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Go Greyhound and Leave the Fourth Amendment to Us: *Florida v. Bostick*

The mood towards drugs is changing in this country, and the momentum is with us. . . . Drugs are bad, and we're going after them.

President Ronald Reagan¹

I. INTRODUCTION

Our nation is fighting a "war on drugs."² Though arguably a metaphorical war, it has quickly assumed the trappings of a conventional military campaign.³ Life during wartime is often charac-

1. President's Radio Address to the Nation on Federal Drug Policy, II 1982 PUB. PAPERS 1252, 1253 (Oct. 2, 1982).

2. OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY (Sept. 1989) [hereinafter DRUG STRATEGY].

Richard M. Nixon was the first President to declare war on drugs, throwing down the gauntlet during his first term in the White House. Since then, every U.S. President has taken part in the battle. See Joyce Price, *Nobel Winner, Two Judges Want Drugs Made Legal*, WASH. TIMES, Nov. 17, 1991, § A, at A3.

On September 5, 1989 President Bush addressed the nation in order to announce the DRUG STRATEGY and urge its immediate adoption by Congress. The DRUG STRATEGY outlines the Bush Administration's plan for fighting suppliers, pushers, and users and its language is replete with metaphors of war.

The war motif permeated President Bush's speech announcing the DRUG STRATEGY. Drugs, he said, are "turning our cities into battle zones" and "sapping our strength as a nation." President's Address to the Nation on the National Drug Control Strategy, II 1989 PUB. PAPERS 1136, 1137 (Sept. 5, 1989) [hereinafter Bush Address, Sept. 5, 1989]. The President discussed his strategic "weapons" and offered a plan for their effective use. *Id.* at 1138. The weapons, which include "America's Armed Forces," "will intensify our efforts against drug smugglers on the high seas, in international airspace, and at our borders." *Id.* President Bush closed his address with this call to action:

If we fight this war as a divided nation, then the war is lost. But if we face this evil as a nation united, this will be nothing but a handful of useless chemicals. Victory—victory over drugs—is our cause, a just cause. And with your help, we are going to win.

Id. at 1140.

3. The President has even installed a "Drug Czar," the Administration's nickname for the Director of the Office of National Drug Control Policy. See Charles B. Rangel, *Our National Drug Policy*, 1 STAN. L. & POL'Y REV. 43, 52 (1989). The repressive ideology of William Bennett, the country's first Drug Czar, is exemplified by the following nationally televised exchange:

CALLER: My question is to Mr. Bennett. Why build prisons? Get tough like Arabia. Behead the damned drug dealers. We're just too darned soft.

BENNETT: It's actually—there's an interesting point. One of the things that I think is a problem is that we are not doing enough that is morally proportional

terized by a sudden expansion of government power at the expense of the individual citizen's constitutional rights.⁴ Although the tactics of the drug war vary from city to city,⁵ one common theme resounds: a majority of Americans are willing to forego some civil liberties in order to make a significant dent in the country's drug problem.⁶

to the nature of the offense. I mean, what the caller suggests is morally plausible. Legally, it's difficult. But say—

LARRY KING: Behead?

BENNETT: Yeah. Morally I don't have any problem with that.

The Larry King Show (CNN television broadcast, June 15, 1989), quoted in *Crackmire*, NEW REPUBLIC, Sept. 11, 1989, at 7.

Commenting on Bennett's approach to the drug problem, Lewis H. Lapham wrote:

I am reminded of the Ayatollah Khalkhali, appointed by the authorities in Iran to the office of executioner without portfolio. Khalkhali was blessed with the power to order the death of anybody found in the company of drugs, and within a period of seven weeks he killed 176 people. Still he failed to suppress the use of opium, and he said, "If we wanted to kill everybody who had five grams of heroin, we would have to kill 5,000 people." And then, after a wistful pause, he said, "And this would be difficult."

Lewis H. Lapham, *A Political Opiate*, HARPER'S, Dec. 1989, at 43, 47; see also Jerome H. Skolnick, *A Critical Look at the National Drug Control Strategy*, 8 YALE L. & POL'Y REV. 75 (1990) (criticizing the Bush DRUG STRATEGY for poorly framing the drug issues that face the nation and for implementing the "semi-martial state" to attack the drug problem).

4. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of an executive order that led to mass incarceration of Japanese-Americans); see also Roger W. Pincus, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813 (1987) (contending that the government's exclusion of the press from the Grenada invasion was a constitutionally suspect prior restraint on publication); *Recent Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1134 (1972) ("[T]he political branches, . . . characteristically have overestimated threats to national security—to the detriment of civil liberties.").

5. See John Leo, *Chipping Away at Civil Liberties*, U.S. NEWS & WORLD REP., June 26, 1989, at 61 (noting the following regional strategies as examples of the various war-like tactics: landlords lawfully evicted apartment dwellers in Alexandria, Virginia based solely on suspicion of criminal activity; police in Chicago, Illinois conducted warrantless sweeps of public housing facilities absent tenant consent; and legislators in Minnesota enacted a law that allows doctors to test some pregnant women for drugs without their knowledge).

6. Richard Lacayo, *A Threat to Freedom?: Civil Liberties Could Be a Casualty of Bush's War on Drugs*, TIME, Sept. 18, 1989, at 28 (citing a September 1989 Washington Post-ABC News poll that found 62% of those questioned would willingly forego "a few of the freedoms we have in this country" to make significant headway in the drug war); see also Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough; Mandatory Drug Tests, Searches Backed*, WASH. POST, Sept. 8, 1989, § A, at A1 (reporting that most of the adults questioned were willing to go far beyond the framework of the President's DRUG STRATEGY to fight the drug problem). Despite the apparent anti-drug zeal demonstrated by the overall poll results, 85% of those surveyed agreed that "very few would be willing to join a community group to reduce the problem." Lacayo, *supra*, at 28.

In Broward County, Florida, the expansion of police power is typified by the suspicionless bus sweep. As part of their daily routine, members of the Broward County Sheriff's Department board interstate buses and trains at random stops, asking passengers for identification and permission to conduct luggage searches.⁷ The United States Supreme Court addressed the constitutionality of this practice in *Florida v. Bostick*.⁸ In a six-to-three decision,⁹ the Court held that police, without articulable suspicion, can board buses and randomly ask passengers for identification, tickets, and permission to search luggage.¹⁰ The Court declared that such searches are not per se unconstitutional provided that the passengers give their individual consent.¹¹

This Note first traces the developments in Fourth Amendment law that paved the way for the *Bostick* decision, examining the Supreme Court cases that have shaped the current definitions of "seizure" and "consent"—the linchpins of the *Bostick* case. Next, the Note reviews the facts and procedural history leading to the *Bostick* decision. It then analyzes the underlying rationale of both the majority and minority opinions. Finally, the Note assesses the impact that the *Bostick* decision will have on future encounters between law enforcement officials and private citizens. The Note concludes that because of the *Bostick* Court's willingness to compromise civil liberties in the name of a drug war, the public can reasonably expect police behavior to become more intrusive as the Bush Administration's metaphorical war continues.

II. BACKGROUND

The Fourth Amendment does not protect people from all searches and seizures—only unreasonable ones.¹² Before a seizure

7. *Supreme Court to Take Up Police Searches of Interstate Trains-Buses*, UPI, Oct. 9 1990, available in LEXIS, Nexis library, UPI file.

8. 111 S. Ct. 2382 (1991).

