# Undoing the Fourth Amendment

BY BECKY AKERS

Carlos Gonzalez, 21, of Weston, Florida, stands spread-eagled while an officer pats him down. When the officer bends to frisk his legs, Carlos lowers his arms without asking permission. The officer snarls, "Hey, we're not even close to being finished. What are you trying to hide?" While a crowd watches, Carlos is ordered to disrobe. He hands over his shoes and belt and empties his pockets as the search continues in mortifying detail.[1]

Is Carlos a convicted criminal entering prison, or is he merely among the 10–15 percent of American citizens whom the Transportation Security Administration (TSA) hauls aside for "additional screening" at the nation's airports? Two million passengers weekly are pawed as if they were felons, though their only crime is catching a flight. And while even suspected murderers are not supposed to be searched without warrants, law-abiding passengers such as Carlos abandon this freedom when they enter an airport as surely as Dante's sinners abandon hope when they enter hell.

The Fourth Amendment is so clearly written that even TSA bureaucrats and Supreme Court justices should be able to comprehend it: "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." How is it, then, that no warrant is ever produced nor any probable cause cited before passengers are manhandled and bags rummaged?

The answer leads us down a rabbit-hole of court decisions to the Wonderland of postconstitutional America. Ironically, despite its high-tech wands and X-ray machines, its sophistication and jargon, Wonderland's tactics have been copped from a long-dead British king. Nor have the evils that result from those tactics abated over the years.

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Eighteenth-century British citizens, whether in England or the colonies, were almost alone among the world's peoples in boasting that their homes were their castles, inviolate even from their government. Sir William Pitt described this liberty in November 1783 while addressing the House of Commons: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

Folks lived in peace, their homes and persons sacrosanct. No officer disturbed them unless he had good cause—good enough that he was willing to swear to it—to suspect foul play. Even then, he might not search indiscriminately. He had to specify the place he wanted to search and the object he hoped to find. "Fishing" was not allowed.

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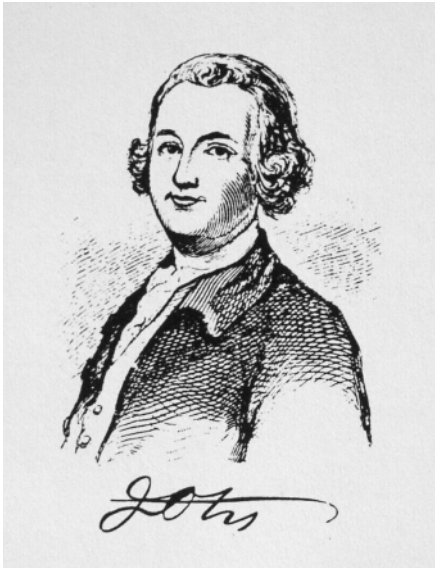
As the French and Indian War waned in the early 1760s, so did this halcyon interlude. England's treasury had been depleted by the war, and it lusted after the customs revenues being lost to smugglers. Because so many items were either prohibited outright or prohibitively taxed, smuggling flourished on both sides of the Atlantic. King George III, however, concentrated on the colonists' criminality. How dare they patronize French and Dutch merchants! The law required them to buy their sugar and furniture, clothing and molasses from the king's friends, regardless of high prices or poor service. Worse, Americans were also dodging the punitive duties on foreign goods by sneaking them past the understaffed customs office.

The first thing George did was beef up his customs department with "swarms of officers, to harass our people and eat out their substance." Then, because that would drive smugglers to increasingly ingenious ploys while the swarms wasted time obtaining warrants, the king resurrected an institution from earlier British history called "writs of assistance."



