ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 75-1721
	)	
JOSEPH A. CHADWICK, et al.,	)	
	)	
Respondents.	)	

Washington, D.C.
April 26, 1977

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v.	:	No. 75-1721
JOSEPH A. CHADWICK, ET AL., Respondents.	:	

Washington, D. C.

Tuesday, April 26, 1977

The above-entitled matter came on for argument at 10:39 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

A. RAYMOND RANDOLPH, JR., ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Petitioner.

MARTIN G. WEINBERG, ESQ., 10 Post Office Square, Boston, Massachusetts, 02109, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States against Joseph Chadwick.

Mr. Randolph, you may proceed when you are ready.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF PETITIONER

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the First Circuit. The issue is whether a search warrant is required before Federal agents may open a locked trunk or footlocker that they properly seized and that they had probable cause to believe contained contraband.

The District Court suppressed the 200 pounds of marijuana found inside the trunk on the Government's appeal. The Court of Appeals affirmed, one judge dissenting.

The relevant facts are these: On May 8th, about four years ago, May 8, 1973, Amtrak officials told Federal agents in San Diego that defendants Machado and Leary had loaded a trunk on a train bound for Boston. They believed the trunk contained marijuana for three reasons.

First of all it was leaking talcum powder, which is often used to cover the odor of marijuana. The trunk had an unusual weight for its size, and Machado's description tallied with a profile used by the railroad to stop drug

traffickers.

The Federal agents relayed this information to their counterparts in Boston.

I should describe the footlocker. It is described in the record as "old and brown." According to Ms. Leary's suppression motion, it was 2 feet, 11 inches wide, 1 foot, nine inches high, and 1 foot, eight inches deep.

QUESTION: Does the record show the source of origin of the shipment?

MR. RANDOLPH: It was San Diego.

QUESTION: Origin or --

MR. RANDOLPH: It was shipped from San Diego to Boston on an Amtrak train.

The latch was locked and there was a padlock on it.

QUESTION: There is no evidence -- There is nothing in the record to show that it was trans-shipped, that is, it came from somewhere else to --

MR. RANDOLPH: Oh, I see. No.

QUESTION: -- San Diego, and then San Diego on to Boston?

MR. RANDOLPH: There is not, Mr. Chief Justice.

The latch was locked --

QUESTION: The baggage was accompanying the owners of the baggage, wasn't it?

MR. RANDOLPH: Yes.

QUESTION: It was checked baggage.

MR. RANDOLPH: There were two suitcases, and for the purposes of this case, we don't think the suitcases are relevant. We have not brought an issue to the Court --

QUESTION: I gathered from reading the brief that the suitcases were not checked and the footlocker was, by the owners, traveling on the same Amtrak train.

MR. RANDOLPH: The footlocker traveled across the country in the baggage compartment. Machado and Leary traveled across the country in the passenger compartment of the same train.

The footlocker, as I said, was locked, had a padlock over it and the latch on it was locked, as well.

QUESTION: So, it was not a question of sending by freight a container from one point to another. It was baggage accompanying the travelers.

MR. RANDOLPH: It accompanied the travelers.

QUESTION: Right.

MR. RANDOLPH: On the evening of May 10th, two days later, the train arrived at Boston's South Station. Federal agents were there to greet it. Within the next 15 to 20 minutes, the following events occurred.

It was 8:50 p.m. in the evening. The agents saw Machado and Leary leave the train, claim the trunk, move it against the wall and sit down on it. Machado left to make a

telephone call and returned.

The agents had a dog with them trained to recognize the smell of controlled substances. The dog went to the footlocker and started scratching on it, which is considered an alert to the presence of such substances.

QUESTION: While the men were still sitting on it?

MR. RANDOLPH: While Ms. Leary and Mr. Machado were sitting on the footlocker, the dog approached it and started scratching.

QUESTION: Does the record show anything else the dog (inaudible)

(laughter)

MR. RANDOLPH: Well, what the record does show is that a car pulled up outside the train station quite quickly thereafter, and in the car was Mr. Chadwick. He opened the trunk of the car -- He went into the train station, talked very quickly with Mr. Machado and Ms. Leary, went outside and proceeded to open the trunk of the car.

With the help of a porter then Ms. Leary and Mr. Machado, accompanying the footlocker, took it outside of the train station to Mr. Chadwick's waiting car.

Defendant Leary sat down in the car while Mr. Chadwick, Mr. Machado and the porter lifted the footlocker into the car's trunk.

When the porter left, the agents moved in. All three

defendants were arrested. The footlocker was seized from the open trunk of the car. It is now 9:10 p.m.

The agents testified that they decided not to open the footlocker on the spot for a number of reasons. Number one, it was dark outside. The area was dimly lit. Many pedestrians were passing by, and there was heavy automobile traffic on the street.

The three defendants and the footlocker were taken to the agents' office in Boston, about five minutes away from the train station. The footlocker was still leaking talcum powder.

At the office, in the presence of the three defendants, the agents opened the footlocker. Inside, as I said before, they found 200 pounds of marijuana.

According to Ms. Leary's suppression motion, what they actually found were 85 packages, each wrapped in blue paper and sealed with a piece of tape, and those 85 packages tallied 200 pounds of marijuana.

The next morning -- This is not in the Appendix the Court has -- The next morning, the defendants, all three of them, were arraigned before a magistrate on a complaint and an affadavit of the arresting agent. Bail was set. They were bound over and later there was an indictment.

The Government, in this case, wants to introduce that marijuana, and indeed the footlocker itself, into evidence at

defendants' trial. The defendants oppose this. They oppose the introduction of the marijuana on the basis that the agents should not have opened the footlocker without first getting a search warrant.

Our brief advances a number of reasons why we think the opening of the footlocker without a warrant was not an unreasonable search under the Fourth Amendment.

As a preliminary matter, I ought to say, that our purpose in advancing these arguments is to try to provide a coherent analysis to guide the decisions in these kinds of cases.

The Courts of Appeals -- and the Court will notice in my brief -- have dealt with this type of situation, moveable objects found outside the home, in countless cases. The results, we think, generally support the Government's position in this case, although the rationales are sometimes difficult to discern.

I might point out that, in fact, Respondents, in their brief, did not cite a single lower court decision in their favor.

QUESTION: How long after the loading of the locker into the trunk of the car did the officers open it, and where?

