10-1982

United States v. Place

Lewis F. Powell Jr.

Probably grant
~~81-1617~~
81-1617
Deny 81-1635

rhf 05/17/82

On basis of "reasonable suspicion", narcotics agents detained Resp's luggage for two hours to enable a "sniffing dog" to have access.

CA2 (Kaufman dissenting) held that same rule applies to luggage as to a person: may conduct a Terry type stop, but can't hold an individual w/o probable cause.

PRELIMINARY MEMORANDUM

May 27, 1982 Conference
List 1, Sheet 2

Cert to CA2 (Mansfield; Oakes concurs; Kaufman dissents)

No. 81-1617

UNITED STATES

v.

PLACE

Federal/Criminal Timely

No. 81-1635

Cert to CA2 (Mansfield; Oakes concurs; Kaufman dissents)

PLACE

v.

UNITED STATES

Federal/Criminal Timely

No. 80-1617 may be a Grant.
No. 81-1635 is not ripe. Deny or possibly Hold.

RF

1. SUMMARY: The issue in No. 81-1617 is whether the Fourth Amendment prohibits police from detaining luggage reasonably suspected of containing narcotics for the purpose of arranging exposure to a narcotics detection dog. No. 81-1635 is a cross-petn, in which the cross-petr argues that he personally--and not merely his luggage--was seized in violation of the Fourth Amendment.

2. FACTS AND DECISIONS BELOW: Cross-petr Place attracted the attention of narcotics detectives as he prepared to board a plane at a Miami airport. The detectives approached Place and asked him to show identification. He did so. The detectives did not detain him and Place boarded the plane for New York. After their investigation revealed that Place had listed false addresses on his luggage tags, the Miami detectives phoned agents in New York. Those agents then approached Place in New York. They did so based on both their own observations of his behavior and the information telephoned from Miami. After a short discussion, the detectives told Place that he was free to leave but that his luggage was being detained for exposure to a narcotics detection dog. At this point Place apparently made a bribe offier, which the police declined. Place left a phone number and departed. About two hours later a dog sniffed Place's luggage. Its response signalled the presence of drugs in one suitcase. With this information police phoned a magistrate, who issued a warrant

authorizing a search. The luggage was found to contain LSD, cocaine, and marijuana. Place then was arrested.

Contending that he and his luggage had been seized in violation of the Fourth Amendment, Place moved for suppression of the evidence. The dist ct (Platt) denied the motion. The court found that at "reasonable suspicion" supported the encounters both in Miami and in New York. (In a footnote the dist ct suggeted that there was "probable cause" to detain Place and his luggage in New York.) Place had been detained only briefly for the kind of investigation countenanced by Terry v. Ohio, 392 U.S. 1 (1968). Further, the court found that "reasonable suspicion" justified detention of the luggage for sniffing by the narcotics detection dog. Place was allowed to leave. The Fourth Amendment did not apply equally to persons and to inanimate objects.

A divided CA2 reversed. CA2 did not consider the issue raised in the cross-petition--whether Place personally was seized in violation of the Fourth Amendment or whether he was only detained in a permissible Terry stop. Focussing on the seizure of Place's luggage, Judge Mansfield's majority opinion found that there was no distinction between the standard for seizure of persons and of possessions. Assuming the existence of "reasonable suspicion" that Place was carrying narcotics, there still was not probable cause. And without probable cause detention of Place's luggage for two hours could not be justified. In so holding CA2 distinguished cases in which

other CAs have upheld detention of luggage for dog-sniffing on the basis of "reasonable suspicion." See United States v. Viegas, 639 F.2d 42 (CA1 1981), cert denied, No. 80-1344 (May 4, 1981); United States v. West, 651 F.2d 71 (CA1 1981), pet for cert pending, No. 81-307 (currently being held for No. 80-2146, Florida v. Royer); United States v. Klein, 626 F.2d 22 (CA7 1980); and United States v. Martell, 654 F.2d 1356 (CA9 1981). According to Judge Mansfield, the detention in each of these cases had been much more limited than the two hours involved in this case. Judge Mansfield also distinguished the case principally relied on by the other CAs, United States v. Van Leeuwen, 397 U.S. 249 (1970). In Van Leeuwen this Court upheld a one-day detention of two packages arousing the suspicion of postal officials; information discovered during that period then was used to obtain a search warrant. The central difference, according to Judge Mansfield, was that the owner of the parcels in Van Leeuwen had deposited the parcels with the post office, "thereby voluntarily relinquishing custody and control over then for an indefinite period." App. 20a. And the Court in Van Leeuwen carefully limited its holding to the facts of the case. 397 U.S., at 252-253.

Judge Oakes concurred in Judge Mansfield's opinion. He wrote separately to emphasize his view that the Fourth Amendment should be read "not atomistically, but regulatorily." He would approve "sidestepping" the probable casue requirement for searches and seizures, if at all, only when the stop or

search was conducted pursuant to clear rules adopted by the appropriate government authority.

Judge Kaufman dissented. He regarded the stops of Place as permissible under Terry. As to the detention of the luggage, the Fourth Amendment prohibits only unreasonable seizures. And here the reasonable suspicion of the detaining officers, viewed in a balance with the government interest in stopping drug traffic and the less than two hour duration of the detention, rendered the detention reasonable. Place's legitimate privacy interest was protected adequately by the subsequent issuance of a warrant before the luggage was searched. Van Leeuwen was the governing authority.

3. CONTENTIONS: Petitioning in No. 81-1617, the SG argues that CA2's decision conflicts with decisions of CAs 1, 7, and 9, supra, and with Van Leeuwen, supra. These courts have reasoned--in clear contrast with CA2--that "Terry and Dunaway and their progeny relate to the detention of people, not inanimate objects." Viegas, supra, 654 F.2d, at 1359. Nor can the cases be distinguished on the basis of the duration of the detention in the different cases. The record in Klein is unclear as to the length of the detention; the detention in West was for about an hour, compared with less than two hours here. And though the publised opinion in Viegas is silent, the Brief in Opposition to cert in that case, No. 80-1344, at 3, indicates that the agents there were informed that no dog would be available for four hours.

Respondent summarily repeats the reasoning of the CA2 majority. The cases are fact-specific; hence there is no conflict. And the Fourth Amendment generally does not establish different standards of reasonableness for the detention of persons and of objects. Van Leeuwen was limited to its facts by this Court's own opinion.

In the cross-petn, No. 81-1835, Place argues that Fourth Amendment rights are violated whenver a person is stopped for questioning solely on the basis of certain "profile characteristics."

The SG responds that this issue is not properly presented. Any question here is inherently fact-bound, as the enforcement officials relied on factors beyond "profile" characteristics. Moreover, this question was not addressed by CA2. If CA2's judgment is reversed, the CA should have the first opportunity to consider this question. Additionally, as argued in the SG's amicus brief in No. 80-2146, Florida v. Royer, every "stop" is not a "seizure." And even if a seizure did occur here, the dist ct cited a number of specific facts establishing a "reasonable suspicion" that would justify a brief investigative stop.

DISCUSSION: I agree with the SG that there is a clear split among the CAs on the standard required for detention of a suitcase for dog sniff. This issue also is presented in No. 81-307, West v. United States, which is being held for No. 80-2146, Florida v. Royer.

I think it is clear that the Court could Grant this case and decide the important issue argued: Whether "reasonable suspicion" will suffice to justify a detention of luggage pending a dog-sniff. Because of the importance of this question, I recommend a Grant.

It appears, however, that the same issue could have been reached in West, supra, which the Court instead held for Royer. I think it most unlikely that Royer could affect this case. But it is not impossible. Because of the Court's disposition of West, it may be worthwhile here to discuss the relationship of this case to Royer.

Royer--like this Court's previous decision in United States v. Mendenahll, 446 U.S. 544 (1980)--principally involves the validity of a defendant's consent to a search. There are at least two potential issues. First, was there a "seizure" of the person of the kind that might constitute an illegal arrest if not justified under the appropriate Fourther Amendment standard? If so, the subsequent consent to search might be invalid. Second, however, comes the question whether the applicable Fourth Amendment standard--presumably probable cause--was satisfied? Royer could affect this case only if the Court reached the second issue and decided that certain "drug courier profile" characteristics were strongly indicative of probable cause. Although CA2 found no probable cause in the current petn, the dist court, in a footnote, App. 57a, appears to have held that there was probable cause for the detention in

New York. The Government has not argued either in CA2 or in this Court that probable cause existed. But, should Royer be decided in this way, I suppose the case could be GVR'ed for CA2 to reconsider the probable cause question. As stated earlier, I regard this possibility as probably too remote to call for a hold. But the likelihood of West's being affected may be equally remote.

