSHAL'S OFFICE  
U.S. SUPREME COURT

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X  
3   STEVEN DEWAYNE BOND,                   :  
4                    Petitioner                    :  
5            v.                                    :   No. 98-9349  
6   UNITED STATES                                :

7   - - - - -X

8                                   Washington, D.C.  
9                                   Tuesday, February 29, 2000

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:05 a.m.

13   APPEARANCES:

14   M. CAROLYN FUENTES, ESQ., Assistant Federal Public  
15            Defender, San Antonio, Texas; on behalf of the  
16            Petitioner.

17   JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor  
18            General, Department of Justice, Washington, D.C.; on  
19            behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	M. CAROLYN FUENTES, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JEFFREY A. LAMKEN, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	M. CAROLYN FUENTES, ESQ.	
10	On behalf of the Petitioner	57
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 98-9349, Steven Dewayne Bond  
5 v. The United States.

6 Ms. Fuentes.

7 ORAL ARGUMENT OF M. CAROLYN FUENTES

8 ON BEHALF OF THE PETITIONER

9 MS. FUENTES: Mr. Chief Justice, and may it  
10 please the Court:

11 Mr. Bond's case presents the question whether a  
12 search occurs for purposes of the Fourth Amendment when a  
13 law enforcement officer manipulates a bus passenger's  
14 carry-on luggage to determine its contents. If  
15 manipulation of luggage is not a search, then law officers  
16 will be able to squeeze and feel carry-on luggage, as  
17 Agent Cantu did in Mr. Bond's case, free from judicial  
18 scrutiny in criminal cases and without any Fourth  
19 Amendment requirement that their actions be reasonable.

20 Over 30 years ago, in Terry v. Ohio, this Court  
21 said that it is sheer torture of the English language to  
22 suggest that a careful exploration all over the outer  
23 clothing of a person's body is not a search. The same can  
24 be said in this case. The principles in Terry, as well as  
25 those in Dickerson v. Minnesota, govern this case.

1 Now, the Government says that they do not and  
2 says, instead, this Court's public exposure cases govern  
3 the determination in Mr. Bond's case. The flaw in the  
4 Government's argument is that it fails to recognize that  
5 on the line between Dickerson and Terry on the one hand  
6 and the public exposure cases on the other, Mr. Bond's  
7 case falls far closer to the facts, circumstances, and  
8 legal principles in Dickerson and in Terry.

9 For example, Terry and Dickerson involved  
10 searches of outer clothing being worn by a person. Outer  
11 clothing, the pockets of outer clothing in particular,  
12 serve the function of being a repository of personal  
13 effects. We commonly carry our personal effects on our  
14 clothing, in our pockets. A travel bag, like the one Mr.  
15 Bond carried, serves the same function.

16 QUESTION: But the difference -- the difference,  
17 Ms. Fuentes, if there is one, I mean, the difference  
18 asserted, is whether there's a reasonable expectation of  
19 privacy, and you do have a reasonable expectation of  
20 privacy in your clothing. You don't expect somebody to  
21 come up and frisk you.

22 MS. FUENTES: I think that's --

23 QUESTION: But you don't have a reasonable  
24 expectation of privacy, your opponents will say, in a soft  
25 bag that you chuck into a -- you know, a carrier on the

1 airplane. You know that other passengers can go there and  
2 feel it.

3 MS. FUENTES: Well, of course, we dispute that,  
4 Your Honor. We think that Mr. Bond did have a reasonable  
5 expectation of privacy in his luggage, and he had a  
6 reasonable expectation to be free from a Government  
7 tactile examination of that luggage.

8 QUESTION: But -- now, how can that be? Did he  
9 have a reasonable expectation other passengers would not  
10 be able to feel the luggage and see what was in it?

11 MS. FUENTES: He reasonably expected that other  
12 passengers might push or move the luggage if they needed  
13 to make room for their own, but that is not what Agent  
14 Cantu did.

15 QUESTION: They couldn't have squeezed it?

16 MS. FUENTES: I think they could have squeezed  
17 it, but again that is not what Agent Cantu did. When we  
18 get on a bus and we put our luggage overhead, the  
19 expectation is that if another passenger needs to come  
20 aboard and needs room in that luggage bin, maybe he will  
21 push it, maybe he will pull it, I think maybe he could  
22 squeeze it.

23 QUESTION: But there are some nasty passengers  
24 who may go beyond that. Let's analogize it to the  
25 situation where you leave your window shades up. Now, you

1 don't expect your neighbors to peek into your room, but  
2 you don't have a reasonable expectation of privacy, and  
3 the police are entitled to observe what is going on in the  
4 room if you leave the shades up, isn't that right?

5 MS. FUENTES: In that --

6 QUESTION: Now, it may be a nasty thing for  
7 people to look into your room.

8 MS. FUENTES: In that case, I think it's  
9 correct, Your Honor, but I think one of the major  
10 distinctions between Mr. Bond's case and the public  
11 exposure cases are that in fact those observa -- the  
12 observations in those cases and in the example that you  
13 just gave took place from public thoroughfares, and this  
14 Court has found that people don't have a reasonable  
15 expectation to be free of visual observations made by  
16 those who are in a vantage point where they have a right  
17 to be. That's --

18 QUESTION: We had a case that involved an  
19 apartment building and the police went right next to the  
20 particular apartment. It wasn't a public road, and it  
21 wasn't the air space above.

22 MS. FUENTES: I believe you're talking about  
23 Minnesota v. Carver --

24 QUESTION: Yes.

25 MS. FUENTES: -- Justice Ginsburg, and I think

1 in that case it was still from a public vantage point. A  
2 street, whether it's an open public thoroughfare or open  
3 area next to a house, is entirely different from the  
4 surface of Mr. Bond's luggage.

5 QUESTION: Well, but you would have to  
6 contend -- well, you don't contend that the aisle of an  
7 interstate bus is not a public place for this purpose? I  
8 mean, Agent Cantu had a perfect right to be in the aisle.

9 MS. FUENTES: He did, and if he had made his  
10 observations from the aisle, we might have a bad case, but  
11 he did not. The observations that he made about the  
12 contents of Mr. Bond's luggage were made from the --  
13 through the surface of his luggage. The observations  
14 weren't made just from the bus. They were made from the  
15 luggage.

16 QUESTION: Yes, but he was standing in the  
17 aisle. Isn't that the point of the analogy? He did the  
18 feeling while he was standing in an aisle where at least  
19 public to the extent of bus passengers were free to be,  
20 just as the person who peeps in the window is doing so, on  
21 your reasoning, from a place where that person has a right  
22 to be.

23 MS. FUENTES: I don't think so.

24 QUESTION: Isn't --

25 MS. FUENTES: I'm sorry.



1 QUESTION: Go ahead.

2 MS. FUENTES: I don't think that is the analogy,  
3 and I think the Court recognized as much in the Dickerson  
4 case. The Dickerson case involved a pat-down of a  
5 person's outer pockets.

6 QUESTION: Okay, but it seems to me, and this  
7 was what I was going to ask you to comment --

8 MS. FUENTES: Certainly.

9 QUESTION: -- on. What is crucial is not where  
10 they were standing, but what they were doing.

11 MS. FUENTES: Correct.

12 QUESTION: Don't we draw a line between looking,  
13 which is basically free, and feeling, which is not  
14 basically free?

15 MS. FUENTES: Yes, I would agree, and that is  
16 another point that distinguishes Mr. Bond's case from the  
17 public exposure cases.

18 QUESTION: What do I do with the following  
19 problem for me, which is, I fly quite a lot up to Boston  
20 and so forth, and I put bags all the time in the upper  
21 thing, and people are always moving them around. they  
22 push them, they lift them up, they move them to other  
23 places, and if they're soft they would feel just what was  
24 in the inside. Now, that happens all the time, and I do  
25 it myself, frankly. I move somebody else's bag and push

1 mine in, and I imagine the interstate bus here was no  
2 different.

3 So if that happens all the time, how can I say  
4 that your client has some kind of special expectation,  
5 since in my own experience, people are always handling  
6 this soft luggage?

7 MS. FUENTES: I think that that experience is  
8 the reasonable expectation. They need to move the  
9 luggage, and so they push it or they move it. Agent Cantu  
10 was not in that position. I'll give you an example. If  
11 you're on the plane and there are only three people on  
12 there, and there's luggage down the hall and there's  
13 luggage over your head, you don't expect that someone is  
14 going to come into the plane and start squeezing and  
15 moving your luggage when --

16 QUESTION: Well, Ms. Fuentes, you know, we don't  
17 have a lot of evidence here about exactly what Agent Cantu  
18 did. It's very sparse. He felt -- the district court  
19 said only that Agent Cantu felt the bag, so we really  
20 don't know what's involved, more than the passenger  
21 shoving it around situation.