James Otis

The term alone sent shivers over any colonist who bought or sold smuggled goods—activities perhaps as common in eighteenth-century America as purchasing plane tickets is today. Writs of assistance professed to be search warrants, but they specified neither the person and place to be searched nor the item to be found. Their generality turned long-standing premises of British law upside down. Writs assumed that everybody was a criminal, that he could be searched at any time for anything. Armed with a writ, an officer could ransack any home or shop, any place at all, in an open-ended hunt for contraband. As Mercy Otis Warren put it, writs permitted officers to "enter the dwelling of the most respectable inhabitant on the smallest suspicion of a concealment of contraband goods, and to insult, search, or seize, with impunity."[2]

Writs so enraged Bostonians that they hired—or tried to hire: he refused payment—Mercy's brother, James, to rebut them before the Superior Court of Massachusetts in February 1761. Otis introduced his case by thundering: "I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is. It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book."[3]

If the power to tax is the power to destroy, then the power to search is the power to degrade. That may explain why government cherishes this authority as much as free people despise it. Few things short of torture keep men more servile than knowing they may, at their ruler's whim, be prodded, poked, stripped, and humiliated.

However, if we grant that one of government's few legitimate pursuits is to apprehend and try thieves, murderers, and other genuine criminals, we must allow it to search for evidence of the crime. Theoretically, warrants balance the state's need to search with the citizen's right to privacy. They severely limit governmental power over the suspected individual—who, at this point has not been convicted of any crime—by specifying the particulars of what can be searched as well as the items sought. Obviously, the more items the state declares illegal, the more essential to freedom these limitations become: allowing government to search indiscriminately means it will find and punish the possessors of drugs, guns, or any of the million and one other things it bans.

Otis listed the malignancies that multiply when specific warrants are abandoned in favor of general searches, malignancies threatening us today. First were the numbers of people who could procure a writ. No longer were a few, specially deputized officers permitted to search. Rather, "Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner, also, may control, imprison, or murder any one within the realm."

## Screeners with Criminal Backgrounds

Otis could have been speaking of the TSA. The agency employs about 45,000 screeners, some with criminal backgrounds.[4] It also boasts about how quickly it hired these people;[5] no wonder the screeners weren't screened. Nevertheless, they wield enormous power over the passengers who fall into their hands. One bragged to magician/comedian Penn Jillette, "Once you cross that line, I can do whatever I want."[6] Another confiscated a passenger's cigarette lighter after exclaiming that he'd always wanted one like it. The passenger reported him to a supervisor but received no satisfaction, so he threatened to contact TSA authorities. The supervisor replied, "Go ahead and complain, there is *nothing you can do to us.*"[7]

"In the next place," Otis observed, general searches are "perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him." When an officer is not looking for a specific item in a specific place, his search never ends. For all practicable purposes, he can search the entire population, and then, if his busybody tendencies still itch, begin over again.

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The scope and universality of airport searches confirm this. One court noted in 1989 that "[i]n the 15 years the [airport searching] program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage have been inspected" (*Nat'l Treasury Employees Union v. Von Raab*).

"In the third place," Otis continued, "a person with this writ . . . may enter all houses, shops, etc., at will, and command all to assist him." He added, "Bare suspicion without oath is sufficient." Writs exempted the officer from swearing to an impartial third party that he had "probable cause" to believe—not merely suspect—that a person had committed a crime. This obliterated any limits on who could be searched because an officer could claim to suspect everyone. It also destroyed the balance of power, so hallowed in Anglo-American jurisprudence, between branches of government. Judges traditionally stood between citizens and the state, protecting them from overly zealous or personally vindictive officers. Having to seek judicial permission for a search meant that an officer offended at the pub one evening could not suddenly appear on a man's doorstep and demand to search his home. He must first charge his victim with a crime and then convince a judge. Writs of assistance sacked this safeguard. The same person who had authorized the search conducted it. There was no recourse to the judiciary, no objective third party deciding whether a proposed search was necessary. Instead, personal pique and prejudice determined who was searched as well as how thoroughly.

The TSA searches all passengers and their baggage. Without any grounds, without even a specific suspicion of a specific passenger, screeners search the flying population at large. The fact that passengers are going about their business peacefully, that they have done nothing to warrant suspicion, much less a search, means nothing. Furthermore, no judge interposes between the citizen and the state. The searches are both sanctioned and conducted by the executive branch of the federal government. And because screeners enjoy enormous leeway in their jobs, they can take revenge on anyone who defies, disobeys, or displeases them.

