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Geo-fencing and Other General Warrants: What the Founders Would Have Done

For years law enforcement — federal, state, and local — have developed and deployed technology and tools that have established a surveillance state that places every American under the inescapable watch of government.

This 21st-century Panopticon has been built and expanded by Washington, D.C., and its water carriers throughout the 50 states in direct and open defiance of the rights protected by the Fourth Amendment of the U.S. Constitution.

Although familiar to most of you, the blackletter of the Fourth Amendment is worth repeating. The Fourth Amendment declares: "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."

Perhaps one of the most pernicious techniques employed by the officers of the federal surveillance Leviathan is the "geo-fence warrant," an unspecific warrant that gives the government power to put you inside an invisible digital dragnet.

Here's an introduction to this tactic as reported by the *New York Times*:

> The warrants, which draw on an enormous Google database employees call Sensorvault, turn the business of tracking cellphone users' locations into a digital dragnet for law enforcement. In an era of ubiquitous data gathering by tech companies, it is just the latest example of how personal information — where you go, who your friends are, what you read, eat and watch, and when you do it — is being used for purposes many people never expected. As privacy concerns have mounted among consumers, policymakers and regulators, tech companies have come under intensifying scrutiny over their data collection practices.

After reporting the use of the geo-fence warrant "has risen sharply in the past six months, according to Google employees familiar with the requests," the *Times* continues:

> Technology companies have for years responded to court orders for specific users' information. The new warrants go further, suggesting possible suspects and witnesses in the absence of other clues. Often, Google employees said, the company responds to a single warrant with location information on dozens or hundreds of devices.

Students of history should spot a very familiar trope in this technology. These "geo-fence warrants" and the assault their use makes upon the rights of Americans are in every significant way identical to a tactic used by the British Empire in its own attempt to deprive Americans of those same liberties some 250 years ago.

King George II (and his son and successor, George III) issued orders known as general writs of assistance. In simple terms, these writs authorized law enforcement and other representatives of the crown to enter buildings to search for contraband without obtaining a warrant. This did not sit well with American Englishmen, and they were determined to boldly declare their determination not to be subjected to searches that exceeded the constitutional authority of the king and parliament.

Another unconstitutional aspect of these writs was the fact that they were not specific, that is to say, they did not name the place to be searched, the things to be searched for, or the people who aroused the suspicion of illegal behavior.

Knowing just that much of the history of these warrants would be enough to demonstrate why so many people are zealously opposed to the geo-fencing warrants and other similar tactics used by government to keep citizens under constant watch.

Given the role that rebellion against these searches and seizures by government played in igniting the spark that lit the fires of armed resistance in America and the American War for Independence, it is remarkable that there aren't more Americans advocating for the immediate abolition of all the agencies involved in the issuing and executing of these contemporary Writs of Assistance.

A bit more history is in order, though, for those wishing to understand why the Founders explicitly prohibited such general warrants from ever again being used to usurp American liberty.

James Otis is a name that is almost completely forgotten by contemporary Americans, but he was once the most famous lawyer in the colonies, and it was his renowned recrimination of unreasonable searches in Boston that earned him fame and influenced his countrymen to resist the tyranny of these deprivations.

At a trial challenging the constitutionality of the General Writs of Assistance, Otis spoke eloquently and persuasively in favor of freedom from the unreasonable searches being carried out by 18th-century government agents:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.
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> This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and, when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware; so that these writs are negotiable from one officer to another; and so your Honors have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, "Yes." "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods" — and went on to search the house from the garret to the cellar; and then served the constable in the same manner.

In 1788, nearly three decades after Otis' speech in defense of the right to be free from unwarranted searches and seizures, his equally eminent sister, Mercy Otis Warren, echoed her brother's bold attack

on despotism. Writing under the pseudonym "Columbian Patriot," Warren said:

> There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence — the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.

In the years prior to the ratification of the Constitution, those later involved in that process already had experience drafting documents to protect these precious liberties from the ever-grasping hand of government.

These men abhorred the use of general warrants and the violence to liberty done by those who were executing them on behalf of the crown and Parliament, believing that "papers are often the dearest property a man can have" and that permitting the government to "sweep away all papers whatsoever," without any legal justification, "would destroy all the comforts of society."

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well: "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence [sic] is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have remained even one day at the Philadelphia Convention if he had believed that the government they were creating would become the instrument of tyranny that it has become.

Finally, whether it is the use of geo-fencing warrants or deployment of Stingray devices or the establishment of Fusion Centers, the surest way to stop the surveillance and gut the general warrants is for states to follow the advice of James Madison and refuse to "cooperate with officers of the union" when their actions exceed the constitutional limits of their authority.

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