22 MS. FUENTES: I think -- excuse me, Your Honor.  
23 I think we do have a good idea of what was involved if we  
24 look at Agent Cantu's testimony itself. Agent Cantu said  
25 he squeezed the bag, and he described what he felt. He

1 felt a brick of methamphetamine, which is a rectangular  
2 object. Now, that brick was wrapped in --

3 QUESTION: I thought it turned out it was an  
4 oval, not a brick at all.

5 MS. FUENTES: It was wrapped with duct tape  
6 until it became oval-shaped. Then it was wrapped in a  
7 pair of pants. Then it was placed inside a canvas bag  
8 which was closed to the public.

9 QUESTION: How large was the brick, Ms. Fuentes?  
10 Does the record show that?

11 MS. FUENTES: The brick was approximately 4 to 5  
12 inches wide by 6 to 7 inches long. It doesn't give the  
13 third dimension of the brick.

14 QUESTION: There's a difference here in what the  
15 police officer did and what the fellow passenger does to  
16 Justice Breyer's luggage. In this case the purpose of the  
17 manipulation, or the touching of the bag, was to see what  
18 was inside. That, I presume, is not the purpose of a  
19 passenger.

20 On the other hand, I think this is a difference  
21 that the law ignores, is it not? We do not ask about the  
22 subjective intention --

23 MS. FUENTES: We do --

24 QUESTION: -- of the person that touches the  
25 bag, or do we?

1 MS. FUENTES: I --

2 QUESTION: Or is there something like an  
3 objective purpose that we look -- I think this is one of  
4 those differences to which the law is blind, or am I wrong  
5 about that?

6 MS. FUENTES: No, I don't think the law is blind  
7 to it. I think what the law says is that we -- is that an  
8 officer's subjective motive, or subjective intent, may not  
9 serve to invalidate objectively justifiable behavior, and  
10 I think that was the Court's holding in the Whren case.

11 QUESTION: How do we distinguish the dog-sniff  
12 cases, where we've upheld the use of police dogs to sniff  
13 luggage for narcotics?

14 MS. FUENTES: There are multiple factors, but I  
15 think the most important one is that a dog-sniff is  
16 incapable of revealing anything to the police except the  
17 presence of contraband.

18 QUESTION: Well, just to conclude my previous  
19 question, do you submit the case on the proposition that  
20 the purpose of the search, or, rather, the touching, is  
21 irrelevant?

22 MS. FUENTES: No. I don't think the purpose is  
23 irrelevant to the extent --

24 QUESTION: All right. Do you have some  
25 authority for that proposition?

1 MS. FUENTES: Yes, I hope so.

2 (Laughter.)

3 MS. FUENTES: To the extent that the purpose  
4 serves to describe what the officer has done, I think the  
5 Court considers it. I'm not saying look at what was in  
6 Agent Cantu's head. I'm saying, look at what Agent Cantu  
7 did. Now, he told you --

8 QUESTION: What he do that's different, because  
9 if you're -- that's -- Justice Kennedy had exactly the  
10 question that I was thinking. Purpose doesn't seem  
11 relevant. I mean, inso -- because if it were relevant,  
12 obviously, if you fly the plane over and look down at the  
13 marijuana fields, your purpose is a search if you're a  
14 policeman, and not if you're not. The Peeping Tom example  
15 that Justice Scalia gave is the same.

16 Did he do something different? What?

17 MS. FUENTES: Let me go back first to the  
18 purpose, and I think the airplane example is a very good  
19 one. The purpose, the purpose of looking down from an  
20 airplane doesn't make any difference, because the officer  
21 had a justifiable reason to be in the air. It's an open,  
22 public air space, and he can be there and he can look down  
23 just like anybody else can.

24 In Mr. Bond's case, the officer did not have the  
25 same sort of right to have his hands on Mr. Bond's



1 luggage, because the inside of a bus and the surface of  
2 luggage is not like open public air space or other --

3 QUESTION: Well, did he have as much of a right  
4 as a fellow passenger would have --

5 MS. FUENTES: I don't --

6 QUESTION: -- to manipulate the luggage?

7 MS. FUENTES: I don't think so, but I don't know  
8 the Court has to reach that issue for the second part of  
9 the question that Justice Breyer asked --

10 QUESTION: What does the right make any -- why  
11 does the right make any difference? I mean, let's take  
12 garbage standing at the curb. There's another example  
13 where purpose makes no difference. Do you have a  
14 reasonable expectation of privacy in your trash? We've  
15 said not, because anybody going by can paw through it.

16 Now, that's not a nice thing to do, and it  
17 doesn't make any difference whether somebody paws through  
18 it because he's a busybody or whether a police officer  
19 paws through it.

20 Now, I don't see why there's any difference in  
21 this pawing over the luggage.

22 MS. FUENTES: Well --

23 QUESTION: Anybody could do it. It would not be  
24 a nice thing for a passenger who sees a nice bag there --  
25 doesn't need the room to -- doesn't need to move it, but

1 says, I wonder what's in that --

2 MS. FUENTES: Well --

3 QUESTION: -- and a passenger can do that.  
4 That's not a nice thing to do. It doesn't make any  
5 difference whether it's a nice thing to do. It can be  
6 done.

7 MS. FUENTES: In deciding reasonable  
8 expectations of privacy I think this Court looks at myriad  
9 factors, not just one or two, and in the garbage --

10 QUESTION: Do you agree with Justice Scalia -- I  
11 don't mean to interrupt you -- that if you're a  
12 passenger -- first of all, I take it your -- a bus case  
13 isn't like an airplane because you don't have the --  
14 luggage doesn't go through any kind of a detector. I  
15 suppose you have much less expectation of privacy on  
16 airplanes than you do on buses. But do you agree that a  
17 person has no right to tell someone else, don't squeeze my  
18 bag to see what you can find, what's in it, just --

19 MS. FUENTES: No.

20 QUESTION: What?

21 MS. FUENTES: No, I don't agree.

22 QUESTION: So you don't agree with the premise  
23 of Justice Scalia's question, then?

24 MS. FUENTES: Correct. I don't think -- a  
25 person retains the right to say, get your hands off of

1 luggage, and that helps to define this reasonable  
2 expectation. But I --

3 QUESTION: You think a person has a right to  
4 say, don't paw through my garbage?

5 MS. FUENTES: Yes.

6 QUESTION: You think a person has a right to  
7 say, don't peek into my windows?

8 MS. FUENTES: Yes, but --

9 QUESTION: I mean, indeed, there are some laws  
10 against Peeping Toms.

11 MS. FUENTES: I agree, but as to --

12 QUESTION: But there are Peeping Toms, and when  
13 you leave your blinds open, you know you're exposing  
14 yourself to them.

15 MS. FUENTES: As to the garbage first, the  
16 privacy interest in garbage is far different than the  
17 privacy interest -- the expectations may be the same, they  
18 may be similar, but the privacy interest in garbage is far  
19 different from the privacy interest in luggage.

20 QUESTION: Did you make the analogy to abandoned  
21 property? If you put your garbage out there, it's gone?

22 MS. FUENTES: Correct.

23 QUESTION: If somebody has a piece of luggage,  
24 and the police officer says, whose is this, and nobody  
25 answers, then it's abandoned.

1 MS. FUENTES: Then it's abandoned.

2 QUESTION: Is there -- I beg your pardon.

3 QUESTION: But here, I think your case is  
4 resting on the difference between ordinary pushing and  
5 shoving and taking a bag and feeling around like this,  
6 which, at least from my experience on airlines, doesn't  
7 happen. People jam their stuff in. They don't take it  
8 out and feel here and there.

9 MS. FUENTES: That is one of the major points  
10 upon which Mr. Bond's argument rests, and what Mr. Bond  
11 did, Justice Breyer -- excuse me. What Agent Cantu did to  
12 Mr. Bond's luggage that was different than what other  
13 passengers do is demonstrated by the agent's testimony.  
14 Any passenger pushing or pulling luggage, or even  
15 squeezing luggage, grasping it, would not have been able  
16 to discern the edges of a rectangular brick which had been  
17 wrapped in duct tape until it became oval, placed in a  
18 pair of pants, wrapped in a pair of pants, put in a canvas  
19 bag --

20 QUESTION: Well, I'm not sure that's right,  
21 Ms. Fuentes. I mean, supposing you had someone who had  
22 the same experience Mr. Cantu had, he now retired from the  
23 Government service and was simply pushing and shoving  
24 without any particular motive, he could have discerned the  
25 same thing that Agent Cantu could, could he not?