MR. RANDOLPH: The loading took place at 9:10, which is the time the arrest took place. The footlocker was searched,

the testimony is, shortly after 9:30, Mr. Chief Justice.

QUESTION: After they arrived.

MR. RANDOLPH: After they arrived at the office of the Federal agents in Boston, five minutes away from the train station.

QUESTION: And the argument of the -- of your friends -- is that they should have retained possession while they proceeded to go and get a warrant.

MR. RANDOLPH: That's right.

We think -- I might point out that the factual patterns in all these cases are endless, of course. And to make our position clear, in this case alone, for example, after the agents had probable cause, Mr. Machado, for instance, could have been arrested and the footlocker seized while he was sitting on it in the train station, or while he was moving it out to the car, or while Mr. Chadwick's car was pulling away with the footlocker in the trunk.

Under our view of the case, a search without a warrant, in all those situations, would be reasonable under the Fourth Amendment, not unreasonable. And so we draw no distinction between those. We don't think they are constitutional distinctions.

Let me explain why. First of all, this is not strictly a search and seizure case. The sequence is reversed. It is a seizure and search situation. Like the cases dealing

with automobiles and unlike cases dealing with homes or houses, the seizure came first here, and we think it was a lawful seizure. And we don't think there can be any doubt whatever that the agents had probable cause to believe that the footlocker was loaded with contraband.

QUESTION: Is that a controverted issue in this case, whether or not there was probable cause to seize the footlocker?

MR. RANDOLPH: Yes, in the suppression motion filed by Mr. Chadwick and joined by Mr. Machado, they sought not only to suppress the contents of the footlocker but also the footlocker, itself.

QUESTION: I wondered if, in the present posture of the case, that's a controverted issue.

MR. RANDOLPH: Well, they didn't cross-petition and the Court of Appeals decided that there was probable cause.

QUESTION: Well, that's a given in this case, isn't it, that there was --

MR. RANDOLPH: It's a given.

QUESTION: -- probable cause to seize the footlocker.

MR. RANDOLPH: It's a given, as the case is presented to the Court.

QUESTION: That's my understanding.

MR. RANDOLPH: In fact, the conclusion of the probable cause to seize the footlocker, obviously, was the very reason

for example, for Mr. Machado's arrest. The two were intertwined.

We think it is as clear as can be that the agents didn't need a warrant -- the authority of warrant to take that footlocker into their possession. And the reason is the same as in the automobile cases.

Aside from the fact that the footlocker was evidence in obvious view, it was moveable. And there can be no doubt about its moveability. The footlocker had just traversed the entire continent, you will recall, and it appears that it still hadn't reached its final destination.

Once that footlocker was in the agent's lawful possession, our position is that they didn't have to treat it like a child treats a Christmas package on Christmas eve. They shake it, and everything, but they couldn't open it. We believe they could open it. We believe they could open it on the spot or we believe it was reasonable for them to open it back at the station house -- or at the office, as occurred in this case.

It is at this point in the events that the Respondents in this case invoke the warrant requirement.

QUESTION: Did I understand you to say that your friends concede that if the footlocker had been taken while they were -- Respondents were sitting on it, around the time when the dog identified it, that that would have been

without a warrant?

MR. RANDOLPH: I don't know what they concede, Mr. Chief Justice.

QUESTION: I got some impression that you intimated that they concede that.

MR. RANDOLPH: No, I think that they --

QUESTION: Or you said that's when it should have been seized; that was, perhaps, the way you put it.

MR. RANDOLPH: I am sorry if I misled the Court. All I intended to state was that under our, the Government's position, the validity, under the Fourth Amendment, of the seizure and search of the footlocker in this case, would be the same, if it were seized at the time -- after probable cause, while the defendants were sitting on the footlocker.

QUESTION: The issue in this case involves the search of the foot -- the opening and search of the footlocker.

MR. RANDOLPH: That's right.

QUESTION: And not the seizure of the footlocker, isn't that correct?

MR. RANDOLPH: That's right.

But it is important that the seizure occurred and it is important that I -- and I have -- explain precisely what led up to that, because at this point --

QUESTION: The footlocker was in the lawful possession, custody, of the Federal agents, and the issue

involves the opening and search of it; isn't that it?

MR. RANDOLPH: It was in the lawful possession of the Federal agents, not just simply for the moment, or the time being. They could have kept that footlocker. They had probable cause to believe that that footlocker was being used to transport contraband. That made it forfeit. Beyond that, it was evidence of the commission of the crime. They knew that it was leaking talcum powder and knew that a dog alerted to it.

It was not a temporary seizure of that footlocker. They could have kept that footlocker. They could have kept it at least through trial.

QUESTION: For a long, long time. Plenty of time to get a warrant.

MR. RANDOLPH: Yes.

We don't believe that's the test.

If this were the search of a home, of course, there is no question a warrant would be required.

QUESTION: Mr. Randolph, you keep mentioning opening the lock. How did they open it? Did they break those locks?

MR. RANDOLPH: It is not clear in the record. I think our brief, or at least our petition said that they used the keys seized from Mr. Machado. But, actually, I don't think that's correct in light of the testimony. The testimony was that the keys were seized after the footlocker was opened.

So, if that testimony is accurate, from the agent that testified, then it is not clear on the record how it was opened.

QUESTION: Well, there is some information at some point in the record that they picked the lock. That was the phrase. Maybe used a screwdriver as a substitute for a key.

MR. RANDOLPH: Perhaps. I am sorry, Mr. Justice.

The reason we think that this is not to be treated like a home where a warrant is required is the same reason that I might say Mr. Justice Black -- and this is dictum -- stated for the Court in the Preston case. He said that "common sense dictates that questions involving searches of motor cars, or other things readily moved, cannot be treated identical to questions arising out of searches or fixed structures, like houses."

QUESTION: Mr. Randolph, how could it be readily moved if it was in the FBI office?

MR. RANDOLPH: Because -- The reason for the search -- It couldn't be readily moved once it was resting in the office of the agents, I agree. Just like the automobile in Chambers could not be readily moved once the police had possession of it, or the automobile in Texas v. White, but the seizure itself, bringing it into their lawful possession, justified, we think, the search, as well. Because, once an automobile has been properly seized under the Fourth Amendment,

Mr. Justice Marshall, the Court has ruled that it can be searched, that search of it is not unreasonable, if the police have probable cause. And there are other cases where even when they don't, when they are taking an inventory, in South Dakota v. Opperman, for example. The same is true here --

QUESTION: Where was the FBI office? Was it near the courthouse?

