

*UNITED STATES v. DRAYTON:*  
**SUPREME COURT UPHOLDS STANDARDS  
 FOR POLICE CONDUCT DURING  
 BUS SEARCHES**

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## INTRODUCTION

To keep pace with the growing problem of drug trafficking, law enforcement agencies have relied on rapid developments in technology to create and employ new search tactics.<sup>1</sup> Yet one of the most effective techniques in locating contraband—the consent search<sup>2</sup>—demands neither equipment nor innovative technology.<sup>3</sup> Nonetheless, largely due to the potential for coercion in consent searches,<sup>4</sup> this type of police-citizen encounter triggers hotly contested legal debates over the Fourth Amendment's parameters, protections, and restrictions.<sup>5</sup> The Supreme Court's grant of certiorari in *United States v. Drayton*,<sup>6</sup> provided a recent forum to identify more precisely the standards for conducting consensual searches on modes of public transportation.<sup>7</sup>

In *Drayton*, the Eleventh Circuit reversed two drug possession convictions of two defendants who were searched while traveling on an interstate bus, based on its finding that police officers had coerced the defendants into consenting to a search of their belongings and their persons.<sup>8</sup> On June 17, 2002, the Supreme Court reversed the

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1. See generally *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (permitting aerial surveillance of a suspect's backyard); *United States v. Place*, 462 U.S. 696, 707 (1983) (permitting drug sniffing canines at airports); *United States v. Knotts*, 460 U.S. 276, 282 (1983) (allowing use of a "beeper," which acted as a tracking device, to ascertain a vehicle's location). But see *Kyllo v. United States*, 121 S. Ct. 2038, 2043 (2001) (disallowing use of a thermal imaging device outside a person's home without a warrant).

2. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (explaining that a consent search only satisfies the Fourth and Fourteenth Amendments when an individual gives such consent freely and voluntarily).

3. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 241 (2d ed. rev. 1997) ("[T]here are few areas of Fourth Amendment jurisprudence of greater and practical significance than consent searches."). All searches and seizures are presumed unreasonable unless the government first obtains a warrant; however, this principle does not render all warrantless searches unlawful. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 34 (6th ed. rev. 2000); see also WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK 13 (1995) (listing consent as an exception to the warrant requirement).

4. See Petition for Certiorari at 20 n.2 & 22, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000) (No. 01-631) (noting the significant and recurring nature of the coercion issue in consent search cases and referring to numerous published and unpublished opinions addressing this dispute).

5. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .").

6. 231 F.3d 787 (11th Cir. 2000), *rev'd*, No. 01-631, 2002 WL 1305729, at \*1 (U.S. June 17, 2002).

7. *United States v. Drayton*, No. 01-631, 2002 WL 1305729, at \*3 (U.S. June 17, 2002).

8. *Drayton*, 231 F.3d at 788. See generally Respondent's Brief at 24-40, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000) (No. 01-631) (citing the following factors as justification for invalidating consent: failure to advise passengers of right

U.S. Court of Appeals' decision and concluded that the police officers had neither seized the defendants nor coerced their consent to a search of their persons or belongings.<sup>9</sup>

In 1991, the U.S. Supreme Court upheld the constitutionality of bus searches<sup>10</sup> in *Florida v. Bostick*,<sup>11</sup> and established a totality of the circumstances test for determining whether a person had given valid consent to a search.<sup>12</sup> Prior to *Bostick*, the Supreme Court also explicitly rejected per se rules requiring police officers to advise citizens of the right to refuse to consent to searches.<sup>13</sup> Despite this well-established bar on per se rules, circuit courts have recently split over whether certain circumstances can make a bus search so inherently coercive that law enforcement officers must advise citizens of their right to refuse consent.<sup>14</sup>

This Note explains the debate over consensual searches that gave rise to the Supreme Court granting certiorari in *Drayton* and

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to refuse consent; confined space on bus; number and positioning of officers; passenger-by-passenger show of authority; authoritative tone of officer's voice; and officer's physical touching of defendants).

9. *Drayton*, 2002 WL 1305729, at \*5.

10. See Dennis J. Callahan, Note, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs*, 43 WM. & MARY L. REV. 365, 366-67 (2001) (explaining the controversial drug interdiction practice of random bus sweeps—also known as “working the buses”). When conducting bus searches, police officers generally board a bus traveling cross-country, announce either to the entire bus or to individual passengers that they are conducting a random search for contraband, and then ask individuals for consent to search their persons, belongings, or both. *Id.*

11. 501 U.S. 429, 439-40 (1991).