1 MS. FUENTES: No. I think there's a difference.  
2 I think Agent Cantu's experience is what led him to think  
3 that what he felt was narcotics, but it's simply the same  
4 sort of physical manipulation that anybody could use in  
5 finding out what that brick felt like. I don't think  
6 anyone, whether they'd been trained or not, can feel the  
7 details that Agent Cantu described unless they are  
8 manipulating that bag in a way that is significantly  
9 different from the way passengers are reasonably expected  
10 to push and --

11 QUESTION: You don't mean just with respect to  
12 purpose or intent --

13 MS. FUENTES: Correct.

14 QUESTION: -- but you mean a lot more  
15 manipulation.

16 MS. FUENTES: In the manner in which the bag was  
17 manipulated, that's correct.

18 QUESTION: You want us to decide these cases on  
19 that basis, decide in each case what degree of  
20 manipulabil -- manipulation would have had to occur to --  
21 if it was a bigger brick, it might have been -- I'm very  
22 unlikely to come up with a rule like that, I'll tell you.  
23 It seems to me --

24 MS. FUENTES: That is --

25 QUESTION: -- you can either squeeze the bags or



1 you can't squeeze the bags, but I don't think we're likely  
2 to make it depend upon how much you squeezed it.

3 MS. FUENTES: Well, I think that is a very hard  
4 question, and I think --

5 QUESTION: It is.

6 MS. FUENTES: -- the issue in Mr. Bond's case  
7 could be decided by saying, officers cannot squeeze bags.

8 QUESTION: On the degree of manipulation point  
9 and the questions put to you by Justice Stevens and  
10 Justice Scalia, it does seem to me that a passenger does  
11 not have the right to start manipulating my luggage to see  
12 what's in it. Is that a tort? It's not a conversion.  
13 There's no asportation of the property. I just -- it's  
14 not an assault, because an inanimate thing can't be  
15 assaulted.

16 MS. FUENTES: I'm not certain that it rises to  
17 the level of a tort.

18 QUESTION: I'm not sure it does, although it  
19 seems to me that it's -- there's some level of wrong  
20 occurring there.

21 MS. FUENTES: If the officer -- if Agent --  
22 Agent Cantu took that bag and he converted it to his own  
23 purpose. It doesn't amount to a conversion because it  
24 wasn't so intrusive that it would be a conversion, but for  
25 a dispossession of property in tort law there are some

1 damages. I don't know if it would rise to that level, but  
2 I think the important point is that tort law provides a  
3 privilege to Mr. Bond to stop even harmless interference  
4 with his luggage.

5 QUESTION: Did he object?

6 MS. FUENTES: No, he did not.

7 QUESTION: And how is it different physically  
8 from, say, what happens occasionally -- one of the flight  
9 attendants, or maybe a passenger will take my canvas bag  
10 out, they'll be holding it, they'll move it to a different  
11 compartment, they'll push it around, and I guess they can  
12 feel something. Now, how -- physically what happened, how  
13 is it different from that?

14 MS. FUENTES: Because Agent Cantu was able to  
15 feel more than the actions you described --

16 QUESTION: How do we know that? How do we know  
17 that?

18 MS. FUENTES: By his testimony. By the fact  
19 that it was a rectangular brick whose edges were so  
20 disguised by duct tape that it was described as an oval  
21 mass, to be able to feel those rectangular edges through  
22 duct tape, through --

23 QUESTION: All right. So one way you might win  
24 is, we'd say there's a difference between the manipulation  
25 physically and taking the bag out and moving it from one

1 place to another. There had to be more here. Is there  
2 any other way you could win?

3 MS. FUENTES: I think so, Your Honor, and I  
4 think it goes back to expectations of privacy, and not to  
5 purpose, but to how -- what means are used to achieve that  
6 purpose. For example, reasonable expectations of privacy  
7 I think cannot rest on the extremes of conduct, because we  
8 have to look at what we as a society, a civil society,  
9 expects is the norm, and we expect that maybe the flight  
10 attendant, or maybe someone else will push or move our  
11 luggage.

12 But when a uniformed officer comes in and starts  
13 squeezing all of the luggage, clearly from his actions you  
14 can see he's trying to find out -- and I'm not talking  
15 motive, I'm talking manner. You can see that he's trying  
16 to find out what's in your luggage, that is an incredible  
17 intrusion on personal security.

18 QUESTION: You know, I'd feel more sympathetic  
19 to your client, you know, from this terrible intrusion on  
20 his privacy if there were not some very easy way to avoid  
21 it, which is called hard luggage. If he's really  
22 concerned about the privacy of the contents of whatever  
23 he's carrying, put it in hard luggage. What's the big  
24 deal?

25 MS. FUENTES: Well, I think that's very

1 demonstrative of what a reasonable expectation of privacy  
2 is. The way -- he kept it with him on the bus. I don't  
3 think that can be discounted. I think that probably a  
4 passenger's first line of defense, and best line of  
5 defense against others, is keeping his luggage with him.  
6 Hard-backed luggage, of course, would have helped --

7 QUESTION: Second after that is getting a hard  
8 bag, but if he gets a soft bag he knows people are going  
9 to be able to feel things through it.

10 MS. FUENTES: I -- he expects that if he doesn't  
11 like the way people are feeling it, he can stop them, and  
12 action by a police officer is different.

13 In addition to that, if you look at the way  
14 Mr. Bond wrapped his methamphetamine brick, that wrapping  
15 would have withstood any discoveries by passengers who are  
16 moving luggage in the way that we would reasonably expect.

17 QUESTION: Well, would you agree that the  
18 passenger had a right to tell the policeman, don't feel my  
19 bag?

20 MS. FUENTES: I think he did. I think he had a  
21 right to.

22 QUESTION: But he didn't do that.

23 MS. FUENTES: No. Agent Cantu came on this bus  
24 with a show of authority. The bus was pulled off of IH-  
25 10 for border for an immigration inspection --

1           QUESTION: Well, we've been through that in  
2 Florida and Bostick, in which we said that the police  
3 officer with a show of authority -- two of them in that  
4 case, in fact, with guns and so forth -- said, may I  
5 search your bag, and we said the passenger, the citizen  
6 has to exercise his rights.

7           MS. FUENTES: Agent Cantu did not say, may I  
8 squeeze your bag, and that is really the critical --

9           QUESTION: But the point is, the passenger was  
10 there and didn't try to stop him. He had the right to do  
11 it if he wanted, I assume. I'm making that assumption.

12          MS. FUENTES: I think he did have the right to  
13 do it, but the difference is, Agent Cantu came on the bus  
14 and started questioning people about their citizenship or  
15 other right to be in the country. He's coming on board.  
16 He's demanding answers of them. He doesn't have to do it  
17 in an ugly way, but he is telling them, you must answer me  
18 about your citizenship, and then, without a do-you-mind  
19 and may-I-please, he starts squeezing their luggage. That  
20 is very different than saying, may I squeeze your luggage.

21          QUESTION: In Bostick it rested on consent. The  
22 question was asked. Here, there was no --

23          MS. FUENTES: He --

24          QUESTION: -- endeavor to obtain consent.

25          MS. FUENTES: Correct. The officer never said,



1 Mr. Bond, may I squeeze your luggage.

2 QUESTION: Did the expectation of privacy change  
3 at the moment he saw the officer squeezing and he did not  
4 object? Is that relevant?

5 MS. FUENTES: No. I think that's when the  
6 expectation of privacy was violated, when he saw the  
7 officer squeezing. He expected, reasonably, as we all do,  
8 that other passengers might move or push his luggage to  
9 make room for their own, but it is very startling, and it  
10 is an invasion of personal privacy, when a law officer  
11 gets on and starts squeezing those bags. Another example,  
12 not --

13 QUESTION: What if the officer has stood there  
14 squeezing the thing for 15 minutes and he had said  
15 nothing? Would we at that point be able to infer a  
16 consent, or at that point, alternatively, would we be able  
17 to say, the terms of the bus travel in effect had changed  
18 whatever his original expectation may have been, and he no  
19 longer had a reasonable expectation of privacy? Would  
20 that be a valid line of reasoning?

21 MS. FUENTES: I don't think so, because the  
22 longer he squeezes the more intrusive it is.

23 But in terms of consent for Fourth Amendment  
24 constitutional purposes, I don't think this Court has ever  
25 accepted mere acquiescence to a show of authority, whether

1 it is short or whether it is long, as consent. There has  
2 to be an affirmative indication that the person has  
3 consented to a search under the Fourth Amendment, and the  
4 Court has never accepted any less.