9. See *infra* notes 97 and 124.

10. *Bostick*, 111 S. Ct. at 2389.

11. *Id.*

12. The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Fourth Amendment applies to the states through the Fourteenth Amendment. See *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding that unlawful intrusion by state agents violates the Due Process Clause of the Fourteenth Amendment); *Mapp v. Ohio*, 367 U.S.

can be deemed unreasonable, a court must determine that a seizure actually occurred.¹³ Encounters between police and private citizens trigger Fourth Amendment scrutiny only after a seizure has taken place.¹⁴

A. Lawful Seizures

Fully aware that police officers and citizens encounter each other in a variety of day-to-day situations,¹⁵ the United States Supreme Court has been careful not to define "seizure" too precisely.¹⁶ Clearly, an arrest is a Fourth Amendment seizure.¹⁷ Short of an arrest, however, classification of the police-citizen encounters that constitute seizures is less obvious.

In *Terry v. Ohio*,¹⁸ the Court made its first attempt to define "seizure." In *Terry*, the police officer, a thirty-nine-year veteran of the force, accosted three men he thought were behaving in a suspicious manner.¹⁹ To ensure his own safety, the officer patted down each of the men for weapons; his search produced two revolvers.²⁰ The officer then arrested the men.²¹

The issue that reached the Supreme Court was whether the officer's pat-down and subsequent search for weapons violated the Fourth Amendment rights of Terry, one of the men searched.²² The Court recognized that a police officer seizes a citizen whenever the officer "accosts an individual and restrains his freedom to walk away."²³ Although the Court was quick to conclude that a seizure

643 (1961) (holding that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court).

13. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when [the officer seized the suspect].").

14. See *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed."); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (plurality opinion of Stewart, J.) ("[N]ot every encounter between a police officer and a citizen is an intrusion requiring objective justification.").

15. *Terry*, 392 U.S. at 12.

16. *INS v. Delgado*, 466 U.S. 210, 215 (1984).

17. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(a), at 387-88 (2d ed. 1987).

18. 392 U.S. 1, 16-20 (1968).

19. *Id.* at 5.

20. *Id.* at 7.

21. *Id.* at 7-8.

22. *Id.* at 8. The exclusionary rule, a judicially-created remedy for Fourth Amendment violations, provides that evidence illegally obtained may not be introduced at the criminal trial of a person who has standing to object. 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 78 (student ed. 1985).

23. *Terry*, 392 U.S. at 16. *Webster's Third New International Dictionary* offers the

had occurred,²⁴ the issue of reasonableness spawned a lengthy discussion by Chief Justice Warren.²⁵ Balancing the safety of both the police and citizens against the individual's right to be free from intrusive law enforcement procedures, the *Terry* Court held that a police officer may constitutionally conduct a brief stop-and-frisk when that officer has an articulable suspicion that the person stopped engaged in criminal activity.²⁶

Thus, the *Terry* Court's definition of a seizure consists of two prongs: the officer must (1) accost the individual, and (2) restrain that person's freedom to walk away.²⁷ It is the scope of the second prong that generates constitutional controversies. According to *Terry*, an individual's liberty may be restrained in one of two ways, through sheer physical force or by a more subtle show of authority by a police officer.²⁸

*United States v. Mendenhall*²⁹ provided the Court with its first opportunity to discuss a seizure that was the product of a more subtle display of authority. In *Mendenhall*, Justice Stewart announced a new test for determining whether a Fourth Amendment seizure has taken place.³⁰ First, a court should examine the totality of the circumstances surrounding the challenged incident.³¹ Second, the court should decide whether a reasonable person in the

following definitions for "accost": to approach and speak to; to confront, usually in a somewhat challenging or defensive way; to address abruptly and usually with a certain degree of impetuosity or boldness; to solicit. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12 (1961). The *Terry* Court did not define the term.

24. *Terry*, 392 U.S. at 19.

25. *Id.* at 20.

26. *Id.* at 30-31. Although the *Terry* Court did not explicitly define "articulable suspicion," it held that a police officer may conduct a stop-and-frisk when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . ." *Id.* at 30.

Probable cause to arrest exists when, at the time of the arrest, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)); cf. Thomas S. Kiriakos, Comment, *Fourth Amendment Rights of Persons Present When a Search Warrant Is Executed: Ybarra v. Illinois*, 66 IOWA L. REV. 453, 458-59 (1981) (concluding that the line between articulable suspicion and probable cause often is a blurry one).

27. *Terry*, 392 U.S. at 17-19.

28. *Id.* at 19 n.16.

29. 446 U.S. 544 (1980).

30. Justice Stewart announced the judgment of the Court, but only Justice Rehnquist joined that part of the Stewart opinion outlining the new test. *Id.* at 546 (opinion of Stewart, J.).

31. *Id.* at 554 (opinion of Stewart, J.).

same situation would believe that he or she was free to leave.³²

In explaining this test, Justice Stewart noted several non-exclusive factors that might suggest a seizure had taken place, even when the "seized" person made no attempt to leave. These factors include: (1) the threatening presence of more than one law enforcement official; (2) a display of weaponry by the police; (3) physical contact initiated by the officer; and (4) a tone of voice by the officer indicating required compliance with the request.³³

Subsequent Court decisions eventually accepted the *Mendenhall* test. In *Florida v. Royer*,³⁴ a four-justice plurality adopted Justice Stewart's standard,³⁵ concluding that a suspected drug courier's consent was tainted by an illegal detention.³⁶ The *Royer* plurality noted that there is no litmus test for determining the point at which a consensual encounter becomes a seizure.³⁷ Further, one year after *Royer*, in *INS v. Delgado*,³⁸ a six-justice majority embraced the *Mendenhall* test.³⁹ *Delgado* presented the question of whether factory sweeps by Immigration and Naturalization Service ("INS") agents in search of illegal aliens involved Fourth Amendment seizures of the factory's workforce.⁴⁰ The Court held that the INS interviews at issue were consensual encounters rather than Fourth Amendment seizures.⁴¹ According to the *Delgado* Court, routine police questioning will seldom rise to the level of a Fourth Amendment seizure.⁴² The Court found that the consensual nature of responses to police questioning is not diminished by the fact

32. *Id.* (opinion of Stewart, J.).

33. *Id.* (opinion of Stewart, J.). According to Justice Stewart, absent one of these factors, otherwise inoffensive police-citizen contact cannot, as a matter of law, amount to a seizure of that citizen. *Id.* at 555 (opinion of Stewart, J.).

34. 460 U.S. 491 (1983).

35. *Id.* at 502 (plurality opinion). Justice Blackmun's dissent also endorsed the *Mendenhall* test. *Id.* at 514 (Blackmun, J., dissenting). Thus, Justice Stewart's test was technically adopted by a majority of the *Royer* Court.

36. *Id.* at 507-08 (plurality opinion).

37. *Id.* at 506 (plurality opinion).

38. 466 U.S. 210 (1984).

39. *Id.* at 215. None of the other Justices expressed any disagreement with the use of the *Mendenhall* "reasonable person" test. In *Michigan v. Chesternut*, 486 U.S. 567, 573-74 (1988), the Court explicitly adopted the *Mendenhall* test.

40. *Delgado*, 466 U.S. at 211-12.