12. See *id.* at 439 (explaining that the “cramped confines of a bus” are merely one factor to consider when determining whether consent was voluntary).

13. See *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (reversing the Ohio Supreme Court's ruling that invalidated a consensual search where the police officer failed to inform the driver in a routine traffic stop that the encounter had terminated and he was free to refuse consent); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”); see also Carolyn Miller Ross, J.D., Annotation, *When is Consent Voluntarily Given so as to Justify Search Conducted on Basis of That Consent—Supreme Court Cases*, 148 A.L.R. FED. 271 § 6 (1998) (citing to Supreme Court cases where the Court refused to impose per se rules that require law enforcement officers to inform citizens of the right to refuse consent). But see *Amos v. United States*, 255 U.S. 313, 317 (1921) (concluding that consent is not valid where a person merely acquiesces to a show of authority).

14. Compare *United States v. Guapi*, 144 F.3d 1393, 1395 (11th Cir. 1998) (reversing a drug conviction pursuant to a bus sweep, where the police officers failed to inform the defendant that he could refuse consent or leave the bus with his belongings), with *United States v. Broomfield*, 201 F.3d 1270, 1275-76 (10th Cir. 2000) (affirming defendant's conviction despite the fact that the federal agent failed to inform the defendant that he could refuse consent to search his carry-on luggage), and *United States v. Flowers*, 912 F.2d 707, 711-12 (4th Cir. 1990) (finding no coerced consent where officers displayed no weapons, spoke in a casual tone, and never blocked the aisle or otherwise restrained the passengers).

addresses the legal ramifications of the decision. Part II of this Note examines Fourth Amendment jurisprudence relating to consensual searches. Part III provides *Drayton's* procedural history. Lastly, Part IV explains the Supreme Court's decision in this bus search case and its likely impact on Fourth Amendment jurisprudence.

#### I. FOURTH AMENDMENT JURISPRUDENCE: CONSENT SEARCHES

Courts have often referred to the Fourth Amendment as the most ambiguous amendment in the Bill of Rights.<sup>15</sup> Because the Framers of the Constitution drafted the Fourth Amendment in broad terms, courts have struggled over the proper scope and application of the amendment, namely attempting to discern what constitutes a search and a seizure.<sup>16</sup>

##### A. Supreme Court Establishes "Free to Leave" Test

In *United States v. Mendenhall*,<sup>17</sup> the Supreme Court established a test to determine when a police-citizen encounter amounts to an unlawful seizure. Justice Stewart's "free to leave" test stated: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>18</sup> Since *Mendenhall*, courts have relied on the "free to leave" test—especially in drug interdiction cases—to determine when a police-citizen encounter amounts to an illegal seizure.<sup>19</sup>

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15. See DRESSLER, *supra* note 3, at 67 ("[T]he Fourth Amendment contains 'both the virtue of brevity and the vice of ambiguity.'" (quoting JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966))).

16. See DARIEN A. MCWHIRTER, SEARCH, SEIZURE AND PRIVACY 12 (1994) (stating that while the Fourth Amendment appears simple at first glance, the Framers: (1) failed to define the meaning of "unreasonable search and seizure" and "probable cause"; (2) never delineated the type of property protected under the amendment; and (3) failed to explain whether a warrant is automatically required for all valid searches).

17. 446 U.S. 544 (1980) (concluding that *Mendenhall* voluntarily consented to a strip search, where federal agents acted in a non-threatening manner and advised the passenger more than once of her right to refuse consent).

18. See *id.* at 554 (listing several factors to consider in evaluating valid consent: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled").

19. See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (refusing to find that a state trooper illegally seized the defendant pursuant to a consensual search when the trooper failed to advise the defendant that he was free to leave after a traffic stop); *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (conducting the "free to leave test" when invalidating defendant's consensual search of his luggage); *United States v. Brady*, 842 F.2d 1313, 1314 (D.C. Cir. 1988) (questioning "whether a reasonable person would conclude from the circumstances, and the show of authority, that he

B. Florida v. Bostick:  
*Supreme Court Upholds Constitutionality of Bus Sweeps*

When the Supreme Court considered *Florida v. Bostick*, a bus search case questioning the validity of consensual searches in confined areas, the Court applied a modified version of *Mendenhall*'s "free to leave" test.<sup>20</sup> In *Bostick*, the defendant was convicted of a drug offense after police found contraband in his bag during a routine bus sweep.<sup>21</sup> On appeal, the Florida Supreme Court, applying the *Mendenhall* test, found that a reasonable passenger in Bostick's position would have believed that he was not free to leave.<sup>22</sup> In addition, the court effectively adopted a rule rendering bus searches per se unconstitutional.<sup>23</sup>

The Supreme Court held that the drug interdiction in *Bostick* must be evaluated in view of a totality of the circumstances to determine whether a seizure occurred, and it rejected the Florida Supreme Court's holding that bus searches are per se unconstitutional.<sup>24</sup> The Court reasoned that these same encounters would not be seizures if they occurred in a bus depot or on the sidewalk; therefore, consensual searches do not violate the Fourth Amendment merely because they transpire inside a bus.<sup>25</sup> Based on this reasoning, the majority established a modified "free to leave" test for circumstances

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was not free to leave the officer's presence" in order to determine if a detention violated the Fourth Amendment).

