1. State v. Nolan, 356 N.W.2d 670
   Client/Matter: -None-
2. Fla. v. Riley, 488 U.S. 445
   Client/Matter: -None-
3. United States v. Dunn, 480 U.S. 294
   Client/Matter: -None-
4. Dow Chem. Co. v. United States, 476 U.S. 227
   Client/Matter: -None-
5. United States v. Pinson, 24 F.3d 1056
   Client/Matter: -None-
6. Cal. v. Ciraolo, 476 U.S. 207
   Client/Matter: -None-
7. Hester v. United States, 265 U.S. 57
   Client/Matter: -None-

State v. Nolan

Supreme Court of Minnesota

October 26, 1984

No. C7-83-284

Reporter
356 N.W.2d 670; 1984 Minn. LEXIS 1497

State of Minnesota, Respondent, v. Kevin James Nolan, Appellant

Prior History: [**1] Appeal from County Court, Wabasha County, Hon. William A. Johnson, Judge.

Disposition: Affirmed.

Core Terms

open field, marijuana, fields, aerial surveillance, intent to sell, plants, reasonable expectation of privacy, constitutionally protected, possession of marijuana, probable cause, search warrant, no trespass, trial court, cornfields, discovery, erecting, trailers, posting, fences, signs, steps, suppression motion, suppress evidence, no necessity, unidentified, convicted, informant, issuance, suppress, seizure

Case Summary

Procedural Posture
Defendant appealed a judgment of the County Court, Wabasha County (Minnesota), which convicted him of possession of marijuana with intent to sell in violation of *Minn. Stat. § 152.09, subd. 1(1)* (1982). On appeal he alleged a violation of his Fourth Amendment rights, and claimed that the trial court erred in denying his motion to suppress the marijuana that was found in the two open fields.

Overview
An unidentified informant told police that he had seen plants in two open cornfields that looked like marijuana. The police flew over the fields, and then obtained and executed a search warrant. The search resulted in the discovery and seizure of marijuana, and a second warrant led to the discovery of additional marijuana in defendant's trailer. Defendant was convicted of possession of marijuana with intent to sell, but he claimed on appeal that the drug evidence should have been suppressed. The court disagreed and affirmed his conviction, ruling that the police did not need a search warrant to go onto the land. Under the open fields doctrine, defendant had no constitutionally protected reasonable expectation of privacy in open fields, even if he took steps to show a desire to bar the public from them by erecting fences or posting no trespassing signs. Police did not need a warrant or probable cause to enter on to such fields. The court also ruled that aerial surveillance of open fields did not constitute a search. Because the Fourth Amendment did not protect open fields, there was no need for a warrant and thus no basis for suppression of the evidence that the police discovered.

Outcome
The court affirmed defendant's conviction for possession of marijuana with intent to sell.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

HN1 Under the "open fields" doctrine, a person has no constitutionally protected reasonable expectation of privacy in "open fields," even if he

takes steps such as erecting fences and posting "No Trespassing" signs to demonstrate a desire to bar the public from them. Police do not need a warrant or probable cause to enter onto such fields. Aerial surveillance of open fields does not constitute a search.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN2 The Fourth Amendment does not protect open fields.

Syllabus

Fourth Amendment does not protect "open fields."

Counsel: Phillip S. Resnick, Robert G. Davis, Minneapolis, Minnesota, for Appellant.

Hubert H. Humphrey III, Attorney General, Norman Coleman, Jr., St. Paul, Minnesota, Jerome Schreiber, Wabasha Cnty Attorney, Lake City, Minnesota, for Respondent.

Judges: Considered and decided by the court en banc without oral argument. Peterson, Justice.

Opinion by: PETERSON

Opinion

[*670] Defendant was charged by complaint with possession of marijuana with intent to sell, *Minn. Stat. § 152.09, subd. 1(1)*(1982). After the trial court denied defendant's motion to suppress on Fourth Amendment grounds, defendant waived his right to a trial by jury and submitted the issue of guilt to the court on stipulated facts. The court found defendant guilty as charged and stayed imposition of sentence, conditioning probation on, among other things, defendant's serving 120 days in jail. The court stayed execution of the jail term pending this appeal. On appeal, defendant argues that the court erred in denying his motion to suppress. We affirm.