41. *Id.* at 221. For a more extensive discussion of *Delgado*, see Cheryl L. Marsh, Note, *Brief Encounters of the "Alien" Kind —Challenges to Factory Sweeps and Detentive Questioning: I.N.S. v. Delgado*, 15 SW. U. L. REV. 473 (1985); Cristina Navarro, Note, *The Fourth Amendment: In Search of Illegal Aliens: Immigration and Naturalization Service v. Delgado*, 18 AKRON L. REV. 339 (1984); Jill Shorey, Note, *Enhancing the Powers of the INS: Immigration and Naturalization Service v. Delgado*, 38 SW. L.J. 1039 (1984).

42. *Delgado*, 466 U.S. at 216.

that most people are unaware of their right to refuse to cooperate.⁴³

B. Consent Searches

Police officers regularly rely on consent searches to aid them in criminal investigations.⁴⁴ When the state in a criminal prosecution attempts to justify a search on the basis of consent, two Fourth Amendment challenges often are raised by the defendant: (1) that the defendant's "voluntary" consent was actually the product of coercion or duress;⁴⁵ and (2) that the scope of the search exceeded the qualified consent actually given.⁴⁶

In *Schneckloth v. Bustamonte*,⁴⁷ the Court resolved a long-standing debate over the definition of "voluntariness" as applied to consent searches. Before the *Bustamonte* decision, it was unclear whether a State's claim⁴⁸ of voluntary consent required a knowing waiver of Fourth Amendment rights⁴⁹ or merely a showing by the State that the subject freely agreed to the search.⁵⁰ Although the *Bustamonte* Court acknowledged the need to balance effective police questioning with individual liberty and due process rights,⁵¹ the Court rejected the contention that a voluntary consent must include a knowing waiver of Fourth Amendment rights.⁵² After undertaking a Fifth Amendment analysis⁵³ that has been criticized by many as wholly unpersuasive,⁵⁴ the Court noted that a waiver

43. *Id.*

44. 3 LAFAYE, *supra* note 17, § 8.1, at 147.

45. 3 *id.* § 8.1(a), (b), at 149-59.

46. 3 *id.* § 8.1(c). For a recent examination of qualified consent, see Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 185-87 (1991).

47. 412 U.S. 218 (1973).

48. When the State attempts to justify a non-custodial search on the basis of consent, it has the burden of demonstrating the voluntariness of the consent. *Id.* at 222.

49. See *Johnson v. United States*, 333 U.S. 10, 13 (1948) (finding that entry into the defendant's room "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right").

50. See *Davis v. United States*, 328 U.S. 582 (1946) (finding no constitutional violation by government's use of business coupons that were voluntarily given to police by petitioner); *Zap v. United States*, 328 U.S. 624 (1946) (holding that no Fourth Amendment violation exists when the petitioner agreed to permit inspection of certain business accounts and records).

51. *Bustamonte*, 412 U.S. at 225.

52. *Id.* at 247-49.

53. The *Bustamonte* Court compared the determination of voluntariness involved in a consent search with the test used to determine whether a confession was coerced. *Id.* at 223-34. Justice Marshall observed, however, that coercion and consent are "subtly different concept[s] to which different standards have been applied in the past." *Id.* at 282 (Marshall, J., dissenting).

54. See William Kluwin & Joseph Walkowski, Note, *Valid Consent to Search Determined by Standard of "Voluntariness"*—*Schneckloth v. Bustamonte*, 12 AM. CRIM. L.

standard typically applies only after the wheels of a criminal prosecution have been set in motion.⁵⁵ According to the *Bustamonte* Court, Fourth Amendment protections are of an entirely different order than those rights involved in a criminal prosecution, such as those that ensure a fair trial.⁵⁶ Justifiably, then, the Court determined that there is no reason to require an officer to issue a *Miranda*-type warning and to receive a knowing waiver before undertaking a consent search.⁵⁷

The Court's determination that a voluntary consent does not require an explicit waiver of Fourth Amendment rights begged the answer to another question: What must the state show before a consent will be deemed "voluntary"? The Court ruled that voluntariness is a question of fact to be determined by looking at the totality of the circumstances under which the consent was given.⁵⁸

The *Bustamonte* decision left at least one important issue unresolved. The Court failed to state whether the test for determining the voluntariness of consent requires an "objective" or a "subjective" analysis. Seven years later, however, the *Mendenhall* Court answered the question: the prosecution must prove that the consent was "in fact voluntary"—the police officer's reasonable belief that the consent was voluntary is not sufficient.⁵⁹

Since it is easier for a police officer to request permission to conduct a search than to swear out a warrant, the consent search will continue to be a favored tool of law enforcement officials. Likewise, because "consenting" parties often are arrested and convicted, voluntariness challenges will continue to be made by criminal defendants.⁶⁰ Although the *Bustamonte* Court held that a

REV. 231 (1974); William R. Sage, Note, *Criminal Procedure—Standards for Valid Consent to Search*, 52 N.C. L. REV. 644 (1974); Note, *The Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME LAW. 891 (1974); *Recent Developments*, 7 IND. L. REV. 592 (1974).

55. *Bustamonte*, 412 U.S. at 237.

56. *Id.* at 241-42. The Court explained that Fourth Amendment protections do not promote "the fair ascertainment of truth at a criminal trial." *Id.* at 242.

Some of the rights that cannot be forfeited absent a knowing waiver include: the right to counsel at trial, *Glasser v. United States*, 315 U.S. 60 (1942); the right to counsel at the entering of a guilty plea, *Boyd v. Dutton*, 405 U.S. 1 (1972); the right to confront witnesses, *Barber v. Page*, 390 U.S. 719 (1968); and the right to be free from double jeopardy, *Green v. United States*, 355 U.S. 184 (1957).

57. *Bustamonte*, 412 U.S. at 242-46.

58. *Id.* at 248-49. The Court reaffirmed this principle in *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); and *INS v. Delgado*, 466 U.S. 210 (1984).

59. *Mendenhall*, 446 U.S. at 557-58.

60. During oral argument in *Florida v. Bostick*, 111 S. Ct. 2382 (1991), Justice Marshall commented quizzically on the number of criminals who "freely consent" to

suspect need not be aware of his right to refuse consent, *Mendenhall* made it clear that it is the suspect's belief, rather than the police officer's, that will be dispositive on the issue of voluntariness.

III. FLORIDA V. BOSTICK

A. *The Facts and the Lower Courts' Opinions*

On August 27, 1985, Officer Steve Rubino and Detective Joe Nutt, both of the Broward County Sheriff's Department, boarded a bus on which Terrance Bostick was a ticketed passenger.⁶¹ The two men boarded the vehicle as part of a routine procedure known as "working the buses."⁶² The department used this tactic to improve drug interdiction efforts in the area.⁶³ Although clad in civilian clothing, the officers wore raid jackets bearing the official department insignia.⁶⁴ Detective Nutt displayed a recognizable weapon pouch containing a gun.⁶⁵

The bus, en route from Miami to Atlanta, was on a brief stop-over in Fort Lauderdale when the officers came aboard.⁶⁶ The driver, familiar with this procedure, exited the vehicle and closed the doors behind him.⁶⁷ With no articulable suspicion,⁶⁸ the officers moved to the rear of the bus in the direction of Bostick.⁶⁹ Detective Nutt stood in front of Bostick's seat, partially blocking the aisle.⁷⁰ Officer Rubino positioned himself nearby.⁷¹ Nutt roused the resting Bostick to get his attention and then fired a volley of questions at him, requesting identification, a bus ticket, and travel information.⁷² After explaining to Bostick that members of the Broward County Sheriff's Department routinely board buses to hunt for illegal drugs, Detective Nutt asked him for permission to

searches: "It's always interesting to me that all of the drug dealers, when you ask them to be searched, say 'Sure, come on.'" Justice Thurgood Marshall, Remarks at Oral Argument in *Florida v. Bostick* (Feb. 26, 1991), reprinted in Stuart Taylor, Jr., "Consenting" to a Police State, *RECORDER*, Mar. 1, 1991, at 4.

