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"TOUCHY" "FEELY" — IS THERE A CONSTITUTIONAL DIFFERENCE? THE CONSTITUTIONALITY OF "PREPPING" A PASSENGER’S LUGGAGE FOR A HUMAN OR CANINE SNIFF AFTER BOND V. UNITED STATES

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The United States Supreme Court held in Bond v. United States1 that a law enforcement officer's physical manipulation of a bus passenger's soft-sided carry-on luggage constitutes a "search" within the meaning of the Fourth Amendment to the United States Constitution. This article discusses the impact, if any, of that decision upon the related, but distinct, investigative technique of "prepping" or "poofing"2 a passenger's luggage preparatory to subjecting it to a human or canine sniff for illegal drugs.

I. THE "LEGITIMATE EXPECTATION OF PRIVACY" TEST

The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause."3 The Amendment is designed to protect liberty, privacy, and possessory interests.4 It requires that, as a general matter, searches be conducted pursuant to a warrant issued by a neutral and detached magistrate5 upon a finding of probable cause to

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2. See infra text accompanying notes 89-93.
3. U.S. CONST. amend. IV states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
5. See, e.g., Connally v. Georgia, 429 U.S. 245, 250-51 (1977) (per curiam) (holding that an unsalaried justice of the peace who received five dollars for issuing a search warrant, but no compensation for refusing to issue a warrant, was not "neutral and detached"); Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (holding that the State Attorney General, who issued a search warrant in his capacity as a justice of the peace while acting as chief investigator and prosecutor in the case, was not "neutral and detached"); Shadwick v. City of Tampa, 407 U.S. 345, 346, 350 (1972) (holding that clerks of Tampa's municipal court qualify as neutral and detached magistrates). Arizona United States v. United States Dist. Court, 407 U.S. 297, 317 & n.18 (1972); Johnson v. United States, 333 U.S. 10, 14 (1948).
As the Supreme Court stated in *Katz v. United States*,

> [T]he Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.

However, because the Fourth Amendment, by its very terms, applies only to "searches" and "seizures," "an investigative technique that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use."

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6. Some searches are permissible without a warrant, though they still require probable cause to search. *E.g.*, Chambers v. Maroney, 399 U.S. 42, 52 (1970) (search of a motor vehicle); California v. Carney, 471 U.S. 386, 392 (1985) (same); California v. Acevedo, 500 U.S. 565, 579-80 (1991) (search of a container located in a motor vehicle); Minsey v. Arizona, 437 U.S. 385, 392-94 (1978) (dictum) (exigent circumstances: entry and search of premises for a person in need of immediate aid or to prevent the loss, destruction, or removal of evidence). Other searches are permissible not only without a warrant but also without probable cause to search. *E.g.*, Chimel v. California, 395 U.S. 752, 762-63 (1969) (search of the area within the "immediate control" of an arrestee incident to the arrest); United States v. Robinson, 414 U.S. 218, 224, 235 (1973) (search of an arrestee's person incident to the arrest); New York v. Belton, 453 U.S. 454, 460-61 (1981) (search of the passenger compartment of a motor vehicle and any containers therein incident to the arrest of an occupant of the vehicle); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (search pursuant to consent); United States v. Mailock, 415 U.S. 164, 171 (1974) (search pursuant to consent of a third party having "common authority" over the place or item searched); South Dakota v. Opperman, 428 U.S. 364, 372-76 (1976) (inventory search of a lawfully impounded motor vehicle); Illinois v. Lafayette, 462 U.S. 540, 543, 548 (1983) (inventory search of an arrestee's personal effects incident to his booking and jailing). Still other searches can be conducted without a warrant, provided the police or other government actor has "reasonable suspicion," a lesser standard than "probable cause." *E.g.*, Terry v. Ohio, 392 U.S. 1, 26, 30-31 (1968) (holding that the "frisk" of an individual during a lawful investigatory stop is permissible upon reasonable suspicion that the individual is armed and presently dangerous); Michigan v. Long, 463 U.S. 1032, 1049-50 (1983) (holding that, during a lawful investigatory stop, the protective search of areas in the passenger compartment of a motor vehicle in which a weapon may be placed or hidden is permissible upon reasonable suspicion that the suspect is dangerous and may gain immediate control of a weapon); Maryland v. Buie, 494 U.S. 325, 334 (1990) (holding that a "protective sweep" of areas not immediately adjoining the place of arrest is permissible upon reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the arrest scene); New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985) (holding that the search of a public school student by a teacher or other school officials is permissible upon reasonable suspicion that the student violated or is violating either the law or school rules).


A "search" within the meaning of the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" by the government. The Supreme Court first articulated this test in *Katz v. United States*, a case in which FBI agents attached an electronic listening and recording device to the outside of a public telephone booth from which Katz placed calls. The Court in *Katz* rejected the notion that the Fourth Amendment applies only when the government invades a "constitutionally protected area," reasoning that "the Fourth Amendment protects people, not places."

The Court further stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

The Court concluded that the government's activities in electronically listening to and recording Katz's words constituted a "search and seizure" for Fourth Amendment purposes because the FBI agents "violated the privacy upon which he justifiably relied."

Justice Harlan joined the opinion of the Court in *Katz*, but also wrote a concurring opinion in which he amplified the test set forth by the Court to determine whether a "search" has occurred. Justice Harlan concluded that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" A majority of the Supreme Court ultimately adopted this formulation of the test, under which "the application of the Fourth

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10. A "search" of property within the meaning of the Fourth Amendment "occurs when there is some meaningful interference [by the government] with an individual's possessory interests in that property." *Jacobson*, 466 U.S. at 113. A "search" of the person occurs when a law enforcement officer, "by means of physical force or show of authority, . . . in some way restrain[s] the liberty of [the] citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). *See also California v. Hodari D.*, 499 U.S. 621, 624-25, 626, 629 (1991) (holding that a "search" of the person occurs either when a law enforcement officer applies physical force to the individual, whether or not he succeeds in subduing the individual, or when the individual submits to a law enforcement officer's show of authority).


12. The Fourth Amendment prohibition against unreasonable searches and seizures applies only to governmental action. *Berdoo v. McDowell*, 256 U.S. 465, 475 (1921). *See also Jacobson*, 466 U.S. at 113 ("[T]he Fourth Amendment is] wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."") (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).


14. *Id.* at 351.

15. *Id.*

16. *Id.* at 353.

17. *Id.* at 361 (Harlan, J., concurring).
Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action, and today it is the test used to determine whether a particular governmental investigative technique constitutes a "search" for purposes of the Fourth Amendment.

With respect to the first element of the Katz test, the question is "whether the individual, by his conduct, . . . has shown that 'he seeks to preserve [something] as private.'" As to the second element, the question is "whether the individual's subjective expectation of privacy . . . viewed objectively, is 'justifiable' under the circumstances." The test for determining whether an expectation of privacy is "justifiable," "legitimate," or "reasonable," in the sense required by the Fourth Amendment, "is not whether the individual chooses to conceal assertedly "private" activity, but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" Thus, "[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" Although the existence of a property right is relevant in determining whether an expectation of privacy is "legitimate," it is not always sufficient.