5 Now, in this case, let me return --

6 QUESTION: I suppose what we'd be saying -- I'm  
7 not sure there's any authority for it -- is that your  
8 expectation of privacy is reinforced by the fact that you  
9 have at hand the means to protect it.

10 MS. FUENTES: Yes, I think that's correct.

11 QUESTION: And you haven't availed yourself of  
12 that means.

13 MS. FUENTES: Well, you haven't -- again, the  
14 circumstances in this case are, you haven't availed  
15 yourself of it because of the show of authority. The fact  
16 that the right exists, I think, shows --

17 QUESTION: But that's where Bostick comes in,  
18 and it seems to me that case is against you.

19 MS. FUENTES: Again, respectfully, I would  
20 disagree, because if Agent Cantu had said to Mr. Bond, may  
21 I squeeze your luggage, I would have a much harder case,  
22 but he didn't. He just --

23 QUESTION: Do you think your fellow passengers  
24 can sniff your luggage?

25 MS. FUENTES: I think you wouldn't like it, and

1 I think it would --

2 QUESTION: But that's okay. You don't think  
3 that would be an invasion of privacy.

4 MS. FUENTES: Again, you pose a very hard  
5 question --

6 QUESTION: I mean, you have to say that it  
7 wouldn't, because we've said that the police or police  
8 dogs can sniff the luggage, right?

9 MS. FUENTES: Well, we've -- this Court has  
10 approved police dogs sniffing --

11 QUESTION: Uh-huh.

12 MS. FUENTES: -- luggage, and I think that  
13 anything --

14 QUESTION: Now, do you think it would be an  
15 invasion of privacy if you saw a passenger who was  
16 moving --

17 (Laughter.)

18 QUESTION: -- you know, as he's moving one of  
19 your bags? Would you consider that invasion of privacy?

20 MS. FUENTES: I think I would.

21 QUESTION: Yes, because --

22 QUESTION: I think I would, too, but you know it  
23 can happen, and you've exposed yourself to it when you put  
24 the soft luggage up there --

25 MS. FUENTES: Because --

1 QUESTION: -- just as you expose yourself when  
2 you put your trash out in containers that can be readily  
3 opened and looked into.

4 MS. FUENTES: Again, I find the difference  
5 between luggage, which is meant to safeguard personal  
6 belongings and kept close by, the difference between that  
7 and former possessions that have been placed in a bag and  
8 set on the street to be destroyed, to be -- it is a  
9 qualitative difference that I think shows absolutely  
10 different privacy interests.

11 In this case, again returning to privacy  
12 interests, I think that if you were to see -- for example,  
13 if there were a bored 15-year-old in the front of the bus,  
14 tired of the layover, who decided to tap out a tune on the  
15 bags in the overhead bins in time with the music he was  
16 listening to, I think that would be an invasion of privacy  
17 because it's not what you reasonably expect.

18 I'd like to reserve the rest of my time for  
19 rebuttal.

20 QUESTION: Very well, Ms. Fuentes.

21 Mr. Lamken, we'll hear from you.

22 ORAL ARGUMENT OF JEFFREY A. LAMKEN

23 ON BEHALF OF THE RESPONDENT

24 MR. LAMKEN: Mr. Chief Justice, and may it  
25 please the Court:

1           Placing a bag in the overhead rack of a public  
2 conveyance like a bus necessarily subjects it to touching  
3 and handling by other members of the traveling public who  
4 may need to move or push on the luggage to make room for  
5 additional bags, to retrieve previously stowed bags, or --

6           QUESTION: Yes, but do they squeeze and  
7 manipulate it in such a way as to disclose contents by  
8 virtue of the kind of handling that's done? I wouldn't  
9 think so.

10          MR. LAMKEN: That very well may occur, Justice  
11 O'Connor, because when bags are so handled the sense of  
12 touch inevitably operates, so if a passenger places his  
13 hands on a piece of luggage to push it or snug it into the  
14 rack, he may very well --

15          QUESTION: Well, certainly you could, but I  
16 would think there would a difference in the kind of  
17 squeezing and manipulation that would occur to identify  
18 objects within a bag than would occur normally when you  
19 just move it to make more room for your own.

20          MR. LAMKEN: That's possible, Your Honor. The  
21 distinction, however, and the principle that governs the  
22 case, is one of knowing exposure. That which any other  
23 member of the traveling public might have observed is  
24 knowingly exposed, and the agent does not violate the  
25 Fourth Amendment by observing it. That's not to say that



1 the agent can manipulate the bag in any way or for any  
2 extended period of time.

3 QUESTION: Mr. Lamken, supposing the passenger  
4 put a sign on his bag that said, fragile, please do not  
5 touch?

6 MR. LAMKEN: Your Honor, there's a very good  
7 possibility that touching that bag notwithstanding the  
8 sign would be a seizure within the meaning of the Fourth  
9 Amendment. I would have a very -- I would hesitate to  
10 call it a search, on the other hand, because this cases --  
11 this Court's cases in Oliver and Dunn, for example, make  
12 it clear that violating signs on land that say, no  
13 trespass, do not convert the entry on land into a search,  
14 but it may very well be a meaningful deprivation of the  
15 individual's possessory interest --

16 QUESTION: Is there --

17 MR. LAMKEN: -- it would be a search.

18 QUESTION: Is there a seizure or an invasion of  
19 privacy if the passenger moves your object, the object for  
20 any reason other than to make room for his or her own  
21 luggage?

22 MR. LAMKEN: Would that constitute -- well, if  
23 it's private conduct it would not be governed by the  
24 Fourth Amendment at all, but if a passenger moves it for  
25 any other reason, I don't -- still don't think that would

1 be a meaningful deprivation of a possessory interest,  
2 which -- so it's not a -- it's not a Fourth Amendment  
3 violation.

4 QUESTION: Well, a meaningful deprivation of  
5 possessory interest is defined how? The injury caused to  
6 the owner, I take it?

7 MR. LAMKEN: Yes, that the owner's dominion  
8 or --

9 QUESTION: All right. And here, the injury was  
10 very substantial, was it not?

11 MR. LAMKEN: No, Your Honor, I don't believe  
12 there was any injury to the chattel of any variety. There  
13 was no damage to --

14 QUESTION: I'm talking about the injury to the  
15 owner.

16 MR. LAMKEN: That he was caught with drugs and  
17 sent to jail? I'm not sure that's an injury that he would  
18 have a right to expect that would not occur.

19 QUESTION: You're saying he has no standing to  
20 object, he hasn't been injured. I don't understand that.  
21 He's in jail.

22 MR. LAMKEN: Well, no, I'm not saying that he  
23 does not have standing to seek -- file a motion to  
24 suppress, but in terms of the bag being moved, if you're  
25 applying common law standards, which would be neither

1 necessary nor sufficient for a Fourth Amendment violation,  
2 there certainly wouldn't be any sort of tort, because  
3 there is no damage to the chattel, the object was not  
4 meaningful -- he wasn't deprived of possession of it for  
5 any meaningful period of time, and in the absence of those  
6 conduct there would be no trespass to chattel.

7 In addition, the tort of trespass to chattel  
8 wouldn't occur if contact with the bag were privileged,  
9 and that is, all the other passengers would be privileged  
10 by custom, and I think the Restatement in 892(d) makes it  
11 clear, besides which, your -- all the other passengers --

12 QUESTION: May I ask a question about the --  
13 what if he kept it in his lap?

14 MR. LAMKEN: The law treats items that are on  
15 the person and in the person's grasp as if they're part of  
16 the person itself. If the object is in his lap, the  
17 officer would not be permitted to touch it, and no other  
18 member of society would --

19 QUESTION: What if he had it under the seat?  
20 What if he had it under his seat?

21 MR. LAMKEN: To the extent that's an area  
22 reserved for the exclusive use of the passenger sitting  
23 behind the seat, that would not be a public area.

24 QUESTION: Maybe somebody else needed to use it.  
25 Sometimes you have to put two bags under a seat. If there

1 was another person's bag under the seat, would it then be  
2 okay to search it, or not?

3 MR. LAMKEN: I think ordinarily, Justice  
4 Stevens, the rule would be that the area under the seat in  
5 front of you is reserved exclusively for your use and  
6 possession. It's part of your seat, effectively.

7 QUESTION: What if the bus was empty, except  
8 for -- and he had the choice of putting it in the seat or  
9 an entirely overhead bin, and only one bag up there?

