SMU DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 27 | Issue 4 Article 9

January 1973

United States v. Meulener: Hijacking Prevention, the Fourth Amendment, and the Right to Travel

Steven J. Corey

Recommended Citation

Steven J. Corey, Note, *United States v. Meulener: Hijacking Prevention, the Fourth Amendment, and the Right to Travel*, 27 Sw L.J. 734 (1973)
https://scholar.smu.edu/smulr/vol27/iss4/9

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

United States v. Meulener: Hijacking Prevention, the Fourth Amendment, and the Right To Travel

A ticket agent in a large city airport determined that defendant, Meulener, who was carrying a small suitcase, matched the Federal Aviation Administration Profile designed to detect possible hijackers. Accordingly, the ticket agent notified a U.S. marshal monitoring a magnetometer in the passageway leading to the aircraft, and as the defendant passed through the magnetometer registered the presence of metal, whereupon the marshal detained the defendant and prohibited him from boarding the plane or leaving the airport. Before attempting to search Meulener's person and before informing him that he could refuse to submit to the search provided he did not board the aircraft, the marshal ordered him to open his suitcase. After hesitating, he opened it and the marshal discovered a plastic bag containing marijuana. Meulener was charged with possession of marijuana with intent to distribute. Prior to trial, on defendant's motion to suppress the evidence, the United States district court *held*: The search of an airline passenger is constitutionally permissible only if he is apprised of his right to avoid the search should he choose not to board the plane. Furthermore, the search of a passenger's carry-on luggage is constitutionally permissible only if a pat-down of the passenger's outer clothing seeking the object which activated the magnetometer proves fruitless. *United States v. Meulener*, 351 F. Supp. 1284 (C.D. Cal. 1972).

I. "STOP" AND "FRISK": THE FOURTH AMENDMENT, TERRY, AND SIBRON

The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[1] Implied in the standard of "reasonableness" is a scale of probability that the person has been, or is about to be, engaged in criminal activity. Along this scale are various degrees of probability justifying different types of intrusions upon the privacy of the individual. Highest on the scale are the classic probable cause levels that justify the issuance of search warrants. Lowest on the scale lies the investigative stop and protective frisk, and the airport search.[2]

The United States Supreme Court in *Terry v. Ohio*[3] enunciated the "stop and frisk" doctrine. In *Terry* a police officer observed two men pacing back and forth in front of a store. When the two joined a third person, the officer, suspecting the men of "casing a stick up" approached the three and asked for their identification. When they failed to reply, the officer spun

[1] U.S. CONST. amend. IV.

[2] United States v. Lopez, 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971).

[3] 392 U.S. 1 (1968). For a detailed analysis of *Terry v. Ohio* and its impact, see LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968); Comment, *Stop and Frisk*, 63 NW. U.L. REV. 837 (1969); Comment, *Terry Revisited and the Law of Stop-and-Frisk in Texas*, 27 SW. L.J. 490 (1973); Comment, *Stop and Frisk: Invasion of Privacy Without Probable Cause*, 4 U. SAN. FRAN. L. REV. 284 (1970); Note, *"Stop and Frisk" Under the Fourth Amendment: Terry and Sibron*, 6 U. HOUSTON L. REV. 333 (1968).

Terry around, patted down his outer clothing and discovered an object he believed to be a weapon, and upon reaching into the defendant's clothing discovered a concealed weapon. There was neither probable cause for an arrest nor for a search, but only what the Court termed "suspicious circumstances."[4] It was held that the limitations of the fourth amendment were applicable to police conduct which falls short of a technical arrest,[5] and, therefore, such conduct must be tested against the fourth amendment's requirement of reasonableness.[6] The Court prescribed three criteria for determining what constitutes reasonable police conduct in stop and frisk encounters. One must analyze the governmental interest justifying the intrusion, the specific and articulable facts which reasonably warrant the intrusion, and the extent of invasion.[7] Relying on these standards, the Court held that the governmental interest in the prevention of crime and protection of the officer from persons who a police officer would reasonably believe to be armed and whose conduct is suspicious is sufficient to justify a limited search for weapons.[8] The Court adopted reasonable suspicion as a justification for this lesser governmental intrusion.[9] However, the Supreme Court cautioned that the fourth amendment limits the scope of the intrusion as well as its initiation. Specific facts must give rise to the suspicion of the officer; he cannot act upon what the Court termed an "inarticulate hunch." The intrusion based only upon reasonable suspicion must be restricted to a pat-down of the outer clothing until further facts are discovered justifying a full-blown search.[10]

In *Sibron v. New York*[11] the Supreme Court reiterated its holding that

---

[4] 392 U.S. at 30.