20. See *infra* note 26 and accompanying text (describing the "free to leave" test).

21. *Bostick*, 501 U.S. at 431. Two armed officers boarded a bus traveling from Miami to Atlanta during a stopover in Fort Lauderdale and asked Terrance Bostick for his ticket and identification. *Id.* The officers then explained their purpose of searching for contraband and asked Bostick for permission to search his luggage. *Id.* at 431-32. The trial court agreed with the government's assertion that Bostick consented to the search of the luggage and that the officers informed him of his right to refuse consent. *Id.* at 432. Pursuant to the search, the officers found contraband in Bostick's bag and arrested him. *Id.*

22. See *id.* at 432-33 (noting that the Florida District Court of Appeal affirmed the trial court's ruling on the motion to suppress but certified the narrow question concerning validity of consent to the Florida Supreme Court).

23. See *id.* at 433 (quoting *Bostick v. State*, 554 So.2d 1153, 1154 (Fla. 1989)) (stating that the Florida Supreme Court "ruled categorically that 'an impermissible seizure result[s] when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage'").

24. *Id.* at 437-40.

25. See *id.* at 434-36 (asserting that even though Bostick did not feel free to leave the bus, the police did not necessarily seize him because he was a passenger on a bus about to depart and would not have felt free to leave the bus absent police presence). *But see id.* at 448 (Marshall, J., dissenting) ("Unlike a person approached by the police on the street, or at a bus or airport terminal after reaching his destination, a passenger approached by the police at an intermediate point in a long bus journey cannot simply leave the scene and repair to a safe haven to avoid unwanted probing by law-enforcement officials.").

when an individual's movement is restricted by location: "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>26</sup> In applying this reasonable person test, a court must consider all the circumstances surrounding the police-citizen encounter.<sup>27</sup> Following *Bostick*, the circuit courts developed conflicting theories on proper application of this test.

### C. A Circuit Split Arises from *Florida v. Bostick*

In 1998, the Eleventh Circuit reversed drug convictions in two bus search cases, *United States v. Guapi*<sup>28</sup> and *United States v. Washington*,<sup>29</sup> based on the panels' findings that the defendants in each case did not voluntarily consent to the searches.<sup>30</sup> The Tenth Circuit, however, expressly rejected the Eleventh Circuit's analysis in another bus search case, *United States v. Broomfield*.<sup>31</sup> The conflict stemmed from disagreement over proper application of the totality of the circumstances test, particularly whether a court may place additional emphasis on an officer's failure to advise passengers of the right to refuse consent.<sup>32</sup> In the *Drayton* opinion, the Eleventh Circuit

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26. *Id.* at 436. *But see id.* at 447 (Marshall, J., dissenting) (arguing that the real issue in *Bostick* was whether a passenger in the respondent's position would have felt free to terminate the police encounter without being affirmatively apprised of the right to refuse consent). Justice Marshall asserted that the intimidating and coercive circumstances created during bus sweeps mandate that officers advise passengers of the right to refuse consent. *Id.* at 447-48 (Marshall, J., dissenting).

27. *Id.* at 439-40. The Court underscored two particular factors in examining the circumstances surrounding the encounter at issue: (1) the officer advised the defendant of his right to refuse consent to the search; and (2) the officer never brandished his weapon. *Id.* at 432.

28. 144 F.3d 1393 (11th Cir. 1998).

29. 151 F.3d 1354 (11th Cir. 1998).

30. In *Guapi*, the Eleventh Circuit reversed a defendant's drug conviction pursuant to a bus search in Mobile, Alabama. 144 F.3d at 1393. Although the court placed additional emphasis on the fact that the officers failed to inform Guapi of the right to refuse consent, the panel also evaluated other circumstances of the encounter. *Id.* at 1394-95. The court concluded that a reasonable person would have believed that he was not free to ignore the officer's request or leave the bus. *Id.* at 1395. Later that year, the Eleventh Circuit decided *Washington*, where the court reversed another conviction pursuant to a bus search. 151 F.3d at 1355. Although the court once again refrained from creating a per se rule mandating consent warnings, the court did conclude that the coercive atmosphere of this particular encounter demanded an *affirmative warning* from police that the defendant need not consent to the search. *Id.* at 1357.

