



## 'Pre-Search' Is Coming to U.S. Policing

**Does the Fourth Amendment protect against unreasonable searches before the fact?**

Jim Harper

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News that the city of Baltimore has been under surreptitious, mass-scale camera surveillance will have ramifications across the criminal justice world. When it comes to constitutional criminal procedure, privacy, and the Fourth Amendment, it's time to get ready for the concept of "pre-search." Like the PreCrime police unit in the 2002 movie *Minority Report*, which predicted who was going to conduct criminal acts, pre-search uses technology to conduct the better part of a constitutional search before law enforcement knows what it might search for.

Since January, police in Baltimore have been testing an aerial surveillance system developed for military use in Iraq. The system records visible activity across an area as wide as thirty square miles for as much as ten hours at a time. Police can use it to work backward from an event, watching the comings and goings of people and cars to develop leads about who was involved. "Google Earth with TiVo capability," says the founder of the company that provides this system to Baltimore.

But the technology collects images of everyone and everything. From people in their backyards to anyone going from home to work, to the psychologist's or marriage counselor's office, to meetings with lawyers or advocacy groups, and to public protests. It's a powerful tool for law enforcement—and for privacy invasion.

In high-tech Fourth Amendment cases since 2001, the U.S. Supreme Court has stated a goal of preserving the degree of privacy people enjoyed when the Constitution was framed. Toward that end, the Court has struck down convictions based on scanning a house with a thermal imager and attaching a GPS device to a suspect's car without a warrant.

The Fourth Amendment protects against unreasonable searches and seizures. The straightforward way to administer this law is to determine when there has been a search or seizure, then to decide whether it was reasonable. With just a few exceptions the hallmark of a reasonable search or seizure is getting a warrant ahead of time.

Applying the "search" concept to persistent aerial surveillance is hard. But that's where pre-search comes in.

In an ordinary search, you have in mind what you are looking for and you go look for it. If your dog has gone missing in the woods, for example, you take your mental snapshot of the dog and you go into the woods comparing that snapshot to what you see and hear.

Pre-search reverses the process. It takes a snapshot of everything in the woods so that any searcher can quickly and easily find what they later decide to look for.

The pre-search concept is at play in a number of policies beyond aerial surveillance and Baltimore. Departments of Motor Vehicles (DMVs) across the country are digitally scanning the faces of drivers with the encouragement of the Department of Homeland Security under the REAL ID Act. Some DMVs compare the facial scans of applicants to other license-holders on the spot. They are searching the faces of all drivers without any suspicion of fraud. And the facial scan databases are available for further searching and sharing with other governmental entities whenever the law enforcement need is felt acutely enough.

The National Security Agency's telephone meta-data program is an example of pre-seizure. Phone records that telecom companies used to dispose of, having kept them confidential under their privacy policies and federal regulation, are now held so that the government can search them should the need arise.

Exactly how courts will apply the pre-search concept to mass aerial surveillance remains to be seen. The Fourth Amendment doesn't directly protect our movements in public, but it does protect our "persons" and "houses." Mass aerial surveillance captures data about both. The Supreme Court struck down warrant-less GPS tracking in public. The practice rips away the natural concealment that time gives to most people's public activities.

Courts may find that a pre-search of every person's movements is a full search, even before their names and the locations of their travels are known. Or they may require warrants to examine the pre-search data.

Is "pre-search" a strange concept? In 2007, a prominent federal appeals court judge called it "untenable" to say that attaching a GPS device to a car might be a seizure under the Fourth Amendment. But doing so makes use of the car without the permission of the owner, and the Supreme Court struck down warrant-less GPS tracking on that basis in 2012.

Strange, untenable, or not, it might be time to get ready for pre-search. Because pre-search is already here.

*Jim Harper is a senior fellow at the Cato Institute.*