Overall, I would recommend a Grant in No. 81-1617.

The issue raised by the cross-petition, No. 81-1835, is whether "profile characteristics" are sufficient to warrant even a Terry-type stop under the Fourth Amendment. This question would arise in this case only if the Court granted the main petition; otherwise there would be an independent basis for suppressing the evidence under the CA2 holding. Whatever the Court does with the main petition, for the reasons cited by the SG there is no reason for the Court to consider this question in the current posture of the case. CA2 has not decided whether Place's rights were violated in this regard. If this Court reversed on the issue in the main petition, Place could still raise this defense in the lower courts. Accordingly, I think that the Court simply could deny the cross-petn. There is also a possibility, however, that this question could be affected by the decision in No. 80-2146, Florida v. Royer. If the Court grants the main petition, it therefore might wish to consider holding the cross-petn either for Royer or for the main petn itself.

There are responses to both the petn and the cross-petn.

May 17, 1982 Fallon opn in petns

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 81-1835

Submitted ....., *19*... *Announced* ....., *19*...

PLACE

vs.

UNITED STATES

Relist
for
BRW

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 81-1617

Submitted ....., 19... *Announced* ....., 19...

UNITED STATES

vs.

PLACE

Denied

Relist
on BRW

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.													
Brennan, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.			✓		or Hold								
Stevens, J.			✓										
O'Connor, J.		✓											

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 81-1617

Submitted ....., *19*... *Announced* ....., *19*...

UNITED STATES

vs.

PLACE

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

mfs 02/07/83 This is "dog sniffing" case involving initial suspicion at Miami & terminal suspicion at La Guardia.

This Court has not extended the "reasonable suspicion" doctrine of Terry & progeny to detention of property.

Mike would extend it as another "exception" to the warrant requirement. (Chadwick & Sanders hold that even probable cause to believe a trunk or suitcase has narcotics does not justify its search - 7).

That is, where there is reasonable suspicion, the prop. may be "seized" - but only for a reasonable time.

BENCH MEMORANDUM

No. 81-1617

United States v. Place

Michael F. Sturley

February 7, 1983

On CA2 (Mansfield) held, taking Rep. bag on Fri. afternoon, & removing it to Kennedy where dog was available, & holding it until Mon. was unreasonable

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Questions Presented

1. May the police seize personal luggage and hold it for a reasonable period pending exposure to a narcotics detection dog when they have reasonable suspicion (but not probable cause) to believe that the luggage contains narcotics?

That

2. What constitutes a "reasonable period" for purposes of such a seizure?

Mike would affirm on unreasonableness of detention

Outline of Memorandum page

I. Background

A. Facts

On Friday, August 17, 1979, resp attracted police attention at Miami International Airport. Soon after he entered the airport, officers noticed that he was scanning the terminal area and seemed to be very nervous. After standing in line at the National Airlines ticket counter for 20 minutes, he purchased a ticket on the 12:40 flight to LaGuardia Airport in New York with cash, and checked his two suitcases. The luggage tags on the suitcases bore resp's true name and a street address on South Ocean Drive in Hallandale, Florida. The street numbers, however, differed slightly: 1885 on one bag and 1865 on the other.

After resp passed through the airline security checkpoint, two officers approached him and asked to see his ticket and some identification. Resp produced his ticket and a New Jersey driver's license, both of which properly identified him. The officers asked permission to search his suitcases, and he consented. Since it was then 12:35, five minutes before flight time, they decided not to conduct the search. As they parted, resp stated that he had recognized them as policemen when he had first seen them in the lobby.

This parting taunt apparently angered the officers, for they immediately resumed their investigation. They obtained the callback number on resp's reservation from National Airlines. This number was assigned to 1980 South Ocean Drive in Hallandale. The Hallandale police reported (incorrectly, it was later discovered) that neither 1885 nor 1865 South Ocean Drive (the addresses

on the luggage tags) existed. The Miami officers telephoned DEA agents in New York and passed on the information they had discovered.

When resp's plane arrived at LaGuardia, some two and one-half hours later, two DEA agents were waiting for him. After observing his nervous behavior and allowing him to reclaim his suitcases, the agents approached resp and identified themselves. They asked permission to search his luggage, but he declined, claiming that it already had been searched in Miami. At this point the agents seized the suitcases and told resp that they would be held until a federal judge had determined whether there was probable cause to issue a search warrant. (One agent also took resp's driver's license and ran a computer check for any violations.) Resp was told that he was free to go, but that he could accompany the agents and his baggage to the district court. Resp declined this invitation. The agents did not tell him how long they planned to hold the luggage, but one of them gave resp a piece of paper listing his name and telephone numbers where he could "be reached by your attorney or yourself to pick up this luggage." J.A. 9.

By then it was about 4:00 o'clock Friday afternoon. The agents took the suitcases to their car and left LaGuardia at about 4:10. Rather than taking the suitcases to the district court, as they had told resp they would, they drove to Kennedy Airport, where they arrived some 35 minutes later. At about 5:30 or 5:40, a trained "sniffer dog" reacted positively to the smaller bag, indicating that there was a controlled substance inside.

The agents therefore contacted the U.S. Attorney's Office (EDNY) for instructions and were told to apply for a warrant on Monday morning. They secured the suitcases in their office over the weekend.

On Monday afternoon a federal magistrate (Caden) issued a warrant for the smaller bag. On opening it, the agents discovered over a kilogram of cocaine. Resp was indicted under 21 U.S.C. §841(a)(1) (possessing cocaine with intent to distribute it).

B. Decisions Below

Resp's motion to suppress the cocaine discovered in the suitcase was denied by the DC (EDNY; Platt). The DC concluded that resp's behavior created a reasonable suspicion that he was carrying narcotics, and this reasonable suspicion justified the stop that occurred at LaGuardia when the DEA agents took resp's license and suitcases. On the basis of United States v. Klein, 626 F.2d 22 (CA7 1980), the DC upheld the detention of the luggage, too. Even if reasonable suspicion is inadequate to justify a seizure, the DC noted (without explanation) that the agents had probable cause to detain the bags here.

On appeal, CA2 (Mansfield [majority], Oakes [concur]; Kaufman [dissent]) reversed. Judge Mansfield, writing the majority opinion, found it "clear that the drug enforcement agents did not have probable cause to arrest Place or seize his baggage at LaGuardia Airport," petn app 11a, but was willing to assume that they had reasonable suspicion justifying an investigatory stop,

"Mansfield's Op. for CA2

id., at 14a. Judge Mansfield was also willing to assume that the principles of Terry v. Ohio, 392 U.S. 1 (1968), apply to seizures of property, despite arguments that the Terry exception to the Fourth Amendment's probable cause requirement should not be so expanded. Petn app 15a. Even with these assumptions, however, the police were only entitled to detain the suitcases for a reasonable period. Judge Mansfield concluded that the detention here went well beyond the narrow exception sanctioned by Terry. He relied on the excessive length of time that the luggage was held, "the high-handed procedure adopted by the agents," the fact that the agents lied to resp about what the agents would do with the suitcases, and the fact that such extreme measures were unjustified by the circumstances of the case.

Judge Mansfield distinguished United States v. Van Leeuwen, 397 U.S. 249 (1970), in which the owner of two parcels voluntarily relinquished custody and control over the parcels "for the indefinite period (at least a couple of days) required for forwarding and delivery." Petn app 20a. Judge Mansfield also distinguished decisions in other CAs where the detention of a suspect's luggage had been reasonable--in sharp contrast to the present case. Id., at 21a.

Judge Oakes concurred in Judge Mansfield's opinion, thus giving Judge Mansfield majority support, but wrote separately to emphasize his own Fourth Amendment views. He argued "that the Fourth Amendment should be read not atomistically, but regulatorily." Id., at 22a. Warrantless seizures on less than probable cause should be permissible only when conducted "pursu-

ant to duly adopted, proper, nondiscriminatory, and reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review." Ibid.

Judge Kaufman dissented. In his view, the seizure of the luggage was reasonable. He seems to argue that the seizure was justified by the later discovery of the cocaine, id., at 25a, by the exigent circumstances, ibid., by the fact that resp could have avoided any inconvenience merely by waiving his Fourth Amendment rights, id., at 26a, and by the fact that the seizure of the suitcases did not violate resp's privacy interest in their contents, id., at 26a-27a. He found Judge Mansfield's distinctions between Van Leeuwen and the present case to be "nebulous" and unpersuasive. Id., at 27a.