31. *See* 201 F.3d 1270, 1274-75 (10th Cir. 2000) (finding that the Eleventh Circuit incorrectly applied the totality of the circumstances test in *Guapi* and *Washington*). In *Broomfield*, a DEA agent boarded a bus in Topeka, Kansas during a stopover and approached the defendant. *Id.* at 1272.

32. In *Broomfield*, the Tenth Circuit rejected the Eleventh Circuit's undue emphasis on one factor, namely, the consent warning, and concluded that under a totality of the circumstances, the agent's search was reasonable even though the agent never informed Broomfield of the right to refuse consent. *Id.* at 1275-76.

dismissed the criticism of its sister circuit, reasoning that *Washington*, and not the Tenth Circuit's *Broomfield* decision, controlled its ruling,<sup>33</sup> thereby causing a split in the circuits.<sup>34</sup> The *Drayton* decision presented an opportunity for the Supreme Court to resolve this circuit conflict.

## II. PROCEDURAL HISTORY OF *UNITED STATES v. DRAYTON*

On February 4, 1999, three Tallahassee, Florida police officers boarded a bus traveling from Fort Lauderdale to Detroit.<sup>35</sup> After boarding the bus, two officers moved to the rear of the vehicle while one kneeled, facing the passengers, in the driver's seat.<sup>36</sup> At the same time, two other officers began walking down the aisle asking passengers where their trips originated and matching the passengers to carry-on bags.<sup>37</sup> When the officers reached Christopher Drayton and Clifton Brown, Jr., one officer leaned over Drayton's shoulder,<sup>38</sup> displayed his badge, and informed the men that they were conducting a bus interdiction to deter drug and firearm trafficking.<sup>39</sup> When asked whether the officers could search his bag, Brown consented.<sup>40</sup>

Noticing that both passengers were wearing baggy pants and heavy jackets despite the warm weather,<sup>41</sup> the officers continued the encounter by asking permission from Brown to conduct a search of his person, to which Brown consented.<sup>42</sup> During the pat-down, the officer detected two objects, later identified as cocaine, in the groin area of Brown's pants.<sup>43</sup> After an officer handcuffed Brown and removed him from the bus, the remaining officer asked Drayton for

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33. See *United States v. Drayton*, 231 F.3d 787, 788 n.2 (11th Cir. 2000), *rev'd*, No. 01-631, 2002 WL 1305729, at \*1 (U.S. June 17, 2002) ("We do not have any occasion to pass on [the Tenth Circuit's] criticism, and express no view concerning it, because we are bound by the prior panel decision in *Washington* in any event.")

34. See *Circuit Split Roundup*, 68 U.S.L.W. (BNA), at 2654 (May 2, 2000) (reporting that the Tenth Circuit's decision in *Broomfield* created a conflict with the Eleventh Circuit).

35. *Drayton*, 231 F.3d at 788.

36. *Id.* at 789.

37. See *id.* (explaining that the officers would either stand to the rear of the passenger or to the side during each encounter).

38. See *id.* (observing that the officer stood with his face about 12 to 18 inches from Drayton's face when initiating the encounter).

39. *Id.*

40. See *id.* (noting that the officers found no contraband in Brown's bag).

41. See Linda Greenhouse, *Justices Hear Arguments On Searches Of Bus Riders*, N.Y. TIMES, Apr. 17, 2002, at A19 (noting that Justice Scalia commented during oral arguments on *Drayton* that the respondents' attire under these circumstances established probable cause for police to search them).

42. *Drayton*, 231 F.3d at 789.

43. See *id.* at 790 (indicating that Brown had 483 grams of cocaine duct-taped to his thighs).

consent to search his person, and Drayton consented.<sup>44</sup> In the course of the pat-down, the officer also found cocaine in the groin area of Drayton's pants and arrested him.<sup>45</sup> After conviction, the defendants appealed the trial court's refusal to grant their motions to suppress.<sup>46</sup>

On appeal, the Eleventh Circuit Court of Appeals addressed whether Drayton and Brown's "consent" to the search of their persons constituted actual consent or mere submission to a show of authority. Reversing the defendants' convictions, the panel found that the decisions in *Guapi* and *Washington* controlled,<sup>47</sup> and noted that the facts in *Drayton* were materially indistinguishable from those in *Washington*.<sup>48</sup> Though the court examined four factual differences between *Drayton* and *Washington*,<sup>49</sup> it concluded that the distinctions had no bearing on its finding that the defendants' consent was the product of coercion.<sup>50</sup> The Supreme Court granted certiorari to determine whether officers must advise citizens of the right to refuse consent in *Bostick*-type situations and to resolve the circuit split.<sup>51</sup>