[5] *Id.* at 19.

[6] *Id.* at 20.

[7] *Id.* at 20-21. The reviewing court should determine the reasonableness of the officer's conduct by examining the governmental interest which allegedly justifies the intrusion into the constitutionally protected privacy of the individual. The test for determining reasonableness consists of balancing the need to search against the invasion which the search entails. The Supreme Court further stated:

> [To justify the intrusion] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . . . [I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on . . . inarticulate hunches, a result this Court has consistently refused to sanction.

Id. at 21-22.

[8] *Id.* at 30-31.

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot and that persons with whom he is dealing may be armed and . . . dangerous, [and] where . . . [he] makes reasonable inquiries . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons . . . .

Id. The Court held that the officer was reasonably prudent in assuming that individuals contemplating robbery would be likely to use weapons. *Id.* at 28.

[9] *Id.* at 26-27.

[10] *Id.* at 29. Since the justification of the search is for the protection of the officer and others, it must be limited to an intrusion designed to discover weapons. Thus, evidence discovered in a frisk which extends beyond its permissible scope is inadmissible. *Id.*

[11] 392 U.S. 40 (1968).

frisks based merely on inarticulate hunches were not permissible. In *Sibron* the officer observed the defendant conversing with several persons whom the officer knew to be drug addicts. The subsequent search of the defendant was held to be without probable cause,[12] and, relying on *Terry*, the Court held that the mere act of talking to narcotics addicts was not the type of specific and articulable fact from which an officer could reasonably infer that the individual was armed and dangerous.[13]

II. THE TERRY DOCTRINE APPLIED TO AIRPORT SEARCHES

Airplane hijacking has been described as the "escalating criminal phenomenon of our times"[14] and a continuing hazard to public travel.[15] In response to increased skyjacking incidents, the Federal Aviation Administration developed a pre-boarding passenger surveillance system.[16] The surveillance system provided the following procedures: (1) If the passenger meets the profile, he is kept under surveillance by airline employees. (2) If the passenger activates a magnetometer installed in the entrance to the boarding gate and conforms to the profile, he is interviewed by airline personnel. (3) If satisfactory identification is not produced during the interview a frisk is conducted by a U.S. marshal.[17]

United States v. Lopez[18] was the first case to consider the constitutionality of airport screening procedures. In *Lopez* an airline ticket agent determined that the defendant fitted the FAA hijacker profile. While attempting to board the aircraft the defendant activated a magnetometer and was unable to produce proper identification.[19] The defendant was subsequently frisked and a packet of heroin discovered. The *Lopez* court summarily concluded that it was not feasible to obtain a warrant for an airport search due to the exigency of time,[20] and determined that the only judicially developed exception applicable to the airport search was the protective frisk for weapons upheld by the United States Supreme Court in *Terry v. Ohio*.[21]

---

[12] *Id.* at 62.

[13] *Id.* at 64. Also, the officer's statement to Sibron, "You know what I am after," indicated that the officer sought narcotics rather than a weapon. *Id.*

[14] United States v. Bell, 464 F.2d 667, 670 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

[15] *Id.* at 669.

[16] United States v. Lopez, 328 F. Supp. 1077, 1082 (E.D.N.Y. 1971). The system utilizes two informational aids, a profile of the average potential hijacker and an electronic search by a metal detective magnetometer. *Id.* The profile characteristics are based on the behavioral patterns of embarking passengers rather than on inherited or social characteristics and are of necessity secret to prevent potential hijackers from modifying their behavior to avoid matching the profile. The magnetometer reacts to ferrous metal such as coins, keys, cigarette lighters, etc., and, therefore, is activated by approximately 50% of all passengers who pass through it. *Id.* at 1086.

[17] *Id.* at 1086. Some airlines have modified the screening procedures and monitor the magnetometer only when the passenger matches the profile. Others search the effects of each passenger which is followed by a magnetometer search of all air passengers. Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1040 (1971).