The Supreme Court has applied the two-part test from Katz on a number of occasions. In California v. Ciraolo, for example, the Court concluded that law enforcement officers did not conduct a "search" within the meaning of the Fourth Amendment when they conducted physically noninvasive naked-eye observations of the backyard of a suburban house from a fixed-wing aircraft lawfully operating in navigable airspace. The Court reached this result even though the

21. Id. (quoting Katz, 389 U.S. at 353).
22. Ciraolo, 476 U.S. at 212 (quoting Oliver, 466 U.S. at 182-83). See also Greenwood, 486 U.S. at 43 ("[T]he Fourth Amendment analysis must turn on such factors as 'our societal understanding that certain areas deserve the most scrupulous protection from government invasion.").
24. Oliver, 466 U.S. at 183-84 (stating that, for example, the law of trespass does not necessarily define the limits of the Fourth Amendment).
26. Id. at 213-15. Under FAA regulations, the minimum altitude for a fixed-wing aircraft is 1000 feet over congested areas and 500 feet over other areas. 14 C.F.R. § 91.119(b) & (c) (2000).
occupant of the dwelling had taken measures to restrict views of the area from public vantage points on the ground by erecting a ten-foot high privacy fence around his backyard, and even though the police conducted the overflight for the specific purpose of observing the particular backyard in question. The Court reasoned that, despite erecting the privacy fence, the occupant of the dwelling knowingly exposed objects within his backyard to public view, because any member of the public flying in the airspace over the dwelling could have glanced down and seen them, and that consequently the occupant lacked a reasonable expectation of privacy vis-à-vis aerial observations of his backyard.

Similarly, in United States v. Knotts, the Supreme Court concluded that a person has no reasonable expectation of privacy in his movements from one place to another while traveling in an automobile on public thoroughfares, because in traveling over public streets he voluntarily conveys to anyone who wants to look the fact that he is traversing particular roads in a particular direction, the fact of whatever stops he makes, and the fact of his final destination when he exits from public roads on to private property. The Court therefore held that law enforcement officers did not conduct a “search” within the meaning of the Fourth Amendment when they maintained surveillance of an individual by monitoring signals from an electronic tracking device (“beeper”) being transported inside the individual’s car on public.

28. Id. at 213-14. See also Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986) (holding that the taking of aerial photographs of an industrial plant complex from an airplane flying in public navigable airspace, using a precision aerial mapping camera, is not a “search” within the meaning of the Fourth Amendment); Florida v. Riley, 488 U.S. 443, 448-49 (1989) (plurality opinion) (holding that looking through the partially-open roof and sides of a greenhouse located within the curtilage of a mobile home from a helicopter that twice circled over the property at a height of 400 feet is not a “search” within the meaning of the Fourth Amendment); id. at 454 (O’Connor, J., concurring) (same).
30. Id. at 281-82.
31. An electronic tracking device, also known as a “beeper,” “is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.” Knotts, 460 U.S. at 277.
32. With the consent of the chemical company from which a suspect had been purchasing chloroform, a “precursor” chemical used to manufacture illegal drugs, law enforcement officers installed the beeper inside a drum of chloroform. When the suspect again purchased chloroform from the company, the company gave him the drum containing the beeper, and he placed it inside his automobile. He later transferred the drum to the automobile of a second suspect. Id. at 278. Knotts, the occupant of a cabin to which the second suspect took the drum of chloroform, did not challenge the warrantless installation of the beeper in the chloroform container. Id. at 279 n.4 The Supreme Court subsequently held in United States v. Karem, 468 U.S. 705 (1984), that law enforcement officers do not conduct a Fourth Amendment “search” when they place an electronic tracking device into an object owned and possessed by the government, or into an object not possessed by the government if they do so with the permission of the current owner and possessor of the item, because in such situations other people do not have a legitimate expectation of privacy.
streets and highways. The Court also held that the monitoring of the "beeper" while it was located outside a dwelling on private property did not constitute a "search" for purposes of the Fourth Amendment, because police officers following the individual's car at a distance could have observed him with their naked eyes leaving the public highway and arriving at the dwelling, with the drum of chloroform still in the car.

On the other hand, in United States v. Karo, the Supreme Court held that law enforcement officers conducted a "search" for Fourth Amendment purposes when they monitored an electronic tracking device located inside a private residence, because it revealed information that could not be obtained through visual surveillance from outside the curtilage of the house, namely, that the particular item containing the beeper was located inside the house and in the possession of those who resided in the house.

In applying the Katz "legitimate expectation of privacy" test in other cases, the Supreme Court consistently has held that an individual has no legitimate expectation of privacy in information or objects he voluntarily turns over to a third party. Thus, in Smith v. Maryland, the Court rejected the claim that an individual has a legitimate expectation of privacy in the numbers he dials on his telephone and held that police did not conduct a "search" within the meaning of the Fourth Amendment when they installed and used a pen register to record the numbers dialed from a suspect's telephone. The Court reasoned, first, that telephone users do not "harbor any general expectation that the

in the object. Id. at 711. Nor do law enforcement officers conduct a "search" when they or an agent transfer an object containing an unactivated electronic tracking device to an individual who does not know of the presence of the device, because the mere transfer of an object containing a beeper conveys no information that the recipient desires to keep private, for the simple reason that it conveys no information at all. Id. at 712.

34. Id. at 282, 284-85.
35. Id. at 285.
37. Id. at 714-16. See also Kyllo v. United States, 121 S. Ct. 2038, 2043, 2046 (2001) (holding that law enforcement officers conducted a "search" when they used a thermal imager to scan a residence and measure the relative heat of various rooms in the home).
39. Id. at 742.
40. A pen register is a mechanical device that records the numbers dialed on a particular telephone by monitoring the electrical impulses caused when someone dials that phone. It usually is installed at a central telephone facility and records on a paper tape all numbers dialed from the telephone line to which it is attached. Id. at 736 n.1 (quoting United States v. New York Tel. Co., 434 U.S. 169, 161 n.1 (1977), and United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part and dissenting in part)).
41. Id. at 745-46.
numbers they dial will remain secret,”42 because they “typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.”43 And, second, that even if a particular individual harbors some actual expectation that the numbers he dials will remain private, that expectation is not “reasonable” or “legitimate,” because “[w]hen he use[s] his phone, [he] voluntarily convey[s] numerical information to the telephone company and ‘expose[s]’ that information to its equipment in the ordinary course of business,”44 thereby “assum[ing] the risk that the company [will] reveal to police the numbers he dialed.”45

So too, in California v. Greenwood,46 the Supreme Court concluded that a homeowner does not have a legitimate expectation of privacy in garbage that he places inside a sealed, opaque plastic garbage bag and leaves on the curb in front of his house for pickup by the trash collector.47 The Court therefore held that a police officer did not conduct a “search” within the meaning of the Fourth Amendment when she obtained the garbage bag from the trash collector and examined its contents.48 The Court acknowledged that the individuals in question may have had a subjective expectation of privacy in the contents of the garbage bags they left at the curb, but concluded that that expectation was not objectively reasonable because the individuals had exposed their garbage to the public.49 The Court reasoned, first, that “plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public,”50 and second, that the individuals had “placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through [their] trash or permitted others, such as the police, to do so.”51