10 MR. LAMKEN: Again, I think --

11 QUESTION: What about that case?

12 MR. LAMKEN: The happenstance that the bus is  
13 empty does not convert an area that is ordinarily shared  
14 with other passengers --

15 QUESTION: So even on an empty bus, if he made  
16 the mistake of putting it up in the overhead bin he would  
17 allow it to be searched, but if he put it under the seat,  
18 it could avoid that?

19 MR. LAMKEN: I think that would be correct, Your  
20 Honor, because the area under the seat is reserved  
21 exclusively for his use under most circumstances, and you  
22 would not expect other passengers to be pushing or  
23 touching or having contact with the bag in that area.

24 QUESTION: Since this case may well turn on  
25 rather fine-spun distinctions, would there be any

1 difference between the situation where, by simply  
2 observing the bag, and there's something unusually kind of  
3 sticking out that you can tell, and this, where apparently  
4 there was nothing unusual sticking out, and it required,  
5 you know, pushing, feeling, whatever you want to call it,  
6 to discern the methamphetamine?

7 MR. LAMKEN: I think, Your Honor, in both cases  
8 the question is one of knowing exposure. Was there  
9 something that any member of the traveling public, or any  
10 other member of the traveling public could have observed  
11 during handling of the bag? If the answer to that is yes,  
12 then it's knowingly exposed and is not a subject of Fourth  
13 Amendment protection.

14 QUESTION: You do want us to go into the degree  
15 of manipulation, then, you're say. We're going to have to  
16 decide, you know, whether a normal member of the traveling  
17 public would have manipulated it to this degree.

18 MR. LAMKEN: No, I don't think that's the  
19 inquiry, Justice Scalia. I think the inquiry is one of  
20 knowing exposure. Again, if this is the type of item that  
21 another member of the traveling public could have felt  
22 while handling the bag, such as by pushing on it to snug  
23 into the rack, or grabbing the bag to remove it from the  
24 rack, then it's knowingly exposed, and the officer's  
25 observation --



1 QUESTION: Well, okay, suppose I say no.

2 MR. LAMKEN: Pardon me?

3 QUESTION: Suppose I -- if my answer to that  
4 question is no, it would not have been discerned simply by  
5 pushing or by grabbing, it would have taken -- it would  
6 have had to be another member of the traveling public who  
7 wanted to know what was in the bag, and who squeezed it to  
8 figure it out, you say, if that's the case, you lose.

9 MR. LAMKEN: Yes, I think we would lose if that  
10 were the case, and -- now --

11 QUESTION: I think you may lose.

12 (Laughter.)

13 MR. LAMKEN: I don't think so, Justice Scalia.

14 QUESTION: I think you're making two different  
15 assertions. You're saying if the bag and its palpability  
16 is knowingly exposed to the public, the police can take  
17 advantage of that, and you're also saying that whatever  
18 the public can do, the police can do, the public in this  
19 case at least being fellow passengers.

20 In the latter example, the only thing that you  
21 in effect consent or understand that your fellow  
22 passengers will do will be to make room for their own  
23 luggage. You do not understand that your fellow  
24 passengers are going to work their way up and down the bus  
25 feeling other people's luggage to see if anything

1 interesting turns up. So if the criterion, it seems to  
2 me, is what other passengers can do, then what this  
3 officer was doing was outside of that, and would be  
4 outside the reasonable expectation.

5 On the other hand, if you abstract from that and  
6 say, anything that could be felt by the public can be felt  
7 by the police, you're at a different level of generality,  
8 and I guess my question is, why should we take the  
9 abstract proposition, anything feelable can be felt by the  
10 police, as opposed to your other proposition, that what  
11 the passengers can do the police can do? Why do we choose  
12 one rather than the other to answer the question of what  
13 is a reasonable expectation?

14 MR. LAMKEN: You would choose the latter, for --  
15 because it's consistent with this Court's cases, for  
16 example. In Sorallo and Raleigh, for example, the dissent  
17 contended that other people flying over the yard wouldn't  
18 stare down. They might want to glance down --

19 QUESTION: Ah, but you're making -- your  
20 argument there makes the assumption that touching and  
21 looking are for Fourth Amendment purposes identical, and I  
22 don't see that identity at all. We in -- generally in  
23 society I think we accept the fact that what is out there  
24 to be seen can be looked at, and we may be irritated when  
25 someone stares, for example, but we don't say, you know,

1 you're doing something wrong. It's a question of  
2 etiquette and that's all.

3 But when it comes to touching, that's a very  
4 different thing. People can stare at you on the street,  
5 but if they start coming -- patting down your pockets, I  
6 think you're going to feel that a different value is  
7 involved, and for that reason I don't see how you can  
8 equate looking with touching.

9 MR. LAMKEN: Well, the two -- the same Fourth  
10 Amendment principles apply to both cases, but they may  
11 turn out to yield different results. There are many  
12 fewer --

13 QUESTION: Well, the basic principle is one of  
14 reasonable expectation, and the reasonable expectation in  
15 looking, or being seen, is different from the reasonable  
16 expectation, or the expectation about being touched, or  
17 explored by someone who is touching to find out what he  
18 can feel.

19 MR. LAMKEN: Your Honor, that is correct, and  
20 there are many circumstances where one would knowingly  
21 expose their person, for example, to visual observation,  
22 and I can't imagine any circumstances where they'd  
23 knowingly expose -- we'd say they'd knowingly expose their  
24 person to tactile observation.

25 But one of the few circumstances in which

1 something is knowingly exposed to the touch of other  
2 people is when a bag is placed in an overhead rack in a  
3 public conveyance.

4 QUESTION: It is -- yes, but there again, you  
5 make the argument easy when you make it at that generality  
6 and say, it's exposed to touching. What it is exposed to  
7 is to being moved to make room for other luggage.

8 MR. LAMKEN: That distinction I think turns on  
9 the purpose with which someone is acting.

10 QUESTION: Well, there's --

11 MR. LAMKEN: I think that's not a purpose that  
12 the law recognizes in the Fourth Amendment --

13 QUESTION: I don't know that that is so. I  
14 mean, our purpose inquiry, again, turns at different  
15 levels. We say the very fact that you may have a law  
16 enforcement objective, purpose in mind as opposed to a  
17 private one doesn't matter, but it seems to me that at a  
18 lower level of generality the purpose for which you may  
19 engage in touching may very well matter.

20 Take a nonlaw enforcement example. We both  
21 agree that generally speaking we expose ourselves to being  
22 looked at, but we don't expose things that we carry to  
23 being touched, so if somebody comes up to you on the  
24 street and starts feeling the package you have in mind,  
25 you'd tell them to get away. On the other hand, if you

1 drop the package and someone politely comes along and  
2 picks it up for you, even though they're touching it,  
3 you'd say thank you.

4 In that sense, at that level of purpose, purpose  
5 matters a very great deal to reasonable expectation, and  
6 that's the suggestion that I'm making about the purpose  
7 for which luggage is touched. It is touched for the  
8 purpose of being moved, not for the purpose of being  
9 explored, and I don't see why that is not a relevant  
10 consideration for the law in judging reasonable  
11 expectation.

12 MR. LAMKEN: Your Honor, those are individual  
13 subjective reactions to how certain observations are made.  
14 Purpose may make a difference. We may respond differently  
15 to someone who happens to glance up through a window and  
16 see --

17 QUESTION: Yes, but just --

18 MR. LAMKEN: -- compared to someone --

19 QUESTION: Just one thought. I'm intending, at  
20 least, to suggest something more than a personal  
21 idiosyncrasy. What I was intending to describe I think  
22 was a, kind of a generally shared set of expectations. if  
23 you think I'm wrong there, I -- you know, I'll stand  
24 corrected, but I think it's something more than just  
25 personal subjectivity here.



1 MR. LAMKEN: I think the -- I think you are  
2 wrong there, with respect, Justice Souter, and the reason  
3 for that is as follows. Whether one's expectation of  
4 privacy is reasonable or not does not vary with the intent  
5 of the actor. It's either knowingly exposed to the  
6 public, and this is the type of thing you would expect to  
7 be touched or seen, or it is not, and the actor's  
8 intent --

9 QUESTION: Do you have authority for that  
10 proposition?

11 MR. LAMKEN: Yes, Your Honor. The general --  
12 Sorallo would probably be our best case. The dissent  
13 again contended that the purpose was law enforcement, and  
14 this was not simply a fly-by for ordinary purposes like --

15 QUESTION: But that was at least -- at least  
16 that was in the visual context. I think you're probably  
17 right about that. Can you come close to the purpose  
18 analysis by using the objective criteria of how long and  
19 how intrusive the manipulation was?

