

## Privacy in the Modern Age, Part 1

Edward D. Duvall  
5 Feb 2021

### Introduction

The Fourth Amendment to the U. S. Constitution reads:

"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."

This particular Amendment was to ensure that one abuse, among others, that had been inflicted the colonists by the British government could not be repeated under the Constitution: the infamous 'writ of assistance'. The historian John Fiske [1] gives a summary:

"In 1761, it was decided to enforce the Navigation Act, and one of the revenue officers at Boston applied to the superior court for a "writ of assistance", or general search warrant, to enable him to enter private houses and search for smuggled goods, but without specifying either houses or goods. Such general warrants had been allowed by a statute of the bad reign of Charles II, and a statute of William III, in general terms, had been granted to revenue officers in America like powers to those they possessed in England. But James Otis showed that the issue of such writs was contrary to the whole spirit of the British constitution. To issue such universal warrants allowing the menials of the custom-house, on mere suspicion, and perhaps from motives of personal enmity, to invade the home of any citizen, without being held responsible for any rudeness they might commit there, - such he said, was 'a kind of power, the exercise of which cost one king of England his head and another his throne;' and he plainly declared that even an act of Parliament which should sanction so gross an infringement of the immemorial rights of Englishmen would be treated as null and void."

James Otis was a Boston lawyer, and one of the principal proponents of independence in the 1760's. He was in declining mental health and suffered permanent injury in 1769 after being severely beaten by a British customs officer. However, he was able to sneak out of his house and fought against the British in the Battle of Bunker Hill (17 Jun 1775), escaping afterwards back to his house.

The Fourth Amendment requires any agent of the government to apply for a warrant, to be sworn under oath before a judge, describing what is to be searched and what evidence they have already obtained that would justify such a search. It has always been a feature of American justice, at least at the local level, with two exceptions: it never applied to slaves, and it did not apply to free black people in the South during the Jim Crow era (1890's to about the 1940's). The Democratic Party was an advocate for slavery and later was responsible for Jim Crow.

But we now have three problems not contemplated by the authors of the Constitution. First is the growth of electronic technology; secondly, the power of corporations that control the electronics technology; and third, the union of those corporations and the government. At this point in our history, the average American, unless he practices good electronic security, has virtually no privacy at all. The following essays will describe these risks, and what you, the average American, can do to protect your privacy in the digital environment that we now wallow in.

But before we get to details, let's first establish how the Fourth Amendment should be interpreted, and by extension, how we should think of individual privacy. To me it means different things in the three cases I've mentioned. Toward the government alone (case 1) it means, "My affairs are none of your business unless you have prior evidence that justifies investigation." Toward corporations, and the cooperation between corporations and the government (cases 2 and 3) it means, "My affairs are none of your business."

There is one cardinal rule that we should remember in regard to privacy in the electronic environment: if a violation of your privacy is possible, it is being done unless the government and corporations prove under oath that it is not. Even then, take their claims with a grain of salt.

## Reference

[1] John Fiske, *John Fiske's Historical Writings*, NY: Houghton, Mifflin and Company, 1896, Vol. 10, p. 14. It is the same as Fiske's original *The American Revolution*, 1891, Vol. 1, p. 14.