42. Id. at 743.
43. Id.
44. Id. at 744.
45. Id.
47. Id. at 41.
48. Id. at 37.
49. Id. at 40.
50. Id. (footnotes omitted).
51. Id. See also United States v. Miller, 425 U.S.435, 442-43 (1976) (holding that a bank depositor has no legitimate expectation of privacy in the contents of his checks and deposit slips in the possession of his bank because he voluntarily conveys such information to the bank and exposes it to bank employees in the ordinary course of business).
II. Bond v. United States

After completing a routine check of the immigration status of passengers on a Greyhound bus traveling from California to Little Rock, Arkansas, a United States Border Patrol agent at the permanent Border Patrol checkpoint in Sierra Blanca, Texas, squeezed the soft-sided luggage that passengers had placed in the overhead storage space of the bus.\textsuperscript{52} As the agent inspected the luggage above the seat occupied by Steven Bond, he squeezed a green canvas bag and felt a "brick-like" object. Bond admitted that the bag belonged to him, and he agreed to allow the agent to open it.\textsuperscript{53} Upon opening the bag, the agent discovered, rolled in a pair of pants, a "brick" of methamphetamine wrapped in duct tape until it was oval-shaped.\textsuperscript{54} After being warned of his \textit{Miranda} rights, Bond admitted that he was transporting the methamphetamine to Little Rock.\textsuperscript{55}

The Government charged Bond with conspiracy to possess, and possession with intent to distribute, methamphetamine.\textsuperscript{56} Prior to his trial, Bond unsuccessfully moved to suppress the drugs on the ground that the Border Patrol agent conducted an illegal search of his bag.\textsuperscript{57} Following his conviction on both counts, he appealed. The Court of Appeals for the Fifth Circuit affirmed the denial of his motion to suppress, holding that the agent’s manipulation of Bond’s bag did not constitute a “search” for purposes of the Fourth Amendment.\textsuperscript{58}

\textsuperscript{52} Bond v. United States, 529 U.S. 334, 336 (2000).
\textsuperscript{53} The Government did not argue that Bond’s consent to the agent’s opening the canvas bag justified admission of the evidence discovered inside the bag. \textit{Id.} at 336 n.1.
\textsuperscript{54} \textit{Id.} at 336.
\textsuperscript{57} Bond, 529 U.S. at 336.
\textsuperscript{58} 167 F.3d 225, 227 (5th Cir. 1999), rev’d, 529 U.S. 334 (2000). Accord United States v. McDonald, 100 F.3d 1320 (7th Cir. 1996), aff’d, 855 F. Supp. 267, 269 (S.D. Ind. 1994) ("[R]ubbing, squeezing, [and] manipulating, . . . the exterior of defendant’s luggage did not constitute an unreasonable search or seizure within the meaning of the Fourth Amendment."); Scott v. State, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996). See also United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir. 1996) (holding that a police officer did not conduct a "search" when he "touch[ed]" the exterior of a bag in the overhead rack of a bus and felt several hard bricks he immediately thought were drugs); Pooley v. State, 705 P.2d 1293, 1304 (Alaska Ct. App. 1985) (stating that it may have been unreasonable for an airline passenger to expect that it would remain unknown to the airline’s baggage handlers that each of his checked suitcases contained a "bulge" or "dense, compressed area," but concluding that the issue was a "very close one" and assuming for purposes of the case that pressing the sides of the bags violated the Fourth Amendment); State v. Peters, 941 P.2d 228, 229 (Ariz. 1997) (holding that squeezing and feeling checked luggage is not a "search," provided the squeezing process is not violent or extreme); State v. Millan, 916 P.2d 1114, 1117-18 (Ariz. Ct. App. 1996) (same). \textit{Contrary United States v. Gwinn}, 191 F.3d 874, 878-79 (8th Cir. 1999) (holding that a police officer conducted a "search" of carry-on luggage in the overhead rack of a train when he lifted a soft-sided bag and
The Supreme Court reversed, however. It held that the Border Patrol agent’s physical manipulation of Bond’s canvas bag constituted a “search” that violated the Fourth Amendment. The Court first concluded that “[a] traveler’s personal luggage is clearly an ‘effect’ protected by the [Fourth] Amendment.” Applying the two-part test from Katz, the Court then concluded that Bond exhibited an actual expectation of privacy in the contents of his bag by using an opaque bag and placing that bag directly over his seat in the bus, and that Bond’s expectation of privacy was “one that society is prepared to recognize as reasonable.” The Court rejected the Government’s argument that by exposing his bag to the public by placing it in the overhead storage bin, Bond lost a reasonable expectation that his bag would not be physically manipulated. Instead, the Court accepted Bond’s argument that the Border Patrol agent’s “physical manipulation of [Bond’s] luggage ‘far exceeded the casual contact [he] could have expected from other passengers.’” The Court reasoned:

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.

The Court made it clear, however, that the subjective intent of the agent in touching the bag was irrelevant in determining whether his actions

59. Bond, 529 U.S. at 339.
60. Id. at 336.
61. Id. at 338.
62. Id. (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)).
63. The Government relied upon California v. Ciraolo, 476 U.S. 207 (1986), see supra text accompanying notes 25-28, and Florida v. Riley, 488 U.S. 445 (1989), see supra note 28, arguing that the Fourth Amendment does not protect matters open to public observation. The Court, however, distinguished these cases on the ground that they involved only visual observation, not tactile observation, and stated that “[p]hysically invasive inspection is simply more intrusive than purely visual inspection.” Bond, 529 U.S. at 337.
64. Bond, 529 U.S. at 338 (quoting Brief for Petitioner at 18-19, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349)).
65. Id. at 338-39. Justice Breyer, in an opinion joined by Justice Scalia, dissented. He concluded that a traveler who places soft-sided luggage in the shared overhead storage compartment of a bus does not have “a ‘reasonable expectation’ that strangers will not push, pull, prod, squeeze, or otherwise manipulate his luggage.” Id. at 339 (Breyer, J., dissenting).
constituted a “search” for Fourth Amendment purposes; rather, the issue was “the objective effect of his actions.”

III. “PREPPING” OR “POOFING” A PIECE OF LUGGAGE

In recent years, law enforcement agencies have attempted to interdict the flow of illegal drugs into and within the country by conducting surveillance at airports, train stations, and bus depots. One technique is for federal agents or local police stationed at such locations to approach individuals in public areas of these facilities, either randomly or because they suspect that the individuals may be engaged in criminal activity, ask to inspect their tickets and identification, question them about their travel plans, and perhaps request consent to search their person and/or luggage. When a law enforcement officer stationed at one of these locations suspects that a departing passenger may be carrying illegal drugs in luggage that he intends to check with the public carrier for transport to his destination, the officer, instead of approaching the passenger to seek consent to search his bags, may wait until the passenger checks his luggage and transfers possession of his bags to the public carrier. Then, with the permission of the carrier, the officer will enter the baggage holding area and sniff, or have a trained narcotics-detection dog sniff, the luggage in question in an attempt to detect the aroma of illegal drugs or of talcum powder, perfume, or other agents used to mask the odor of illegal drugs.