An unidentified informant told **[**2]** the Wabasha County Sheriff that, while flying over and also while walking through two cornfields in Wabasha County, he had seen plants which he thought were marijuana. The sheriff and his chief deputy then flew over the area and saw two cornfields, each enclosing 1/2 to 3/4-acre cultivated plats of bushy, dark green plants which the sheriff and his deputy took to be marijuana. On September 8, 1981, the sheriff obtained and executed a search warrant. The search resulted in the discovery and seizure of 5,520 pounds of marijuana and led to the issuance and execution of a second warrant, to search two trailers near the fields of marijuana. Evidence discovered in the search of one of the trailers, which was occupied by defendant, connected defendant to the marijuana.

At the omnibus hearing the prosecutor apparently conceded that a warrant was needed to enter onto the land. The trial court decided the case on that basis, concluding that the aerial surveillance did not require a warrant and that the affidavit contained sufficient information to justify **[*671]** the issuance of the warrant to enter onto the land and examine and seize the plants.

A recent decision by the United States **[**3]** Supreme Court, *Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)*, makes it clear that the sheriff did not need a warrant to go onto the land. Relying on *Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924)*, which first announced ***HN1*** the "open fields" doctrine, the Court held (a) that a person has no constitutionally protected reasonable expectation of privacy in "open fields" even if he has taken steps -- such as erecting fences and posting "No Trespassing" signs -- to demonstrate a desire to bar the public from them and (b) that police therefore do not need a warrant or probable cause to enter onto such fields. *Oliver* also made it clear that aerial surveillance of open fields does not constitute a search. *104 S. Ct. at 1741*. Since *Oliver* makes it clear that ***HN2*** the Fourth Amendment did not protect the open fields onto which the sheriff and his deputies entered, there was no need for a warrant and, hence, **[**4]** no basis for suppression of the evidence which they discovered.

Affirmed.

Fla. v. Riley

Supreme Court of the United States

October 3, 1988, Argued ; January 23, 1989, Decided

No. 87-764

Reporter
488 U.S. 445; 109 S. Ct. 693; 102 L. Ed. 2d 835; 1989 U.S. LEXIS 580; 57 U.S.L.W. 4126

FLORIDA v. RILEY

Prior History: CERTIORARI TO THE SUPREME COURT OF FLORIDA.

Disposition: *511 So. 2d 282*, reversed.

Core Terms

helicopter, fourth amendment, altitude, feet, curtilage, greenhouse, plurality, surveillance, privacy, regulations, expectation of privacy, flying, observations, aircraft, aerial, flight, burden of proof, backyard, police officer, vantage point, inspection, reasonable expectation of privacy, air, navigable airspace, marijuana, enclosed, traffic, fence, police surveillance, naked eye

Case Summary

Procedural Posture
Plaintiff state appealed the judgment of the Supreme Court of Florida, which quashed the court of appeals' decision and reinstated the trial court's suppression order of evidence obtained when the police flew over defendant's greenhouse in a helicopter.

Overview
The police flew over a greenhouse located on defendant's property in a helicopter at 400 feet, looked into the greenhouse and saw marijuana. The police then obtained a search warrant for the greenhouse and seized the marijuana. The trial court suppressed the marijuana, the court of appeals reversed, and the state supreme court quashed the court of appeal's decision and reinstated the suppression. The Court reversed, finding that the property surveyed was within the curtilage of defendant's home and, therefore, subject to search without a warrant. Although defendant no doubt intended and expected that his greenhouse would not be open to public inspection and took precautions to protect against ground-level observation, because the sides and roof of his greenhouse were left partially open, what was growing in the greenhouse was subject to viewing from the air. Defendant could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in an aircraft flying in navigable airspace at an altitude of 500 feet where such private and commercial flight at that altitude was routine.

Outcome
The Court reversed the judgment of the Florida Supreme Court.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Certified Questions

HN1 There being no indication that the decision clearly and expressly is alternatively based on bona fide separate, adequate, and independent grounds, the United States Supreme Court has jurisdiction.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Transportation Law > Air Transportation > Airspace > Navigable Airspace

HN2 Inspection by air is not a search subject to the *U.S. Const. amend. IV*. The yard is within the curtilage of the house, a fence shields the yard from observation from the street, and the occupant had a subjective expectation of privacy. However, such an expectation was not reasonable and not one that society is prepared to honor. The home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection. As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be. Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Transportation Law > Air Transportation > Airspace > Airways

HN3 In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The *Fourth Amendment* simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

Transportation Law > Air Transportation > Airspace > General Overview

Transportation Law > Air Transportation > Maintenance & Safety

Transportation Law > Air Transportation > Rotorcraft

Transportation Law > Air Transportation > US Federal Aviation Administration > General Overview

HN4 While Federal Aviation Administration regulations permit fixed-wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing aircraft if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the FAA Administrator pursuant to 14 C.F.R. § 91.79 (1988).