II. Discussion

I fear that the Court has again taken a case to decide an important issue which is not well presented by the case. Here the SG claims that the question presented is "[w]hether the Fourth Amendment prohibits police from temporarily detaining personal luggage reasonably suspected of containing narcotics for the purpose of arranging its exposure to a trained narcotics detection dog." Brief for the United States i. That question, however, was neither addressed nor decided by CA2. Judge Mansfield assumed that the Fourth Amendment does not prohibit a reasonable detention of luggage reasonably suspected of containing narcotics for the purpose of exposing it to a sniffer dog. It was only after making this assumption that he found the detention

here to be unreasonable. It thus appears that this case will end up being much like Florida v. Royer, No. 80-2146: the Court will give important guidance to police on what they are allowed to do in airports, but technically the guidance will be dicta.

A. The Permissible Police Options

The first inquiry should focus on the options that are legitimately available to police who desire to discover the contents of a closed container in which a suspect has a legitimate expectation of privacy. What steps may police take, and what do they need to support their actions?

(1) Probable Cause. I begin with the easy case. If the police have both (i) probable cause to believe that there is contraband or other evidence of a crime inside a closed container, and (ii) a valid warrant describing that container, then there should be no problem with the Fourth Amendment. The police may seize the container and conduct the search immediately.

If the police have probable cause, but no warrant, they may not search the container immediately. Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). If the exigencies of the circumstances demand it, however, they are entitled to seize the container and secure it pending a decision on their request for a warrant. In Sanders, for example, the police "had ample probable cause to believe that respondent's green suitcase contained marihuana." 442 U.S., at 761. But it was being taken away from the airport in a taxi, so

if the police did not seize it immediately they were likely to lose it entirely. Although they had no right to search the suitcase without a warrant, you declared that "[t]he police acted properly--indeed commendably--in apprehending ... [resp's] luggage," ibid. Dicta in Chadwick similarly endorsed the seizure of a footlocker there. 433 U.S., at 13, 15-16. Again the seizure was based on probable cause, and justified by the fact that the suspects were about to drive away with the evidence.

(2) Reasonable Suspicion. The general rule is that searches and seizures subject to the Fourth Amendment require a warrant supported by probable cause. There are "a few 'jealously and carefully drawn' exceptions" to this general rule, Arkansas v. Sanders, 442 U.S., at 759 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)) (footnote omitted), such as the one recognized in Terry v. Ohio, 392 U.S. 1 (1968). You explained the relevant principles in Sanders:

> [B]ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and "the burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951).... Moreover, we have limited the reach of each exemption to that which is necessary to accommodate the identified needs of society.

442 U.S., at 759-760. Most of the "few 'jealously and carefully drawn' exceptions" permit the police to dispense with a warrant, but still require the existence of probable cause. For present purposes, the most relevant exception is that recognized by Terry

Terry (person detained) to property

and its progeny, which allow a warrantless seizure of a person on less than probable cause. This Court has never recognized a warrantless seizure of property on less than probable cause.[1] The issue, therefore, is whether the Court should create a new exception along Terry lines to permit property seizures.

There are good arguments why there should not be a property seizure exception. Historically, seizures based on less than probable cause were one of the principal targets of the Fourth Amendment,[2] and it could be considered contrary to the Amendment's purposes to create a seizure exception. It has also been argued that property seizures cannot be justified by the Terry rationale, for there are no differences in degree: "an owner is either dispossed of his property or it remains in his custody." Comment, Seizing Luggage on Less than Probable Cause, 18 Am. Crim. L. Rev. 637, 645 (1981).

On balance, I am unconvinced by these arguments. I conclude that there should be a narrow exception to the Fourth

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[1]The closest case is United States v. Van Leeuwen, 397 U.S. 249 (1970). There two suspicious packages were mailed at a local post office. Rather than forwarding them immediately to their destinations, the post office delayed their delivery pending a decision on a search warrant. Since the suspect had voluntarily surrendered the packages to the post office, there was no seizure involved. The Court recognized that, in theory, "detention of mail could at some point become an unreasonable seizure ... within the meaning of the Fourth Amendment," id., at 252, but held that no Fourth Amendment interest had been invaded "on the facts of this case," id., at 253. Since the case was decided, This Court has never cited Van Leeuwen for its holding.

[2]The historical considerations are discussed in the ACLU's Amicus Brief at pp. 16-26. (In view of the weakness of resp's brief, this is a brief you should read in any event.)

Amendment's probable cause requirement to govern minimally intrusive property seizures. Although I agree with the Government's conclusion on this point, I find it a much harder question than the SG would make it. The conclusion does not follow directly from Terry, despite the SG's assertions to the contrary. The justification for detaining a person for an investigative stop does not necessarily entitle an officer to seize the suspect's luggage for the same period. If the officer has no reasonable suspicion relevant to the luggage itself, the suspect should be free to turn it over to a third party when that is a practical option. And given that the detention of a suspect does not necessarily entitle an officer to detain the suspect's luggage, it does not always follow that detaining the luggage is the lesser intrusion. Nor is it always true that a seizure of a container is less intrusive than an impermissible search of that container. See Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (As between the search or seizure of an automobile, "which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances."). Finally, there are distinctions between people and property that make a limited seizure of property less appropriate. As Judge Mansfield recognized, a suitcase (unlike a person) cannot independently resume its course after the police have finished with it. Petn app 15a.

Nevertheless, the Terry rationale is compelling here. Contrary to the argument made in the secondary literature, there are differences in degree among property seizures. The seizure

difference in degree among probable suspicion

may be brief or prolonged. The officer may hold the property in the suspect's presence, or remove it to a distant location. The seizure may come under circumstances to cause minimal inconvenience, or at a time that wrecks havoc with the suspect's plans. The item seized may be of minor importance, or essential to the suspect's life. All of these factors can be considered in deciding whether a given seizure is so minimally intrusive that it may be justified by reasonable suspicion and the government's interest in stemming the drug traffic.

B. The Existence of Reasonable Suspicion

I conclude that the DEA agents at LaGuardia had reasonable suspicion sufficient to justify a Terry stop by the time they seized resp's suitcases, but once again the question is closer than the SG would have the Court believe. In Florida v. Royer, No. 80-2146, we agreed that the officers had reasonable suspicion when they learned that Royer was travelling under an alias. Here I do not think that the DEA agents had comparable suspicion until resp lied to them about his suitcases having been searched in Miami.

yes

Before resp's lies, there was little real evidence suggesting criminal activity except for resp's nervous behavior and scanning of the airport terminal, and that alone cannot be enough to establish reasonable suspicion. The discrepancy between the addresses on the baggage tags was minor, and it could easily be explained by the fact that resp was not from Hallendale. (His driver's license was issued by New Jersey.) The discrepancy be-

came particularly insignificant when the officers learned that resp had tagged his luggage with his true name. His paying for his flight in cash might have been suspicious (although there is no indication that the flight was very expensive, or that resp had a large roll of small bills), but the cash payment lost whatever significance it had when the officers discovered that resp (i) had given a genuine callback number when making his reservation and (ii) had purchased his ticket under his true name.[3]

Other suspicious circumstances commonly found in drug courier profile cases were not present here. Resp was not travelling without luggage (a factor deemed suspicious in United States v. Mendenhall, 446 U.S., at 547 n.1), or with unusually heavy suitcases (a factor deemed suspicious in Royer), or with empty suitcases (a factor deemed suspicious in some lower court cases). He was not a known drug dealer. In fact, a computer check of his license revealed no violations at all.

Despite all this, I think the lies resp told the New York DEA agents about his experience with the Miami policemen were enough to give them sufficient reasonable suspicion for a Terry stop. Coupled with his nervous behavior and scanning of the airport, they made it reasonably likely that he was trying to hide something. The lies also focused this suspicion on the

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[3]The only reason it is suspicious for a person to misidentify his luggage or to pay for a plane ticket with cash is because these actions indicate a desire to avoid having his ownership of the luggage or his identity discovered. When resp used his true name for both the luggage tags and the flight reservation, however, such a suspicion is no longer justified.

suitcases. Under all of the circumstances, the agents were well short of probable cause, but they had a reasonable suspicion that resp was carrying contraband in his suitcases.

C. The Reasonableness of the Seizure

Although an exception to the Fourth Amendment's probable cause requirement is justified, it is justified only if the seizure is minimally intrusive. The Court must remember that it is dealing with an exception to a constitutional provision, and the exception should be narrowly drawn.