[18] 328 F. Supp. 1077 (E.D.N.Y. 1971).

[19] Neither the *Lopez* opinion nor any other case explains what would constitute proper identification or the effect that producing such documents would have upon the prevention of hijacking.

[20] 328 F. Supp. at 1092.

[21] *Id.* at 1092-93. The court discussed the judicially developed exceptions to the

Relying on *Terry*, certain factors to be considered in determining the constitutionality of airport searches were delineated: (1) the objective evidence available to the officer from the profile, magnetometer, and interview; (2) the degree of probability that the individual was dangerous; (3) the determination of whether the probability level justified the frisk, balancing the manner in which the frisk was conducted, the extent of the invasion of privacy, and the risk to the officer and others.[22] The court held that properly administered screening procedures using the profile and magnetometer were statistically accurate in detecting illegal conduct and thus warranted the airport stop and frisk.[23] The governmental interest in preserving safe air travel justified the use of the profile and magnetometer, outweighed the minimal inconvenience to a small number of passengers, and was reasonable.[24] However, the court cautioned that the use of the magnetometer alone may not satisfy the "specific and articulable facts" requirement of *Terry* and could go beyond constitutional limits.[25]

However, in *United States v. Epperson*[26] the use of a magnetometer alone was held to be constitutional. While the use of the magnetometer was a search within the meaning of the fourth amendment, it was held to be a lesser intrusion than a physical search,[27] and justified by the imminent danger and exigent circumstances.[28] Relying on *Terry* and *Lopez*, the court upheld the frisk conducted subsequently to the defendant's activating the magnetometer as being justified for the protection of "others" as well as the officer.[29]

Following the rationale of *Epperson*, the Third Circuit in *United States v. Slocum*[30] also upheld the use of the magnetometer alone despite the fact that in that case the defendant both met the profile and activated the mag-

---

search warrant requirement. Implied consent was discounted as grounds for the search since the Government cannot condition the exercise of the passenger's constitutional right to travel on the voluntary relinquishment of his fourth amendment rights. *See* Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969). The court also discounted a search incident to an arrest since the arrest was not made until after the frisk was completed and the contraband seized. Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132 (1925). There was no evidence that the officer was in "hot pursuit" of the defendant, Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967), nor was there danger of imminent destruction of evidence, Schmerber v. California, 384 U.S. 757 (1966). Similarly, since there was no apparent offense committed in the presence of the investigating officer, Sibron v. New York, 392 U.S. 40 (1968), and no contraband was in plain view, Harris v. United States, 390 U.S. 234 (1968), these exceptions were rejected.

[22] 328 F. Supp. at 1097.

[23] *Id.* at 1100.

[24] *See* 328 F. Supp. at 1097.

[25] *Id.* at 1100.

[26] 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). When the defendant passed through a magnetometer, it gave an unusually high reading. The defendant was frisked and a pistol was found in his jacket. Since there was no antecedent profile designation of the defendant, the only basis for the stop and frisk was the magnetometer response. *Id.* at 770.

[27] *Id.* at 770. The use of the device, unlike a frisk, cannot be "an annoying, frightening, and perhaps humiliating experience" since the person scrutinized is usually not even aware of the examination. *Id.* at 771.

[28] *Id.* at 771.

[29] *Id.* at 772.

[30] 464 F.2d 1180 (3d Cir. 1972).

netometer. When a frisk yielded no metal, the officer inspected the defendant's carry-on luggage and discovered narcotics. The court excused the warrant requirement because of the great danger, overwhelming governmental interest, and minimal invasion of privacy.[31] The justification for the magnetometer search was found to exist independent of the profile.[32] The profile did not establish a basis for the subsequent use of the magnetometer, nor was its use to be restricted by fourth amendment standards.[33] The use of the magnetometer and the limited search were justified by a reasonable governmental interest in protecting air commerce.[34] Further, the court extended the scope of the warrantless search to include hand luggage if the frisk of the individual's person fails to explain the magnetometer reading. However, the court strongly emphasized that this extension was applicable only after the frisk failed to account for the activation of the magnetometer.[35]