Lawyers' Edition Display

Decision

Surveillance from helicopter, at altitude of 400 feet, of interior of residential backyard greenhouse held not to be "search" requiring warrant under *Fourth Amendment*.

Summary

A county sheriff's office received an anonymous tip that marijuana was being grown on the accused's property. An investigating officer discovered that he could not see from the road the contents of a greenhouse located behind the accused's mobile home, but the officer, while circling twice over the accused's property in a helicopter at an altitude of 400 feet, was able to see with his naked eye what he thought was marijuana growing in the greenhouse, of which the roof and sides were partially open. After a search, pursuant to a warrant based on the officer's observations, revealed marijuana growing in the greenhouse, the accused was charged in a Florida state court with possession of marijuana. The trial court granted the accused's motion to suppress the evidence, and the Florida Court of Appeals, Second District, reversed, but certified to the Florida Supreme Court the question whether the helicopter surveillance constituted a "search" for which a warrant was required under the *Federal Constitution's Fourth Amendment*. The Florida Supreme Court (1) held that because the accused had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers, the helicopter

surveillance constituted a "search" under the *Fourth Amendment*, (2) quashed the decision of the Court of Appeals, and (3) ordered the trial court's suppression order reinstated (*511 So 2d 282*).

On certiorari, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that because the accused did not have a reasonable expectation that the greenhouse was protected from observation from a helicopter, the helicopter surveillance did not constitute a "search" under the *Fourth Amendment*.

White, J., announced the judgment of the court and, in an opinion joined by Rehnquist, Ch. J., Scalia, and Kennedy, JJ., expressed the view that the accused could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter which was not violating the law or Federal Aviation Administration (FAA) regulations by flying over the greenhouse at an altitude of 400 feet, where (1) there was nothing in the record to suggest that helicopters flying at altitudes of 400 feet were sufficiently rare to lend substance to the accused's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude, and (2) there was no intimation that the helicopter interfered with the accused's normal use of the greenhouse or other parts of the curtilage.

O'Connor, J., concurring in the judgment, expressed the view that police observation of the greenhouse in the accused's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy that society was prepared to recognize as reasonable, because there was reason to believe that there was considerable public use of airspace at altitudes of 400 feet and above, and because the accused introduced no evidence to the contrary before the Florida courts, but that (1) the plurality's approach rested the scope of *Fourth Amendment* protection too heavily on compliance with FAA regulations whose purpose was to promote air safety, not to protect against unreasonable searches and seizures, and (2) the relevant inquiry was not whether the helicopter was where it had a right to be under FAA regulations, but whether it was in the public airways at an altitude at which members of the public traveled with sufficient regularity that the accused's expectation of privacy from aerial observation was reasonable.

Brennan, J., joined by Marshall and Stevens, JJ., dissenting, expressed the view that the helicopter surveillance of the greenhouse from an altitude of 400 feet was a "search" for which a warrant was required under the *Fourth Amendment*, because (1) public aerial observation from that altitude of the accused's curtilage was not so commonplace that the accused's expectation of privacy in his backyard could be considered unreasonable, and (2) in resolving an empirical issue as to the extent of public use of the airspace at that altitude, the state should carry the burden of proof which, in the case at bar, it failed to do.

Blackmun, J., dissenting, expressed the view that (1) since private helicopters rarely fly over curtilages at an altitude of 400 feet, the burden of proving contrary facts necessary to show that the accused lacked a reasonable expectation of privacy should be imposed on the prosecution, and the failure to carry this burden should compel a finding that a *Fourth Amendment* search occurred, and (2) since prior cases gave the parties little guidance on the burden of proof issue, the case should be remanded to allow the prosecution an opportunity to meet this burden.