### III. SUPREME COURT BALANCES FOURTH AMENDMENT RIGHTS WITH LAW ENFORCEMENT INITIATIVES TO CONTROL DRUG TRAFFICKING

In a six to three decision,<sup>52</sup> the Supreme Court struck down the Eleventh Circuit's holding in *Drayton*, finding that the Court of Appeals effectively created a per se rule requiring officers to affirmatively advise passengers of the right to refuse consent during bus searches.<sup>53</sup> The Court concluded that the Tallahassee police officers seized neither Drayton nor Brown during the routine bus

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44. *See id.* (explaining that Drayton consented to the pat-down by raising his hands about eight inches away from his waist).

45. *See id.* (stating that Drayton possessed 293 grams of cocaine).

46. *United States v. Drayton*, No. 01-631, 2002 WL 1305729, at \*4 (U.S. June 17, 2002) (explaining that the trial court denied Drayton and Brown's motions to suppress because the officers' appearance, demeanor and conduct failed to demonstrate coercion).

47. *Drayton*, 231 F.3d at 790.

48. *Id.*

49. *See id.* at 790-91 (delineating the four factual differences as: (1) an individual versus general show of authority; (2) the request or failure to request tickets and identification; (3) hearing testimony in *Drayton*, but not other cases, regarding instances when passengers exited the bus rather than consenting to a search; and (4) the stationing of an officer at the bus exit in *Drayton* unlike the officers' positioning in the other cases).

50. *Id.* at 791.

51. *United States v. Drayton*, No. 01-631, 2002 WL 1305729, at \*3 (U.S. June 17, 2002).

52. Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas and Breyer. *Id.* Justice Souter wrote the dissenting opinion joined by Justices Stevens and Ginsburg. *Id.* at \*9.

53. *Id.* at \*6.

interdiction.<sup>54</sup> Moreover, the Court asserted that the defendants had voluntarily consented to the search of their persons and belongings.<sup>55</sup> Given that the Court simply applied existing law to a new factual situation, *Drayton* offers minimal precedential value and merely solidifies this Court's position on Fourth Amendment jurisprudence. The practical effect of *Drayton*, however, could be a future alteration in police tactics in light of the Court's decision to afford officers broad latitude in conducting consensual searches.

A. *Legal Debate Over the Adoption of a Per Se Rule*

The fundamental disagreement between the parties in *Drayton* stemmed from whether the Eleventh Circuit, in overturning the convictions, imposed a per se rule requiring police officers to advise passengers of the right to refuse consent during bus sweeps. To illustrate this point, the government asserted a broad view of the question on appeal to emphasize its position that the Eleventh Circuit effectively adopted a per se rule, whereas the respondents asserted a drastically different perspective with a very narrow scope to persuade the Court of the case's highly fact-specific nature.<sup>56</sup>

The government argued that the Eleventh Circuit's holding, while on its face not imposing a per se rule mandating a warning before a consent search, had the *effect* of creating a per se rule.<sup>57</sup> *Drayton* and *Brown* faced none of the factors typically considered to create a coercive atmosphere,<sup>58</sup> yet the Court of Appeals still found

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54. *See id.* at \*7 (finding the police conduct reflected "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice").

55. *Id.* at \*8.

56. Compare Petition for Certiorari at I, *Drayton* (No. 01-631) (stating the issue as: "Whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another plainclothes officer stays at the front of the bus without blocking the exit, has effected a 'seizure' of that passenger within the meaning of the Fourth Amendment and *Florida v. Bostick*, 501 U.S. 429 (1991)."), with Respondent's Brief at I, *Drayton* (No. 01-631):

Whether three police officers, who boarded a bus solely to obtain consent to search passengers and their bags, and who sought consent through one officer's 'in your face' show of authority, a second officer assisting his search, and a third officer kneeling in the driver's seat watching passengers, but who never advised passengers of their rights to ignore officers, and to refuse to have their carry-on bags searched and their 'groin areas' frisked, violated the passengers' Fourth Amendment rights?