61. Joint Appendix at *13, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717), available in LEXIS, Genfed library, Briefs file.

62. *Bostick v. State*, 554 So. 2d 1153, 1156 (Fla. 1989).

63. Melissa Goodman, *A Long Journey: One Case Travels from a Bus in Florida to the U.S. Supreme Court*, *LIFE*, Fall Special 1991, vol. 14, no. 13, at 78.

64. Joint Appendix at *13, *Bostick* (No. 89-1717).

65. *Id.* at *21.

66. *Id.* at *25.

67. *Id.* at *90.

68. *Id.* at *19-*20.

69. *Id.* at *22.

70. *Id.* at *50-*51.

71. *Id.*

72. *Id.* at *24-*25.

search a small tote bag on his seat.⁷³ Although Bostick consented, the record did not establish conclusively whether he was advised by either officer of his right to refuse the request.⁷⁴

Finding nothing illegal, Detective Nutt requested permission to search Bostick's suitcase, which was stored on an overhead rack.⁷⁵ Again, the record was unclear as to whether Bostick was ever told that compliance was optional.⁷⁶ The evidence was also inconclusive on the question of whether he consented to the suitcase search. Nevertheless, implicit in the trial court's decision was the finding that Bostick did consent and that his consent was valid.⁷⁷ The second search yielded nearly one pound of cocaine and prompted Bostick's arrest.⁷⁸

Bostick moved to suppress the evidence claiming it was the fruit of an illegal seizure, but the trial judge rejected this argument.⁷⁹ Bostick entered a plea of *nolo contendere*⁸⁰ and was sentenced to five years in prison.⁸¹ The State agreed, however, as part of the plea bargain, to allow Bostick's attorneys to appeal the ruling on the motion to suppress.⁸²

The Florida District Court of Appeal issued a per curiam opin-

73. *Id.* at *31-*32.

74. *Bostick*, 544 So. 2d at 1154. In fact, the Florida Supreme Court stated:

Needless to say, there is conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

Id. (quoting *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part)).

75. Joint Appendix at *31, *Bostick* (No. 89-1717).

76. *See supra* note 74.

77. *Bostick*, 510 So. 2d at 322 (Letts, J., dissenting in part).

78. *See Goodman, supra* note 63, at 76.

79. *Bostick*, 510 So. 2d at 322 (Letts, J., dissenting in part).

80. *Nolo contendere* is a "[t]ype of plea which may be entered with leave of court to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it." BLACK'S LAW DICTIONARY 1048 (6th ed. 1990).

81. *See Goodman, supra* note 63, at 78. Terrance Bostick entered prison in October 1986. He was released in early 1989—more than two years before the U.S. Supreme Court decided the constitutionality of his conviction. *Id.* at 78-80.

82. *Id.* at 78. The right to appeal was preserved pursuant to *Fla. R. App. P. 9.140(b)* (West 1990). Respondent's Brief at 7, *Bostick* (No. 89-1717). Rule 9.140(b) provides in pertinent part:

A defendant may not appeal . . . from a judgment entered upon a plea of *nolo contendere* without an express reservation of the right to appeal from a prior order of the lower tribunal, identifying with particularity the point of law being reserved.

FLA. R. APP. P. 9.140(b) (West 1990).

ion affirming the circuit court decision,⁸³ but decided to certify the following question to the Florida Supreme Court: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?"⁸⁴ Although the appellate court ruled that Bostick's Fourth Amendment rights had not been violated,⁸⁵ the question it posed to the Florida Supreme Court suggested that the general practice of "working the buses" may be unconstitutional.⁸⁶

B. The Florida Supreme Court Opinion

The Florida Supreme Court restated the issue in the following way: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?"⁸⁷ The court maintained that an impermissible seizure does result.⁸⁸ Because the officers had no articulable suspicion,⁸⁹ the Florida Supreme Court found that their detention of Bostick was unconstitutional.⁹⁰

Although not expressly applying the *Mendenhall* test, the court opined that a reasonable person would not have felt free to ignore the officers' questions.⁹¹ Indeed, because one of the officers blocked a significant part of the aisle during the interrogation, the court found that Bostick was not free to get up and walk away.⁹² Moreover, as the bus was only in Fort Lauderdale on a short stopover,

83. *Bostick v. State*, 510 So. 2d 321 (Fla. Dist. Ct. App. 1987). Although the court unanimously agreed to certify the question to the Florida Supreme Court, Judge Letts dissented from that part of the court's decision that denied Bostick's petition for rehearing. *Id.* at 322 (Letts, J., dissenting in part). Judge Letts reviewed the facts in light of the relevant U.S. Supreme Court decisions, *see supra* notes 29-43 and accompanying text, and found no applicable bright-line test. *Bostick*, 510 So. 2d at 322-24 (Letts, J., dissenting in part). After evaluating the totality of the circumstances, Judge Letts concluded that the evidence should have been suppressed. *Id.* at 324 (Letts, J., dissenting in part).

84. *Bostick*, 510 So. 2d at 322.

85. *Id.* Under Florida law, the findings of fact made by a trial court are presumed to be correct. *Marsh v. Marsh*, 419 So. 2d 629, 630 (Fla. 1982). An appellate court may disturb the trial court's findings only when there is a lack of substantial evidence to support the court's conclusion. *Strawgate v. Turner*, 339 So. 2d 1112, 1113 (Fla. 1976).

86. *Bostick*, 510 So. 2d at 322.

87. *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989).

88. *Id.*

89. For a definition of articulable suspicion, see *supra* note 26 and accompanying text.

90. *Bostick*, 554 So. 2d at 1158.

91. *Id.* at 1156-57.

92. *Id.*

the court suggested that it was impractical for Bostick to leave the vehicle.⁹³ Consequently, the court found that the police officers' detention of Bostick was unconstitutional.⁹⁴

The United States Supreme Court granted certiorari⁹⁵ to address the constitutionality of the per se rule purportedly used by the Florida Supreme Court to exclude any evidence seized in a suspicionless bus sweep.⁹⁶

C. *The United States Supreme Court Opinion*

Writing for the majority,⁹⁷ Justice O'Connor first acknowledged the recent nationwide increase in drug interdiction efforts⁹⁸ before turning her attention to Broward County's routine use of suspicionless bus sweeps. O'Connor then restated the Florida Supreme Court's description of Bostick's encounter,⁹⁹ focusing on two facts accepted by the Florida Supreme Court: (1) that the officers told Bostick that he could freely refuse consent;¹⁰⁰ and (2) that the officers never threatened Bostick with a gun.¹⁰¹ The issue before the Court, O'Connor stated, was whether this type of police encounter necessarily constitutes a Fourth Amendment seizure.¹⁰²

To resolve this issue, the Court first distinguished police encounters that are consensual in nature from those that implicate the Fourth Amendment,¹⁰³ citing *Terry*¹⁰⁴ and *Royer*¹⁰⁵ for the proposition that a police officer, like a private citizen, is free to

93. *Id.*

94. *Id.* at 1158.

95. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989), *cert. granted*, *Florida v. Bostick*, 111 S. Ct. 241, 241-42 (1990).

96. *Florida v. Bostick*, 111 S. Ct. 2382, 2385 (1991). In dissent, however, Justice Marshall noted that nowhere in its opinion did the Florida Supreme Court claim to apply a per se rule. *Id.* at 2392 (Marshall, J., dissenting).

97. Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter. *Id.* at 2384.

98. *Id.* at 2384. Some of the tactics used throughout the country include stepped-up police surveillance, suspicionless stops, and random questioning at airports, train stations, and bus depots. *Id.*; *see supra* note 5.

99. *Bostick*, 111 S. Ct. at 2384-85. In his dissent, Justice Marshall noted this verbatim restatement of the facts. The Florida Supreme Court's careful analysis of the record convinced him that no per se test was used. *Id.* at 2392 (Marshall, J., dissenting); *see infra* note 133 and accompanying text.

100. *Bostick*, 111 S. Ct. at 2385. Although Bostick challenged this point, the Florida Supreme Court adopted the trial court's finding that Bostick had been advised of his right to refuse consent. *Bostick v. State*, 554 So. 2d 1153, 1154-55 (Fla. 1989); *see supra* note 74; *see also supra* note 85 (explaining presumptions in Florida factfinding).

101. *Bostick*, 111 S. Ct. at 2385.

102. *Id.* at 2386.

103. *Id.* The line between these two types of encounters is crossed when a reasonable person would no longer feel free to terminate the encounter with the police officer. *Id.*

approach an individual in a public place and ask that person if he or she would be willing to answer some questions.¹⁰⁶ In fact, the Court concluded that Terrance Bostick's encounter would not have triggered Fourth Amendment analysis if it had occurred in a bus depot or on the street.¹⁰⁷

The Court then addressed Bostick's contention that a police encounter is much more intimidating on a cramped bus than in an open depot or a busy airport.¹⁰⁸ Bostick argued that because the bus passenger is typically seated, with little or no room to move, he or she is at an immediate disadvantage when approached by a law enforcement official.¹⁰⁹ Bostick maintained that he was seized within the meaning of the Fourth Amendment because a reasonable person in his situation would not have believed that he was free to leave the vehicle.¹¹⁰

The Court, however, was not persuaded by this argument, because it did not accept the threshold inquiry to be whether or not Bostick felt "free to leave" the Greyhound bus.¹¹¹ That test, the Court reasoned, is appropriate when a police officer stops an individual who is walking through an airport lobby or down a city block.¹¹² Since that person is on the move, compliance with the officer's request to stop necessarily impedes the individual's movement. The Court distinguished Bostick's encounter from that of the detained pedestrian, emphasizing the fact that the seated Bostick had no desire to leave the bus.¹¹³ Justice O'Connor concluded that because Bostick did not want to leave the vehicle, the Florida Supreme Court erred in applying the *Mendenhall* test to gauge the coerciveness of the encounter.¹¹⁴

According to the Court, Bostick, a ticketed passenger at a mid-point on his journey, would not have felt free to leave the bus even if the police had not boarded the vehicle.¹¹⁵ His movements were

(citing *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991)); see *supra* notes 29-43 and accompanying text.

104. *Terry v. Ohio*, 392 U.S. 1 (1968).

105. *Florida v. Royer*, 460 U.S. 491 (1983).

106. *Bostick*, 111 S. Ct. at 2386.

107. *Id.* (citing *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (holding that a similar encounter in an airport did not rise to the level of a Fourth Amendment seizure)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 2387.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

not restricted by the police officers; rather, his confinement was simply "the natural result of his decision to take the bus."¹¹⁶ Finding support for this conclusion in *Delgado*,¹¹⁷ the Court stated that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."¹¹⁸

Answering this question requires an evaluation of the totality of the circumstances surrounding the encounter.¹¹⁹ Justice O'Connor criticized the Florida Supreme Court for failing to apply a totality analysis and for deciding the case, instead, based on one fact—that Bostick's encounter took place on a bus.¹²⁰

After announcing the proper test for determining whether Bostick was seized, the Court chose not to reach the merits of the case.¹²¹ The Court struck down the Florida Supreme Court's purported use of a per se test,¹²² reversed the decision to suppress, and remanded the matter for an evaluation of the seizure using the proper standard.¹²³

D. *The Dissent*

At the outset, Justice Marshall¹²⁴ also acknowledged the nation's

116. *Id.*

117. *INS v. Delgado*, 466 U.S. 210 (1984); see *supra* notes 38-43 and accompanying text.

118. *Bostick*, 111 S. Ct. at 2387. The assumption that the confining nature of a bus trip rendered the *Mendenhall* test inappropriate drew heavily on the *Delgado* Court's description of the nature of factory work:

Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers . . . [The conduct of the INS agents] should have given [the employees] no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.

Delgado, 466 U.S. at 218. The *Bostick* Court found the Greyhound bus encounter "analytically indistinguishable from *Delgado*." *Bostick*, 111 S. Ct. at 2387.

Bostick also contended that he was seized because no reasonable person would consent to a luggage search knowing the luggage contained cocaine. The Court rejected this argument, however, stating that the "reasonable person" test makes no accommodation for the "reasonable drug trafficker." *Id.* at 2388.

119. *Bostick*, 111 S. Ct. at 2387.

120. *Id.* at 2388.

121. *Id.* The Court did not reach the merits of Bostick's case because the trial judge made no express findings of fact. *Id.*

122. *Id.*; see *supra* notes 95-96, 99 and accompanying text.

123. *Bostick*, 111 S. Ct. at 2388. On remand, the question at issue was whether Bostick freely consented to a luggage search. *Id.* The Florida Supreme Court, in a 4-3 opinion, ruled that he did. *Bostick v. State*, 593 So.2d 494 (Fla. 1992) (per curiam).

124. Justice Marshall was joined by Justices Blackmun and Stevens. *Bostick*, 111 S. Ct. at 2389.

ongoing "war on drugs" and the role of law enforcement officials as footsoldiers in the campaign.¹²⁵ Marshall cautioned, however, that effective law enforcement is not the same thing as constitutional law enforcement.¹²⁶ He launched his attack on suspicionless bus sweeps by recalling the effectiveness of the general warrant.¹²⁷

Although Justice Marshall noted the characteristic lack of articulable suspicion that typifies these dragnet searches,¹²⁸ he suggested that young black males are more likely to be targets of "random" police encounters than any other group of passengers.¹²⁹ Unspoken racism, however, is just one of the problems inherent in suspicionless sweeps, according to Justice Marshall. He was equally troubled by the totalitarian taint of the practice, likening it to law enforcement under Hitler or Stalin.¹³⁰

125. *Id.* (Marshall, J., dissenting).

126. *Id.* (Marshall, J., dissenting); see also *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989). In its decision, the Florida Supreme Court noted:

Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate [drug courier activity] in this state. Nazi Germany, Soviet Russia and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means.

Id. at 1158-59.

127. *Bostick*, 111 S. Ct. at 2389 (Marshall, J., dissenting). A general warrant allowed the officer possessing it to conduct a legal search of a home or business absent any showing of probable cause. The warrant did not specify the goods sought or the places to be searched. For a thorough discussion of the general warrant, the Star Chamber, and other precursors to the Fourth Amendment, see NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

128. *Bostick*, 111 S. Ct. at 2390 (Marshall, J., dissenting).