20 I make the assumption -- there's nothing in the  
21 record. I make the assumption that the police officer had  
22 to manipulate this piece of luggage for a much longer  
23 period of time and much more intrusively than he would if  
24 he were just moving it from one side of the bin to  
25 another. If I'm right about that, is that a relevant

1 distinction?

2 MR. LAMKEN: I don't think you're right about  
3 that, and I don't believe it's a -- well, it is a relevant  
4 factor, certainly, because an officer in our view is  
5 entitled to --

6 QUESTION: A relevant, or irrelevant?

7 MR. LAMKEN: It is relevant. It is pertinent.  
8 It doesn't take that long for a law enforcement officer to  
9 observe all of those aspects of a piece of luggage that  
10 are knowingly exposed to the rest of the public.

11 QUESTION: Suppose there were a finding that it  
12 takes 10 seconds to move a bag, and it took over 45  
13 seconds to manipulate it, would that be a -- there is no  
14 such finding, but would that be a basis on which we could  
15 and should decide the case if that finding were before us?

16 MR. LAMKEN: No, but I think the amount of time  
17 spent is a relevant factor, and this is why. It doesn't  
18 take that long for an officer to observe all those things  
19 that were knowingly exposed.

20 Other passengers, for example, might push on a  
21 bag to snug it in a rack. The officer, therefore, may  
22 push on the bag in all of the various locations that a  
23 passenger might, because all of those things were  
24 knowingly exposed. Other passengers might grab a bag to  
25 remove it from the rack. The officer therefore may grab

1 the bag from all the different angles another passenger  
2 might, because all of those angles are knowingly exposed.

3 That actually does not take all that long. The  
4 DEA advises us that it's a reasonably brief period of  
5 time, typically far less than 30 seconds, so if the  
6 officer took longer than a reasonably brief period of  
7 time, it might --

8 QUESTION: Is that in the record?

9 MR. LAMKEN: No, it is not. It's simply what we  
10 have been advised, Your Honor.

11 QUESTION: But Mr. Lamken, what is in the record  
12 is that this was not pushing, shoving, that this was  
13 deliberate manipulation, and that's a distinction that you  
14 don't deal with when you say, well, passengers could grab,  
15 passengers could shove. This was admittedly a  
16 manipulation, and I don't think that there's an  
17 expectation that your fellow passengers are going to take  
18 your luggage and go like this around it.

19 MR. LAMKEN: The record does not reflect that  
20 the officer did this with the bag. The only thing the  
21 record reflects is that the officer grabbed the bag, he  
22 squeezed the bag hard, and when he did that, he felt a  
23 solid object that he thought might be drugs.

24 QUESTION: Do we have -- you have his exact  
25 testimony some place here?

1 MR. LAMKEN: Yes. It's in the joint appendix,  
2 and if you look to page, for example --

3 QUESTION: He was squeezing them and moving them  
4 from side to side. Was he shaking any of them? Yes.

5 MR. LAMKEN: Right. That's actually not  
6 agent -- the agent's testimony. That is the defendant's  
7 testimony.

8 QUESTION: 18.

9 MR. LAMKEN: That's on page 18, but there's  
10 nothing in the record that suggests that he actually  
11 handled the bag for a greater period of time -- excuse me.  
12 That he had repeated squeezings of the bag or anything  
13 else. The only thing it reflects is that he grabbed the  
14 bag once.

15 QUESTION: Mr. Lamken --

16 QUESTION: Do you think it would make a  
17 difference? That's really the question.

18 MR. LAMKEN: No, we don't believe it would make  
19 a difference, because we believe --

20 QUESTION: Then why argue it? Let's assume he  
21 took 45 seconds, then. You'd say that wouldn't matter.

22 MR. LAMKEN: Your Honor, if he took 45 seconds,  
23 that could raise an inference that he was observing things  
24 that other members of the public --

25 QUESTION: You're asking us to draw a line that

1 based between 15 seconds and 45 seconds --

2 MR. LAMKEN: No, Your Honor, we're not.

3 QUESTION: -- there's a constitutional  
4 difference between the two?

5 MR. LAMKEN: We're not. We think the district  
6 courts would fulfill their normal fact-finding function in  
7 this context.

8 QUESTION: The only thing --

9 QUESTION: You say that if he took more than 45  
10 seconds he would be observing things that other polite  
11 members of the public would not observe. I don't  
12 understand why you take the position that the only thing  
13 you expose yourself to when you put a soft piece of  
14 luggage in a public space that you know people can paw  
15 through is pawing through by other polite members of the  
16 public. Why isn't the case that he exposed that to  
17 somebody else who could readily go in there and manipulate  
18 the bag in order to find out what was inside of it?

19 Now, I agree that that's not a polite thing to  
20 do, but isn't the question whether he really expected to  
21 be protected from that kind of inquiry when he put it in a  
22 public place in a soft bag, and it seems to me there are a  
23 lot of impolite travelers who might well have done that.

24 MR. LAMKEN: Justice Scalia, we could take that  
25 position, and it would be certainly a defensible one.



1 when people do push -- in fact, it may be even more  
2 defensible than impolite people. Someone who's grabbing a  
3 bag in order to move it may very well be keenly aware of  
4 what they're grabbing to make sure they don't break  
5 something or to make sure they support a heavy object  
6 which is loosely packed in the bag, so people may  
7 actually, even when they're being polite, explore the  
8 contents of the luggage to some degree.

9           However, for purposes of this case, because the  
10 contact was not particularly extended, and there's nothing  
11 in the record which suggests --

12           QUESTION: Well, it's not going to be for the  
13 purpose of this case. You're going to come out with an  
14 opinion that says so long as you don't do, you know,  
15 anything more than what a polite member of the public  
16 would do, and I'm not sure that's going to help you,  
17 because in every case you're going to have to get into  
18 this inquiry about, was it 45 seconds or 50 seconds, did  
19 he really squeeze it hard, or squeeze it more lightly. I  
20 don't think courts are able to manage this kind of a  
21 principle.

22           MR. LAMKEN: Your Honor, I think in most cases  
23 it will be relative, a relatively simple process.

24           QUESTION: How is it simple here? I mean, the  
25 only thing I've found on this is, the owner says he

1 reached for my bag and he shook it a little and squeezed  
2 it, and then sniffed it.

3 MR. LAMKEN: Right.

4 QUESTION: Then he says, I squeezed the bag, and  
5 how -- the way you usually do these inspections, yes, when  
6 you squeeze the bag, you squeeze them very hard, yes,  
7 okay, so it's a hard squeeze, and I guess Justice Scalia's  
8 expected you to say, which I rather did, too, that it is a  
9 mistake to generate a juris prudence of hard squeezes.

10 (Laughter.)

11 QUESTION: What we will have is an infinite  
12 number of cases trying to decide whether a hard squeeze is  
13 more than a soft squeeze, is more than medium squeeze, et  
14 cetera. Now, there may be extremes, of course.

15 But you don't say that, and I'm rather curious  
16 why.

17 MR. LAMKEN: Well, actually, I think what I mean  
18 to exclude are the extremes, where based on the evidence  
19 you have the micromanipulation and the rearrangement of  
20 the contents of the luggage, such that it's -- the  
21 officer's enabled to observe that which no other passenger  
22 could potentially have observed, and in that case we would  
23 say that it would violate the Fourth Amendment.

24 QUESTION: Would you accept a rule that the  
25 police cannot touch or manipulate or probe baggage to a --

1 any greater degree than a passenger might do in moving it?

2 MR. LAMKEN: No, we would not, because that  
3 would not be consistent with the principle of knowing  
4 exposure. The officer is permitted to observe all those  
5 things that were knowingly exposed to other members of the  
6 traveling public. Objects --

7 QUESTION: So you think the traveling public has  
8 no reasonable expectation that their bags will be left  
9 untouched, except for being moved?

10 MR. LAMKEN: Again, I think because that  
11 distinction turns on the purpose of the handling, it's not  
12 one that the law recognizes.

13 QUESTION: Do I assume --

14 QUESTION: Well, but you just accepted the  
15 previous premise in the answer to my earlier question.

16 QUESTION: Well, all our cases say about purpose  
17 is the fact it's not a law enforcement purpose doesn't  
18 matter, but we have never said you don't look at the  
19 purpose of the activity. We've never said that.