57. Petitioner's Brief at 27-28, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000) (No. 01-631).

58. *See* Petitioner's Brief at 19, *Drayton* (No. 01-631) (noting the absence of police uniforms, showing of force, brandishing of weapons, blocking of exits or issuance of threats or commands).

respondents' consent invalid.<sup>59</sup> Therefore, the government asserted that "[i]f warnings are required in the innocuous circumstances of this case, it is difficult to imagine a situation in which they would not be necessary."<sup>60</sup> If the Eleventh Circuit decision was upheld, argued the government, police officers will have no choice but to issue a *Miranda*-like warning in every police-citizen encounter.<sup>61</sup>

Conversely, Drayton and Brown asserted that the Court of Appeals did not establish a per se rule mandating consent warnings,<sup>62</sup> but rather the court concluded, under a totality of the circumstances, that the respondents did not voluntarily consent to the searches or pat-downs.<sup>63</sup> While respondents acknowledged that the circuit court took into consideration that the officers failed to give notice of the right to refuse consent, they denied that the court created a per se rule or placed undue emphasis on that factor alone.<sup>64</sup>

The Supreme Court ultimately sided with the government and determined that the Eleventh Circuit adopted, in effect, a per se rule that required the police to issue *Miranda*-like consent warnings to passengers during all bus searches.<sup>65</sup> While the Court acknowledged that the Eleventh Circuit relied on numerous factors that could have contributed to a coercive atmosphere in *Drayton*, *Guapi*, and *Washington*, the Court also observed that "the lack of an explicit warning to passengers is the only element common to all [the circuit court's] cases."<sup>66</sup>

### B. *Drayton* Court Upholds *Stare Decisis*

Having concluded that the Eleventh Circuit erroneously adopted a per se rule, the Court next examined two issues pertinent to suspicionless bus searches: (1) was there a seizure; and (2) was the

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59. *See id.* (noting that the Eleventh Circuit contradicted well-established law in *Bostick* by failing to properly apply the totality of the circumstances test).

60. *Id.* at 30-31.

61. *See id.* at 31 ("Short of telling the passengers of the right to refuse consent . . . it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable.") (quoting *United States v. Washington*, 151 F.3d 1354, 1358 (11th Cir. 1998) (Black, J., dissenting)). *But see* Respondent's Brief at 19, *Drayton* (No. 01-631) (denying the claim that police will have no choice but to issue consent warnings and reasserting that courts evaluate each encounter individually).

62. *See* Respondent's Brief at 16, 19, *Drayton* (No. 01-631) (rejecting the argument that the Eleventh Circuit adopted a per se rule in *Drayton* either expressly or tacitly).

63. *Id.* at 20-21.

64. *See id.* at 24 (defending the Eleventh Circuit's analysis by citing to *Bostick*, where the Supreme Court found "particularly worth noting" that the officers issued a consent warning to the passenger).

65. *United States v. Drayton*, No. 01-631, 2002 WL 1305729, at \*6 (U.S. June 17, 2002).

66. *Id.*

search unreasonable? In its analysis of these issues, the Court relied exclusively on well-established search and seizure law without modifying those principles.<sup>67</sup> Because of the fact-specific nature of search and seizure cases, the Court devoted much of its discussion to the details surrounding the encounter.

In its brief, arguing that a seizure never occurred, the government asserted that the circumstances of this police-citizen encounter never rose to the level of a coercive atmosphere:<sup>68</sup> the officers wore no uniforms, showed no weapons, made no general announcement over the public address system, spoke in a calm tone, and left an open path to the exit.<sup>69</sup> The respondents, conversely arguing that a seizure did occur, depicted a drastically different scenario by pointing to the officer's "in your face" interaction<sup>70</sup> that culminated into a highly invasive search of the passengers' groins and mid-sections.<sup>71</sup> In fact, Drayton and Brown pointed to ten separate factors that the Eleventh Circuit considered in applying its fact-specific analysis to determine whether the men voluntarily consented to the searches.<sup>72</sup>

Examining first the issue of whether the officers seized Drayton and Brown, the Court relied on the legal framework established in *Bostick* eleven years ago.<sup>73</sup> The Court concluded that the officers' conduct during the bus interdiction in *Drayton* did not amount to a seizure of the defendants.<sup>74</sup> In determining whether a reasonable person would have felt free to decline the officers' requests or terminate the encounter under a totality of the circumstances, the Court relied on the same facts asserted by the government in its brief: that the officers never brandished a weapon or made any intimidating movements; the officers left the aisle free; and the officers spoke to the passengers individually and in a polite and quiet voice.<sup>75</sup> Furthermore, the Court placed minimal weight on several

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67. *Id.* at \*7-9.

68. See Petitioner's Brief at 19, *Drayton* (No. 01-631) (quoting the district court's finding that the police-citizen encounter in *Drayton* was neither coercive nor confrontational).