129. *Id.* at 2390 n.1 (Marshall, J., dissenting) ("[T]he basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*."); see *United States v. Winston*, 711 F. Supp. 639 (D.D.C. 1989) (discussing stops of black suspects made by police officers); *United States v. Mitchell*, 699 F. Supp. 1, 2-3 (D.D.C. 1987) (same); see also Gregory L. Young, *The Role of Stereotyping in the Development and Implementation of the D.E.A. Drug Courier Profiles*, 15 *LAW & PSYCHOL. REV.* 331, 348 (1991) (contending that because travelers are often stopped based only upon stereotypical characteristics of what a drug trafficker is supposed to look like, racial and ethnic criteria freely enter the calculus).

130. *Bostick*, 111 S. Ct. at 2391 (Marshall, J., dissenting). Justice Marshall quoted a powerful passage from another Florida appellate court case involving a Broward County bus sweep:

"[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked by badge-wielding police, for identification, travel papers — in short a *raison d'etre* — is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every

While he agreed that the majority's test was the proper analytical tool to use to evaluate the constitutionality of the sweep, Marshall wholly disagreed with the majority's refusal to find that Bostick was seized in an unreasonable manner.¹³¹ He saw no need to remand the matter because he believed that the Florida Supreme Court applied the test correctly, basing its opinion on a careful examination of the facts rather than on the mechanized use of a *per se* test.¹³²

The Florida Supreme Court, Marshall explained, carefully analyzed the factual record before reaching its decision.¹³³ He reasoned that because the question of whether Bostick was "seized" was a question of law,¹³⁴ the Court was free to examine the findings of fact discussed in the Florida Supreme Court opinion.¹³⁵

Applying the "reasonable person" test, Justice Marshall concluded that Bostick's consent was coerced because a reasonable person in that situation would not have felt free to terminate the encounter with the armed officers.¹³⁶ In support of that conclusion, Marshall stressed the officers' intimidating show of authority, their position in front of Bostick's seat, and the impracticability of exiting the bus during a brief stopover.¹³⁷

According to Justice Marshall, suspicionless bus searches categorically violate the Fourth Amendment's right to be free from unreasonable seizures.¹³⁸ Removing this arrow from law enforcement's quiver, he added, would do little to thwart the Administration's war on drugs.¹³⁹ Although the majority mechanically stated

person on board buses and trains ('that time permits') and check identification [and] tickets, [and] ask to search luggage—all in the name of 'voluntary cooperation' with law enforcement"

Id. (Marshall, J., dissenting) (quoting *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting *State v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 1987))).

131. *Id.* (Marshall, J., dissenting). The majority did not find it necessary to decide whether a seizure had occurred. *Id.* at 2388.

132. *Id.* at 2392-93 (Marshall, J., dissenting).

133. *Id.* at 2392 (Marshall, J., dissenting). Justice O'Connor acknowledged that analysis in her majority opinion: "The Florida Supreme Court, whose decision we review here, stated explicitly the factual premise for its decision." *Id.* at 2384. She followed that statement with a verbatim transcription of the court's fact statement. *Id.* Justice O'Connor chose, however, to characterize the Florida Supreme Court's decision as an incorrect application of an erroneous *per se* rule. *Id.* at 2389.

134. *Id.* at 2392 (Marshall, J., dissenting); see *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980) (opinion of Stewart, J.).

135. *Bostick*, 111 S. Ct. at 2392 (Marshall, J., dissenting).

136. *Id.* at 2393 (Marshall, J., dissenting).

137. *Id.* at 2393-94 (Marshall, J., dissenting).

138. *Id.* at 2394 (Marshall, J., dissenting).

139. *Id.* (Marshall, J., dissenting). To gauge the general inefficiency of suspicionless

that individual rights should not fall victim to policy-fueled police power,¹⁴⁰ Justice Marshall drew little comfort from the Court's platitudes. He closed his dissent by noting that "the majority's actions . . . speak louder than its words."¹⁴¹

IV. ANALYSIS

"War creates consent."¹⁴² These words, written only ten weeks before the Court handed down its decision in *Florida v. Bostick*, launched their author, Andrew Kopkind, into an analysis of the "warrior state," a model that he uses to explain our nation's current approach to domestic policy issues.¹⁴³ For Terrance Bostick, war also created consent. In his case, the "war on drugs" tacitly justified the finding that he provided voluntary consent to a search of his luggage.

The Court's decision in *Bostick* is the latest blow to individual liberty in the name of the government's "war on drugs."¹⁴⁴ By placing its imprimatur on intrusive police tactics, the Court has allowed a return to the witch-hunt mentality of the 1950s.¹⁴⁵ Forty years later, however, it is the snow-white spectre of cocaine that has replaced the red scare of communism.¹⁴⁶ Once again, civil lib-

bus searches, see *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990) (reporting that a single officer's search of 100 buses netted only 7 arrests).

140. *Bostick*, 111 S. Ct. at 2389.

141. *Id.* at 2395 (Marshall, J., dissenting).

142. Andrew Kopkind, *Imposing the New Order at Home: The Warrior State; U.S. Social Problems May Be Handled Like an International Military Campaign*, 1991 THE NATION, at 433.

143. Kopkind argues that the United States has been "in a state of war—cold, hot, and lukewarm" for the last fifty years. *Id.* The "warrior state," he contends, "has so saturated everyday ideology . . . that government is practically unthinkable without it." *Id.* at 434. He suggests that because people are easier to govern in a time of war, it behooves those in power to sustain a perpetual "warrior state." *Id.* at 435-36. At home, he continues, the "warrior state" manifests itself in the "war on drugs" and the "war on crime." *Id.* at 448.

144. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting) (decrying the "drug exception to the Constitution"); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

145. See *Dennis v. United States*, 341 U.S. 494 (1951) (upholding seditious speech convictions of the leadership of the Central Committee of the Communist Party of the United States based on a markedly diluted "clear and present danger" standard). See generally DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* (1978) (discussing the nation's intolerance of Communism in the 1940s and 1950s).

146. In its 1989 and 1990 terms, the Court discarded the need for individualized suspicion in three cases closely linked to the drug war: *Michigan v. Sitz*, 110 S. Ct. 2481 (1990) (upholding the constitutionality of sobriety checkpoints); *National Treasury Em-*

erties fall by the wayside in the name of a search-and-destroy war.¹⁴⁷ Like the McCarthy campaign, this war is being fought to build political reputations.¹⁴⁸ In the words of Santayana, "Those who cannot remember the past are condemned to repeat it."¹⁴⁹

Although the Bush Administration uses vivid war imagery to describe America's struggle against drugs,¹⁵⁰ colorful language is not an end in itself. By painting a blood-and-guts picture on an olive drab canvas, the Administration has successfully depicted the drug problem as the gravest threat to our nation since communism.¹⁵¹ The nation should take little comfort in the President's assurance that the war on drugs is a just war,¹⁵² because the advo-

ployees Union v. Von Raab, 489 U.S. 656 (1989) (concluding that suspicionless drug-testing of certain Customs Service employees is reasonable under the Fourth Amendment); and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (holding that suspicionless drug testing of railroad employees is reasonable under the Fourth Amendment). See also Lacayo, *supra* note 6, at 28 (providing that "[w]hen you start saying a search satisfies the Fourth Amendment even though it's not based on any focused suspicion at all, you've ripped the heart out of the Fourth Amendment" (quoting University of Michigan law professor Yale Kamisar)).