One author has concluded that *Terry* cannot be constitutionally extended to inarticulate hunches of the type supplied by a profile and magnetometer.[36] This argument is based upon the lack of specific and articulable facts required by *Terry* and *Sibron.*[37] Reliance on the profile has been described as an "inarticulate hunch" because fourteen of fifteen persons matching it are found to be unarmed.[38] As the magnetometer may be activated by virtually any ferrous metal object, it is activated by approximately fifty percent of all passengers screened. Thus, it is contended that because of the inaccuracy of both the profile and the magnetometer, they provide no more articulable facts than those the Supreme Court rejected in *Sibron.*[39] It also appears that the later cases such as *Epperson* and *Slocum* have diluted the requirement of specific and articulable facts of *Terry.*[40]

III. UNITED STATES V. MEULENER

United States v. Meulener initially considered the constitutional grounds which could justify the airport search in question in the absence of a search warrant.[41] The court determined that probable cause for arrest was lacking and discounted the theory that there was either express or implied consent. Drawing on the Supreme Court's decision in *Johnson v. Zerbst*,[42] express voluntary consent was equated with the waiver of a constitutional right, waiver

---

[31] *Id.* at 1182.
[32] *Id.* at 1183.
[33] *Id.*
[34] *Id.* at 1182.
[35] *Id.* at 1183.
[36] McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORD. L. REV. 293, 320 (1972).
[37] *See* note 7 *supra*, and accompanying text.
[38] McGinley & Downs, *supra* note 36, at 314. The profile does not purport to identify potential hijackers, but is rather a means of identification for further surveillance. It is contended that demonstrating characteristics which may also have been exhibited by a significant number of hijackers is not sufficient to justify an invasion of the individual's privacy. *Id. See also* United States v. Lopez, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).
[39] McGinley & Downs, *supra* note 36, at 314. *See also* note 16 *supra.*
[40] McGinley & Downs, *supra* note 36, at 314-15.
[41] 351 F. Supp. at 1286-87.
[42] 304 U.S. 458 (1938).

meaning "an intentional relinquishment of a known right or privilege."[43] To meet constitutional requirements, "the consent must be . . . voluntary, unequivocal, specific and intelligently given rather than resulting from duress or coercion, whether actual or implied."[44] The *Meulener* court thus concluded that the search was coercive because of the marshal's order to the defendant to open his suitcase.[45] The court likewise was not persuaded by the Government's argument that Meulener's attempt to board amounted to implied consent in light of the presence of signs at the boarding gate stating that passengers and baggage were subject to search. This proposition was rejected, not only because the consent did not meet the constitutional standards, but also because the right to travel cannot be conditioned upon the relinquishment of fourth amendment rights.[46]

The court, relying on *Terry* and *Sibron*, noted that the type of search in question, initiated as a result of a positive reaction to the magnetometer and profile, would be constitutional, provided it was circumscribed by the exigencies justifying its initiation and was confined in scope to an intrusion reasonably designed to discover weapons.[47] In applying *Terry* to the airport search, *Slocum, Lopez,* and *Epperson* were relied upon to uphold the use of the profile and magnetometer.[48] The decision thus followed the line of cases which narrowed the *Terry* doctrine into a two-criteria standard, and seemingly diluted the requirement for specific and articulable facts by accepting the profile and magnetometer readings as such facts.[49] As has been noted, such a modified interpretation of *Terry* appears unconstitutional.[50]

However, the *Meulener* decision went beyond *Slocum, Lopez,* and *Epperson,* and for the first time in an airport search case held that for such a search to meet fourth amendment guarantees, the prospective passenger must be expressly advised that he may refuse to submit to search, provided he does not board the plane.[51] Conforming to the profile and activating the magnetometer were held to warrant a forced search only if the person chose to board the plane. The court, by not requiring submission to a search, attempted to avoid the unique fourth amendment standard for prospective passengers at airline boarding gates established by earlier cases.[52] The basis for this departure was that the governmental interest justifying a limited search of a person and hand luggage was to prevent air piracy, and such justification arises only from the marshal's reasonable fear for the safety

---

[43] 351 F. Supp. at 1287, quoting from Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[44] *Id. See also* Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965); United States v. Como, 340 F.2d 891, 893 (2d Cir. 1965); United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied,* 372 U.S. 906 (1963).