20 MR. LAMKEN: Oh, you have in Sorallo, Your  
21 Honor. You said quite squarely that the officer's purpose  
22 was to observe marijuana is irrelevant. I mean, the Court  
23 used the word irrelevant. That would be on page 213 --

24 QUESTION: No. That's a different --

25 QUESTION: Well, but purpose would certainly

1 matter in Justice Souter's example, wouldn't it? I mean,  
2 imagine that I have a particular kind of object, and it's  
3 almost always going to be mine, and no one will ever touch  
4 it, but we have -- we can dream up some weird purpose for  
5 which, I guess, it would be touched. Well, the fact that  
6 99 percent of the time it wouldn't be touched, but it  
7 would be touched for one weird purpose 1 percent of the  
8 time, wouldn't that be highly relevant to my expectation  
9 of privacy?

10 MR. LAMKEN: What it would be relevant to is  
11 whether you consider the object knowingly exposed. The  
12 frequency with which other people handle your luggage, for  
13 example, if it were never the case that people touch  
14 luggage on overhead racks, and it were prohibited --

15 QUESTION: Ah, so you would say in respect to  
16 the fact that I have a package, and the only time I expect  
17 somebody else to touch it is when they drop it, is that  
18 doesn't show the purpose of dropping it's irrelevant. It  
19 just shows it doesn't happen very much.

20 MR. LAMKEN: Well, it would show that when -- if  
21 the -- unless the package is dropped, you would expect  
22 that no one else would handle it, but once the package is  
23 dropped, you would expect that people would.

24 QUESTION: So the person in that case --

25 MR. LAMKEN: Whether they're handling it for law



1 enforcement purposes or otherwise is irrelevant.

2 QUESTION: Well, all right, but --

3 MR. LAMKEN: But their handling it once it's  
4 dropped, and once it's dropped on the ground, it's fair  
5 game for someone to pick it up and hand it back to you,  
6 regardless of what their subjective intent is.

7 QUESTION: Mr. Lamken, does it make any  
8 difference whether the luggage is in a closed luggage  
9 compartment or an open one? On airplanes and some buses  
10 there are cupboard doors that close, so the luggage is all  
11 in there and behind the door.

12 MR. LAMKEN: No, Your Honor, it would --

13 QUESTION: Now, is it reasonable to expect that  
14 a police officer could come on board and open the luggage  
15 compartment and then squeeze? Does that matter?

16 MR. LAMKEN: No, Your Honor, we don't believe it  
17 would make a difference whether they're closed or open  
18 variety, and the reason is, whether or not it's closed, it  
19 is a shared location with other members of the traveling  
20 public. It is not a location --

21 QUESTION: But then if that's your view, then on  
22 a bus sometimes they have a compartment for luggage kind  
23 of underneath, and all the stored luggage goes in there  
24 together. He could say to the driver, unload all that  
25 luggage. I want to squeeze it.



1 MR. LAMKEN: Well, if you were to do --

2 QUESTION: Is that your view?

3 MR. LAMKEN: Your Honor, we don't believe that  
4 check -- there's a reasonable expectation of privacy with  
5 respect to handling of checked luggage, either.

6 QUESTION: No, no, not checked. It's just, you  
7 know, on the -- you -- the driver, the bus driver often  
8 will take the luggage from the passenger and put it in  
9 kind of a bin under the truck, and then when they get to  
10 the destination they unload it all out together, and you  
11 pick out your bag.

12 Now, would they -- would the -- would your agent  
13 have a right to say to the driver, I want to go through  
14 all that luggage down there?

15 MR. LAMKEN: No, Your Honor. I don't think you  
16 would normally expect the bus driver to do it.

17 QUESTION: So if it's closed overhead, he can  
18 look at it, but if it's closed under the bus, he cannot?

19 MR. LAMKEN: I -- you know, I don't -- the  
20 problem is, I'm not understanding the circumstances you're  
21 describing.

22 QUESTION: I think --

23 QUESTION: You've never ridden on buses, I  
24 guess. You only ride airlines.

25 MR. LAMKEN: That's probably the answer, Justice

1 Stevens.

2 (Laughter.)

3 MR. LAMKEN: That's probably it.

4 QUESTION: You don't have the expectation of  
5 privacy on the airline, because it's all X-rayed as you go  
6 in.

7 MR. LAMKEN: I don't think that's the critical  
8 factor.

9 QUESTION: That's an entirely different case.

10 MR. LAMKEN: On an airline, sometimes larger  
11 bags are taken to another compartment at the front of the  
12 airplane, for example, where it's -- other people's  
13 luggage is placed.

14 QUESTION: Can --

15 QUESTION: Well, could he then say, I want to  
16 see all the stuff in the front of the airline?

17 MR. LAMKEN: You wouldn't normally expect him to  
18 do that, but you would also expect other people --

19 QUESTION: Well, the question is, would it be  
20 constitutional if he did?

21 MR. LAMKEN: Unless the bus driver is a  
22 Government agent, I'm not sure that it would be a  
23 constitutional question, because private conduct doesn't  
24 implicate the Fourth Amendment.

25 QUESTION: We may not be understanding -- I'm

1 asking if, under your view, if a lot of luggage is put in  
2 either the rear of the bus, or underneath the bus as it  
3 sometimes is, the agent could say, I want to squeeze all  
4 that luggage?

5 MR. LAMKEN: Oh, the law enforcement agent. I'm  
6 sorry, I misunderstood your question.

7 QUESTION: Yes.

8 MR. LAMKEN: Yes. If it's a shared location, and  
9 other passengers have access -- were going to have access  
10 to it, like it's time to unload the stuff, it would be --

11 QUESTION: They don't have access to it. It's  
12 the bus driver who pulls it out and puts it on the floor.

13 MR. LAMKEN: He pulls it out and puts it on the  
14 floor --

15 QUESTION: Outside the bus.

16 MR. LAMKEN: Outside the bus --

17 QUESTION: Right.

18 MR. LAMKEN: And then all the passengers gather  
19 round and grab what's theirs.

20 QUESTION: What's theirs.

21 MR. LAMKEN: Other passengers may handle your  
22 bag to get at their bags, they may look at your bag in  
23 order to determine whether it's theirs. I think again we  
24 would consider that knowingly exposed to touching and  
25 handling by other members of the traveling public.

1 QUESTION: And if the bus driver alone was the  
2 person who put the bags in the compartment, what would  
3 your answer then be?

4 MR. LAMKEN: And he's the one who pulls them  
5 out, but other members -- but they're presented out on the  
6 ground --

7 QUESTION: He takes them one by one. He looks  
8 at the name, he says, Jones. Jones, come on up here.

9 (Laughter.)

10 QUESTION: This is a slow bus.

11 (Laughter.)

12 QUESTION: It's an unusual bus driver, too.

13 MR. LAMKEN: Yes.

14 QUESTION: What's your answer?

15 MR. LAMKEN: I think as you're moving the  
16 hypothetical towards an example, for example, like a coat  
17 check in a restaurant --

18 QUESTION: Okay, but I've given you the  
19 hypothetical. I'm not moving it.

20 MR. LAMKEN: Okay.

21 QUESTION: It's this hypothetical. What's the  
22 answer in the case of this hypothetical?

23 MR. LAMKEN: I think in that case you would have  
24 to say that you would have a reasonable expectation of  
25 privacy because there's only one other person with whom

1 you have an established relationship. That is, the bus --

2 QUESTION: What does it matter whether it's only  
3 the bus driver who can touch it, or a fellow passenger who  
4 can touch it?

5 MR. LAMKEN: Well, I think --

6 QUESTION: You have given up -- on your theory,  
7 you've given up your right to demand privacy, and if the  
8 law enforcement officer in effect can share in what the  
9 fellow passenger can do, why can't he share in what the  
10 bus driver can do?

11 MR. LAMKEN: For the same reason that, for  
12 example, in a -- you may give access to your hotel room to  
13 the maids and the janitors and the manager, but you don't  
14 necessarily mean that the whole world or law enforcement  
15 officers can enter your hotel room.

16 QUESTION: Okay --

17 QUESTION: The bus driver's a bailee, I  
18 assume --

19 MR. LAMKEN: Yes.

20 QUESTION: And he probably has some  
21 responsibilities as a bailee --

22 MR. LAMKEN: He doesn't --

23 QUESTION: -- not to feel your luggage.

24 MR. LAMKEN: There's an established  
25 commercial --



1 QUESTION: -- which the impolite passenger does  
2 not.

3 (Laughter.)

4 QUESTION: So in effect I guess you're saying  
5 that the general expectations of what will happen, and by  
6 whom things will be done, matters.