69. See Petition for Certiorari at 8, *Drayton* (No. 01-631) (insisting that the Eleventh Circuit relied on the wrong facts in finding that the police coerced consent by Drayton and Brown).

70. See Respondent's Brief at 1, *Drayton* (No. 01-631) (maintaining that "[a] reasonable passenger could not ignore the 'in your face' show of authority which officers employed in this case").

71. Respondent's Brief in Opposition at 10, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000) (No. 01-631).

72. Respondent's Brief at 20-21, *Drayton* (No. 01-631).

73. *United States v. Drayton*, No. 01-631, 2002 WL 1305729, at \*6-7 (U.S. June 17, 2002).

74. *Id.* at \*7.

75. *Id.*

factors that Drayton and Brown emphasized in their brief. Specifically, the Court was not swayed by the fact that the officers displayed badges and wore sidearms; that one officer kneeled on the driver's seat near the bus exit; or that the testifying officer had observed only a few passengers over the course of a year actually refuse consent during bus searches.<sup>76</sup>

After determining that the officers did not seize Drayton and Brown, the Court turned to the issue of whether the officers coerced the men into consenting to a search of their persons and belongings. Taking into consideration the totality of the circumstances surrounding the searches, including the fact that the officers never advised Drayton and Brown of their right to refuse consent, the Court nonetheless determined that the defendants voluntarily consented.<sup>77</sup> The Court reiterated the well-established principle that knowledge of the right to refuse consent constitutes only one factor in determining whether valid consent to search exists.<sup>78</sup>

### C. *Broader Impact of Drayton for Passengers of Public Transportation*

One glaringly absent component of the majority opinion was any reference to the need for enhanced security measures following the September 11, 2001, attacks.<sup>79</sup> In its petition for certiorari, the government pointed to the recent national security concerns,<sup>80</sup> and amicus briefs pointed specifically to concerns about the safety of the interstate public transportation system.<sup>81</sup> Consequently, much of the media attention given to *Drayton* focused on how the Court would, in the wake of the terrorist attacks, balance the freedom from unreasonable searches and seizures with the need for public safety on

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76. *Id.*

77. *See id.* at \*8 (noting that the officer gave Brown and Drayton the opportunity to object to the search of their carry-on bag and their persons, yet neither individual displayed any signs of protest).

78. *Id.* (citing *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)); *see also supra* note 13 (reciting the holdings in *Schneckloth* and *Robinette*).

79. *See* Charles Lane, *Police Search Of Bus Upheld*, WASH. POST, June 18, 2002, at A6 (reporting that the Court made no direct reference in its decision to the terrorist attacks on September 11, 2001).

80. *See* Petition for Certiorari at 22, *Drayton* (No. 01-631) (asserting that consensual searches may become increasingly important "in the current environment" to detect not only drugs but other forms of criminal activity).

81. *See, e.g.*, Brief of Amici Curiae Washington Legal Foundation et al. at 5-8, *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000) (No. 01-631) (conveying the importance of consensual police-citizen questioning in combating the threat of terrorism after the attacks of September 11, 2001). "Open to relatively easy penetration, trains, buses, and light rail systems offer an array of vulnerable targets to terrorists who seek publicity, political disruption, or high body counts." *Id.* at 7.

interstate transportation.<sup>82</sup>

Although the majority refrained from explicit references to the events of September 11, it briefly addressed the broader issue of national security. In its discussion of consensual searches, the majority reasoned that bus passengers cooperate with law enforcement officers “because the passengers know that their participation enhances their own safety and the safety of those around them.”<sup>83</sup> Vehemently objecting, the dissenters argued that while the public has accepted the necessary intrusions required for safe air travel, no such justification exists for similar security measures on ground travel.<sup>84</sup> In fact, this distinction by the dissent between air travel and ground travel may have signaled an emerging trend in search and seizure law, where the legal analysis employed could depend on the mode of public transportation at issue.<sup>85</sup>

#### D. Future Implications: Legal and Practical

Although *Drayton* possessed great potential to impact Fourth Amendment jurisprudence, especially in regards to police procedure for obtaining consent to search, the fact-specific opinion provides only minimal precedential value.<sup>86</sup> In essence, the *Drayton* Court complied with past decisions on two long-standing issues of contention in the area of search and seizure law.<sup>87</sup> First, the Court

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82. See Lane, *supra* note 79, at A6 (reporting that *Drayton* “attracted attention as an early test of how the court would balance the competing interests of individual freedom and public safety in the transportation context after Sept[ember] 11,” 2002) (quoting Donald J. Hall, Vanderbilt University law professor, as stating: “You would certainly think in a post-9-11 context, the justices are going to be more conscious of and sensitive to the needs of law enforcement to have as much investigative power as is constitutionally proper.”).