[45] 351 F. Supp. at 1288.

[46] *Id. See also* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Lopez, 328 F. Supp. 1077, 1092-93 (E.D.N.Y. 1971).

[47] 351 F. Supp. at 1289.

[48] *Id.* at 1288-89; *see* notes 23, 27, 32 *supra,* and accompanying text.

[49] *Id.* at 1289; *see* notes 36-40 *supra,* and accompanying text.

[50] *See* notes 36-40, and accompanying text.

[51] 351 F. Supp. at 1289-90.

[52] *Id.* at 1289. *Lopez* held that once the profile is met and the magnetometer activated, grounds for a forced search are established whether the passenger wants to board the plane or not. *Epperson* and *Slocum* held that activation of the magnetometer alone was sufficient grounds for a forced search. *Id.*

of the passengers. Accordingly, the court reasoned that if the suspect does not board the plane, the danger to the passengers and crew is obviated and the governmental interest justifying the search no longer exists.[53] The governmental interest justifying the need for intrusion was weighed against the degree of invasion of privacy,[54] and it was apparently concluded that the intrusion based upon the modified interpretation of *Terry* went beyond constitutionally permissible limits. By redefining the need for intrusion and focusing on the governmental interest involved, the court hoped to restore constitutionality to the doctrine by giving the passenger an opportunity to retain his privacy. However, in its attempt to protect the passenger's fourth amendment rights, the court did not give complete consideration to the effect of its holding on the constitutional right to travel.

Prior to the decision of *Meulener* it had been suggested that a passenger's right to air travel could be conditioned on his consenting to be searched prior to embarkation since fourth amendment rights may be waived by unequivocal and voluntary consent.[55] Several authors have rejected this suggestion for two reasons. First, the consent does not meet constitutional standards because it is inherently coercive—a refusal to accede to an airport search will result in a denial of passage.[56] It is evident that passengers possessing the type of articles being sought would submit to such searches only under duress, thus rendering the waiver involuntary.[57] Second, the Government cannot condition the prospective passenger's constitutionally protected right to travel upon the relinquishment of his fourth amendment rights.[58] The Supreme Court in *Shapiro v. Thompson*[59] emphatically asserted that such was unconstitutional, stating: "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[60] *Shapiro* has also exerted an influence upon the other airport search cases. For example, *Lopez*, relying on the *Shapiro* opinion, held that the Government cannot condition the exercise of the passenger's constitutional right to travel on the relinquishment of his fourth amendment rights in the context of an airport search.[61] Further, the argument that there are alternative modes of travel is invalid as flying may be the only practical means of transportation.[62]

---

[53] *Id.* at 1289.

[54] *See id.*

[55] Note, *supra* note 17, at 1047-48; *see* McGinley & Downs, *supra* note 36, at 321-22.

[56] Note, *supra* note 17, at 1048.

[57] *Id.*

[58] 328 F. Supp. at 1093. *See also* Crandall v. Nevada, 73 U.S. 35 (1896); McGinley & Downs, *supra* note 36, at 322.

[59] 394 U.S. 618 (1969).

[60] *Id.* at 629. The Supreme Court stated that it was not necessary to ascribe the right to travel to a particular constitutional provision. It occupies a position "fundamental to the concept of our Federal Union" and was conceived from the beginning "to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 630-31.

[61] 328 F. Supp. at 1093.

[62] McGinley & Downs, *supra* note 36, at 322.

The reasoning of *Meulener*, however appears to be self-contradictory. On the one hand the decision excluded implied consent as a possible basis for the search as not meeting constitutional standards for waiver of fourth amendment rights and because it conditioned the exercise of the right to travel upon relinquishment of those rights.[63] Yet the effect of the holding is to permit searches to be conducted upon express consent which likewise seems to fall short of the constitutional requirements for the same reasons, that is, it is inherently coercive and the exercise of the right to travel is conditioned upon such consent being given. The rule formulated by *Meulener* appears to incorporate both of these constitutionally impermissible actions while on its face disclaiming them.