(1) The SG's General Arguments. The SG makes certain general arguments that would lead to an expansive exception for property seizures. For example, he contends that a property seizure "may be of longer duration than a detention of the person because it entails a significantly lesser intrusion into personal liberty." Brief for the United States 11; see also id., at 23 ("[T]he detention of baggage is significantly less intrusive than the detention of a person."). Although this generalization may be true for extended seizures, that is irrelevant here. It does not matter that a two-week property seizure is significantly less intrusive than a two-week arrest, or even that a two-hour property seizure is significantly less intrusive than a two-hour arrest, for it is clear that a person may not be seized for that long without probable cause. Dunaway v. New York, 442 U.S. 200 (1979). It does the Government no good for the SG to argue that the seizure at issue is not so bad as something else that is

clearly impermissible.[4]

The relevant comparison is between a property seizure and the most intrusive seizure of a person that is permissible. The permissibility of a Terry stop, of course, varies according to the circumstances, but thus far the Court has endorsed only brief detentions. See Michigan v. Summers, 452 U.S. 692 (1981) (detention of home-owner while home searched pursuant to warrant); United States v. Cortez, 449 U.S. 411 (1981) (brief immigration check near border); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (order to leave car when car lawfully stopped and weapons frisk); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (investigative stop near border lasting less than a minute for "a brief question or two"); Adams v. Williams, 407 U.S. 143 (1972) (weapons frisk on basis of reasonable suspicion); Terry, supra (same). The American Law Institute's Model Code of Pre-Arraignment Procedure would limit Terry stops to a maximum of twenty minutes.[5] Although twenty minutes is longer than any stop

ALI

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[4]If it was not already clear from Dunaway, it is certainly clear from Royer that the DEA agents could not have seized resp himself on the basis of reasonable suspicion and taken him from LaGuardia to Kennedy in order to carry out further investigation.

[5]The ALI proposal provides:

> A law enforcement officer, lawfully present in any place, may [under certain circumstances] order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized [by the proposal], but in no case for more than twenty minutes.

Model Code of Pre-Arraignment Procedure §110.2(1) (1975).

that the Court has permitted, and the choice of twenty minutes has been criticized in the secondary literature for being excessive,[6] it can probably be viewed as a good approximation of the theoretical maximum. At this level, the SG's assertion is probably incorrect, for a twenty-minute property seizure is likely to be just as intrusive as a twenty-minute detention. In most cases a suspect will stay with the luggage for the twenty minutes to assure himself that nothing happens to it. In that case, there is no practical difference between the seizure of the luggage and the detention of the person. But even if the suspect does not stay with the luggage, he is effectively tied to the immediate vicinity so that he can reclaim it. The need to make special arrangements to recover a suitcase is probably more intrusive than simply staying with it for twenty minutes, at least in most cases.

In sum, the comparison with Terry does not support an expansive exception. When a property seizure goes beyond what Terry would permit for a seizure of a person, it is no longer a minimal intrusion that may be justified on grounds of reasonable suspicion.

The SG also argues that United States v. Van Leeuwen demonstrates that an extended property seizure is not unreasonable under the Fourth Amendment. This argument, however, ignores

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[6] E.g., Note, Field Interrogations: Court Rule and Police Response, 49 J. Urb. L. 767, 776 (1972) (most field interrogations take less than ten minutes).

the fact that Van Leeuwen arose in an entirely different context.[7] The "detention" in Van Leeuwen did not involve any seizure from a suspect, for the suspect had voluntarily surrendered custody of the packages to postal authorities. The suspect was not even aware of the detention until well after it was over. Had the warrant not been issued, it is not clear that the suspect would even have known that the detention had taken place, for mail often arrives a day or two later than a person might expect it. Judge Chambers, in CA9's Van Leeuwen decision, gave an apt summary of the situation:

> I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the post office for 29 hours does not offend me very much. Someone in the post office holds up much of my mail over 29 hours.

United States v. Van Leeuwen, 414 F.2d 758, 760 (CA9 1969) (Chambers, J., concurring), rev'd on other grounds, 397 U.S. 249 (1970).

There are other distinctions that make Van Leeuwen less compelling than the SG contends. In Van Leeuwen, for example, the detention of the packages was unrelated to the finding of

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[7]Of course Van Leeuwen would be relevant in a similar context. For example, the Court might wish to indicate that DEA agents have considerably more leeway with respect to checked luggage during the period after the passenger has surrendered it to the airline and before he has reclaimed it at the baggage claim area. So long as the luggage arrives at the claim area at about the same time it would have arrived without police interference, Van Leeuwen is relevant authority supporting a detention.

probable cause. The police did not establish probable cause by investigating the packages, but by investigating the addressees. In its brief, the Government relied on the fact that it could have conducted the investigation in the same way without detaining the packages. Brief for the United States in Van Leeuwen 6. This means that, under Wong Sun v. United States, 371 U.S. 471 (1963), any problem with the detention would not have tainted the warrant. Accordingly, Van Leeuwen did not even challenge the initial detention, but rather challenged the lapse of time between the establishment of probable cause and the application for a search warrant. Brief for Resp in Van Leeuwen 19 ("this unreasonable lapse of time after having probable cause violated the Fourth Amendment").

unreasonable detention

(2) The Facts Here. On the facts of the case here, I have no difficulty in concluding that the DEA agents went well beyond the minimal intrusion that could be justified on the basis of reasonable suspicion. The outrageousness of their behavior is highlighted by the fact that even Judge Mansfield[8] condemned it.

Resp's suitcases were seized from him at about 4:00 on a Friday afternoon. It was an hour and a half later 90 min before the agents were able to expose the bags to a "sniffer dog" at a different location. If the dog had not detected drugs in the bags,

[8]Judge Mansfield is not only a good judge, on criminal matters he is easily the most conservative of the good judges on the Second Circuit.

it would have been at least two hours before resp could have recovered his luggage--and this requires several generous assumptions. To recover them so quickly, we must assume that resp would have stayed in the Laguardia area,[9] thus severely restricting his movement. In view of the fact that resp was from New Jersey, and had already telephoned for a limousine, this would presumably have been a serious imposition. We would also have to assume that the agents would have returned the bags promptly once resp's innocence was established, and there is no support for such an assumption in the record. It is noteworthy, for example, that the agents did not return the larger suitcase, as to which they did not have probable cause even after exposing it to the sniffer dog. All they did at the time of the arrest was give resp a telephone number to call to see about recovering his bags, with no suggestion as to when such a call would be appropriate or where resp would have to go or what he would have to do to regain possession of his property. Under these circumstances, it is extraordinarily generous to the Government to speak of this case as involving merely a two hour seizure.

If the Court is generous enough to treat this as a two hour seizure, there can still be little doubt that it goes far beyond anything the Court has permitted under Terry. (The Court

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[9] If resp had gone with the agents to Kennedy, of course, he would have been able to recover the bags sooner. If the resp is required to go with the agents to protect his right to recover his luggage, however, he has effectively been seized himself. Such a seizure is plainly impermissible. See note 4, supra.

has rejected less intrusive seizures in Royer and Dunaway.) Furthermore, even if the Court were to ignore past precedents, this seizure should still be considered unreasonable. The only justification for dispensing with the probable cause requirement is the assumption that the seizure at issue is minimally intrusive. The police intrusion here, however, did far more than offend a person intent on asserting his Fourth Amendment rights. An innocent traveller whose bags were detained without probable cause under these circumstances would be understandably furious.[10]

The SG claims to justify the seizure here on the basis of the Government's interest in controlling the drug traffic.[11] That interest is, of course, compelling, and it is sufficient to justify a minimal intrusion on the basis of reasonable suspicion rather than probable cause. But in the absence of probable cause

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[10]The Government has argued that the Fourth Amendment standard should be based on what a reasonable person innocent of any wrongdoing would find objectionable. This Court has frequently rejected that standard. Numerous decisions recognize the right of an individual to protect his Fourth Amendment rights far more vigorously than a typical innocent bystander. See, e.g., Kolender v. Lawson, No. 81-1320. But even if the Court accepted this "general reasonableness" test, the conduct here would not satisfy it. Almost anyone would be furious if the police took his luggage from him on a Friday afternoon and merely gave him a telephone number that he or his attorney could call to arrange to pick up the luggage himself at some unspecified time. Although that innocent person could avoid this inconvenience by consenting to a search, it is no answer to resp's argument to say that he could have waived his clear Fourth Amendment rights in order to avoid the violation of other Fourth Amendment rights.

[11]The real governmental interest that the SG seeks to protect here is the DEA's decision not to have a "sniffer dog" at LaGuardia Airport. And the only justification for that decision is the assertion that it would be uneconomical to keep a dog at LaGuardia.

it is only sufficient to justify a minimally intrusive seizure of a suspect's luggage. A generalized interest in controlling the drug traffic (awful as that traffic is) does not justify an abandonment of all Fourth Amendment principles. In particular, it does not justify a two hour seizure of luggage on less than probable cause--any more than it justified the less intrusive seizure in Florida v. Royer, No. 80-2146.