"Fourthly," Otis wrote, "by this writ not only deputies, etc., but even their menial servants, are allowed to lord it over us." That rendered citizens "the servants of servants, the most despicable of God's creation."

Tucked away on the TSA's website are three explosive words that encourage screeners "to lord it over us." On a page titled "Civil Sanction Guidelines for Individuals" is a list of eight "Aggravating factors" that, when committed by passengers, may result in the TSA's "imposing civil penalties up to $10,000 per violation. . . ."[8] Number 8 is "Attitude of violator."

Passengers waiting in long lines to be groped had better smile, obey screeners' orders without question, and be deferential. Even so, a screener may find a passenger's "attitude" troubling, particularly if the screener is tired and hungry, or dislikes the passenger's ethnicity or choice of T-shirt, or considers himself the poor man's ven-

geance on anyone wearing a Rolex and designer clothes.

The TSA's antics might also sour a passenger's "attitude," especially given the "factors" that can provoke a fine. These include "number of weapons" and "type of weapon" found on passengers at checkpoints.[9] That sounds reasonable, if unconstitutional: everyone knows not to bring guns or grenades to an airport. However, the TSA's definition of "weapon" is amazingly broad, so broad it encompasses emery boards and Zippo lighters. This turns many passengers into "criminals" who are liable to fines—or worse.

Add to this that at the checkpoint, mid-search, screeners can suddenly declare *anything*— barrettes, belt buckles, bracelets—a weapon. The TSA's website lists "Permitted and Prohibited Items," but it warns that "The prohibited and permitted items chart is *not intended to be all-inclusive* and is updated [that is, changed, usually without any fanfare or announcement] as necessary. To ensure everyone's security, the screener may determine that *an item not on the prohibited items chart is prohibited*. In addition, the screener may also determine that *an item on the permitted chart is dangerous* and therefore may not be brought through the security checkpoint."[10]

The wise passenger will betray no displeasure at these arbitrary decisions, even if the "weapon" stolen from him is a fountain pen inherited from his father or a diamond-topped stickpin. As he is ordered about, insulted, mauled, and prodded by screeners, as they confiscate his nail clippers or steal his money[11] or jewelry,[12] the wise passenger merely smiles and thanks them. Otherwise, he may incur a $10,000 fine.

Cigarette lighters were banned from commercial aircraft in February. But many plastic lighters can slip past the TSA's metal detectors. Nevertheless, the wise passenger who forgot to leave his lighter at home will resist the urge to keep it quietly in his pocket: "artful concealment" is No. 1 on the list of "factors." Should the wise but forgetful passenger make it through the metal detector only to be pulled aside for a random pat-down, he again risks a fine. "Our intent is just to make sure that people who are a threat are dealt with accordingly. The, 'Oh, I forgot I had it' doesn't work with us anymore," explained Lauren Stover, speaking on behalf of the TSA, when a passenger not only lost the contraband in his carry-on bag but was fined $250 for the pleasure.[13] (For his part, the passenger protested, "I don't feel as though I had intent that would really go hand in hand with a fine." But, as with so many legal niceties, "intent" no longer matters when dealing with the TSA.)

The TSA prizes its power over American passengers every bit as much as the British government prized its power over colonial consumers, so Otis was probably not surprised when the court ruled against him. What did surprise him was an ambush by some of the customs commissioners his suit had threatened. They jumped him one night and beat him so severely he was left for dead. "[T]he wounds did not prove mortal, [but] the consequences were tenfold worse than death," his sister reported. Otis's mind "was destroyed, reason was shaken from its throne, genius obscured, and the great man in ruins lived several years for his friends to weep over. . . ."[14]

## End of an Era—Almost

Meanwhile, arbitrary and warrantless searches continued, until, 15 years later, they sparked a revolution. (Even modern courts admit this. General searches "more than any one single factor gave rise to American independence," Justice Felix Frankfurter noted in a dissenting opinion in *Harris v. United States*, (1947). "John Adams surely is a competent witness on the causes of the American Revolution. And he it was who said of Otis' argument against search by the police . . . 'American independence was then and there born.' ") Later, when the Bill of Rights was added to the Constitution, Americans whose homes and papers had been ransacked, who had been humiliated and insulted by the Crown's "menial servants," made sure they never would be again. The Fourth Amendment—and, as Frankfurter also noted, similar provisions in all 48 state constitutions—guaranteed Americans' freedom from general searches.