MR. RANDOLPH: Five minutes away.

QUESTION: I said the courthouse.

MR. RANDOLPH: Oh, the courthouse.

Yes, it was nearby.

QUESTION: Was the magistrate in the courthouse?

MR. RANDOLPH: I have no idea. It was 9:10 at night. There was a magistrate there the next morning.

QUESTION: Wouldn't it be important for us to know that?

MR. RANDOLPH: I don't think so.

QUESTION: I mean where they could have gotten a search warrant.

MR. RANDOLPH: We will concede that a search warrant would have and should have been theirs for the asking, but we think that the reason a search warrant isn't required is the same reason a search warrant wasn't required in the automobile cases. There is, we submit, no rational distinction between the footlocker, involved in this case and the glove

compartment of an automobile, or the trunk of an automobile which can be opened without a warrant.

QUESTION: Well, that supports the original seizure of the footlocker. It was in an automobile, and the seizure of the footlocker took place without a warrant because it was an automobile and because it was incident to a lawful arrest.

So, that supports the seizure, but, as I understand it, the issue is not the seizure of the footlocker but the opening and the search of it.

MR. RANDOLPH: And we think that could be opened back at the agents' office for the same reason that the trunk of an automobile can be opened back in the police impoundment lot.

The glove compartment, as in Cooper v. California, could be opened back at the police station, and so on and so forth.

On page 38, is it? No, I am sorry.

We have a list of cases. Yes, 38.

QUESTION: Of your brief or your petition?

MR. RANDOLPH: Of our brief.

Top of 38, Texas v. White, the search was of the front seat console.

QUESTION: It wasn't in (inaudible)?

MR. RANDOLPH: No, absolutely not.

In Cady v. Dombrowski, it was a locked trunk.

In Chaires v. State, it was a locked trunk.

In Chambers v. Maroney it was a glove compartment.

One case which isn't listed here, Cooper v. California, was a glove compartment, as well.

We see no rational distinction between the two, but we do see a distinction between what happened here and a search, for example, of a person's bedroom. In that case, you would be at the core of the First Amendment where the most protection is reasonably demanded.

Here, we are not at the core of the privacy interest of the Fourth Amendment. We are on the periphery.

I don't think Respondents reasonably dispute that's not the same as a house. The Court has said that and it said it in Preston.

QUESTION: Is it important that the locker was seized incident to arrest?

MR. RANDOLPH: That's one of our arguments.

QUESTION: But you would be making the same argument, I take it, if it had been seized in somebody else's possession?

MR. RANDOLPH: That's right. We would. The first part of our argument. We think it adds to the reasonableness, the fact --

QUESTION: Are there any cases that you know of -- What is the established rule? In the event you arrest a man

and find a locked small box in his pocket. Now, you can search him incident to arrest, I take it, and you find the locked box. May you open it? Are there some cases on that?

MR. RANDOLPH: I don't know about locked. Is Robinson a case where --

QUESTION: How about a sealed envelope in his pocket?

MR. RANDOLPH: Well, there was a case, and I think it was Robinson, where they found a crumpled cigarette pack which was closed and the Court upheld the opening of that. I think it contained pills or narcotics.

QUESTION: On the incident to arrest theory?

MR. RANDOLPH: Yes, I believe.

QUESTION: Because it was in his possession and under control.

How about -- Let's say a man carrying a locked briefcase. How about that.

MR. RANDOLPH: Well, Draper is a case that involves that type of situation. Whether it is a locked briefcase or not, I don't know. It was a brown leather bag that was zippered closed, and the Court upheld the search of that, as, I think, incident to arrest.

There is another case that we haven't cited. The Court has cited it usually for the proposition it involves plain view doctrine. In fact, when you look at the record, it involves something different. It is a case called Lee.

United States v. Lee. The Coast Guard shined a light on a boat and it had -- they saw -- the way the case was described -- illicit alcoholic beverages -- bringing alcohol on the boat.

It has always been a question to me how they could see it. The search was upheld, the seizure was upheld, because the alcohol was in cans, not in bottles, and some of the search took place back at the dock.

So, I think that is probably another example, Mr. Justice, although it hasn't been used for that proposition.

QUESTION: With that sound approach, you don't need to go any farther than to uphold this as an incident to arrest search, do you? Simply, on the basis that you could have searched it when you arrested them.

MR. RANDOLPH: If they would argue that, we would have to go no further, but they say that it is not incident to arrest because it wasn't in the immediate control of these people who were arrested.

We think that that's irrelevant. We think that that rule was set down so that arrest would not be used as pretext for general searches, which was the case under the Rabinowitz rule and was overruled in Chimel.

But these people were caught red-handed, so to speak.

If you talk about expectation of privacy, could anyone reasonably expect that the content of that footlocker would not be revealed?

They were caught red-handed. They were taken back to the station house. Did they reasonably expect that that footlocker was going to remain inviolate?

QUESTION: It could become a self-fulfilling prophecy. I mean if FBI agents open it and it is sustained, I presume the next people have no expectation of privacy. The concept of privacy must mean something more than that.

MR. RANDOLPH: Yes, I think it does. The Court has used the phrase "expectation of privacy" in a number of recent cases.

QUESTION: But not quite in such a totalogical way.

MR. RANDOLPH: A legitimate reason -- Would a reasonable man have an expectation of privacy, that once he is arrested -- I don't know. I think that the privacy still continues and I think the only point we have to sustain is that he has no more expectation, or the privacy interest is no greater than it is in an automobile, or in the trunk of an automobile or in the glove compartment of an automobile.

And I notice the dissenting opinion, in South Dakota v. Opperman, points out that personal effects and papers are carried from time to time in the glove compartment of an automobile. I suppose that's true of footlockers, as well.

I would like to come back to the question, Mr. Justice Marshall, that you asked, which is: If the agents could have gotten a warrant, why shouldn't we require them to

go get one?

QUESTION: Not we require them, but the Constitution requires them.

MR. RANDOLPH: We think that the Constitution does not require them.

The agents could have gotten a warrant, as I said, in Cooper v. California, and Texas v. White and Chambers v. Maroney, or even in regard to the clothing in Edwards, yet the warrantless searches were upheld in all those cases.

QUESTION: Which one of those cases is material in the FBI office?

MR. RANDOLPH: Edwards would be like that, Mr. Justice Marshall.

