



# FOCUS: SEARCHES WITHOUT WARRANTS

## A CORE AMERICAN RIGHT IS BEING TRIMMED

Americans have long had deep concerns about government searches. A specific search and seizure case from colonial days was the seed that grew into the American Revolution, according to John Adams.

The case involved “writs of assistance” that British officials used to enforce anti-smuggling laws. The writs allowed the king’s officers to enter colonial homes and businesses at will and seize virtually any property.

Boston attorney James Otis was hired by Boston merchants in 1761 to challenge the writs. Otis lost. But the case would shape the writing of the Fourth Amendment nearly 30 years later.

The scope of searches and seizures today

is very different. Technology enables searches where there may be no contact between you and the law. Information you may have provided (to make a cell phone call, for example) can be seized without your knowledge.

More and more of these high-tech searches are occurring without a showing of probable cause before a judge and the approval of a warrant. That’s troubling. It’s a violation of Fourth Amendment principles.



### U.S. CONSTITUTION

The Fourth Amendment states that people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” Additionally “...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.”

## INQUESTS: END-RUN AROUND THE CONSTITUTION

In 2010 the Vermont Attorney General’s Office acknowledged it was obtaining sensitive cell phone tracking data that continuously identifies a person’s whereabouts. The information was being obtained secretly, without a warrant.

The acknowledgement came in a lawsuit brought by the ACLU-VT. Cell phone data are being seized by law enforcement in other states to track individuals surreptitiously. We wanted to know if it was happening in Vermont.

The attorney general’s office admitted it was. It also admitted that the tracking data is obtained through an administrative request made in a secret proceeding called an “inquest” — not through court-issued warrants based

on probable cause.

An inquest proceeding offers little or no judicial oversight, with no known standards for determining whether the request is justified. No jury is present, as at a grand jury proceeding.

The request amounts to an administrative subpoena, which is then presented to phone companies as an order to turn over data.

It’s not known how frequently such searches are used in Vermont. In other states, cell phone tracking has become so common that one phone company has set up a special Web site where police can instantly call up customers’ location data.

We think cell phone data can be turned over to police — as long as a warrant for seizure of the data has been obtained first. But that’s not been happening.

Cases challenging the constitutionality of secret use of cell phone tracking data are being litigated in several states.

### VERMONT CONSTITUTION

Article 11 of Chapter 1 may provide broader search protections: “That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them ... are contrary to that right, and ought not to be granted.”



## WITHOUT WARRANT, POLICE TRACK DRIVERS

If law enforcement needs no warrant to seize cell phone data and track your whereabouts, can they surreptitiously stick a GPS device on your car to monitor where you drive?

Courts have heard several lawsuits from people who discovered strange-looking devices stuck to the bumpers or frames of their cars. The devices send global positioning system (GPS) signals to plot the car's location.

A Virginia court ruled in late 2010 that it's OK for police to attach the devices without a warrant and without your knowledge.

But earlier, courts in New York, Massachusetts, and Washington said warrants are needed.

The use of another car tracking device is becoming widespread, and courts generally have said that's OK.

The device is an automated license plate

reader. ALPR cameras are attached to police cruisers. As an officer drives along the highway or through a parking lot, the cameras scan the information from vehicles' license plates. The information is fed into an onboard computer that's linked to databases that can instantly pull up registration records and information on the owner.

ALPRs can scan up to 3,000 to 5,000 license plates an hour. The data can be stored, which means that over time police can determine a car owner's driving habits and places she's been.

So far, no court has found that a warrant is needed for ALPRs.

Several police departments in Vermont have bought ALPR systems.



### "SMART" METERS: PRIVACY THREAT?

A "smart" electric meter may look like a traditional meter, but it's not.

A smart meter provides constant monitoring of customers' electricity usage. The meters are so accurate that your utility will be able to tell when you come home, when you do wash, when you watch TV — and when you leave the next morning.

That's a lot of personal information. It's important that privacy standards are established so that government does not have access to these records without a warrant.

## 'HOTWATCH' ENABLES REAL-TIME SURVEILLANCE

A little-known tool used by government agents recently came to light through a FOIA request filed by security and privacy analyst Christopher Soghoian and published at wired.com.

Since at least 2005 investigators have set up real-time surveillance of individuals' credit card transactions. The government has also appeared interested in information from calling cards, airline reservations, rental cars, and retail shopping clubs.

The surveillance is done without a probable



cause hearing and warrant. Instead, investigators issue an administrative subpoena and set up a "hotwatch." Agents must only show how the surveillance is relevant to an ongoing investigation. Authority to issue such an order is claimed under the "All Writs Act," the federal law that authorizes courts to issue orders.

Soghoian notes: "The only role that courts play in this process is in issuing non-disclosure orders to the banks, preventing them from telling their customers that the government has spied on their financial transactions."

## Got the card?



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