Over the next hundred years the government occasionally assailed this liberty. It began its assault in earnest, however, during the twentieth century. "Moral" crusaders against gambling, drinking, and drugs hated the Fourth for thwarting their attempts to make their neighbors as virtuous as themselves. Politicians drafted laws circumventing the Fourth, while sympathetic judges ruled in favor of the state's power to search. Their decisions mimic the childhood game of "Telephone," in which one judge mistakes a term or concept when ren-

dering his decision, and the next judge not only repeats but adds to the error. The judicial reasoning that allowed the government to eavesdrop on gamblers and launch "no-knock" raids on drug dealers now permits passengers to be pawed.

Several preposterous presuppositions underlie this reasoning. First, the government always assumes its "interest," which it sometimes cloaks as "society's interest," outweighs the individual's. Whatever the government determines its interest to be—purging the land of poker and pot, extorting taxes, controlling airports and passengers—trumps any individual's right to privacy, property, or even life.

Second, the government has an "interest" in "safe aviation." How it procured this interest is anyone's guess. Unlike the natural rights to life, liberty, and justly acquired property, which "their Creator" has "endowed" on "all men," government's "interests" seem to have materialized, appropriately enough, out of thin air. Flight paths, airports, and runways are goods like any others that would be privately owned but for the government's usurping that ownership. That usurpation is a crime and an outrage, but it confers on the state neither an "interest" in searching passengers nor the right to do so.

The government's third presumption is that flying is a "choice." Judges are apparently seldom faced with driving a couple of cranky kids cross-country in a car whose odometer has turned over 150,000 miles. Also, by "choosing" to fly, passengers give their consent to whatever the government wreaks on them meanwhile. This doctrine apparently applies to any action the government wishes to take, including strip searches, groping, and theft.

Finally, there are no inalienable rights and no absolute truths. Rights depend on what "society" considers "reasonable," "average," or "normal," and they change with society's whims. The Bill of Rights is void unless your neighbors are in a generous mood that day.

These presuppositions permitted the Feds to "protect" aviation after a couple of hijackings in the 1960s and early '70s (dignified as an "observable national and international hijacking crisis" in one decision). Then, in 1974, government made the scary leap from apprehending criminals after they had committed a crime to preventing them from committing it in the first place. The courts declared (in *United States v. Moreno*) that "the hijacker must be discovered when he is least dangerous to others and when he least expects confrontation with the police. . . . In practical terms, this means while he is still on the ground and before he has taken any overt action." In practical terms, it also meant that any passenger could be a hijacker. All passengers and their luggage, therefore, must be searched.

## Previous Wounds

The Fourth Amendment might have reared its pesky head here had it not already sustained some serious wounds. In *Silverman v. United States* (1961) the Supreme Court announced that the Founders intended the Fourth to secure a man's right to "retreat into his own home and there be free from unreasonable governmental intrusion." However true that statement was, subsequent decisions emphasized that *only* in his home might a man be free from governmental intrusion; he abandoned such an expectation once he stepped outside. From this sprang much slicing and dicing of freedom, including the bizarre notion that neither automobiles nor public areas such as airports afford the same level of privacy and freedom from the government as homes, so cops may search the former with far more impunity than they do the latter.

One of the most seminal cases in modern thinking regarding the Fourth is *Katz v. United States* (1967). Charles Katz was a bookmaker who used a public phone booth to conduct his illegal business. The FBI attached microphones to the booth and eavesdropped. Katz argued that this constituted an unreasonable search.