QUESTION: Was it in the FBI office?

MR. RANDOLPH: Yes, I believe. It may have been in the station house, or the jail. I am not sure.

The test the Court has said in Cooper and Edwards and South Dakota v. Opperman is not whether it was reasonable to procure a warrant, but whether the search was reasonable.

That's, of course, what we think the Fourth Amendment, in fact, says.

The Court has also said on numerous occasions that searches without a warrant are, per se, unreasonable, under the Fourth Amendment, subject only to a few established and well deliniated exceptions.

Well, of course, the Court has never had a case like this before, so it hasn't created an exception. It has had no occasion.

QUESTION: Well, you concede, don't you, that under that standard that you've just quoted, this does not fall within any of the exceptions, so far established.

MR. RANDOLPH. So far. The Court has never had occasion to pass on this issue, and if it had established an exception, it would have been dictum. So we agree.

QUESTION: It is not your argument that this case is governed by any existing exceptions, is it?

MR. RANDOLPH: If it were, we think the Court of Appeals would have gone the other way.

QUESTION: I understood you to say that you thought this footlocker was analogous to automobile.

MR. RANDOLPH: That's right.

QUESTION: And, certainly, this Court has not upset any search, in the past five years, of an automobile where there has been probable cause, has there?

MR. RANDOLPH: We agree. It is analogous, but it is not exactly directly a statement, although the Court has said, in South Dakota v. Opperman, for example, Mr. Chief Justice, you quoted an opinion by Judge Wisdom that talked about containers, such as automobiles, drawing no line between what the container was.

There are indications in the opinions going our way, we think, but --

QUESTION: Do you really think a footlocker is very much like an automobile? It doesn't have motor and wheels. In other words, it's not mobile.

MR. RANDOLPH: If I may, may I quote your opinion in Coolidge v. New Hampshire, which said, "It is true the automobile has wheels and its own locomotive power, but given the virtually universal availability of automobiles in our society, there is little difference between driving the container itself away and driving it away in a vehicle brought to the scene for the purpose."

Yes, we think there is no relevant difference.

QUESTION: How about the container in an automobile? This one is out and in the custody of the FBI.

MR. RANDOLPH: But it just traversed the entire continent and it was on its way for another destination. It was like a car stopping --

QUESTION: It wasn't at the time it was searched, was it?

MR. RANDOLPH: No, and neither were the cars in Chambers v. Maroney, Texas v. White, Cady v. Dombrowski, and so on.

QUESTION: Do you think the expectation of privacy is as great with respect to a footlocker as it might be with

respect to, say, the personal suitcase of a traveler?

MR. RANDOLPH: I would think, as a -- And someone suggested that if I had personal belongings on me, I would be carrying them. I'd want them close to me. When I go on a plane, those personal documents accompany me. I keep them close to me.

There is a curious thing about that, because if that had been the case here, if those people had been arrested with a suitcase or a briefcase, it would have been a search incident to an arrest. It could have been opened up. The courts are fairly unanimous on that, and they wouldn't have even needed probable cause to open that briefcase.

QUESTION: Do you want us to say that this opinion, if we go with you, applies only to footlockers and doesn't apply to other bags? You don't want us to do that, do you?

MR. RANDOLPH: No, I would not like you to do that. If that's all you would do, well, I would accept it.

QUESTION: Would the case be different, Mr. Randolph, if the footlocker had not been traveling with the individual who was arrested?

MR. RANDOLPH: The fact of the arrest, we think, adds to our argument.

We have argued in our brief, and I rely upon that, that even without the addition of the arrest, which brings the people quickly before a magistrate, -- they were brought

the next morning -- which diminishes, we think, privacy interest, and so on.

Even without that, it would have been proper. The seizure would have been proper and the search -- once the item is lawfully in the Government's possession, yes.

QUESTION: Mr. Randolph, before you -- I just want to get one thing straightened out.

You cited the Preston case, and Mr. Justice Black remarks in that case. Doesn't Preston dispositive against you on the question whether it is incident to an arrest, because there they invalidated the search?

MR. RANDOLPH: But the reason for the arrest was not the same reason as the reason for the search.

And Cooper v. California, which came down later, also written by Mr. Justice Black, is precisely the type of situation we have here. The reason for the arrest was the reason for the search. The search took place back at the station house. The Court upheld it.

QUESTION: Well, Preston certainly doesn't help you does it?

MR. RANDOLPH: Well, I think the common sense language does.

I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Randolph.

Mr. Weinberg.

ORAL ARGUMENT OF MARTIN G. WEINBERG, ESQ.,

FOR THE RESPONDENTS

MR. WEINBERG: Mr. Chief Justice, and may it please the Court:

The Government on three separate occasions, twice at the District Court and once at the Circuit Court, has tried to persuade the courts that this search falls within the established standards of the presumptive warrant requirement of the Fourth Amendment.

They have explicitly conceded today that it does not and have asked this Court to use this case as a vehicle to make major incursions into the Warrant Clause of the Fourth Amendment.

There is a coherent standard which prevails on even warrantless searches, and that's the "cat standard," the expectation of privacy standard. And by admitting that no existing exception to the search warrant justifies this search, as the law now stands, there are tremendous consequences towards an individual's expectation of privacy.

Here there was a seizure, as there frequently is in automobile cases, and, ipso facto, the Government says you can, therefore, search.

Well, it is the position of the defendants that there is a constitutional distinction of grave importance

between an automobile and footlocker, and with a footlocker, a briefcase and a trunk and all kinds of other containers, which, unlike a car, are often repository for private property, which, unlike a car, are not constantly the subject of non-criminal investigations, of contact with the police, with regulations, with inspection, with motor vehicle laws, with all the various indicia which this Court in the Cady case and in the Opperman case has said reduces one's expectation of privacy in an automobile.

But the Government has conceded, as those cases state, that the mobility of a vehicle, like the arguable mobility of a trunk, has grounds for a seizure. It is grounds for immobilization of the property.

But the Court has stated, and the Government concedes in their brief on page 35, that mobility, in and of itself, is not a justification for a search. The justification for the search following the seizure, in the automobile cases, is the reduced expectation of privacy which an individual has in a vehicle, particularly following the decisions of this Court in Cady and in Opperman.

Those justifications for the reduced expectation of privacy in an automobile are not present in the case with the footlocker, are not present in the case of the briefcase.

QUESTION: Let me ask you the same question I asked Mr. Randolph.