83. *Drayton*, 2002 WL 1305729, at \*7.

84. See *id.* at \*9 (Souter, J., dissenting) (contending that the “commonplace precautions of air travel have not, thus far, been justified for ground transportation”). But see Warren Richey, *Court upholds police tactics in searching bus riders*, CHRISTIAN SCI. MONITOR, June 18, 2002, at 9 (“[T]he ruling may prove even more useful for counterterrorism agents . . . at a time when top government officials . . . are warning that the U.S. may soon be subjected to the same kind of suicide bombings on buses and in other public areas as experienced in Israel.”).

85. See Jan Crawford Greenburg, *Justices Strengthen Police Search Power*, CHI. TRIB., June 18, 2002, at A19 (quoting Steven Shapiro, national legal director of the American Civil Liberties Union, as stating that Justice Souter’s distinction between air and ground travel “could be as important as the court’s decision”).

86. See Linda Greenhouse, *Supreme Court Rules Police Need Not Tell Bus Riders of Right to Refuse Search*, N.Y. TIMES, June 18, 2002, at A19 (reporting that the *Drayton* opinion offers “relatively little new law”). See generally Heidi M. Westby, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 WM. MITCHELL L. REV. 829, 860 (1992) (explaining that a court’s fact-specific analysis in an unlawful seizure case should not have any precedential value because of its highly contextual nature).

87. See Greenhouse, *supra* note 86, at A19 (observing that the Court demonstrated its continuing support for the constitutionality of bus searches as well

demonstrated that the *Bostick* test continues to govern bus search cases.<sup>88</sup> Second, the Court reaffirmed the bar on per se rules requiring police officers to advise citizens of their right to refuse consent to search.<sup>89</sup>

Concerns over the *Drayton* opinion, however, arise from the likely practical effects, rather than the legal effects, of the ruling. Indeed, some members of the criminal defense community contend that the decision invites law enforcement agents to engage in more aggressive search tactics in arenas beyond public transportation.<sup>90</sup> Defendants' advocates fear a long-term effect of *Drayton* could be that lower courts will afford the government even broader latitude when conducting consensual searches—sacrificing Fourth Amendment rights in the name of counterterrorism.<sup>91</sup>

#### CONCLUSION

*Drayton* presented the Supreme Court with the continuing dilemma of balancing Americans' Fourth Amendment freedom from unlawful searches and seizures with law enforcement's responsibility to combat drug trafficking.<sup>92</sup> The Court sent a clear message to the legal community that both the *Bostick* test and the bar on per se rules requiring consent warnings remain very much intact. Above all, *Drayton* places the burden of knowing one's right to refuse consent squarely on individual citizens—not law enforcement.<sup>93</sup> While the *Drayton* decision may not drastically alter Fourth Amendment

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as clarified where the individual justices stand on this Fourth Amendment issue).

88. *Drayton*, 2002 WL 1305729, at \*6-7.

89. *Id.* at \*8.

90. See, e.g., Joan Biskupic, *Justices OK Searches on Mass Transit*, USA TODAY, June 18, 2002, at 3A ("Advocates of defendants' rights say the ruling greatly expands police powers and could lead officers to be more aggressive with people who appear to have done nothing wrong."); Frank J. Murray, *Warning for search on bus not required*, WASH. TIMES, June 18, 2002, at A11 (quoting Donna Shea, legal director of the National Organization for the Reform of Marijuana Laws, as stating that law enforcement's response to the ruling will be more aggressive questioning and further invasions of bus passengers' privacy).

91. See Greenburg, *supra* note 85, at A19 (quoting Boston University Law School professor, Tracey Maclin, who rejected the notion that *Drayton* pertained to combating terrorism and instead asserted that the case represented a "typical, random working of the buses").

92. See Ian Heath Gershengorn, *When Is a Warrantless and Suspicionless Search of a Bus Passenger "Consensual"?*, 7 PREVIEW U.S. SUP. CT. CAS. 377, 381 (2002) (referring to the Court's "classic struggle" of preserving citizens' civil liberties while affording the government latitude in keeping modes of public transportation free from drugs and firearms).

93. Oral Argument Transcript at 44, *United States v. Drayton*, 2002 WL 1305729 (U.S. Apr. 16, 2002) (No. 01-631) ("It seems to me a strong world is when officers respect people's rights and . . . people know what their rights are . . . and assert their rights.").

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jurisprudence, only time will tell whether the ruling generated any long-lasting and significant effects on the government's search and seizure tactics.