66. Id. at 338 n.2. The issue raised by the facts in Bond can arise in other contexts. For example, in State v. Tagaloa, 2 P.3d 718 (Haw. Inter. App. Ct. 2000), a police officer felt the exterior of a fanny pack seized from an arrestee and discerned the shape of a firearm. Relying upon Bond, the court held that the officer’s feeling the fanny pack in excess of the feeling reasonably incident to the necessary handling of the bag constituted a search of the bag for Fourth Amendment purposes. Id. at 724.


70. Of course, prior to the Supreme Court’s decision in Bond, law enforcement officers frequently also attempted to discern the contents of soft-sided luggage by squeezing or otherwise manipulating the exterior of the bag. See, e.g., Jaquez, 849 F.2d at 936; Karman, 849 F.2d at 929; Lovell, 849 F.2d at 911; Peters, 941 P.2d at 229; State v. Millan, 916 P.2d 1114, 1116 (Ariz. Ct. App. 1996).
Another investigative technique used by law enforcement agencies is to have officers board buses at scheduled stops, ask to examine the passengers' tickets and identification, and request permission to search their carry-on luggage. A variation of this technique is for law enforcement officers, perhaps accompanied by a trained narcotics-detection dog, to board buses and trains during scheduled layovers while passengers have temporarily left the conveyance and sniff, or have the canine sniff, any carry-on luggage left on board. At the same time, one or more other officers might examine and sniff, or have a narcotics-detection dog sniff, checked luggage being transported in the cargo hold of the bus or the baggage car of the train.

A law enforcement officer's warrantless sniff of a passenger's carry-on luggage or of checked luggage being transported in the baggage compartment of the public carrier or located in the baggage holding area or baggage claim area of an airport, bus depot, or train station does
not call into play the Fourth Amendment. For, just as a law enforcement officer does not conduct a “search” within the meaning of the Fourth Amendment when she observes individuals, objects, or activities in “plain sight” or “open view” from a lawful vantage point, she does not conduct a “search” when, while present in a place where she has a right to be, she uses her olfactory organ to perceive odors emanating into the air from a suitcase or other closed container. In

82. A law enforcement officer does not “seize” baggage checked with a public carrier or a piece of unattended carry-on luggage when he lifts it, e.g., United States v. Hall, 978 F.2d 616, 619 (10th Cir. 1992) (a DEA agent lifted a suitcase in an open luggage area of a train car, or temporarily moves it a short distance to facilitiate his, or a canine’s, sniffing it, because such movement does not constitute a meaningful interference with the absent owner’s possessory interest in the item. E.g., United States v. Ward, 144 F.3d 1024, 1032-33 (7th Cir. 1998) (a police officer removed a checked bag, belonging to a person not traveling on the bus, from the outside luggage compartment of the bus); United States v. Gant, 112 F.3d 239, 242 (6th Cir. 1997) (a police officer moved a tote bag from the open overhead storage compartment to the seat of a bus); United States v. Graham, 982 F.2d 273, 274 (8th Cir. 1993) (per curiam) (a police officer moved a suitcase from the overhead storage rack to the aisle of a bus); United States v. Harvey, 961 F.2d 1361, 1363-64 (8th Cir. 1992) (per curiam) (same); United States v. Gutiérrez, 849 F.2d 940, 942-43 (5th Cir. 1988) (a border patrol agent removed a checked suitcase from a conveyor belt in the baggage handling area of an airport); United States v. Hahn, 849 F.2d 932, 934-35 (5th Cir. 1988) (same); United States v. Lovell, 849 F.2d 910, 916 (5th Cir. 1988) (same); State v. Peters, 941 F.2d 228, 231-32 (Ariz. 1991) (a police officer placed checked suitcases on their side); State v. Mosier, 392 So. 2d 602, 605 (Fla. Dist. Ct. App. 1981) (a police officer moved a checked suitcase from the baggage cart to the floor of the baggage loading area of an airport); Scott v. State, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996) (a police officer removed a bag from the outside luggage compartment of a bus). However, if the passenger is present when an officer moves his suitcase or bag, the movement — even though temporary — may well constitute a “seizure,” thus calling into play the Fourth Amendment, because the passenger’s “access to [his luggage would be] impaired.” United States v. Gant, 112 F.3d 239, 242 (6th Cir. 1997).


such circumstances, the owner or possessor of the property may have a legitimate expectation of privacy in the contents of his suitcase or other closed container, but he does not have such an expectation in the airspace surrounding the item from which the odor is emanating. Nor does a law enforcement officer conduct a "search" for Fourth Amendment purposes when, instead of sniffing a suitcase or bag herself, she uses a trained narcotics-detection dog to do so.

Frequently, however, before sniffing, or having a canine sniff, a piece of luggage, law enforcement officers will "prep" or "poof" the

87. Gaulth, 92 F.3d at 992; Lowell, 849 F.2d at 913; McDonald, 855 F. Supp. at 269; Shandt, 215 Cal. Rptr. at 920.

In United States v. Place, 462 U.S. 696, 707 (1983), the Supreme Court concluded that exposing luggage located in a public place to a sniff by a trained narcotics-detection dog does not constitute a "search" within the meaning of the Fourth Amendment. See also United States v. Jacobsen, 466 U.S. 109, 123-24 (1984). The Court in Place reasoned that, because a dog sniff does not require opening the luggage, "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search," 462 U.S. at 707, and that the information revealed by the investigative technique is limited because "the sniff discloses only the presence or absence of narcotics, a contraband item," id., so that "the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." Id. More recently, in City of Indianapolis v. Edmond, 532 U.S. 32, 40 (2000), the Supreme Court concluded that a dog sniff of the exterior of a motor vehicle does not constitute a "search" for purposes of the Fourth Amendment. The Court reasoned that "[i]f just as in Place, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics," id., and that "[i]ke the dog sniff in Place, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" Id. (quoting Place, 462 U.S. at 707).

90. People v. Santana, 73 Cal. Rptr. 2d 886, 886, 887, 889 (Ct. App. 1998); Lancellotti, 595 N.W.2d at 559.

The process is also known as "venting," e.g., Sprows, 433 So. 2d at 1272, "breath[ing]," e.g., United States v. Gwinn, 191 F.3d 874, 877 n.3 (8th Cir. 1999), or "palpitating," e.g., Scott, 927 P.2d at 1068, the luggage.
suitcase or bag. "Prepping" or "poofing" a piece of luggage normally consists of pressing the sides of the suitcase or bag lightly with the hands, forcing air from the interior, and then, perhaps, slowly circulating the air a bit.\footnote{Vera, 644 F.2d at 510. See also Posada, 57 F.3d at 430; Hernandez, 353 F.2d at 626; Scott, 927 P.2d at 1068.} With hard-sided luggage, the investigating officer might use a greater amount of force. For example, he may "hit [the suitcase] with both hands."\footnote{Spraul, 433 So. 2d at 1272 (Hubbart, J., dissenting).} Or, as one Border Patrol agent described the method he employed to "prep" hard-sided suitcases:

[T]o get the best results, you lay the suitcase on the floor and pound it a couple of times, give it some hard pounds. That's to get the air circulating in the suitcase. You bring it upright and then you squeeze the sides, and at the same time you put your nose along the seams or anywhere there's — like the keyholes or anywhere where there's holes that protrude all the way inside.\footnote{Garcia, 849 F.2d at 918 n.2.}

Prior to the Supreme Court's decision in \textit{Bond v. United States}, only two reported cases, both of which involved checked luggage, had held that a law enforcement officer conducts a "search" within the meaning of the Fourth Amendment when he squeezes the sides of a suitcase to enable him to sniff the escaping air.\footnote{529 U.S. 334 (2000).} One of these cases, however, \textit{Hernandez v. United States}, was decided before the Supreme Court's decision in \textit{Katz v. United States}, in which the Court redefined the term "search" for Fourth Amendment purposes, holding that it is an invasion by the government of an individual's "legitimate expectation of privacy."\footnote{See Hernandez, 353 F.2d at 626; State v. Randall, 569 P.2d 313, 315 (Ariz. Ct. App. 1977), overruled by Peters, 941 P.2d at 230, 232. The court in \textit{Hernandez} defined a "search" as "an 'exploratory investigation,' an 'invasion or quest,' a 'prying into hidden places for that which was concealed.'" 353 F.2d at 626. See also \textit{Santana}, 73 Cal. Rptr. 2d at 888 n.3 (noting that \textit{Hernandez} was decided before \textit{Katz} and subsequent decisions "elucidating privacy expectations as central to Fourth Amendment analysis").} The second case, \textit{State v. Randall}, although decided after \textit{Katz}, relied heavily upon \textit{Hernandez}.\footnote{569 P.2d 313 (Ariz. Ct. App. 1977), overruled by Peters, 941 P.2d at 230, 232.} Other courts that had considered the issue prior to \textit{Bond} — all of which also involved checked luggage — held that "prepping" or "poofing" a suitcase does not constitute a "search" for Fourth Amendment purposes.\footnote{See id. at 315.} These courts typically reasoned

\footnotesize{
91. Vera, 644 F.2d at 510. See also Posada, 57 F.3d at 430; Hernandez, 353 F.2d at 626; Scott, 927 P.2d at 1068.
92. Spraul, 433 So. 2d at 1272 (Hubbart, J., dissenting).
93. Garcia, 849 F.2d at 918 n.2.
95. See Hernandez, 353 F.2d at 626; State v. Randall, 569 P.2d 313, 315 (Ariz. Ct. App. 1977), overruled by Peters, 941 P.2d at 230, 232. The court in Hernandez defined a "search" as "an 'exploratory investigation,' an 'invasion or quest,' a 'prying into hidden places for that which was concealed.'" 353 F.2d at 626. See also Santana, 73 Cal. Rptr. 2d at 888 n.3 (noting that Hernandez was decided before Katz and subsequent decisions "elucidating privacy expectations as central to Fourth Amendment analysis").
96. 353 F.2d 624 (9th Cir. 1965).
98. See supra text accompanying notes 13-24.
100. See id. at 315.
101. United States v. Gutierrez, 849 F.2d 940, 943 (5th Cir. 1988); United States v. Sawyer, 849 F.2d 938, 940 (5th Cir. 1988); United States v. Jaques, 849 F.2d 935, 937 (5th Cir. 1988); United States v. Hahn,}

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that lightly pressing the sides of a checked suitcase is such a minor intrusion upon privacy that it should not be deemed a "search" subject to the safeguards of the Fourth Amendment. 102 One court analyzed the issue a bit differently. It reasoned:

[When luggage is checked [with a common carrier], it is unavoidably subject to manipulation, handling and compression. While it might be reasonable to expect that packed articles will not be exposed to public view, it is not reasonable to believe that the air contained in checked luggage, and its odors, will remain in the luggage. That in any given case the air is expelled as the result of a bag being dropped to the ground, pushed hard against other bags or squeezed by a police officer is of no constitutional significance. 103

Even where the investigating officer compressed a suitcase by "pounding" its sides, that conduct was not deemed a "search," because such "handling ... was certainly no rougher than could be expected in an airport baggage handling context." 104 Courts have indicated, however, that "a 'prepping' process [could be] so violent, extreme and unreasonable in its execution as to cross the bounds of constitutional propriety." 105


Courts have held that a law enforcement officer does not "seize" a suitcase or other piece of luggage when she squeezes its sides to expel air. Gutierrez, 849 F.2d at 942-43 (checked luggage); Hahn, 849 F.2d at 934-35 (same); Karman, 849 F.2d at 931 (same); Garcia, 849 F.2d at 919 (same); Lovell, 849 F.2d at 916 (same); Peters, 941 P.2d at 231-32 (same); Killean, 907 P.2d at 554-55 (same), vacated on other grounds, 915 P.2d 1225 (Ariz. 1996); Spruells, 433 So. 2d at 1272 (same); Scott, 927 P.2d at 1068 (same). But see United States v. Daniel, 982 F.2d 146, 149 & n.4 (5th Cir. 1993) (holding that a federal agent "seized" a package being shipped by private carrier when, during the forty-five minutes in which he awaited the arrival of a drug-detection dog, he squeezed and shook the package, and obviously exercised dominion over it); Spruells, 433 So. 2d at 1272 (Hubbart, J., dissenting) (stating that a police officer "seized" a suitcase "when he straddled [it] ... and simultaneously struck it on both sides with his hands in order to force out aromas in the suitcase for the narcotics dog to sniff").

102. Lovell, 849 F.2d at 913; Viera, 644 F.2d at 510-11; Spruells, 433 So. 2d at 1272; Scott, 927 P.2d at 1068.

103. Santina, 73 Cal. Rptr. 2d at 889 (footnote omitted). See also id. at 888 (stating that "the accepted need for heightened security has lessened air travelers' reasonable expectation of privacy in both checked and carry-on baggage").

104. Garcia, 849 F.2d at 919 (but indicating that compression of a suitcase could be "so egregious" as to constitute a "search").

105. Lovell, 849 F.2d at 913. Accord State v. Millan, 916 P.2d 1114, 1117 n.2 (Ariz. Ct. App. 1996); Scott, 927 P.2d at 1068 n.4. See also Garcia, 849 F.2d at 919 (indicating that compression of a suitcase could
IV. "PREPPING OR "POOFING" A PASSENGER'S LUGGAGE AFTER BOND

A law enforcement officer's "prepping" or "poofing" a passenger's luggage constitutes a "search" within the meaning of the Fourth Amendment only if the officer's conduct invades a "legitimate expectation of privacy" that the passenger has in her luggage.106 A traveler who places clothing and other items inside an opaque suitcase or bag and then carries that suitcase or bag on board a public carrier with her, or checks it with the carrier, has — like any other individual who places effects inside a closed, opaque container — a legitimate expectation that others, including police officers acting without a warrant, will not open her luggage and visually inspect its contents.107 And, after the Supreme Court's decision in Bond v. United States,108 that legitimate expectation extends, at a minimum, to an attempt by others to determine the contents of her soft-sided carry-on luggage by physically manipulating its exterior.109 The question that must be answered is whether a passenger on a public carrier legitimately expects that others will not squeeze, hit, or pound her luggage in an attempt to determine its contents by forcing air from its interior and then sniffing, or having a trained dog sniff, that expelled air. In answering this question, it may be helpful to analyze separately two different situations: first, the "prepping" or "poofing" of a suitcase or other bag carried on board an airplane, bus, or train by a passenger and, second, the "prepping" or "poofing" of an item checked by a passenger with the public carrier before boarding. A passenger's legitimate expectation of privacy in her luggage may differ in these two situations.