You say the reduced expectations of privacy aren't present after Cady and Opperman. Well, if we decide this case against you and the next case against your counterpart, presumably, there will be reduced expectations of privacy in footlockers. That's kind of a self-fulfilling prophecy however you argue.

MR. WEINBERG: Well, it is true that if this Court did, in fact, make that decision, that the citizens would, from here on in, have a reduced expectation of privacy. The real question is whether or not the constitutional standards of the Fourth Amendment justify a decision which, in fact, reduces the expectation of privacy.

And we would state that the entire body of juris prudence, starting with Ex parte, Jackson, through Katz, to U. S. v. Van Leeuwen, does not justify that kind of decision, Your Honor.

QUESTION: But the same kind of argument could have been and was made to us in Cady and Opperman, that, you know, the right of privacy protected searches of automobiles even though there might be probable cause, if you didn't have a warrant.

MR. WEINBERG: And if I were arguing those cases, I would make the same argument, but henceforth that argument can't be made.

There are distinctions why this Court found a lesser

expectation of privacy in the automobile. What I am suggesting is those distinctions which justify the automobile cases are not present in this case. And I would argue that this Court should not establish a lesser expectation of privacy in a briefcase, in a footlocker, a trunk, in luggage.

QUESTION: If the Fourth Amendment were repealed, there couldn't be a reasonable expectation of privacy by anybody anywhere, could there?

MR. WEINBERG: That is correct. The Fourth Amendment, at its very basis, up until this time, creates a presumtive warrant requirement.

In the cases under the Fourth Amendment, particularly, the Ex parte, Jackson case, the Van Leeuwen case, do not restrict the Fourth Amendment privacy protections of the Warrant Clause to homes. They very explicitly state that sealed packages, that mail, that letters can be taken out of the home; wherever they may be found, people have the justification of privacy, have the right to the protection of the Warrant Clause.

QUESTION: I'll ask you the same question I asked your opponent.

What do you think the established rule is in the lower courts, or maybe here, although I don't think we have settled it, about closed containers in the possession of a person when he is arrested?

MR. WEINBERG: To the extent that the lower courts have developed any coherent philosophy surrounding their holdings in these cases, that has been generated by the Chimel case, and that has been an immediate control case.

QUESTION: Let's assume there is no question about immediate control, but the only thing is the container is closed.

MR. WEINBERG: Well, what they've really done is frozen the situation at the time of the arrest and asked the question: Could the defendant put his hand into a briefcase, into a suitcase, and take out evidence to destroy or remove, or could they take out a gun which would --

QUESTION: All it is, that briefcase is just closed. Nobody knows whether it is locked or not. May the officer look in the briefcase, or not? Is there some established rule about that?

MR. WEINBERG: I would argue that there is really --

QUESTION: I know what you would argue, but what about --

MR. WEINBERG: There is no established rule. There has never been a coherent rule, so there has never been a decision of this Court.

QUESTION: How about a sealed envelope? Are there some cases about sealed envelopes found on somebody?

MR. WEINBERG: The Government would argue that.

QUESTION: Are there some cases on it?

MR. WEINBERG: No, I don't think there are.

QUESTION: How about when you search a car on the spot when there has been probable cause to arrest and there is probable cause to believe that there is some seizable material in the car, and you open a locked trunk and you find a closed container. Is there some established rule about that closed container?

MR. WEINBERG: There is no established rule. Some of the issues are left open --

QUESTION: I suppose the issue we have here is rather relevant to those situations.

MR. WEINBERG: It is relevant, by analogy to any kind of container where there is indicia of privacy. A double-locked footlocker would perhaps contain the most drastic indicia of privacy. It is the least accessible to an arrested defendant. It is the most secure, even if it was in the trunk of a vehicle.

QUESTION: Do you think if the rule were that you could open a closed container found in the possession of a person and under his control when he was arrested -- If the rule were that you could open that, would that govern this case?

MR. WEINBERG: No, it would not. If it was in the person's control, there is at least accessibility to it at time

of arrest.

QUESTION: What about -- If you could open a closed container found in the trunk of a car, and the car was otherwise searchable, would that rule cover this case?

MR. WEINBERG: It would not because the auto search, with reduction of expectation of privacy, could be used as the basis for that decision. So there are distinctions.

QUESTION: In the Draper case, what was the situation? I am a little cloudy on that. Wasn't it a zippered bag, like a briefcase that has a zipper on it?

MR. WEINBERG: My recollection is that it was being held by the traveler who was arrested in Draper. It was a zippered bag. It wasn't locked, to the best of my recollection.

QUESTION: Do you think there is any analogy between the zippered bag in Draper and the box with Mr. Machado, was it, sitting on it at the depot?

MR. WEINBERG: The two crucial distinctions are: here, we have a double-locked, really unportable, footlocker, too heavy to move. The second one is --

QUESTION: Well, it wasn't too heavy to move, obviously. They moved it. You mean too heavy to move for one ordinary man.

MR. WEINBERG: Right. That would be the principal distinction. It is a distinction of degree.

QUESTION: How does the size of it, bear on the right

to -- Suppose, instead of a lock it had a zipper as some large lockers do?

MR. WEINBERG: And we are talking here specifically of when Mr. Machado was sitting on it, as opposed to where it was at the time of the seizure and arrest?

QUESTION: After the dog had identified, they concluded there was probable cause, as the courts below have done, and that said, "Mr. Machado, you are under arrest," and then searched it, right then and there.

MR. WEINBERG: Firstly, this Court could justify that search without necessarily justifying the Chadwick search because of the location of the search and because of the double locks.

QUESTION: You mean they could search it at the depot, but not after they got back to the FBI office?

MR. WEINBERG: I would argue they couldn't search it, but if this Court decided otherwise it doesn't govern the Chadwick situation. I would suggest that under the Chimel situation, you really do need an in fact ability at the time of the arrest when the positions of the people are frozen to reach in and get either evidence --

QUESTION: You wouldn't argue that your position today, if sustained, would necessarily overrule seizing the -- overrule a case authorizing the sei -- It wouldn't overrule Draper, would it?

MR. WEINBERG: That is correct, Your Honor.

There are distinctions both at the time of the arrest, the fact that the footlocker was not being held, and the fact that the double-locks made it impossible, under any conceivable circumstances to have the contents of the trunk accessible.