Headnotes

SEARCH AND SEIZURE §2 > what constitutes search -- helicopter surveillance -- greenhouse -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]***LEdHN[1D]*** [1D]

A law enforcement officer's naked-eye surveillance from a helicopter, at an altitude of 400 feet, of the interior of a greenhouse in a residential backyard, where the roof and sides of the greenhouse are partially open, and where the officer sees what he thinks is marijuana growing in the greenhouse, will be held not to constitute a "search" under the *Federal Constitution's Fourth Amendment*, since the

resident of a mobile home behind which the greenhouse is located does not have a reasonable expectation that the greenhouse is protected from aerial observation from that altitude, where (1) four Justices are of the opinion that the resident could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter which was not violating the law or Federal Aviation Administration (FAA) regulations by flying over the greenhouse at an altitude of 400 feet, where (a) there is nothing in the record to suggest that helicopters flying at 400 feet are sufficiently rare to lend substance to the resident's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude, and (b) there is no intimation that the helicopter interfered with the resident's normal use of the greenhouse or other parts of the curtilage; and (2) a fifth Justice is of the opinion that because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because the resident introduced no evidence to the contrary before the lower courts, the resident's expectation that his curtilage was protected from naked-eye aerial observation from altitudes of 400 feet was not a reasonable one, but that (a) the scope of *Fourth Amendment* protection should not be rested heavily on compliance with FAA regulations whose purpose is to promote air safety rather than to protect against unreasonable searches and seizures, and (b) the relevant inquiry is not whether the helicopter was where it had a right to be under FAA regulations, but whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that the resident's expectation of privacy from aerial observation was reasonable. [Per White, J., Rehnquist, Ch. J., Scalia, Kennedy, and O'Connor, JJ. Dissenting: Brennan, Marshall, Stevens, Blackmun, JJ.]

SEARCH AND SEIZURE §2 > what constitutes search -- public exposure -- > Headnote:

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]

What a person knowingly exposes to the public is not a subject of protection under the search and seizure provisions of the *Federal Constitution's Fourth Amendment*. [Per White, J., Rehnquist, Ch. J., Scalia, Kennedy, O'Connor, Brennan, Marshall, and Stevens, JJ.]

SEARCH AND SEIZURE §2 > what constitutes search -- regulatory compliance -- > Headnote:

LEdHN[3A] [3A]***LEdHN[3B]*** [3B]***LEdHN[3C]*** [3C]***LEdHN[3D]*** [3D]***LEdHN[3E]*** [3E]***LEdHN[3F]*** [3F]***LEdHN[3G]*** [3G]

For purposes of determining whether a "search" has occurred under the *Federal Constitution's Fourth Amendment*, whether a person has a reasonable expectation of privacy from helicopter surveillance, at an altitude of 400 feet, of a greenhouse located on his curtilage does not depend upon the fact that the helicopter was flying at a lawful altitude under applicable Federal Aviation Administration regulations, but depends on the frequency of public flights at that altitude. [Per O'Connor, Brennan, Marshall, Stevens, and Blackmun, JJ.]

Syllabus

A Florida county sheriff's office received an anonymous tip that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not observe from ground level the contents of a greenhouse on the property -- which was enclosed on two sides and obscured from view on the other, open sides by trees, shrubs, and respondent's nearby home -- he circled twice over the property in a helicopter at the height of 400 feet and made naked-eye observations through openings in the greenhouse roof and its open sides of what he concluded were marijuana plants. After a search pursuant to a warrant obtained on the basis of these observations revealed marijuana growing in the greenhouse, respondent was charged with possession of that substance under Florida law. The trial court granted his motion to suppress the evidence. Although reversing, the State Court of Appeals certified the case to the State Supreme Court on the question whether the helicopter surveillance from 400 feet constituted a "search" for which a warrant was required under the *Fourth Amendment*. Answering that question in the affirmative, the court quashed the Court of Appeals' decision and reinstated the trial court's suppression order.

Held: The judgment is reversed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that the *Fourth Amendment* does not require the police traveling in the public airways at an altitude of 400 feet to obtain a warrant in order to observe what is visible to the naked eye. *California v. Ciraolo, 476 U.S. 207* -- which held that a naked-eye police inspection of the backyard of a house from a fixed-wing aircraft at 1,000 feet was not a "search" -- is controlling. Thus, respondent could not reasonably have expected that the contents of his greenhouse were protected from public or official inspection from the air, since he left the greenhouse's sides and roof partially open. The fact that the inspection was made from a helicopter is irrelevant, since, as in the case of fixed-wing planes, private and commercial flight by helicopter is routine. Nor, on the facts of this case, does it make a difference for *Fourth Amendment* purposes that the helicopter was flying below 500 feet, the Federal Aviation Administration's lower limit upon the navigable airspace for fixed-wing craft. Since the FAA permits helicopters to fly below that limit, the helicopter here was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Although an aerial inspection of a house's curtilage may not always pass muster under the *Fourth Amendment* simply because the aircraft is within the navigable airspace specified by law, there is nothing in the record here to suggest that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude. Moreover, there is no evidence that the helicopter interfered with respondent's normal use of his greenhouse or other parts of the curtilage, that intimate details connected with the use of the home or curtilage were observed, or that there was undue noise, wind, dust, or threat of injury. Pp. 449-452.