III. Conclusion

On the issue of general importance, the Court should recognize a new exception to the Fourth Amendment's probable cause requirement (along the lines of Terry) to permit a minimally intrusive seizure of a suspect's luggage when the police have a reasonable suspicion that the luggage contains contraband. On the fact-specific issue presented in this case, the Court should hold that the seizure at issue here went far beyond anything that was reasonably justifiable.

81-1617 U.S. v. PLACE

Argued 3/2/83

(dog sniffing case)

Horowitz (SG)

Bags were held over week end before warrant. But Resp did not request them — nor had he given officer any address. But there was probable cause then.

Q re whether the delay was reasonable.

JPS noted: If the presence of drugs is "more likely than not", there is probably cause. Third, an investigative stop or detention of luggage ~~detention~~ on reasonable suspicion, by detention, is made on less than 50% suspicion.

→ The detention here was 90 minutes before probable cause was established by sniffing dog.

Relies on statement in Chadwick as to right to detain suitcase pending obtaining warrant.

x x x

~~Clarke~~

Responding to BRW (at end of argument)

Horowitz agreed issue of reasonable suspicion is not here. It was assumed by CA 2. We could remand on this.

Clark (Resp)

Terry doesn't apply.

~~Ct~~ Concede there was reasonable suspicion. CA2 assumed it w/o deciding. Resp. ~~pet~~ filed a cross-petition arguing it didn't exist, but we denied the X-petition. ~~Pet~~

Seizure of baggage is not less intrusive than seizing ~~the~~ one's person.

(J. ~~Re~~ Rehnquist relied on U.S. v. Van Leeuwen, 397 U.S. 249

Affm 9-0

No. 81-1617, U.S. v. Place Conf. 3/4/83

The Chief Justice Affirm

"Trained dog" is now almost invariably upheld. But problem in this case is the prolonged detention of luggage.

Justice Brennan Affirm

Mansfield relied on the protracted investigation. Agree.

But would it extend Terry to "things"

Decide this case as Mansfield did w/o reaching other issues.

Justice White Affirm.

We can reach the reasonable suspicion issue but don't have it.

Justice Marshall Affirm

Dogs are "incredibly good" (TM has seen them function. Dogs can smell gun powder even when bullet itself has not been removed.

Justice Blackmun DIG or affirm

Justice Powell Affirm

(A 2 "assumed" reasonable suspicion. If we express an opinion on this, I would agree. Reasonable suspicion existed at least after Resp. lied as to what happen in Miami airport

Doctrine of "investigative" detention of person is now well established. I'd apply it to property.

Only Q is a proper standard for "how long"? There can be no arbitrary limit like A 2 R 20 min. rule. The Q is what is reasonable under all circumstances. It was unreasonable here.

Justice Rehnquist Affirm

~~Reverse~~

Can hold for reasonable period of time as reasonable

Justice Stevens Affirm

Duration of detention that is reasonable depends on facts & circumstances

Terry rationale is applicable to detaining

Should say a sniff is not a search.

Justice O'Connor Affirm

Agree with LFP.

Took care to give guidance. We showed

Don't agree with Mansfield view of what is reasonable time.

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: APR 5 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1617

UNITED STATES, PETITIONER *v.*
RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[April —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the issue whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. Given the strength of the public interest in detecting narcotics trafficking and the minimal intrusion that a properly limited detention would entail, we conclude that the Fourth Amendment does not prohibit such a detention. On the facts of this case, however, we hold that the police conduct exceeded the bounds of a permissible investigative detention of the luggage.

I

Respondent Raymond J. Place's nervous behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's LaGuardia Airport. As Place proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. Place complied with the request and consented to a search of the two suitcases he had checked. Because his flight was about to depart, however, the agents decided not to search the luggage.

Prompted by Place's parting remark that he had recog-

Join. Excellent opinion.

Join. I think this is an excellent opinion. Part II extends Terry to seizures of luggage and does so in principled fashion.

Mike

nized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Agency (DEA) authorities in New York to relay their information about Place.

Two DEA agents waited for Place at the arrival gate at LaGuardia Airport in New York. There again, his behavior aroused the suspicion of the agents. After he had claimed his two bags and called a limousine, the agents decided to approach him. They identified themselves as federal narcotics agents, to which Place responded that he knew they were "cops" and had spotted them as soon as he had deplaned. One of the agents informed Place that, based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. After identifying the bags as belonging to him, Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. The agents responded that their information was to the contrary. The agents requested and received identification from Place—a New Jersey driver's license, on which the agents later ran a computer check that disclosed no offenses, and his airline ticket receipt. When Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agents telephone numbers at which the agents could be reached.

The agents then took the bags to Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approxi-

This could be sufficient. The facts support a finding of reasonable suspicion more strongly than suggested here.

mately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.

Place was indicted for possession of cocaine with intent to distribute in violation of 21 U. S. C. § 841(a)(1). In the District Court, Place moved to suppress the contents of the luggage seized from him at LaGuardia Airport, claiming that the warrantless seizure of the luggage violated his Fourth Amendment rights.[1] The District Court denied the motion. Applying the standard of *Terry* v. *Ohio*, 392 U. S. 1 (1968), to the detention of personal property, it concluded that detention of the bags could be justified if based on reasonable suspicion to believe that the bags contained narcotics. Finding reasonable suspicion, the District Court held that Place's Fourth Amendment rights were not violated by seizure of the bags by the DEA agents. 498 F. Supp. 1217, 1228

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[1] In support of his motion, respondent also contended that the detention of his person at both the Miami and LaGuardia airports was not based on reasonable suspicion and that the "sniff test" of his luggage violated his Fourth Amendment rights. 498 F. Supp. 1217, 1221, 1228 (EDNY 1980). The District Court concluded that the agents had reasonable suspicion to believe that Place was engaged in criminal activity when he was detained at the two airports and that the stops were therefore lawful. *Id.*, at 1225, 1226. On appeal, the Court of Appeals did not reach this issue, assuming the existence of reasonable suspicion. Respondent Place cross-petitioned in this Court on the issue of reasonable suspicion, and we denied certiorari. 457 U. S. —— (1982). We therefore have no occasion to address the issue here.

We also note that respondent's challenge in the District Court to the "sniff test" was a challenge only to the manner in which the particular test was administered. 498 F. Supp., at 1226. Respondent did not raise, and we do not address, the question whether a sniff test by a trained narcotics detection dog constitutes a "search" within the meaning of the Fourth Amendment.

(EDNY 1980). Place pleaded guilty to the possession charge, reserving the right to appeal the denial of his motion to suppress.

On appeal of the conviction, the United States Court of Appeals for the Second Circuit reversed. 660 F. 2d 44 (1981). The majority assumed both that *Terry* principles could be applied to justify a warrantless seizure of baggage on less than probable cause and that reasonable suspicion existed to justify the investigatory stop of Place. The majority concluded, however, that the prolonged seizure of Place's baggage exceeded the permissible limits of a *Terry*-type investigative stop and consequently amounted to a seizure without probable cause in violation of the Fourth Amendment.

We granted certiorari, 457 U. S. —— (1982), and now affirm.

II

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, *and effects*, against unreasonable searches and seizures." (Emphasis added.) Although in the context of personal property, and particularly containers, the Fourth Amendment challenge is typically to the subsequent search of the container rather than to its initial seizure by the authorities, our cases reveal some general principles regarding seizures. In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.[4] See, *e. g.*, *Marron* v. *United States*, 275 U. S. 192, 196 (1927). Where law enforcement authorities have probable cause to believe that a container

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[4] The Warrant Clause of the Fourth Amendment provides that "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."

holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it. See, *e. g.*, *Arkansas* v. *Sanders*, 442 U. S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977).[3]

In this case, the Government asks us to recognize the reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of a search, that would quickly confirm or dispel the authorities' suspicion. Specifically, we are asked to extend the principles of *Terry* v. *Ohio*, *supra*, to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime. In our view, such an extension is appropriate.[4]

In *Terry* the Court first recognized "the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on

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[3] In *Sanders*, the Court explained:

"The police acted properly—indeed commendably—in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana. . . . Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle . . . and seizing the suitcase they suspected contained contraband." 442 U. S., at 761.

The Court went on to hold that the police violated the Fourth Amendment in immediately searching the luggage rather than first obtaining a warrant authorizing the search. *Id.*, at 766. That holding was not affected by our recent decision in *United States* v. *Ross*, 456 U. S. 798, —— (1982).