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be "so egregious" as to constitute a "search").


A. Carry-on Luggage

The Supreme Court in Bond v. United States\textsuperscript{110} acknowledged that a passenger who places a suitcase or other bag in an overhead compartment of a public carrier expects that employees of the carrier or other passengers may handle that luggage by moving it for one reason or another.\textsuperscript{111} The Court nevertheless concluded that the Border Patrol agent’s conduct in that case constituted a “search” for Fourth Amendment purposes because the agent’s “physical manipulation of [Bond’s] luggage ‘far exceeded the casual contact [Bond] could have expected from other passengers [or employees of the public carrier].’”\textsuperscript{112} The Court reasoned that a passenger on a public carrier legitimately “does not expect that other passengers or . . . employees [of the carrier] will, as a matter of course, feel [his luggage] in an exploratory manner.”\textsuperscript{113}

Similar reasoning applies to a law enforcement officer’s “prepping” or “poofing” a suitcase or other bag he comes across in a shared overhead luggage compartment of a public carrier. A passenger on a public carrier expects that strangers might handle luggage she puts in an overhead storage bin, perhaps by pushing her suitcase or bag to the back of the compartment, sliding it to the side, putting a coat or bag on top of it, lifting it to put another piece of luggage underneath it, or even briefly removing it from the compartment before replacing it.\textsuperscript{114} Of course, in doing so, the individual will touch the exterior of the passenger’s suitcase or bag and might even squeeze part of it. But this limited contact is a far cry from “[l]aying the suitcase on the floor and pound[ing] it a couple of times . . . to get the air circulating in the suitcase[,] . . . bring[ing] it upright and then . . . squee[zing] the sides,”\textsuperscript{115} or from “hit[ting the suitcase] with both hands,”\textsuperscript{116} ways in which law enforcement officers “prep” or “poof” hard-sided luggage.

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\textsuperscript{110} 529 U.S. 334 (2000).
\textsuperscript{111} Id. at 338.
\textsuperscript{112} Id. (quoting Brief for Petitioner at 18-19, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349)).
\textsuperscript{113} Id. at 338-39.
\textsuperscript{114} E.g., United States v. McDonald, 100 F.3d 1920, 1927 (7th Cir. 1996) (“[A] ny person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage in order to squeeze additional luggage into the compartment or remove previously placed luggage.”) (quoting United States v. McDonald, 855 F. Supp. 267, 269 n.5 (S.D. Ind. 1994)); State v. Lancellotti, 595 N.W.2d 558, 563 (Neb. Ct. App. 1999) (“[P]assengers who place their luggage in the overhead public storage on a commercial carrier can reasonably expect that other passengers will touch, move, or adjust the luggage in order to retrieve or make room for their own luggage.”).
\textsuperscript{115} United States v. Garcia, 849 F.2d 917, 918 n.2 (5th Cir. 1988) (quoting Border Patrol agent’s testimony).
Moreover, even an officer’s “prepping” or “poofing” a suitcase merely by pressing its sides lightly exceeds the type of casual contact that a passenger legitimately expects strangers to make with her carry-on luggage. Just as a passenger legitimately does not expect that strangers "will, as a matter of course, feel [her carry-on] bag in an exploratory manner," the conduct involved in Bond, she legitimately does not expect that other passengers or employees of the public carrier will, as a matter of course, squeeze her carry-on luggage in a manner that will expel air from it and perhaps reveal its contents. Like the physical manipulation of carry-on luggage deemed a "search" in Bond, the “prepping” or “poofing” of carry-on luggage entails touching the passenger’s suitcase or bag “in an exploratory manner.” In the former situation, a law enforcement officer feels, squeezes, or otherwise manipulates a closed suitcase or bag, whose interior is not exposed to his sight, in an attempt to determine its contents through his sense of touch; in the latter situation, the officer squeezes, hits, or pounds a closed suitcase or bag, whose contents are not exposed to either his sight or smell, in an attempt to determine its contents through his (or a trained dog’s) sense of smell.

The “prepping” or “poofing” of carry-on luggage can be equated to the conduct deemed by the Supreme Court in United States v. Karo to constitute a "search." In Karo, law enforcement officers monitored an electronic tracking device, or “beeper,” located inside a private home. The Supreme Court reasoned that the monitoring of the beeper revealed information that could not be obtained through visual surveillance from outside the curtilage of the house, namely, that the article containing the beeper was located inside the house and in the possession of those who resided in the house. The “prepping” or “poofing” of a passenger’s luggage is similar. The squeezing, hitting, or pounding of the exterior of a suitcase or bag is intended to reveal information about the contents of that item that could not be obtained through visual observation or even by smelling it. While a person’s residence may be

119.  This is not saying that the law enforcement officer’s intent is relevant in determining whether his conduct constitutes a “search” for Fourth Amendment purposes. See id. at 338 n.2 ("[T]he issue is not [the officer’s] state of mind, but the objective effect of his actions."). Rather, as in Bond, a passenger on a public carrier legitimately does not expect anyone, including a police officer, to squeeze or otherwise touch her carry-on luggage in an attempt to determine its contents.  Id. at 338-39.
121.  468 U.S. at 714-16. See also Kyllo v. United States, 121 S. Ct. 2038, 2043, 2046 (2001) (holding that law enforcement officers conducted a "search" when they used a thermal imager to scan a residence and measure the relative heat of various rooms in the home).
the area most firmly protected by the Fourth Amendment. Bond reiterates the principle that a traveler’s expectation of privacy in a closed, opaque suitcase or bag is “legitimate.”

Accordingly, the “prepping” or “poofing” of a passenger’s carry-on luggage by a law enforcement officer must constitute a “search” within the meaning of the Fourth Amendment, at least when the passenger is in the immediate presence of her luggage when the “prepping” or “poofing” takes place.

In Bond, the Border Patrol agent manipulated Bond’s canvas bag while it rested in the overhead storage compartment directly above Bond’s seat in the bus at a time when Bond occupied that seat. The Supreme Court’s opinion in that case therefore could be interpreted narrowly to apply only to the physical manipulation of carry-on luggage that a passenger keeps in his immediate presence — the precise facts of Bond. Under this narrow interpretation, no “search” would occur when a law enforcement officer manipulates in an exploratory manner soft-sided luggage either checked by a passenger with the public carrier or temporarily left unattended on board a public carrier during a short stopover. A “search” also might not occur when a police officer manipulates carry-on luggage left by a passenger in an open baggage area at the front or rear of a public carrier or in an overhead storage compartment located down the aisle from her seat. A fortiori, in none of these situations would an officer conduct a “search” if he merely “prepped” or “poofed” the suitcase or bag to expel air that he, or a drug-detection dog, could sniff.