The Court agreed but nonetheless dealt the Fourth some fatal blows. First, the court announced that the "Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." How the justices determined that "places" are beyond the Amendment's scope when it clearly mentions "houses" remains a mystery. Also troubling is the Court's conflating "public" with "government." A citizen may eagerly expose to the public what he would be loath to reveal to government, given the latter's proclivities for violence and retribution. A person might display a gun collection over his mantel; folks invited

into his home would certainly see it, and it might even be visible to neighbors through the front window. But neither visitors nor neighbors are likely to incarcerate the owner for possessing firearms, as is the government. What is knowingly exposed to the public, then, most definitely needs the Fourth's protection in case government also stumbles across it.

Second, the Court decided that eavesdropping on Katz was indeed a search, regardless of "the presence or absence of a physical intrusion." The phrase was merely descriptive in this decision and therefore innocuous, but other judges in other cases pounced on it, took it out of context, and twisted it. Sometime later, Jonathan Lewis Miller reports, freedom from "trespass" was redefined as "freedom from unwarranted invasion of one's right to privacy."[15] Trespassing is an objective act: someone either impinges on property that does not belong to him while installing wiretaps or he does not. But an "unwarranted invasion of one's right to privacy"? One judge's "unwarranted invasion" is another judge's "Why would anyone object to this?" Worse, the Fourth no longer applied unilaterally and absolutely. Instead, requirements must now be met before the Amendment kicked in: not only should the individual have an expectation of privacy, but that expectation also must be one which "society is prepared to recognize as 'reasonable' " (Justice Harlan concurring in *Katz*). Thus if most people do not object to being searched at airports, if they consider it necessary for their safety, the Fourth Amendment no longer applies.

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Nor are specific suspicions of specific passengers required for a search. "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness." Additionally, the "passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air. . . ." (*United States v. Bell*, U.S. 2nd Circuit Court of Appeals, 1972). In other words, because the government searches everyone at airports, and everyone expects to be searched at airports, the government may search us at airports.

Neither the innocence of the vast majority of passengers nor the effectiveness of the search matter. "Nor would we think . . . that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches . . . . By far the overwhelming majority of those persons who have been searched . . . have proved entirely innocent . . ." (*Von Raab*). The government wins either way, whether it discovers hijackers or not.

The courts have also decreed that no reasonable person will object to forfeiting the Fourth. "[T]he danger [of skyjacking] is so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances" (*U. S. v. Epperson*, 4th Circuit, 1972). Airport searching "is not a resented intrusion on privacy, but, instead, a welcome reassurance of safety." Indeed, a warrant would only "frustrate the governmental purpose behind the search" (*United States v. Davis,* 9th Circuit, 1973, quoting *Camara v. Mun. Court*, U.S. Sup. Ct., 1966). Finally, they get it right: frustrating the government's invasion of the individual's privacy and property was precisely the reason for the Fourth Amendment.

## Freedom versus Security

However, in the modern contest between freedom and security, Americans increasingly choose security. Apparently, nothing is sacred—the Fourth Amendment, personal modesty and dignity, airports free of horrific lines, lower ticket prices—so long as the government promises to keep us safe.

And most passengers believe those promises. When the TSA's Office of Strategic Management and Analysis commissioned a survey of passengers at 25 airports, it asked, "How confident are you in TSA's ability to keep air travel secure?" Eighty-two percent answered "fairly confident or very confident."[16]

But a month after this survey was released, two reports from the government itself demolished this touching faith in bureaucracy. Both the Government Accountability Office and the Homeland Security Department concluded that aviation is no safer now than it was before the birth of the TSA. In tests conducted by undercover inspectors, screeners still miss the same 20 percent of weapons that they did prior to 9/11.[17]

"We need to step back and look at the billions of dollars we spent on the system, which doesn't provide much more protection than we had before 9/11," said Rep. John L. Mica of Florida, the chairman of the House aviation subcommittee as well as an author of the legislation that created the TSA.[18]

But the agency cannot secure a loan, let alone the entire system of American aviation. That's because the TSA has never been an honest response by the airlines to terrorist threats against their property and customers. Rather, it resulted from political pandering to a population panicked by 9/11.