What the Government has asked for here --

QUESTION: Could they have picked the lock as readily as they could at the FBI office? Is that really a controlling factor?

MR. WEINBERG: I think a double-lock is, Your Honor, and back at the FBI and the DEA office they already had the key which had been seized from Mr. Machado and used that key.

QUESTION: The evidence -- That's not quite clear. The evidence that I read here is that they picked it with means other than the key.

MR. WEINBERG: My recollection is that was the suitcases, but I could be mistaken.

QUESTION: What difference does it make, really, how they opened it?

MR. WEINBERG: The difference, again, is the freezing effect under the Chimel case at the time of arrest. Could a person go into the container with any kind of likelihood at all and comport with the justifications for the search incident to arrest theory which now are, which is removal and

destruction of evidence, or the protection of the officer.

There is no justification under Chimel, as it now stands, for a search incident to arrest the immediate control area, except those justifications. It is not a search aimed necessarily at obtaining evidence for the Government. It is a search aimed at preserving evidence from the danger of an arrested person.

QUESTION: In Robinson, we said rather clearly that whatever the reason behind the allowance of a search incident to arrest, the Government didn't have to show in every individual case that a particular reason was there, that it was lawful by virtue of the fact that it was incident to arrest.

MR. WEINBERG: That's correct.

When speaking in terms of expanding the search incident to arrest theory, I think it is important to go back to the original justifications for the exception.

Robinson was really decided by saying, "We don't want police officers to have to make justifications every time"-- when someone is arrested they protect themselves, to form the kind of intent as to why they are searching.

But when we are asking to make a major expansion of the Chimel doctrine here, which would state that the Government, when there is an arrest that has probable cause of contraband can search, not only a footlocker, but all the suitcases.

Under the Government doctrine, anything that they

have probable cause contains contraband is susceptible to search. There is no limitation upon that. That's an expansion of the Chimel doctrine, in a very dramatic way. It is an expansion which was overruled -- where Chimel overruled Rabinowitz.

That was the same theory that this Court recognized before Chimel. It is almost trying to be resurrected by the Government in this case.

Now, the Government forms the distinction, but it is not in the home, and that's a distinction which just isn't justified either by history or by the expectation of privacy cases which have emanated from the Fourth Amendment.

The distinction that you have a greater degree of privacy in an envelope, briefcase, a trunk, at home, rather than outside of the home, is really the very basis of the Government's theory, a basis which history doesn't support because the searches which history was directed to occurred both in the home and outside of the home. And it is also a theory which isn't justified by the mobile society we now live in.

QUESTION: Well, there is some truth, in fact, to it, isn't there? In Coolidge, search of an automobile was upset and the automobile was on the premises of the owner. Subsequent cases have sustained not really distinguishable searches of automobiles where they were in public ways.

Someone who carries a sealed envelope on a three thousand mile journey is probably more apt to have things happen to it than somebody who simply leaves it in a drawer at home.

MR. WEINBERG: They are more likely to have something happen to it, but under the prevailing standards of this Court, what would happen to it would have to happen to it pursuant to a search warrant.

Now, in the home situation, like Coolidge, those cases held -- the Coolidge case, the Jeffers case, the Taylor case -- that you have to immobilize the object of a search, that there is a constitutional distinction between the intrusion of a seizure, of an immobilization, of standing guard at the door, standing guard at the driveway, and incurring the second search, the greater search, which is opening up the seized or immobilized container.

To that extent, a home is important. A home is an indicia of privacy to this society, both in its history, in its juris prudence and, most importantly, in the policy justification of why we need a warrant and what kind of society we live in. It is no longer a society of homes. It is a mobile society.

The Government's theory is that if a police officer thought they had probable cause -- something in a lawyer's briefcase or a judge's briefcase, as they left their office or

left their court house contained evidence, contraband, that would be amenable to a search without the necessity of going through a court. That's the basic difference.

QUESTION: Well, Draper holds that, doesn't it? If the search is incident to arrest.

MR. WEINBERG: Draper requires the arrest, which is the Government's fall-back theory.

QUESTION: You are saying that the Government's theory would support that even though there weren't probable cause for arrest.

MR. WEINBERG: Yes, under their request for a luggage exception or a briefcase exception to the search warrant.

QUESTION: Mr. Weinberg, it is, is it not, the dog? Once the dog scratched that trunk, your clients were gone.

MR. WEINBERG: One of my clients -- You know the court made a finding of no probable cause. When that dog scratched the trunk, if the police --

QUESTION: They should have said, "I wonder whose trunk this is?"

(laughter)

QUESTION: I mean, isn't that true?

MR. WEINBERG: If the police comported themselves with the Fourth Amendment --

QUESTION: All they had to do was wait until the next morning and any magistrate in the world, on the basis of

that dog, would have granted the search warrant.

MR. WEINBERG: That is correct, Your Honor. However, the fact that they didn't do it is of the highest constitutional significance, because decisions are made to regulate police conduct and they are made for innocent people as well as people that are likely or have probability, have contraband in their suitcase.

QUESTION: May I ask you a question about the Draper case. I don't know whether you have conceded or not that that holds that incident to arrest it was appropriate to open the brown zippered bag.

The actual facts of that case were that the heroin was in the man's left hand and that the syringe was in the brown zippered bag. And I don't think there is any argument about whether or not it was proper to open the brown zippered bag.

So there really is no holding on the point that's before us.

MR. WEINBERG: That's correct. It is a factual situation which has been relied on by lower courts.

And what I am stating is -- that's firstly, and secondly, this case is different. It is different in a qualitative way because of the privacy indicia of the trunk and because of its general inconsistency with the justifications under Chimel for the search incident to arrest.

QUESTION: Mr. Weinberg, do you agree with the Solicitor General that the footlocker could have been held indefinitely, pending the obtaining of a warrant, the locker having been seized pursuant to probable cause?

MR. WEINBERG: No, Your Honor. The longest period of time we've had anything other than an automobile held is the twenty-nine hours that a 12-pound package which stated coins on the outside, in U.S. v. Van Leeuwen was held.

QUESTION: You would have no problem with holding it for a sufficient period of time to obtain a warrant?

MR. WEINBERG: Excuse me?

QUESTION: The question really addresses whether or not your client could have walked away with the footlocker, under your submission, or did the Government have the right to retain the footlocker?

MR. WEINBERG: The Government had the right to retain the footlocker for a reasonable amount of time and there has never been a case which really says it is thirty hours or forty hours.