[4] We note "that an officer's authority to possess a package is distinct from his authority to examine its contents." *Walter* v. *United States*, 447 U. S. 649, 654 (1980) (opinion of STEVENS, J.) (footnote omitted). Respondent Place has not contended that the exposure of his luggage to the trained narcotics detection dog constitutes an unlawful search, and that question is not before us. See n. 1, *supra*.

less than probable cause." *Michigan* v. *Summers*, 452 U. S. 692, 698 (1981). In approving the limited search for weapons, or "frisk," of an individual the police reasonably believed to be armed and dangerous, the Court implicitly acknowledged the authority of the police to make a *forcible stop* of a person when the officer has reaonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity. 392 U. S., at 22.[5] That implicit proposition was embraced openly in *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), where the Court relied on *Terry* to hold that the police officer lawfully made a forcible stop of the suspect to investigate an informant's tip that the suspect was carrying narcotics and a concealed weapon. See also *Michigan* v. *Summers*, *supra* (limited detention of occupants while authorities search premises pursuant to valid search warrant); *United States* v. *Cortez*, 449 U. S. 411 (1981) (stop near border of vehicle suspected of transporting illegal aliens); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)* (order to get out of lawfully stopped car); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (brief investigative stop near border for questioning about citizenship and immigration status).

The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved. We must balance the nature and quality of the intrusion on the

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[5] In his concurring opinion in *Terry*, Justice Harlan made this logical underpinning of the Court's Fourth Amendment holding clear:

"In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. . . . I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." 392 U. S., at 32–33 (Harlan, J., concurring).

individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. Only when the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests can the opposing law enforcement interests support a seizure based on less than probable cause.

We examine first the governmental interest offered as a justification for a brief seizure of luggage from the suspect's custody for the purpose of pursuing a limited course of investigation. The Government contends that, where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial. We agree. As observed in *United States* v. *Mendenhall*, "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." 446 U. S. 544, 561 (1980) (opinion of POWELL, J.).

Respondent suggests that, absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause. Our prior cases, however, have rejected the suggestion that "the presence of some governmental interest independent of the ordinary interest in investigating crimes and apprehending suspects" is necessary to justify an intrusion based only on reasonable suspicion, *Michigan* v. *Summers*, 452 U. S., at 707 (Stewart, J., dissenting).[4] Indeed,

[4] In *Michigan*, we concluded that "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," in "minimizing the risk of harm" both to the officers and the occupants, and in "the orderly completion of the search" justified a limited detention of the occupants of the premises during execution of a valid search warrant for the premises. 452 U. S., at 702–703.

in *Terry* itself, we acknowledged that the initial seizure of the person, as opposed to the subsequent frisk, was justified by the general interest in "effective crime prevention and detection." 392 U. S., at 22.[7]

Even if it were incumbent upon the Government to "demonstrate an important purpose beyond the normal goals of criminal investigation, or . . . an extraordinary obstacle to such investigation," *Michigan* v. *Summers*, 452 U. S. at 708 (Stewart, J., dissenting), we think that burden would be met here.

> "Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *United States* v. *Mendenhall*, 446 U. S., at 561–562 (opinion of POWELL, J.).[8]

Particularly in the context of airport surveillance, police must make rapid, on-the-spot responses to suspected criminal behavior if they are to prevent the flow of narcotics into distribution channels.

Against this strong public interest, we must weigh the general nature and extent of the intrusion on the individual's Fourth Amendment rights when the police briefly seize his

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[7] "[I]t is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio*, 392 U. S., at 22.

[8] "The special need for flexibility in uncovering illicit drug couriers is hardly debatable. Surely the problem is as serious, and as intractable, as the problem of illegal immigration, discussed in *United States* v. *Brignoni-Ponce*, 422 U. S., at 878–879, and in *United States* v. *Martinez-Fuerte*, 428 U. S., at 552." *Florida* v. *Royer*, 460 U. S. ——, —— (1983) (BLACKMUN, J., dissenting).

luggage for limited investigative purposes. On this point, respondent Place urges that the rationale for a *Terry* stop of the person is wholly inapplicable to investigative detentions of personalty. Specifically, the *Terry* exception to the probable-cause requirement is premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person's liberty interests than a formal arrest. In the property context, however, Place urges, there are no degrees of intrusion. Once the owner's property is seized, the dispossession is absolute.

We disagree. The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner.[9] Moreover, the police may confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog[10]—

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[9] One need only compare the facts of this case with those in *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970). There the defendant had voluntarily relinquished two packages of coins to the postal authorities. Several facts aroused the suspicion of the postal officials, who detained the packages, without searching them, for about 29 hours while certain lines of inquiry were pursued. The information obtained during this time was sufficient to give the authorities probable cause to believe that the packages contained counterfeit coins. After obtaining a warrant, the authorities opened the packages, found counterfeit coins therein, resealed the packages and sent them on their way. Expressly limiting its holding to the facts of the case, the Court concluded that the 29-hour detention of the packages on reasonable suspicion that they contained contraband did not violate the Fourth Amendment. *Id.*, at 253.

As one commentator has noted, "*Van Leeuwen* was an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves." 3 W. LaFave, Search and Seizure § 9.6, p. 60 (1982 Supp.).

[10] Cf. *Florida* v. *Royer*, 460 U. S. ——, —— (1983) (plurality opinion) ("We agree with the State that [the officers had] adequate grounds for sus-

or transport the property to another location. Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

III

There is no doubt that the agents made a "seizure" of Place's luggage for purposes of the Fourth Amendment when, following his refusal to consent to a search, the agent told Place that he was going to take the luggage to a federal judge to secure issuance of a warrant. As we observed in *Terry*, "[t]he manner in which the seizure . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." 392 U. S., at 28. We therefore examine whether the agents' conduct in this case was such as to place the seizure within the general rule requiring probable cause for a seizure or within *Terry*'s exception to that rule.

The precise type of detention we confront here is seizure of personal luggage from the immediate possession of the suspect for the purpose of arranging exposure to a narcotics detection dog. Particularly in the case of detention of luggage

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pecting Royer of carrying drugs and for temporarily detaining him *and his luggage* while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention") (emphasis added).

within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary. Such a seizure effectively restrains the person, since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.[11] Therefore, we must reject the Government's suggestion that the point at which probable cause for seizure of luggage from the person's presence becomes necessary is more distant than in the case of a *Terry* stop of the person himself. The premise of the Government's argument is that seizures of property are generally less intrusive than seizures of the person. While true in some circumstances, that premise is faulty on the facts we address in this case. When the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause. Under this standard, it is clear that the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop.

The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*, see *Michigan* v. *Summers*, *supra*, the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so mini-

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[11] "At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police." 3 W. LaFave, Search and Seizure § 9.6, p. 61 (1982 Supp.).

mally intrusive as to be justifiable on reasonable suspicion. Further, although we decline to adopt any outside time limitation for a permissible *Terry* stop,[12] we have never approved a seizure of a person for the prolonged 90-minute period involved here and refuse to do so now. See *Dunaway* v. *New York*, 442 U. S. 200 (1979). We note that the New York agents knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests.[13]

Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by po-

[12] Cf. ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) (recommending a maximum of 20 minutes for a *Terry* stop). We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation. Whether the length of the detention impermissibly intrudes on the individual's Fourth Amendment interests must take into account whether the police diligently pursue a method of investigation that will quickly confirm or dispel their suspicion. See 3 W. LaFave, Search and Seizure § 9.2, p. 40 (1978).

[13] Cf. *Florida* v. *Royer*, 460 U. S. ——, —— (1983) ("If [trained narcotics detection dogs had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out."). This course of conduct also would have avoided the further substantial intrusion on respondent's possessory interests caused by the removal of his luggage to another location.

lice to detain briefly luggage reasonably suspected to contain narcotics.

IV

We conclude that, under all of the circumstances of this case, the seizure of respondent's luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place's conviction must be reversed. The judgment of the Court of Appeals, accordingly, is affirmed.

~~*It is so ordered.*~~

Affirmed.

April 8, 1983

81-1617 United States v. Place

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 14, 1983

Re: 81-1617 - United States v. Place

Dear Sandra:

Please join me.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 28, 1983

Re: No. 81-1617 - United States v. Place

Dear Sandra:

I am glad to join your second draft circulated April 14.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 29, 1983

Re: No. 81-1617 United States v. Place

Dear Sandra,

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 2, 1983

Re: No. 81-1617 - United States v. Place

Dear Sandra:

On April 28, I joined your second draft circulated April 14. Changes made in your third draft, which I assume were made to attract Bill Rehnquist's vote (judging by his immediate joinder on April 29) are somewhat disturbing to me.