The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home . . . . [The] language [of the Fourth Amendment] unequivocally establishes the proposition that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). See also Kyllo, 121 S. Ct. at 2041, 2043.


124. Even if “prepping” or “poofing” a piece of luggage under these circumstances does not constitute a “search,” a police officer most likely will be deemed to have “seized” the item if he moved it from the overhead luggage compartment to the aisle or a seat of the conveyance to facilitate the “prepping” and subsequent sniff because the passenger’s “access to [her luggage would have been] impaired.” United States v. Gant, 112 F.3d 239, 242 (6th Cir. 1997). If it does, the Fourth Amendment governs the validity of that “seizure.”

125. Bond, 529 U.S. at 336.
Such a niggardly interpretation of Bond is unlikely, however, because a passenger who places a suitcase or bag in an open baggage area of a public carrier or in an overhead storage compartment down the aisle from her seat, or who leaves a suitcase or other piece of luggage unattended on a bus, train, or plane during a short stopover, no more expects strangers to manipulate her luggage while she is seated away from it, or temporarily absent, than she expects strangers to do so when she is in the immediate presence of her luggage. And certainly society recognizes that expectation as reasonable. Many passengers leave their carry-on luggage unattended in an open baggage area at the front or back of a train carriage or bus. Indeed, these areas are designed for use by passengers who are seated throughout the train carriage or bus. Similarly, passengers, especially those on airplanes, often find the storage compartment directly above their seat filled with luggage and coats belonging to other passengers, so they must store their own carry-on items in an overhead compartment above someone else’s seat. Moreover, people frequently leave items unattended by, or on, their seat for a brief period of time while they stretch their legs, visit the restroom, use a public telephone, or purchase refreshments, not only on a public carrier during a short stopover, but also, for example, at a theater, concert hall, or athletic event, or while in the waiting room of a doctor’s office. In none of these situations does a person expect a stranger to come along and either open an unattended item and inspect its contents, manipulate the exterior of the item in an effort to determine its contents, or hit, pound, or even squeeze the item to expel air from it so that he, or a canine, can “take a whiff” in an attempt to determine its contents. Society does not regard a suitcase or bag stored in an overhead bin down the aisle from one’s seat or in an open baggage area of a public carrier, or even a suitcase temporarily left unattended in a storage compartment above a passenger’s seat on a public carrier, as “fair game” for the hands of snoops or other inquisitive strangers.

These situations differ from the one in California v. Greenwood,126 in which the Supreme Court held that a police officer did not conduct a “search” within the meaning of the Fourth Amendment when she inspected the contents of several opaque plastic garbage bags a homeowner had left at the curb in front of his house for the express purpose of conveying to a third person, the trash collector. In the first place, the baggage storage area of a public carrier, unlike a public street, is not, in the words of the Greenwood Court, “an area particularly suited

for public inspection and... public consumption.”  
More importantly, a passenger who leaves her luggage in an open luggage area of a public carrier or in an overhead storage bin down the aisle from her seat, or who temporarily leaves her luggage unattended during a short stopover, does not intend to convey that luggage to a third party. Rather, she intends to maintain ownership of her luggage and, in the first two situations, retake physical possession of it upon arriving at her destination (if not sooner), and in the third situation, return to her seat on the public carrier and rejoin her luggage before the next leg of her journey commences.

At a minimum, then, Bond must be interpreted to apply to the exploratory manipulation of all carry-on luggage, regardless of whether the passenger happens to be present at the time the police manipulate the luggage. And, under the reasoning in Bond, the “prepping” or “poofing” of any carry-on luggage must be deemed a “search” for purposes of the Fourth Amendment.

B. Checked Luggage

The Supreme Court’s opinion in Bond v. United States could be read to apply only to a passenger’s carry-on luggage. Under this interpretation, the Fourth Amendment would not govern the exploratory manipulation by law enforcement officers of soft-sided luggage checked by a passenger with a public carrier, and, a fortiori, would not apply to the less intrusive practice of “prepping” or “poofing” a checked suitcase or bag. Some support for this limited reading of Bond can be garnered from the Supreme Court’s opinion in that case. In concluding that a tactile observation of carry-on luggage is more intrusive than a visual observation, the Court stated that “travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal

127. 486 U.S. at 40-41 (quoting United States v. Reichert, 647 F.2d 397, 399 (3d Cir. 1981)). The Court in Greenwood stated that “[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.” Id. at 40 (footnotes omitted).

128. In this respect, the situations under consideration also differ from Smith v. Maryland, 442 U.S. 735 (1979) (holding that the monitoring of a pen register is not a “search” because when an individual uses the telephone he voluntarily conveys to the phone company any numbers he dials), see supra text accompanying notes 38-45, and United States v. Miller, 425 U.S. 435 (1976) (holding that a bank depositor has no Fourth Amendment interest in the contents of his canceled checks and deposit slips in the possession of his bank because he voluntarily conveyed such information to the bank and exposed it to bank employees in the ordinary course of business).


130. In United States v. Flooker, 234 F.3d 932, 935 (6th Cir. 2000), the Government apparently made the argument that Bond does not apply to checked luggage.
items that, for whatever reason, they prefer to keep close at hand.”\textsuperscript{131} Passengers do not, of course, keep checked luggage “close at hand.” Nevertheless, checked luggage, like carry-on luggage, usually contains personal items belonging to the passenger. As the Supreme Court has stated, “the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.”\textsuperscript{132}

More importantly, though, the underlying rationale of Bond extends to a passenger’s checked luggage. The Supreme Court in Bond recognized that a bus passenger who places his carry-on luggage in an overhead storage bin expects that other passengers or bus company employees might move it for one reason or another. As one lower court stated, “[a]ny person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage in order to squeeze additional luggage into the compartment or remove previously placed luggage.”\textsuperscript{133} Indeed, the two dissenters in Bond, Justices Breyer and Scalia, said that “a traveler who places a soft-sided bag in the shared overhead storage compartment of a bus [should expect] that strangers will . . . push, pull, prod, squeeze, or otherwise manipulate his luggage.”\textsuperscript{134} Nevertheless, despite a passenger’s expectation that his carry-on luggage might be handled in such a manner, the Supreme Court in Bond concluded that the Border Patrol agent’s conduct in that case constituted a “search” for Fourth Amendment purposes. The Court reasoned that the agent’s “physical manipulation of [Bond’s] luggage far exceeded the casual contact [Bond] could have expected from other passengers [or employees of the public carrier],”\textsuperscript{135} because a passenger “does not expect that other passengers or . . . employees [of the public carrier] will, as a matter of