The Federal District Court for the Central District of California began formulating the basis for its requirement in *Meulener*, that the prospective passenger be advised that he may avoid the search should he choose not to board, by looking to *United States v. Allen*,[64] decided by the Federal District Court for the Northern District of California less than six weeks prior to *Meulener*. In *Allen* a defendant who matched the profile checked his suitcase at the counter and proceeded to the gate where he activated the magnetometer. Upon request, he permitted a frisk which yielded no weapons. His suitcase was then brought to the investigating office and the agents asked for the defendant's consent to search it. Believing the options to be to consent to a search, or arrest, the defendant acquiesced and the officers found contraband drugs. The search was held to be illegal, there being neither probable cause nor a voluntary consent.[65] Relying on the *Lopez* holding that the Government cannot condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his fourth amendment rights,[66] the proposition that the defendant had impliedly consented by presenting himself for boarding was rejected. But the court seems to have contradicted itself and in dictum indicated that express consent would be valid, stating that:

> While this court has no doubt that airline authorities have an absolute right to require a passenger to submit to a search of his person and baggage *as a condition* to boarding the aircraft, it accepts the conclusion reached in *Lopez* that in order to be a valid waiver of Fourth Amendment rights a passenger must be aware of his option to avoid the search by not boarding.[67]

The *Meulener* holding implements the dictum of *Allen* and the result is that the airline has the right to require the passenger to waive his fourth amendment right as a condition of exercise of his right to travel. Even though such a consent will be coercive, as it is required as a condition precedent to boarding, it will be upheld so long as the passenger is aware of his right to avoid the search if he does not board. *Meulener* is significant be-

[63] *See* notes 42-46 *supra*, and accompanying text.
[64] 349 F. Supp. 749 (N.D. Cal. 1972).
[65] *Id.* at 753.
[66] 328 F. Supp. at 1092-93.
[67] 349 F. Supp. at 752 (emphasis in original).

cause it is the first airport search decision to require that the passenger be expressly warned prior to a frisk that he need not submit to the search, but that should he refuse he will not be permitted to board the plane. This formulation thus seems to depart from the modified interpretation of *Terry* which permits a search, without regard to consent, if the passenger meets the profile and activates the magnetometer. The *Meulener* court, by authorizing a search only if the passenger chooses to board the plane after being apprised of his right to avoid the search, appears to shift the grounds upon which the search is based. In reality the search is no longer based upon *Terry*, but rather upon the coerced consent and waiver of the passenger's fourth amendment rights as a condition to the exercise of his right to travel. It should be noted, however, that the consent required in *Meulener* seems to differ from the normal consent in the classic search situation. In the normal consent case, probable cause is lacking and the consent serves as a substitute basis for the search. In *Meulener* there was no governmental interest to justify the intrusion until the passenger consented by deciding to board after being warned he would be searched if he did. The consent thus supplied an essential prerequisite for the search rather than being a substitute for that prerequisite as in the classic consent situation.

Aside from the constitutionally infirm consent grounds, the *Meulener* court also found that there was a second, independent ground for holding the search invalid. The search was not properly limited in scope as required by *Terry* and *Sibron*.[68] The court stressed that the search approved in *Terry* consisted of a frisk of the outer clothing of the suspect for weapons and only when the pat-down revealed such objects was it permissible for the officer to place his hands in the defendant's pockets. By analogy, in this case an unsuccessful pat-down of the defendant would be required in order to search the luggage. Further, it was noted that *Sibron* held the search unconstitutional because a limited exploration for weapons was not made before the officer put his hands into the defendant's pocket. In all prior federal cases upholding airport searches the scope of the search was initially restricted to a limited frisk of the outer clothing for weapons.[69] The only other case in which the passenger's carry-on luggage was searched was *United States v. Slocum*,[70] which held the search proper, emphasizing that it was only after the frisk failed to disclose anything which might have triggered the magnetometer that the marshal requested that defendant open his luggage.[71] The *Slocum* court thus implied that the search would have been improper without the frisk.