JUSTICE O'CONNOR concluded that the plurality's approach rests the scope of *Fourth Amendment* protection too heavily on compliance with FAA regulations, which are intended to promote air safety and not to protect the right to be secure against unreasonable searches and seizures. Whether respondent had a reasonable expectation of privacy from aerial observation of his curtilage does not depend on whether the helicopter was where it had a right to be, but, rather, on whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as "reasonable." Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because respondent introduced no evidence to the contrary before the state courts, it must be concluded that his expectation of privacy here was not reasonable. However, public use of altitudes lower than 400 feet -- particularly public observations from helicopters circling over the curtilage of a home -- may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA regulations. Pp. 452-455.

Counsel: Parker D. Thomson, Special Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs were Robert A. Butterworth, Attorney General, Candace M. Sunderland and Peggy A. Quince, Assistant Attorneys General, and Cloyce L. Mangas, Jr., Special Assistant Attorney General.

Marc H. Salton argued the cause and filed a brief for respondent. *

* Briefs of amici curiae urging reversal were filed for the State of Indiana et al. by Linley E. Pearson, Attorney General of Indiana, and Lisa M. Paunicka, Deputy Attorney General, Don Siegelman, Attorney General of Alabama, Robert K. Corbin, Attorney General of Arizona, John Steven Clark, Attorney General of Arkansas, John J. Kelly, Chief State's Attorney of Connecticut, Charles M. Oberly, Attorney General of Delaware, Warren Price III, Attorney General of Hawaii, Jim Jones, Attorney General of Idaho, Neil F. Hartigan, Attorney General of Illinois, Robert T. Stephan, Attorney General of Kansas, Frederic J. Cowan, Attorney General of Kentucky, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, William L. Webster, Attorney General of Missouri, Robert M. Spire, Attorney

Judges: WHITE, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, post, p. 452. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, post, p. 456. BLACKMUN, J., filed a dissenting opinion, post, p. 467.

Opinion by: WHITE

Opinion

[*447] **[***840]** **[**695]** JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

LEdHN[1A] [1A]On certification to it by a lower state court, the Florida Supreme Court addressed the following question: "Whether surveillance of the interior of a partially covered greenhouse **[*448]** in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the *Fourth Amendment* and *Article I, § 12 of the Florida Constitution*." *511 So. 2d 282 (1987)*. The court answered the question in the affirmative, and we granted the State's petition for certiorari challenging that conclusion. *484 U.S. 1058 (1988).* [1]

Respondent Riley lived in a mobile home located on five acres of rural property. A **[**696]** greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some **[***841]** translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet. With his naked eye, he was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure. A warrant **[*449]** was obtained based on these observations, and the ensuing search revealed marijuana growing in the greenhouse.

General of Nebraska, Lacy H. Thornburg, Attorney General of North Carolina, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Travis Medlock, Attorney General of South Carolina, Roger A. Tellinghuisen, Attorney General of South Dakota, David L. Wilkinson, Attorney General of Utah, Jeffrey Amestoy, Attorney General of Vermont, Don Hanaway, Attorney General of Wisconsin, and Joseph B. Meyer, Attorney General of Wyoming; and for the Airborne Law Enforcement Association, Inc., by Ellen M. Condon and Paul J. Marino.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by Kent L. Richland, Pamela Victorine, John A. Powell, Steve R. Shapiro, Paul Hoffman, Joan W. Howarth, and James K. Green; for Community Outreach to Vietnam Era Returnees, Inc., by Deborah C. Wyatt; and for the National Association of Criminal Defense Lawyers by Milton Hirsch.

Ronald M. Sinoway filed a brief for the California Attorneys for Criminal Justice et al. as amici curiae.

[1] The Florida Supreme Court mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the ***Fourth Amendment*** and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the ***Fourth Amendment***, and ***HN1*** there being no indication that the decision "clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds," we have jurisdiction. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

Respondent was charged with possession of marijuana under Florida law. The trial court granted his motion to suppress; the Florida Court of Appeals reversed but certified the case to the Florida Supreme Court, which quashed the decision of the Court of Appeals and reinstated the trial court's suppression order.