I feel, for example, that the first sentence of the first full paragraph on page 7 is somewhat out of context from the Terry material that immediately preceded your Terry quote. In addition, as I read the revision of page 11, you have shifted the departure test to a subjective one. Does this mean that if the Government can prove that Place did not determine that it was necessary for him to remain with the luggage or otherwise disrupt his travel, there is no Fourth Amendment violation? Place, of course, in this case left the airport without his luggage. Further, the addition of the sentence on page 12 beginning with "Moreover" focuses upon diligent police procedures. I doubt if the Court has ever held this. In Dunaway, there was no bow whatsoever in the direction of diligence.

If the third draft remains as it is, I withdraw my joinder and you may record me as concurring only in the result.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 2, 1983

No. 81-1617 United States v. Place

Dear Harry,

I regret that the changes made in my third draft were unacceptable to you. I had thought they were not inconsistent with the second draft. I am willing to make a few more modifications if they will answer your concerns.

With respect to page 7, it is helpful, I think, to refer to the language of the Fourth Amendment in connection with describing the balancing standard for justifiying an exception to the probable cause requirement. I would be willing to delete the first sentence of the first full paragraph, and add the following phrase to the end of the next sentence, "... within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.'"

With regard to page 11, it was not my intention to shift to a subjective test. Perhaps your concern can be met by a return to the following language in the last sentence on page 11:

"Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. 9/"

The addition of the sentence on page 12 beginning with "Moreover" also does not represent a new thought that appeared for the first time in the third draft. That thought previously appeared in footnote 10 of the second draft to explain why adoption of a rigid time limitation for

permissible Terry stops would not be appropriate. In my view, whether the police diligently pursue their investigation can affect, in either direction, the determination whether the detention was impermissibly long--i. e., even a relatively short detention might impermissibly intrude upon an individual's Fourth Amendment interests if the police do not make an effort to confirm or dispel their suspicion during that time. In this case, as the opinion points out, the police did not make efforts reasonably at their disposal to conduct the investigation expeditiously and thereby minimize the intrusion on Place's Fourth Amendment interests. This factor exacerbates the critical fact that the luggage was held for the prolonged 90-minute period.

Although only a plurality opinion, the opinion in Florida v. Royer does support the notion that the diligence with which the police pursue their investigation is relevant to the Fourth Amendment inquiry. There, the opinion notes: "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Slip op. at 9.

If my explanation and proposed adjustments will allay your concerns, I will gladly make the changes.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 5 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1617

UNITED STATES, PETITIONER *v.*
RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May —, 1983]

JUSTICE WHITE, concurring.

Dealing first with the legality of the initial seizure of Place's luggage, the Court affirms the right of the government to seize the luggage without a warrant and on less than probable cause, "for the purpose of pursuing a limited course of investigation." *Ante*, at 5. This conclusion would plainly be foreclosed if the investigative procedure to be carried out was itself illegal or would violate the Fourth Amendment.[1]

I take it, therefore, that the Court is of the view that the purpose of the seizure—to carry out a canine sniff—was consistent with the Fourth Amendment, either because the use of the dogs would not constitute a search or otherwise impli-

[1] In reviewing the reasonableness of investigative detentions, the Court has always looked at the purpose to be served by the detention. Whether a seizure is lawful when initiated depends both on the existence of reasonable suspicion and on whether the course of investigation to be pursued during the detention is itself lawful. See *Terry* v. *Ohio*, 392 U. S. 1, 20 (1963); *United States* v. *Cortez*, 449 U. S. 411, 421 (1981); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975); *Adams* v. *Williams*, 407 U. S. 143, 146 (1972). In *Michigan* v. *Summers*, 452 U. S. 692 (1981), the Court held that reasonable suspicion was sufficient to support a detention for the purpose of maintaining the status quo during a search of the person's residence pursuant to a valid search warrant. There is little doubt that the detention in *Summers* would not have been considered "reasonable" if its purpose was to maintain the status quo during an illegal search.

cate the Fourth Amendment or because, even if the sniff is a search, it is a search that may be carried out on reasonable suspicion and without probable cause or a warrant.

To reach its conclusion that the initial seizure of the luggage was justifiable, the Court must rest on one of these alternative grounds. Since it purports to reserve the question of whether the canine sniff is a search, *ante*, at 3 n. 1, it must be holding, although it does not expressly say so, that even if a search, reasonable suspicion is sufficient to justify it. I agree with that view,[2] although the Court would have been better advised to justify the canine investigation on the grounds that the procedure does not itself require reasonable suspicion or probable cause or otherwise implicate the Fourth Amendment.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U. S. 1, 7 (1977). There is a privacy interest in the contents of suitcases that is protected by the Fourth Amendment and luggage may not be opened and its contents revealed without probable cause and normally without a warrant. But a "canine sniff" does not expose the contents of a suitcase. It involves only the outside surface of the luggage, which is certainly "knowingly expose[d] to the public," *Katz* v. *United States*, 389 U. S. 347, 351 (1967), and the surrounding air which is something in which no person has either a possessory or privacy interest. Without intruding on any legiti-

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[2]The possibility that drug-detecting dogs could have been used as a means of investigating a suspected drug-courier was also discussed with approval in *Florida* v. *Royer*, 460 U. S. ——, —— (1983) (plurality opinion). Unlike the present case, the use of these specialized canines was not involved in that case and there was no opportunity to decide whether their use constitutes a search. That issue is presented in this case and the Court should not leave a cloud of doubt over the propriety of this investigative technique.

mate expectation of privacy in the contents of the luggage, a "sniff test" provides the authorities with reliable evidence indicating that among the contents of the suitcase there is contraband. The Fourth Amendment does not protect a subjective expectation that one may have that the police will be unable, without actually seeing the contents, to garner sufficient evidence to establish probable cause.

Nor does it protect people against the use of particular devices or investigative methods unless there is an intrusion on a legitimate privacy interest. The suggestion that law enforcement authorities may only use their own senses, or a device that enhances their own senses, rather than a "device" that replaces their senses is without merit.[3] There is little doubt that if the officer could, by sniffing the outer surface of a suitcase, smell an odor that he knew from experience was that of contraband he would have probable cause, and no one would suggest that the officer's sniff constituted a "search" of the suitcase.[4] Although drug-couriers may bemoan the fact that "man's best friend" has become the narcotics-carrier's worst enemy, if a human "sniff" does not invade any protected privacy interest, then a dog "sniff" does not either.

Given that the particular course of investigation that the agents intended to pursue did not itself violate the Fourth Amendment and that the agents had reasonable suspicion to believe the suitcases contained contraband, the seizure in this case was "justified at its inception." *Terry* v. *Ohio*, 392

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[3] The only Court of Appeals that has held a "sniff" of luggage to be a "search" within the meaning of the Fourth Amendment relied on such a distinction. See *United States* v. *Beale*, 674 F. 2d. 1327, 1333 (CA9 1982), cert. pending, No. 82-674.

[4] Although the Court of Appeals in *United States* v. *Beale*, *supra*, found that a "dog sniff" of luggage was a "search," it conceded that "[h]ad [the detective], utilizing only his own natural senses, been able to detect the odor of controlled substances emanating from [defendant's] suitcase, this would not have been a Fourth Amendment intrusion. *Id.*, at 1332.

U. S. 1, 20 (1963). The only remaining question is "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Ibid.* It is the Government's burden to show that the particular detention at issue was sufficienty limited in scope and duration. *Florida* v. *Royer*, 460 U. S. ——, —— (1983) (plurality opinion). Here, the Government argues that the scope and duration of the detention meet constitutional requirements because "the agents did not know that they would need a dog to search respondent's luggage," Brief for Petitioner 31, and that "the paucity of trained drug detecting dogs makes it impossible as a practical matter to have a dog waiting whenever a suspected drug courier is arriving at an airport." *Ibid.* These asserted justifications do not bespeak necessity or expediency.

Although I am sympathetic to the myriad problems with which law enforcement authorities must cope in executing their duties, wherever the solution to the Government's problems may lie, it is not in sacrificing interests protected by the Fourth Amendment. Accordingly, I agree with the Court that the judgment of the Court of Appeals must be affirmed.

mfs 05/05/83

To: JUSTICE POWELL

From: Michael

Re: United States v. Place, No. 81-1617

I agree

I agree with JUSTICE WHITE's theory that permits the Court to consider the legality of a dog sniff. I also agree that it would be a good idea to resolve the issue now, without having another argued case.