The former chairman of the Homeland Security Committee admitted as much. "After 9/11," said Christopher Cox of California, "we had to show how committed we were by spending hugely greater amounts of money than ever before, as rapidly as possible."[19] Whether that money bought safety for American passengers was beside the point. Instead, the expenditures made government seem involved and caring, which bought vastly more power for politicians.

The TSA has become such an embarrassment with its incompetence, larceny, arbitrary policies, and "hugely greater" budgets that it will likely be abolished.[20] That doesn't mean passengers will recover their Fourth Amendment rights, especially because general searches are turning up treasures beyond nail files: drugs and other contraband are putting more Americans behind bars[21] and yielding more money in fines.[22] Rather, the feds will shift the TSA's "duties" to other bureaucracies. As the government continues to criminalize behavior, and to ban the accouterments of that behavior, airport searches will become increasingly valuable for discovering "criminals." Americans who might object to being frisked on the street, who would insist on a warrant before allowing a cop to toss their home, actually want government agents to search them at airports. After all, that's what keeps them safe.

Imagine their shock when they realize their protectors have become their wardens.

1. http://flatrock.org.nz/topics/terrorism/what_rights_are_left.htm.

2. Mercy Otis Warren, *History of the Rise, Progress and Termination of the American Revolution*. vol. 1 (Indianapolis: Liberty Fund, 1994), p. 28.

3. James Otis, *Argument Against the Writs of Assistance*, [1761]. Full text, including John Adams's notes, can be found at www.nhinet.org/ccs/docs/writs.htm. All of Otis's subsequent quotes are taken from this speech.

4. Sara Kehaulani Goo, "TSA Under Pressure to Stop Baggage Theft; For Agency, a New Airport Security Problem," *Washington Post*, June 29, 2003, p. A01.

5. Remarks for the Honorable Norman Y. Mineta, secretary of transportation, TSA Anniversary Event, Washington, D.C., November 18, 2002, www.tsa.gov/public/display?theme=46&content=09000519800039e0.

6. Penn and Teller, "Federal V.I.P. Penn–11/13/02," www.pennandteller.com/03/coolstuff/penniphile/roadpennfederalvip.html.

7. John P. Hoke's Asylum, July 14, 2004, http://john.hoke.org/index/asylum/comments/my_experience_with_a_tsa_screener.

8. www.tsa.gov/interweb/assetlibrary/Sanction_Guidance_for_Individuals_7-15-2004.pdf. From the TSA's homepage, four clicks are required to access this information. Casual visitors to the site would be unlikely to see it.

9. Ibid.

10. www.tsa.gov/interweb/assetlibrary/Prohibited_English_4-1-2005_v2.pdf. Emphasis added.

11. See note 7.

12. www.freerepublic.com/focus/f-news/1292356/posts, December 1, 2004.

13. KLTV, "Carry On Controversy," May 2, 2005, www.kltv.com/Global/story.asp?S=3289874.

14. Mercy Otis Warren, p. 50.

15. Jonathan Lewis Miller, *Search and Seizure of Air Passengers and Pilots: The Fourth Amendment Takes Flight,* 22 *Transportation Law Journal* (1994), pp. 199, 203.

16. http://tsa-screeners.com/start/modules.php?op=modload&name=News&file=article&sid=5205.

17. "Airport Screeners Still Doing Poorly, Says Report," NewsMax.com Wires, April 16, 2005, www.newsmax.com/archives/articles/2005/4/15/220205.shtml.

18. Eric Lipton, "Transportation Security Agency Criticized," *New York Times*, April 20, 2005, p. A18.

19. Eric Lipton, "U.S. to Spend Billions More to Alter Security Systems," *New York Times,* May 8, 2005.

20. Sara Kehaulani Goo, "TSA Slated for Dismantling," *Washington Post*, April 8, 2005, p. A1.

21. Sara Kehaulani Goo, "Grateful Dead Songwriter Contests TSA Search," *Washington Post*, December 20, 2004, Page A9.

22. "Screeners find live snake in woman's suitcase," *USA Today*, May 5, 2005, www.usatoday.com/travel/news/2005-05-05-airport-snake_x.htm.