QUESTION: I understand that.

MR. WEINBERG: But, the Government, once having seized the footlocker, whether pursuant to forfeiture or through exigency, then had an obligation to get judicial permission to create the greater intrusion which is the search intrusion.

QUESTION: That brings you back to Justice Marshall's comment, doesn't it? That your argument really wouldn't help your client very much in this case, would it?

MR. WEINBERG: The argument would help my client a great deal in this case because if the conduct of the Government was improper in the method in which they searched and seized, and particularly searched, then the exclusionary rule permits the exclusion of evidence. That's the deterrent effect. It regulates police conduct, and that's one of the purposes of the Fourth Amendment.

QUESTION: The only misconduct here is the failure of the Government to have obtained the warrant. You concede the Government would have had time to obtain it, and had the Government obtained it, in view of the evidence in this case, well, the magistrate certainly would have issued the warrant.

MR. WEINBERG: That's true in almost every case. In the Katz case, there was clearly gambling information being transmitted over the phones, but the Government improperly, you know, electronically surveiled the conversation.

The Fourth Amendment doesn't rely on what is subjectively known by the possessor of a trunk. It relies on certain guidelines and standards which, in this case, were not comported with and the failure to comport with them results in the exclusion of the crucial evidence.

So, whereas I concede that under the facts of this

case a search warrant would have been issued and the Government had the right to lawfully hold the property, that just goes to show the lack of necessity, the lack of exigency and the lack of emergency in not obtaining a warrant, in not obtaining prior judicial approval which this Court has held so often is necessary for the searching of private goods.

And, once again, the luggage is no different, under these circumstances, than a home search, than a briefcase search, or any of the other searches which the Supreme Court has held are protected by the expectation of privacy.

QUESTION: It couldn't be the home because he couldn't carry the home into the FBI office.

MR. WEINBERG: That's correct.

QUESTION: Assume for a moment that -- Well, you need not assume it. The fact is clear that upon opening this locker and finding that the substances in it were totally innocent, sugar, powdered sugar, talcum, whatever, these gentlemen could have been on their way within an hour or so, could they not?

MR. WEINBERG: That's correct, Your Honor.

QUESTION: With the apologies of the agents, and perhaps a potential case against them. But by holding it until they could find the magistrate the next morning, would that not be a greater intrusion than the intrusion of opening it immediately?

MR. WEINBERG: Well, that is what the consent exception is for, in which a person has the right to require the Government when they are intruding upon private property, except in very limited circumstances, to get a search warrant. They can consent to the warrantless opening. That's one of the exceptions. These individuals did not consent. They implicitly asserted their right to privacy and their right to require the Government, under the presumptive warrant standard of this Court to get a search warrant. That's just the calculus made by defendants in trouble.

QUESTION: For purposes of this case, I suppose you would agree that it would make no difference whether the contents of the footlocker were marijuana, heroin or a small tactical atomic bomb?

MR. WEINBERG: That is correct, Your Honor, nor would it have mattered whether it was one ounce of marijuana, a broken talcum powder bottle and 199 pounds of various books and the most private possessions. That footlocker trunk is imbued with the privacy that the cases Ex parte, Jackson, United States v. Van Leeuwen and Katz give it in this society at this point.

And the Government's attempt here is to use the case as a vehicle to make a major incursion in when they have to go get a warrant, without, as all other exceptions, the least bit of need.

There was only a minor inconvenience, in this situation, to get a search warrant. They go right past the Federal Courthouse in Boston on the way to the DEA building.

QUESTION: Well, not at 10:00 o'clock at night, you don't find magistrates. Or do you, in Boston?

MR. WEINBERG: They have been found at all kinds of hours, Your Honor.

QUESTION: In the courthouse?

MR. WEINBERG: Hardworking magistrates, Your Honor. And they are available by telephone. There have been warrants issued at all hours in Boston.

Again, the footlocker could have been held until the next morning, barring consent, and a warrant then could have been requested.

QUESTION: What do you conceive to be the basis for the decision in Cooper? What justified the search of the automobile? That wasn't the automobile theory, was it?

MR. WEINBERG: It was the caretaking function in combination with the reduced expectation of privacy.

QUESTION: It was based on the idea that the car had been used, they had probable cause to believe the car had been used to transport contraband?

MR. WEINBERG: The car was seized pursuant to a state forfeiture statute. It had been held for at least a week.

QUESTION: And did you think the trunk, in this case, was in the position of the car in terms of the right of the United States to forfeit it?

MR. WEINBERG: Only in terms if there is a forfeiture statute governing the containers of contraband. However, that statute only goes for seizure. It doesn't go to search. And the justification for the search in Cooper --

QUESTION: I know.

I am just asking why wouldn't Cooper pick up -- If the United States has the right, on probable cause, to seize the footlocker and hold it, pending a forfeiture proceeding?

MR. WEINBERG: Because Cooper is an automobile and automobiles have a lesser expectation of privacy than luggage, footlockers --

QUESTION: That wasn't the court's rationale in that case, was it?

MR. WEINBERG: The rationale which was stated in Opperman was that it was a caretaking function, that the vehicle --

QUESTION: I am talking about Cooper,

MR. WEINBERG: Opperman related to Cooper and held that it was a caretaking function, and that's the reason why the police were allowed to go --

QUESTION: So the Cooper-Opperman approach would cover anything, not just cars. It would cover a footlocker,

wouldn't it?

MR. WEINBERG: Because the privacy interests in a footlocker are far different than the privacy interests in a car.

QUESTION: If you are holding the footlocker, pending forfeiture proceeding, your submission is, nevertheless, that you may not search it without a warrant.

MR. WEINBERG: If it is being held prior to a search, that's correct, Your Honor.

QUESTION: Prior to a forfeiture.

Pending a forfeiture proceeding, you still say that the Government needs a warrant to search it?

MR. WEINBERG: That's correct. The statute permits seizure. The next step is a search. The search requires a warrant. If the search disclosed contraband, then you wouldn't need a second warrant, then it could be held pursuant to the forfeiture statute. Until then, it is kind of a temporary hold under seizure powers until the search discloses what's in it.

QUESTION: Again, it's the difference between a car and a footlocker.

MR. WEINBERG: That's correct. That's a distinction that is critical.

QUESTION: If the footlocker can be held, Mr. Weinberg, subject to the forfeiture proceeding, as the vehicle or

container of contraband, would it be necessary to open it before the contraband -- the forfeiture proceeding?