JUSTICE WHITE does not make it clear in his concurring opinion what he thinks is the appropriate rationale for upholding dog sniffs. I think the Court should make clear that such sniffs are not "searches" within the scope of the Fourth Amendment. Dog sniffs do not reveal the contents of the luggage. The dogs are trained to reveal only whether a specific type of contraband is present. (This rationale will also apply to United States v. Jacobsen, No. 82-1167 (validity of chemical field test for narcotics). Perhaps the Court could vacate and remand Jacobsen for further consideration in light of Place, thus saving an extra oral argument slot.) This is very different from an X-ray, for example, which reveals information about all of the contents of a suitcase--innocent items and contraband alike.

It would not be a good idea to hold that dog sniffs are searches, but nevertheless permissible on reasonable suspicion. First, this would be an unnecessary extension of the Terry ra-

tionale. Terry permits a weapons frisk in view of the strong interest in protecting the safety of the officer. But Terry has not been used to justify other searches, only seizures. Second, this rationale would be an undue limitation on police practice, for it would impose a reasonable suspicion requirement before a dog sniff can take place. Such a requirement is, of course, no problem in a situation such as this, where the police must seize the luggage before exposing it to a sniffer dog. But a reasonable suspicion requirement could prohibit the police from exposing luggage to sniffer dogs while it is in the airlines' custody. I do not think it would be wise to foreclose such procedures at this point.

I have drafted a letter to JUSTICE O'CONNOR for your consideration. You may wish to add a line saying that you agree with JUSTICE STEVENS' suggestions. All three of his suggestions are fairly technical, however, so I do not think it is necessary for you to express your views.

SOC-MICHAL-POW Draft Letter to JUSTICE O'CONNOR

May 5, 1983

Re: United States v. Place, No. 81-1617

Dear Sandra:

I agree with Byron's theory that permits the Court to consider the legality of a dog sniff in this case. Once the police seized the luggage, their only legitimate purpose was to expose it to a sniffer dog. Since the legality of the seizure is before us, the legality of the officers' purpose is also before us. And I agree that it would be a good idea to resolve the issue now, without having another argued case.

In resolving the issue, I would prefer to say that a dog sniff of a piece of luggage is not a search within the meaning of the Fourth Amendment. Dog sniffs do not reveal the contents of the luggage. The dogs are trained to reveal only whether a specific type of contraband is present. This is very different from an X-ray, for example, which reveals information about all of the contents--innocent items and contraband alike.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 5, 1983

No. 81-1617 United States v. Place

MEMORANDUM TO THE CONFERENCE

Byron has circulated a persuasive concurring opinion which would address and resolve the question of whether the dog sniff is a search within the meaning of the Fourth Amendment.

My draft had reserved the question because it had not been argued or addressed below. I am willing to address the question and to adopt Byron's reasoning if there are sufficient votes in the Conference.

Yes

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 5, 1983

Re: No. 81-1617 United States v. Place

Dear Sandra:

I approve of your proposal to treat the "dog sniff" issue as indicated in your memorandum of May 5th.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 5, 1983

good points

Re: 81-1617 - United States v. Place

Dear Sandra:

Your exchange of correspondence with Harry prompted me to reread your opinion in this case. I am not troubled by the changes on pages 7 and 11 but I do share Harry's concern about the added emphasis on diligence on page 12. Perhaps you could take the word "must" out of the "Moreover" sentence and make it read something like this:

> "Moreover, in assessing the effect of the length of the detention, we take into account the character of the diligence with which the police pursued their investigation."

My rereading also caused me to recognize three minor points that I would like to suggest for your consideration. These are all purely suggestions and if you find none of them persuasive that is perfectly satisfactory with me.

First, in the last line on page 5 you refer to the Government asking us "to extend" the principles of Terry and again in the fourth line on page 6 to such an "extension." I wonder if you might not want to consider substituting the word "construe" on page 5 and the words "a construction" on page 6. I actually do not believe you are departing from the principle that is already implicit in Terry and other decided cases and this slight change in wording makes us look a little more like judges and a little less like lawmakers.

In footnote 6 on page 8 you indicate that "we have observed" whereas you are really quoting a separate

opinion by JUSTICE POWELL. Should you not change it to "JUSTICE POWELL has observed"?

On page 9, it has occurred to me that there is an additional response to the argument that even a temporary dispossession of property is absolute that you may wish to make. It is the obvious but often overlooked point that the brief dispossession of a locked suitcase involves no invasion of the privacy interests protected by the Fourth Amendment. (My concern about the differences between the privacy interest and the possessory interest is what took me so long in figuring out what to say in Texas v. Brown.) I wonder if you might want to insert something like this immediately after the words "We disagree" at the outset of the second paragraph.

> "It is perfectly clear that a temporary dispossession of a locked suitcase involves no examination of its contents and therefore no invasion of the owner's interest in privacy. See Texas v. Brown, STEVENS, J., concurring, slip op., at p. 2."

It may be that you are reluctant to mention the interest in privacy because the very reason for the seizure of the suitcase is to allow the trained dog to take a sniff which itself might be regarded as an intrusion on privacy. Implicitly, however, we must be deciding that such a sniff is perfectly okay or there would be no point in allowing the temporary seizure for the purpose of locating the dog.

Respectfully,

Justice O'Connor

Copies to the Conference

mfs 05/10/83

To: JUSTICE POWELL

From: Michael

Re: United States v. Place, No. 81-1617

I am inclined to agree with him. The reasonable suspicion issue need not be addressed if we hold a "sniff" is not a search.

I have read your draft letter to JUSTICE O'CONNOR in this case, and have a modification to suggest. In lieu of the second paragraph, I recommend adding a sentence to the end of the first paragraph as follows:

> I could join an opinion saying that a canine sniff of a suitcase is not a search.

Deleting the second paragraph has two effects. First, you would not be tied to all of JUSTICE WHITE's reasoning as to why a canine sniff of a suitcase is not a search. Second, you would not tie a canine sniff of a suitcase to the reasonable suspicion standard.

Although I agree with JUSTICE WHITE's reasoning that permits the Court to reach the canine sniff issue, I think there are serious conceptual problems with his resolution of the issue. He argues, for example, that a person has no privacy interest in the air around his luggage. This argument, however, would permit a noncanine sniff by a sensitive device that is capable of identifying all the contents of a suitcase by smell. Despite the fact that there are several good points in JUSTICE WHITE's draft, I don't think you should give carte blanche to his reasoning.

Since I do not think a canine sniff is a search (and since I think there are five votes to so hold), I do not think it

is necessary to say what level of suspicion is necessary to justify such an event if it were a search. In view of your opinion in Texas v. Brown, it also seems inappropriate to rush into a new exception to the Warrant Clause so quickly. Finally, as I explained in my original memo, a reasonable suspicion requirement could well be an unnecessary burden on police practice in these "non-search" cases.

I can understand why you do not want to include such a detailed discussion in your letter to JUSTICE O'CONNOR. Your current draft, with the change I have proposed, will allow her to address the issue. It will also allow you to consider what she has written without the constraint of previous statements.

May 11, 1983

81-1617 United States v. Place

Dear Sandra:

I agree that a dog sniff is not a search within the meaning of the Fourth Amendment, and I think we should say so.

Also, the suggestions in John's letter of the 5th seem reasonable.

Sincerely,

Justice O'Connor

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 11, 1983

Re: No. 81-1617, U.S. v. Place

Dear Byron:

If there are four others I could go the whole route with your "dog view" in this case and settle one issue. This is not an area where argument would add anything for me.

Regards,

WEB

Justice White
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 12, 1983

Re: 81-1617 -

United States v. Place

Dear Sandra,

Please join me. I shall file my separate opinion in the unfiled opinion file.

Sincerely,

Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1983

Re: No. 81-1617 United States v. Place

Dear Sandra:

Please join me in your most recent circulation.

Sincerely,

WR

Justice O'Connor

cc: The Conference

Sandra
Then will reappear
my join of your
opinion

May 17, 1983

81-1617 United States v. Place

Dear Sandra:

This will reaffirm my join of your opinion.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 18, 1983

Re: 81-1617 - United States v. Place

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1983

Re: No. 81-1617 - United States v. Place

Dear Sandra:

Because of the changes effected in your drafts subsequent to the second, I now formally withdraw my joinder of April 28.

This concurrence in the judgment expresses my views.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1983

Re: No. 81-1617-United States v. Place

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

T.M.

Justice Blackmun

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1983

Re: No. 81-1617-United States v. Place

Dear Bill:

Please join me in your opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

81-1617 U.S. v. Place (Mike)

SOC for Court
1st draft 4/5/83
2nd draft 4/14/83
3rd draft 4/30/83
4th draft 5/11/83
5th draft 6/16/83
Joined by CJ, BRW, TM, LFP, WHR, JPS

HAB concurring opinion
1st draft 6/1/83
Joined by TM

WJB concurring in the result
1st draft 6/15/83
Joined by TM