The *Meulener* court correctly relied on the reasoning of *Terry* and *Sibron* and expressly held that the officer's failure to make an initial frisk of the defendant's outer clothing before searching his suitcase was in violation of the fourth amendment because a frisk which discloses the metal object re-

---

[68] *See* note 10 *supra*, and accompanying text.
[69] 351 F. Supp. at 1291.
[70] 464 F.2d 1180 (3d Cir. 1972). In *Slocum* the defendant walked through the magnetometer with carry-on luggage. Not all carry-on luggage activates the magnetometer.
[71] *Id.* at 1183.

sponsible for activating the magnetometer obviates the need to search the suitcase.[72] However, if the search is grounded on consent, as *Meulener* implies, *Terry* appears to be wholly inapplicable. Thus it is arguable that if the Government deems it necessary, consent to search hand luggage as well as person could be required if the passenger chooses to board the plane. The effect of such a requirement would be to impose a much heavier burden upon, and more severely restrict, the right to travel which the Supreme Court has held to be essential to our form of government.

IV. CONCLUSION

The implementation of the holding in *Meulener* should have significant effect upon current surveillance procedures. *Meulener* requires that subsequent to meeting the profile and activating the magnetometer, and prior to being frisked, the passenger be given a warning that he need not submit to the search, but that without such he would not be permitted to board the plane. If the passenger elects to proceed, he is deemed to have consented to the search. Further, as most airports currently search all carry-on baggage prior to the passenger's passing through the magnetometer or any frisk of the outer clothing, current screening procedures appear to extend beyond the constitutional limits of *Meulener*.

The Supreme Court has yet to review an airport search and seizure based upon the profile and magnetometer. However, as evidenced by *Meulener*, the federal courts are in conflict, the constitutional issues have become more acute, and review by the high court appears imminent. If the Supreme Court reviews a *Meulener*-type situation, it will have to confront two major constitutional issues. First, whether a profile which is accurate only six percent of the time and a magnetometer which is activated by fifty percent of embarking passengers sufficiently meets the requirement of "specific and articulable facts" set forth in *Terry* and refined in *Sibron*.[73] If the Supreme Court strictly applies *Terry*, it appears the search cannot be upheld. If, however, the Court determines that the surveillance system satisfies *Terry* in the context of an airport search, then it must deal with the second issue, whether it will permit the conditioning of the right to travel upon the relinquishment of fourth amendment rights. It is unlikely that the Supreme Court will modify *Terry* and significantly dilute a fundamental right in the same day.

Steven J. Corey

---

[72] 351 F. Supp. at 1292.
[73] *See* notes 16, 38 *supra*, and accompanying text.

THE PLACEMENT OFFICE

Southern Methodist University

School of Law

AN INVITATION TO EMPLOYERS

The School of Law of Southern Methodist University invites attorneys, firms, corporations, banking institutions, government agencies and other prospective employers to use the Law School Placement Office to make contact with its students and graduates.

PROCEDURE FOR INTERVIEWS

Employers who wish to interview at the School of Law during the coming year should telephone or write the Placement Office as far in advance as possible, giving preferred and alternate dates. The telephone number is Area Code 214, 692-2622. The Placement Office will reserve conference rooms at the School, will supply resumes if the students have prepared them, and will arrange for overnight accommodations for the interviewer, if desired.

Interviews may be scheduled Mondays through Fridays during the academic year, except during examination periods. Many representatives visit the School during the autumn interview period. Therefore the reservation of autumn interview dates should be arranged some months in advance.

Many members of the June graduating class will have accepted employment by January 1st.

EMPLOYERS ARE ENCOURAGED TO SEND DESCRIPTIONS OF THEIR FIRMS AND ANY OTHER PERTINENT INFORMATION FOR STUDENTS TO READ PRIOR TO THE INTERVIEWS; our experience indicates that such descriptions can sometimes materially increase the student response for particular openings. A file of firm resumes and job descriptions is maintained for student reference throughout the year.

PROCEDURE AND PLACEMENT NOTICES

Employers who do not plan to send representatives to the School but who wish to hire new associates are invited to mail or telephone their job descriptions for posting on the placement bulletin board. Information about interested and qualified candidates will be furnished by mail, and the candidates will be invited to communicate directly with the employer.

The Placement Office will not reveal a student's or a graduate's rank in class or law school average without the consent of the student or graduate having first been obtained.

The Placement Office will indicate to prospective employers in which quintile of his class an individual graduated or is currently ranked.

FURTHER INQUIRY

The Law School Placement Office invites inquiries and suggestions relative to placement. Please address correspondence to:

Placement Office
SMU School of Law
153 Storey Hall
Dallas, Texas 75222