147. See MICHAEL LINFIELD, FREEDOM UNDER FIRE—U.S. CIVIL LIBERTIES IN TIMES OF WAR 2 (1990) ("Rather than being an exception, war-era violations of civil liberties in the United States are the accepted norm for our government.").

148. See Brian Duffy, *Now, for the Real Drug War*, U.S. NEWS & WORLD REP., Sept. 11, 1989, at 18 ("There is also political benefit to taking on cocaine crooks. Republican pollster Richard Wirthlin says drugs are hot, the rough equivalent of Americans' concern over inflation in 1981.").

149. GEORGE SANTAYANA, THE LIFE OF REASON 284 (1921).

150. See *supra* note 2.

151. Bush Address, Sept. 5, 1989, *supra* note 2, at 1136 ("Our most serious problem today is cocaine, and in particular, crack."); see *supra* note 6 and accompanying text.

152. See *supra* note 2; see also JAMES T. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR at xxxi-xxxiv (1981). According to Johnson, the just war model establishes parameters for making "relative moral decisions." *Id.* at xxxiii. The decisions will invariably involve the following questions: (1) Should this war be waged?; and (2) To what extent should the war be prosecuted? *Id.* at xxxiv.

The President has answered the first question in the affirmative. See Bush Address, Sept. 5, 1989, *supra* note 2, at 1136-40. The text of that address also suggests his answer to the second question. President Bush explained that "our nation has zero tolerance for casual drug use" and even less for "drug kingpins"—convicted kingpins will get the death penalty. *Id.* at 1138-39.

Exactly one year later, with American troops deploying to the Persian Gulf, the President's answer to the second question became clearer. He offered these thoughts during a White House briefing:

My administration will remain on the front lines until [the drug crisis] is licked for good. Block by block, school by school, child by child, we will take back the streets. We will never surrender. I know that other subjects are preoccupying all of us these days. But this one remains number one. It will continue to remain number one when the international situation has calmed down

Remarks at a White House Briefing on National Drug Control Strategy, II 1990 PUB. PAPERS 1187, 1188 (Sept 5, 1990).

cate who frames the issues for debate generally is trying to control the subsequent argument.¹⁵³ George Bush has convinced the nation that drugs are an enemy to be conquered at any cost. His recurring use of martial metaphors has numbed many to the dangers of an encroaching police state.¹⁵⁴ That government demands order, uniformity, and consent during wartime is no novel concept.¹⁵⁵ That it creates a metaphorical war to facilitate, if not compel, compliance is reprehensible.

Although the *Bostick* opinion is wholly consistent with the Bush Administration's crackdown on drugs, it is inconsistent with both the record in this case and the Court's prior pronouncements involving the "reasonable person" test.¹⁵⁶ First, as Justice Marshall noted in dissent, the Florida Supreme Court did not employ a mechanized per se rule, suppressing evidence solely because Bostick's encounter took place on a bus.¹⁵⁷ As evidenced by its opinion, the Florida Supreme Court pored over the facts, deciding the case in view of all the circumstances.¹⁵⁸

Second, notwithstanding the Court's reformulation of the *Mendenhall* "reasonable person" test,¹⁵⁹ the majority erred by refusing to find that Bostick was seized unlawfully.¹⁶⁰ Instead, the Court emphasized the trial court's finding that the officers informed Bos-

153. See ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY § 7.32, at 145 (1985) ("The importance of the framing of the issues cannot be overemphasized. How the [audience] perceive[s] the issues in the case will to a large extent determine how . . . [the case] is resolved.").

154. In *United States v. Salas*, 879 F.2d 530, 541 (9th Cir. 1989) (Ferguson, J., dissenting), Judge Ferguson addressed this reality in his dissent: "Invoking the metaphors and images of battle, the government's 'war on drugs' has already made casualties of constitutional protections and personal dignity."

155. See RANDOLPH BOURNE, *The State, in WAR AND THE INTELLECTUALS* 65 (Carl Resek ed. 1964). Bourne explains:

The machinery of government sets and enforces the drastic penalties, the minorities are either intimidated into silence, or brought slowly around by a subtle process of persuasion which may seem to them really to be converting them. . . . [T]he nation in war-time attains a uniformity of feeling, a hierarchy of values culminating at the undisputed apex of the state ideal, which could not possibly be produced through any other agency than war.

Id. at 71.

156. See *supra* notes 29-43 and accompanying text.

157. *Florida v. Bostick*, 111 S. Ct. 2382, 2391-92 (1991) (Marshall, J., dissenting); see *supra* notes 132-33 and accompanying text.

158. See *supra* note 132 and accompanying text. In addition to his criticism of the majority's reasoning, Justice Marshall faulted the Florida Supreme Court for narrowing the certified question to the extent that it overlooked certain details of the encounter. *Bostick*, 111 S. Ct. at 2392 (Marshall, J., dissenting).

159. See *supra* notes 111-18 and accompanying text.

160. See *supra* notes 121-23 and accompanying text.

tick that he was free to withhold consent.¹⁶¹ This myopic fixation blurred the critical issue: If *Bostick* was already seized within the meaning of the Fourth Amendment when the officers requested permission to search his bags, his consent was tainted, rendering the subsequent search unlawful.¹⁶²

Equally troubling was the Court's inability to distinguish Terrence Bostick's bus encounter from the factory surveys at issue in *INS v. Delgado*.¹⁶³ Indeed, more than anything else, it was the Court's expansive reading of *Delgado* that sounded the death knell for Bostick's case. Fourth Amendment jurisprudence would have been better served had the *Bostick* majority reread Justice Powell's concurring opinion in *Delgado*.¹⁶⁴ Although it garnered no accolades from civil libertarians, Justice Powell's *Delgado* opinion was narrowly tailored to the facts and issues before the Court.¹⁶⁵

In light of Justice Marshall's reputation as a fierce champion of individual rights, it was no surprise that the *Bostick* dissent flowed from his pen. What was surprising, and perhaps more telling, was an *amicus* brief filed by Americans for Effective Law Enforcement,

161. *Bostick*, 111 S. Ct. at 2385, 2388. The majority also stated that a simple refusal to cooperate does not generate "the minimal level of objective justification needed for a detention or seizure." *Id.* at 2387. *But see* Taylor, *supra* note 60. Taylor cautioned:

[T]ravelers who exercise their theoretical right not to be searched are sure to become instant suspects. Police will strain to detect or invent signs of nervousness, which can then be bootstrapped into a "reasonable suspicion" and used to justify an involuntary search if their quarry cannot be bullied into "consenting." Some officers have said they phone ahead to suggest further scrutiny of uncooperative sorts at the next stop.

Id. at 4. Commenting on this practice during the Florida v. Bostick oral argument, Justice Scalia stated that although it "could be police harassment, . . . it would have nothing to do with whether there's been a violation of the Fourth Amendment." Justice Antonin Scalia, Remarks at Oral Argument in Florida v. Bostick (Feb. 26, 1991), *reprinted in* Taylor, *supra* note 60, at 4.

162. *See* Wong Sun v. United States, 371 U.S. 471 (1963). The *Wong Sun* Court phrased the threshold test for admissibility in the following way: "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (citation omitted). Assuming, *arguendo*, that Bostick's consent was tainted by an illegal seizure, the cocaine discovered during the search would be the tainted "fruit of a poisonous tree" and thus inadmissible as evidence against Bostick.