\textsuperscript{131} Bond, 529 U.S. at 337-38.
\textsuperscript{133} United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996) (quoting United States v. McDonald, 855 F. Supp. 267, 269 n. 5 (S.D. Ind. 1994)). See also State v. Lanzclotti, 595 N.W.2d 558, 563 (Neb. Ct. App. 1999) (“[P]assengers who place their luggage in the overhead public storage on a commercial carrier can reasonably expect that other passengers will touch, move, or adjust the luggage in order to retrieve or make room for their own luggage.”).
\textsuperscript{134} 529 U.S. 334, 339 (2000) (Breyer, J., dissenting). Justice Breyer cited several newspaper articles describing the treatment that luggage placed in an overhead storage compartment of a public carrier is likely to receive from strangers, including one in which the writer recounted that on a particular trip the “flight attendant ‘rearranged the contents of three different overhead compartments to free up some room’ and then ‘shoved and pounded until [the] bag squeezed in.’” Id. at 340 (quoting John Flinn, Confessions of a One-Only Carry-On Guy, S.F. EXAMINER, Sept. 6, 1998, at T2).
\textsuperscript{135} Id. at 338 (quoting Brief for Petitioner at 18-19, Bond v. United States, 529 U.S. 334 (2000) (No. 98-9349)).
course, feel [his luggage] in an exploratory manner.\textsuperscript{136} The same can be said about a passenger’s expectations concerning a soft-sided suitcase or bag he checked with the public carrier. A passenger who turns over custody and control of a piece of luggage to an airline, bus company, or railroad certainly expects that it will be handled by strangers more extensively and in a rougher manner than an item placed in an overhead storage bin or open baggage area. No doubt he reasonably expects that the carrier’s employees will lift the checked suitcase or bag by the handle, weigh it, turn it on its side, move it, and perhaps even toss it.\textsuperscript{137} He also might reasonably expect that upon arrival at his destination another passenger might remove it from the conveyor belt in the baggage claim area and examine the name tag or baggage claim sticker on it to determine whether it is hers. Yet, he still does not expect that these people “will, as a matter of course, feel [his suitcase or bag] in an exploratory manner.”\textsuperscript{138} As the court put it in \textit{United States v. Nicholson},\textsuperscript{139} a case decided prior to the Supreme Court’s decision in \textit{Bond}:

By checking his suitcase with the bus line, Defendant could reasonably expect that it would be lifted by the handle and moved, even tossed, on its way to and from the cargo hold. But we believe Detective Wenthold’s pressing on the sides of the suitcase with the palms of his hands in order to inspect its contents violated Defendant’s reasonable expectation of privacy in the suitcase because it went beyond that type of contact which a passenger may reasonably expect when checking a bag with a commercial bus line.\textsuperscript{140}

A law enforcement officer’s physical manipulation of a passenger’s checked soft-sided luggage therefore must constitute a “search” for purposes of the Fourth Amendment.

Similarly, a passenger on a public carrier legitimately does not expect that employees of the carrier or other passengers will, as a matter of course, pound, hit, or even squeeze his luggage to expel air in an attempt to discover its contents. Like the physical manipulation of checked luggage, the “prepping” or “poofing” of checked luggage entails touching the suitcase or bag “in an exploratory manner.” In the former situation, the individual touches the suitcase or bag in an attempt to

\textsuperscript{136} \textit{Id.} at 338-39.
\textsuperscript{137} \textit{E.g.,} \textit{United States v. Nicholson}, 144 F.3d 632, 640 (10th Cir. 1998). \textit{See also} \textit{United States v. Bronstein}, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring) (“It is common knowledge that luggage turned over to a public carrier will be handled by many persons who, although not permitted to open it without the owner’s permission, may feel it, weigh it, check its locks, straps and seams to insure that it will not fall apart in transit, and shake it to determine whether the contents are fragile or dangerous.”).
\textsuperscript{138} \textit{Bond}, 529 U.S. at 338-39 (emphasis added).
\textsuperscript{139} 144 F.3d 632 (10th Cir. 1998).
\textsuperscript{140} \textit{Id.} at 640.
discover the contents of the luggage through his sense of touch; in the latter, he touches it in an attempt to determine its contents through his (or a trained canine’s) sense of smell. Accordingly, a law enforcement officer’s “prepping” or “poofing” a piece of luggage also must be deemed a “search” for Fourth Amendment purposes.

V. CONCLUSION

In Bond v. United States, 141 the Supreme Court held that a law enforcement officer conducts a “search” within the meaning of the Fourth Amendment when he manipulates in an exploratory manner the soft-sided carry-on luggage of a passenger on a public carrier. Bond should be interpreted broadly to encompass the physical manipulation by a law enforcement officer of soft-sided luggage checked with the carrier by a passenger. Moreover, given the underlying rationale of Bond, a law enforcement officer also must be deemed to conduct a “search” for purposes of the Fourth Amendment whenever he “preps” or “poofs” a passenger’s luggage — whether that luggage was carried on board a public carrier by the passenger or checked by her with the carrier — preparatory to sniffing it, or having a trained narcotics-detection dog sniff it, in an attempt to determine whether it contains illegal drugs.

At least two important consequences flow from the conclusion that a law enforcement officer conducts a “search” whenever he “preps” or “poofs” a passenger’s luggage. First, that conclusion effectively bars law enforcement personnel from engaging in such conduct. As a “search,” such conduct can be engaged in only pursuant to a search warrant issued by a neutral and detached magistrate and based upon probable cause. 142 Yet law enforcement officers conducting routine drug surveillance at airports, train stations, and bus depots rarely act pursuant to a search warrant; rather, they either randomly select luggage to “prep” or “poof” and sniff or choose particular luggage on the basis of a “hunch” or, at most, “reasonable suspicion” that it contains illegal drugs. Moreover, because they lack probable cause in these cases, the officers could not obtain a search warrant for the luggage in question. In those rare cases where an officer can convince a judicial officer that there exists probable cause to believe a particular suitcase or bag contains illegal drugs, the resultant search warrant would authorize the officer to open the suitcase or bag and visually inspect its contents,

142. An officer could of course conduct a “search” if he had probable cause to believe that a particular suitcase or bag contained illegal drugs or other contraband and an exception to the warrant requirement applied. See supra note 6.
making it unnecessary for him to “prep” or “poof” the luggage and sniff, or have a trained dog sniff, the escaping air.

Second, the conclusion that a law enforcement officer’s “prepping” or “poofing” a passenger’s luggage constitutes a “search” may induce some officers caught up in the “war against drugs” to stretch the truth. Because the sniffing of a passenger’s luggage, either by a law enforcement officer or a drug-detection dog, does not itself constitute a “search,” and therefore is not subject to the warrant and probable cause requirements of the Fourth Amendment, officers seeking a warrant to search a particular suitcase or bag might attempt to show probable cause by falsely testifying that they, or a trained canine, smelled the odor of illegal drugs emanating from the suitcase or bag without their first squeezing, hitting, pounding, or otherwise touching it. Consequently, magistrates deciding whether to issue a warrant to search a passenger’s luggage, as well as judges deciding motions to suppress controlled substances discovered in a passenger’s luggage pursuant to a search warrant, will have to be especially wary when considering a police officer’s testimony that he, or a trained narcotics-detection dog, smelled the odor of illegal drugs emanating from that luggage without the officer first “prepping” or “poofing” it.

143. See supra text accompanying notes 70-88.