7 MR. LAMKEN: Yes, I think that's correct.

8 QUESTION: And if it matters, why doesn't it  
9 matter that the only general expectation is that a fellow  
10 passenger may move the luggage in order to get his luggage  
11 in? That's all you expect. Why isn't that relevant?

12 MR. LAMKEN: Well, I think you expect other  
13 passengers to have contact with your bag.

14 QUESTION: No, I don't expect other passengers  
15 to walk through the bus and feel my luggage gratuitously.

16 QUESTION: And isn't that because the general  
17 principle of law is, you cannot touch another person's  
18 chattel if that touching is going to cause harm to the  
19 owner?

20 MR. LAMKEN: No, Your Honor.

21 QUESTION: Which it did here.

22 MR. LAMKEN: The principle of law, if you're  
23 looking to common law the principle is that you'd have no  
24 expectation that anybody -- if it's placed in a shared and  
25 common location, where the custom is that other people

1 handle it, then you would have no cause of action if  
2 somebody else handled it, and you'd have no --

3 QUESTION: Would you have a cause of action if  
4 someone touches your chattel and thereby causes harm to  
5 you, if someone trespasses on your chattel and causes harm  
6 to you, which is what happened here?

7 MR. LAMKEN: I -- Justice Kennedy, I can't  
8 fathom what the nature of the harm is. I think they'd  
9 have to injure the chattel and deprive you of possession  
10 of --

11 QUESTION: I think your opposing counsel will  
12 say that the owner is in jail as a result of the touching.

13 MR. LAMKEN: Yes, but I'm not sure that that --  
14 certainly that would give you standing to seek suppression  
15 of the evidence, but that would not be sufficient for  
16 purposes of a tort action.

17 QUESTION: I don't think it's regarded as common  
18 law harm. It --

19 MR. LAMKEN: Pardon? No, it wouldn't be  
20 regarded as a common law harm.

21 QUESTION: It's called justice, really, in  
22 common law, isn't it?

23 QUESTION: Well, if a fellow passenger got up  
24 and jarred Bond's bag, such that the brick fell out, I  
25 don't think the fellow passenger would be liable for

1 damages for his imprisonment.

2 MR. LAMKEN: No, I don't think that would --

3 (Laughter.)

4 MR. LAMKEN: He certainly would not, and I think  
5 that's a very good analogy.

6 QUESTION: But that was not intentional. This  
7 is an intentional tort, and that's the difference.  
8 There's a difference between intentional and unintentional  
9 torts.

10 QUESTION: So if the fellow passenger  
11 intentionally threw it the ground and the brick fell out,  
12 the fellow passenger would be liable for his imprisonment?

13 MR. LAMKEN: Again, I think a --

14 QUESTION: The fellow passenger is not an agent  
15 of the State, so it would take away the --

16 QUESTION: Let's let counsel --

17 MR. LAMKEN: Exactly, since he's not an agent of  
18 the State.

19 QUESTION: But you were about to make a  
20 distinction between the cloakroom, and that seems to me  
21 the same thing. You hang up your coat in a public space,  
22 so why couldn't the police go into every coatroom and  
23 start manipulating what's there?

24 MR. LAMKEN: The coatrooms that I've seen, Your  
25 Honor, there would be no reason for anybody else ever to

1 have contact with your possessions, with your coats, and  
2 certainly not the pockets.

3 QUESTION: Well, there are plenty of coatrooms  
4 where there is no attendant.

5 MR. LAMKEN: Well --

6 QUESTION: You just put your coat there. You  
7 may put your bag, hard or soft --

8 MR. LAMKEN: Right. If it begins to resemble  
9 and have the characteristics of the overhead rack, then we  
10 would agree that you don't have a reasonable expectation  
11 of privacy.

12 If I could turn to the record for one moment,  
13 I'd like to point out one thing. Whether or not the  
14 object was disguised in the various ways that petitioner  
15 declares would not make much of a difference to the agent  
16 feeling the package, since what they're attuned to are  
17 things that are signature disguises.

18 But the record also does not reflect that this  
19 was a rectangular object that was then so wrapped in dust  
20 tape that it somehow became rounded. At page 23 of the  
21 transcript, the agent describes it as a brick with rounded  
22 edges, and it was a brick with rounded edges, so it could  
23 also be described as an oval mass.

24 In fact, petitioner's own brief in the district  
25 court described the object as an oval brick. It's for

1 that reason I don't think it's fair to construe the record  
2 as having an object that had sharp edges and was so  
3 wrapped up in brick -- in tape --

4 QUESTION: There isn't any 23, or at least the  
5 appendix --

6 MR. LAMKEN: Joint appendix?

7 QUESTION: The joint appendix doesn't seem to  
8 go -- the transcript doesn't seem to go beyond page 20.

9 MR. LAMKEN: 26, I think -- oh, if you're  
10 talking about --

11 QUESTION: The --

12 MR. LAMKEN: It's -- joint appendix, page 26, is  
13 the district court opinion quoting petitioner's  
14 description of it as an oval brick; in the transcript  
15 pages, page 53, which does not appear in the joint  
16 appendix.

17 QUESTION: Thanks.

18 MR. LAMKEN: Thank you, Your Honor.

19 QUESTION: Thank you, Mr. Lamken.

20 Ms. Fuentes, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF M. CAROLYN FUENTES

22 ON BEHALF OF THE PETITIONER

23 MS. FUENTES: I think overall, Your Honor,  
24 the -- all of the Government's argument is based on the  
25 knowing exposure of Mr. Bond's bag, and those cases that



1 this Court has decided on knowing exposure vary so  
2 radically from Mr. Bond's situation that they should not  
3 be applied.

4 That public exposure principle has been applied  
5 primarily for visual observations with very limited  
6 exceptions, the garbage case, for example, and luggage is  
7 different than garbage, and I believe Maryland v. Macon  
8 where police officers went into a store where people were  
9 invited to buy, and they bought. So they touched it, they  
10 bought, they did just what the public could do.

11 But on that line, what happened to Mr. Bond was  
12 much closer to Dickerson and to Terry, and so the public  
13 exposure principle should not be applied. Instead, the  
14 limited public access principles in Mancuson v. DeForte  
15 for example, just because other people have access to our  
16 office doesn't mean that the police can have access, those  
17 principles, as well as Dickerson and Terry, are more  
18 applicable in this case.

19 I also wanted to say one thing about purpose,  
20 and that is that purpose can be instructive if it is  
21 manifested by objective actions, and that purpose is what  
22 helps to define reasonable expectations. We do expect  
23 that other passengers may move our luggage for the purpose  
24 of making room for their own, and when their actions go  
25 beyond that, our reasonable expectations of privacy are

1 violated.

2 More than 30 years ago, in Terry, this Court had  
3 to decide whether it wanted to isolate an entire range of  
4 police conduct from Fourth Amendment constraints, and  
5 really much the same question is before the Court today.  
6 Will the police be permitted to manipulate luggage  
7 basically as much as they want under the Government's  
8 theory?

9 If anything could have been observed by a member  
10 of the public, then the police are entitled to observe it.  
11 Will they be able to do that outside the constraints of  
12 the Fourth Amendment, and I think the answer should be no.

13 Unless the court has any more questions --

14 QUESTION: Well, I'll ask you one -- I mean,  
15 when I came into this, I thought, well, it isn't that  
16 hard. Maybe it is harder, but the real question's just  
17 whether, when you put this luggage up in a place, you have  
18 a reasonable expectation that somebody could go and feel  
19 the brick, and if the answer's yes, then he has no  
20 expectation. The answer's no, he does.

21 All right, now, on that theory the only way --  
22 the answer must be yes, there's a good chance somebody  
23 would feel the brick unless it requires a special hard  
24 touch, all right?

25 MS. FUENTES: Yes.

1 QUESTION: Now what? I'm not sure.

2 MS. FUENTES: Well, I think the answer is, the  
3 reason they will do it is to move their luggage, and your  
4 expectations would be violated if it were an empty bus and  
5 someone came and started touching your luggage anyway, and  
6 when our reasonable expectations of privacy are violated  
7 by private persons, that doesn't matter for Fourth  
8 Amendment purposes.

9 But when the Government does it, and Agent Cantu  
10 did it in this case, that is covered by the Fourth  
11 Amendment, and unless it is done with some sort of  
12 individualized suspicion, it is a violation of the Fourth  
13 Amendment.

14 CHIEF JUSTICE REHNQUIST: Thank you,  
15 Ms. Fuentes. The case is submitted.

16 (Whereupon, at 11:04 a.m., the case in the  
17 above-entitled matter was submitted.)  
18  
19  
20  
21  
22  
23  
24  
25