MR. WEINBERG: Yes, Your Honor.

QUESTION: Why? Why couldn't the Government go into court and say here, we have probable cause to believe there is contraband in here, and then and there could not the judge say, all right, we will have to open it to find out.

Now would that be a judicial warrant, in quotation marks?

MR. WEINBERG: It goes to the limits of the seizure power, which have not yet been definitively decided.

QUESTION: But, do you concede that the court could say, having brought it into the courtroom, as you would not trouble to do with the automobile, all right, now, have the marshal of the court open it up and have someone decide whether it is contraband.

MR. WEINBERG: If consistent with the Fourth Amendment, the judge made the independent and impartial decision.

QUESTION: On what subject?

MR. WEINBERG: On the basis of whether or not there is probable cause the container, in fact, contained contraband.

QUESTION: I thought it had been conceded now there is probable cuase, at this stage.

MR. WEINBERG: That's correct, Your Honor.

At this stage, I would stipulate --

QUESTION: That footlocker, then, is in the courtroom in a forfeiture proceeding. Could the court direct it to be opened to determine whether there were machine guns, or whatever?

MR. WEINBERG: Yes, Your Honor.

QUESTION: And that would be lawful?

MR. WEINBERG: That would be lawful. It is the involvement, again, of the Judiciary and not merely the opinion of a police officer and his involvement of an investigation that would decide when the search occurred, because we are conceding the seizure -- the police officer, because of the exigency, can make a seizure. But because of the lack of exigency, once having made the seizure, judicial permission is needed for the search, which is the greater intrusion.

Thank you, very much.

QUESTION: Mr. Weinberg, would it make any difference in your argument if there were a provision in the ICC tariffs that permitted the carrier to open material such as this in its custody for inspection at its discretion?

MR. WEINBERG: Once again, that would be a search by a private party and not by the Government.

QUESTION: Right. I am talking about expectation of

privacy.

MR. WEINBERG: It might change the expectation of privacy of an individual regarding what the common carrier can do, but it wouldn't change the expectation of privacy regarding the intent by the Government to find evidence of a crime.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Randolph, do you have anything further?

MR. RANDOLPH: Yes, sir, a few points.

REBUTTAL ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. RANDOLPH: Mr. Justice White, in response to your question, I think it is fair to say the Courts of Appeals are unanimous -- I know of no decision going the other way -- that when a person is arrested a closed container on his person can be opened.

You had asked me whether this Court had ever dealt with that and I gave you the cases.

QUESTION: They are unanimous, like one court, or is it --

MR. RANDOLPH: Well, I think we cited a number of the cases in our brief. I think U.S. v. Hand -- Sorianao stands for that. Chaires is another case. Zaic, Z-a-i-c, I guess it is.

QUESTION: Do any of them cover locked briefcases?

MR. RANDOLPH: Yes, as a matter of fact, the Second Circuit decision in Zaic, dealt with attache case.

And I might point out to the Court there is a decision of the First Circuit, where this case comes from, after we filed our brief, called United States v. McCambridge. It is not cited. It was just decided in late March. It is Number 76-1147, and that court in a decision by the same judge that wrote this opinion, upheld the opening of a closed briefcase in a trunk of an automobile that was properly seized.

That points up a fact --

QUESTION: Did he do that on --

MR. RANDOLPH: On the automobile exception.

QUESTION: And what about on searching closed containers in possession when arrested, is that strictly on the incident to arrest basis, or --

MR. RANDOLPH: In the Courts of Appeals, it is on a variety of different theories, Mr. Justice. Sometimes it is not articulated --

QUESTION: But no court, I take it, has embraced your luggage exception.

MR. RANDOLPH: No, I think the courts, generally, do embrace it. Matter of fact, the only court I know that doesn't -- they don't speak of it in those -- as a luggage exception --

QUESTION: Let's assume -- Do you know of any court that has embraced this notion: That the Government has probable cause to believe that a certain briefcase, checked in a hotel, has got contraband in it, and the checker gives the Government the briefcase.

Let's assume they are in lawful possession of it. Does anybody justify opening it without a warrant? Do you know any cases like that?

MR. RANDOLPH: Unless you restrict me to hotels, I think it would be analogous to the baggage car on a train that hasn't pulled away, where --

QUESTION: They have that right.

MR. RANDOLPH: Yes.

As a matter of fact, there is a case --

QUESTION: Isn't that your theory? Wouldn't the Government like to be able to search any effects that are found outside the home, if they've got probable cause to search it?

MR. RANDOLPH: If it is lawfully in their possession.

QUESTION: Yes.

MR. RANDOLPH: Yes.

And I think the contrary rule, that Respondents urge, has a delusive exactness to it. It sounds very precise -- but then, when you start thinking about it, he makes a distinction between whether the footlocker weighed 2 pounds or 20 pounds, or even if Mr. Machado was the defensive lineman

for a pro football team and had it under his arm as he walked out, it would make a difference.

It would make a difference if the car were pulling away. The First Circuit has said that makes a difference. If the car were pulling away, then you can open up the closed container.

These kind of fine line distinctions, we think, do a couple of things. One, they lead to a lot of litigation. Second, they don't give the police any real guidance, because they are not analytical. I cannot see the line between those events, and I think the Court would have difficulty doing so, as well.

And we think not only that, but finally -- and maybe this is the most important thing -- they take away the importance and the seriousness of the warrant requirement, because they burden the warrant system with these kinds of cases. And I think that may not help to instill the kind of responsibility that we want to instill in magistrates when they are dealing with very serious intrusions where the Court has held a warrant is required, in the home, in the office, private communications.

For that reason, we urge the decision below be reversed.

QUESTION: In response to Mr. Justice White, you said that there was a specific Court of Appeals case, I

believe, relating to a locked briefcase.

Could you identify that case for us.

MR. RANDOLPH: Yes. The case, which is not cited in our brief, is almost exactly like this case -- as a matter of fact, it took place in the San Diego train station about two weeks after this shipment took place-- except for one difference. It was on the baggage car, they had a dog walk up, smell it, the police went -- or the agents went, seized the luggage. They got the luggage before the train pulled away rather than at its destination.

The case is United States v. Johnstone, 497 Fed. 2d, 397, the 9th Circuit, 1974, and the case is indistinguishable from this one, even on the facts.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:40 o'clock, a.m., the case was submitted.)