163. 466 U.S. 210 (1984); *see supra* note 118.

164. *Delgado*, 466 U.S. at 221 (Powell, J., concurring in result).

165. In *Delgado*, Justice Powell stated that the question of whether the INS factory sweeps resulted in any Fourth Amendment seizures was "a close one . . . turn[ing] on a difficult characterization of fact and law." *Id.* (Powell, J., concurring in result). Noting the government's substantial interest in curbing the flow of undocumented aliens, Justice Powell contended that even if the INS surveys were seizures, they were reasonable under the Fourth Amendment. *Id.* at 222-24 (Powell, J., concurring in result).

Inc. ("AELE").¹⁶⁶ AELE is a not-for-profit citizens' organization that has filed *amicus* briefs with the Court on eighty-five separate occasions.¹⁶⁷ Every one of those briefs sided with police interests.¹⁶⁸ However, AELE's *amicus* brief in *Florida v. Bostick* argued that the encounter at issue amounted to an unreasonable seizure of Bostick.¹⁶⁹ Moreover, presaging Justice Marshall's dissent,¹⁷⁰ AELE argued that suspicionless bus sweeps violate the Fourth Amendment right to be free from unreasonable searches and seizures.¹⁷¹ Although an unusual ally for Justice Marshall, in *Bostick*, AELE was fully aligned with the now-retired jurist.

Suspicionless bus interdictions are strategically designed and routinely executed and in no way resemble the unpredictable encounters the Court foresaw when it fashioned the case-by-case analysis in *Terry*.¹⁷² Consequently, the *Bostick* Court should have announced a prophylactic rule barring the practice altogether. The Fourth Amendment should forbid stops based on criteria that do not distinguish actual suspects from innocent travelers.¹⁷³ By refusing to prohibit suspicionless bus sweeps, the Court has placed its imprimatur on the use of oppressive police power. The *Bostick* decision will not shorten the drug war by even a day. It will, however, effectively truncate the ever-shrinking scope of the Fourth Amendment.

V. IMPACT

Bostick provides law enforcement with an additional weapon for its anti-drug arsenal. It is the latest in a long line of Supreme Court decisions to expand police power at the expense of individ-

166. AELE "is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions." Motion to File Brief and Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc. at *7, *Bostick* (No. 89-1717) [hereinafter Amicus Brief, AELE].

167. Amicus Brief, AELE, at *7.

168. Respondent's Brief at *33, *Bostick* (No. 89-1717).

169. Amicus Brief, AELE, at *8-*10. Commenting on the AELE's unusual position, Yale Kamisar quipped, "If this isn't cause for alarm, it is hard to know what is." 60 U.S.L.W. 2253, 2258 (Oct. 22, 1991) (summarizing the 1991 *United States Law Week* Constitutional Law Conference).

170. See *supra* notes 124-41 and accompanying text.

171. Amicus Brief, AELE, at *12. AELE contended that "[w]henver a mass detention and questioning of travelers is contemplated, there must be a requirement of an objective (though minimal) indicia of criminal activity." *Id.*

172. *Terry v. Ohio*, 392 U.S. 1 (1968); see *supra* notes 18-28 and accompanying text.

173. *Reid v. Georgia*, 448 U.S. 438, 441 (1980).

ual liberty.¹⁷⁴ By upholding the constitutionality of suspicionless bus sweeps, the Court left the door open for stepped-up state intrusion into personal affairs.¹⁷⁵

In addition, the Court's latest statement on the consent-coercion question implicitly credits the "reasonable person" with an inordinate amount of Fourth Amendment knowledge.¹⁷⁶ Without a detailed understanding of search and seizure law, it is highly improbable that a reasonable person in Terrance Bostick's position would feel free to terminate an encounter with the armed officers.¹⁷⁷ Faced with circumstances often much less compelling than those before the *Bostick* Court, numerous trial court judges, applying the *Mendenhall* test, have struck down suspicionless bus encounters.¹⁷⁸ Whether those encounters would be deemed consensual under the new *Delgado-Bostick* standard is unknown.

Also unknown is the degree to which law enforcement will push the *Bostick* reasoning. Since six Justices viewed Bostick's confine-

174. See *United States v. Leon*, 468 U.S. 897 (1984) (allowing "good-faith" searches despite Fourth Amendment violations); *Nix v. Williams*, 467 U.S. 431 (1984) (allowing "inevitable discovery" seizures); *Illinois v. Gates*, 462 U.S. 213 (1983) (allowing "totality of circumstances" search warrants); *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing "stop and frisk"); *Jones v. United States*, 362 U.S. 257 (1960) (allowing hearsay warrants); *Draper v. United States*, 358 U.S. 307 (1959) (allowing hearsay arrests).

This list is by no means an all-encompassing survey of constitutional police powers. Nor were all of the decisions cited above drug cases. These cases simply highlight a slow but steady extension of law enforcement's reach.

175. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court offered this timeless caveat:

[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id. at 635.

176. See *supra* note 161 and accompanying text.

177. See James P. Graham, *The Bus Stops Here*, RECORDER, Nov. 7, 1991, at 6. Graham contends that the practice of "working the buses" enables police officers to exert their will over the passengers. *Id.* Because many interstate bus passengers are from society's lower class, they are more likely to be intimidated by a show of authority. *Id.* As Graham points out, "there are probably not too many constitutional scholars or civil rights lawyers traveling on buses similar to the one on which Bostick was riding." *Id.*

178. See, e.g., *United States v. Alston*, 742 F. Supp. 13, 15-16 (D.D.C. 1990); *United States v. Chandler*, 744 F. Supp. 333, 335-36 (D.D.C. 1990); *United States v. Cothran*, 729 F. Supp. 153, 155-56 (D.D.C.), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990); *United States v. Felder*, 732 F. Supp. 204, 207-08 (D.D.C. 1990); *United States v. Lewis*, 728 F. Supp. 784, 786-87 (D.D.C.), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990); *United States v. Madison*, 744 F. Supp. 490, 496 (S.D.N.Y. 1990).

ment as the natural result of his decision to travel by bus, the "free to leave" language of the *Mendenhall* test was found inapposite to the Court's analysis.¹⁷⁹ In its brief, AELE expressed difficulty envisioning a *Bostick*-type sweep of business-class passengers on a commercial airline flight.¹⁸⁰ Regrettably, the *Bostick* decision drew no such line in the sand.¹⁸¹ It follows from the Court's reasoning that any individual who chooses to travel by commercial jet necessarily chooses confinement. So, too, does the person who enters an elevator or a bathroom stall. Whether interrogation in these settings will become the latest tactic in the drug war remains to be seen. *Florida v. Bostick* does little to allay the concerns of citizens who cherish the guarantees of the Fourth Amendment.

VI. CONCLUSION

The *Bostick* decision legitimizes intrusive police action in furtherance of the "war on drugs." It is the latest in a line of post-*Terry* decisions that chips away at the Fourth Amendment right to be "secure . . . against unreasonable searches and seizures."¹⁸² After *Bostick*, bus passengers must choose either to carry on their luggage or their constitutional rights, but not both.

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179. *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991).

180. Amicus Brief, AELE, at *11.

181. The Court maintained that the Fourth Amendment inquiry in *Bostick* would have been handled the same way had the search taken place on a train, plane, or city street. *Bostick*, 111 S. Ct. at 2388.

182. U.S. CONST. amend. IV.