LEdHN[2A] [2A]We agree with the State's submission that our decision in *California v. Ciraolo, 476 U.S. 207 (1986)*, controls this case. There, acting on a tip, the police inspected the backyard of a particular house while flying in a fixed-wing aircraft at 1,000 feet. With the naked eye the officers saw what they concluded was marijuana growing in the yard. A search warrant was obtained on the strength of this airborne inspection, and marijuana plants were found. The trial court refused to suppress this evidence, but a state appellate court held that the inspection violated the *Fourth* and *Fourteenth Amendments to the United States Constitution*, and that the warrant was therefore invalid. We in turn reversed, holding that ***HN2*** the inspection was not a search subject to the *Fourth Amendment*. We recognized that the yard was within the curtilage of the house, that a fence shielded the yard from observation from the street, and that the occupant had a subjective expectation of privacy. We held, however, that such an expectation was not reasonable and not one "that society is prepared to honor." *Id., at 214*. Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion. "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection.'" *Id., at 213*, quoting *Katz v. United States, 389 U.S. 347, 351 (1967)*. As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be," *476 U.S., at 213*. Thus the police, like the public, would have been free to inspect the backyard garden from **[*450]** the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane ***HN3*** was. "In an age where private and commercial flight in the public airways is routine, it is unreasonable **[***842]** for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The *Fourth Amendment* simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id., at 215*.

LEdHN[1B] [1B]We arrive at the same conclusion in the present case. In this case, as in *Ciraolo*, **[**697]** the property surveyed was within the curtilage of respondent's home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. *511 So. 2d, at 288*. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country, *Ciraolo, supra, at 215*, and there is no indication that such flights are unheard of in Pasco County, Florida. [2] Riley could not reasonably **[*451]** have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

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[2] The first use of the helicopter by police was in New York in 1947, and today every State in the country uses helicopters in police work. As of 1980, there were 1,500 such aircraft used in police work. E. Brown, The Helicopter in Civil Operations 79 (1981). More than 10,000 helicopters, both public and private, are registered in the United States. Federal Aviation Administration, Census of U.S. Civil Aircraft, Calendar Year 1987, p. 12. See also 1988 Helicopter Annual 9. And there are an estimated 31,697 helicopter pilots. Federal Aviation Administration, Statistical Handbook of Aviation, Calendar Year 1986, p. 147.

Nor on the facts before us, does it make a difference for *Fourth Amendment* purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. [3] Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass **[***843]** muster under the *Fourth Amendment* simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to **[*452]** observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the *Fourth Amendment*.

The judgment of the Florida Supreme Court is accordingly reversed.

So ordered.

Concur by: O'CONNOR

Concur

[698]** JUSTICE O'CONNOR, concurring in the judgment.

LEdHN[1C] [1C] ***LEdHN[3A]*** [3A]I concur in the judgment reversing the Supreme Court of Florida because I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Katz v. United States, 389 U.S. 347, 361 (1967)* (Harlan, J., concurring). I write separately, however, to clarify the standard I believe follows from *California v. Ciraolo, 476 U.S. 207 (1986)*. In my view, the plurality's approach rests the scope of *Fourth Amendment* protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const., Amdt. 4*.

Ciraolo involved observation of curtilage by officers flying in an airplane at an altitude of 1,000 feet. In evaluating whether this observation constituted a search for which a warrant was required, we acknowledged the importance of curtilage in *Fourth Amendment* doctrine: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *476 U.S., at 212-213*. Although the curtilage is an area to which the private activities **[*453]** of the home extend, all police observation of the curtilage is not necessarily barred by the *Fourth Amendment*. As we observed: "The *Fourth Amendment* protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id., at 213*. In

[3] ***HN4*** While Federal Aviation Administration regulations permit fixed-wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing aircraft "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the [FAA] Administrator." 14 CFR § 91.79 (1988).

Ciraolo, we likened observation from a plane traveling in "public navigable airspace" at 1,000 feet to observation by police "passing by a home on public thoroughfares." We held that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect the curtilage to be constitutionally protected from aerial observation **[***844]** with the naked eye from an altitude of 1,000 feet. *Id., at 215*.

LEdHN[3B] [3B]Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. Although "helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft," *ante*, at 451, there is no reason to assume that compliance with FAA regulations alone determines "'whether the government's intrusion infringes upon the personal and societal values protected by the *Fourth Amendment*.'" *Ciraolo, supra, at 212* (quoting *Oliver v. United States, 466 U.S. 170, 182-183 (1984)*). Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy "society is prepared to recognize as 'reasonable'" simply mirror the FAA's safety concerns.

Observations of curtilage from helicopters at very low altitudes are not perfectly analogous to ground-level observations from public roads or sidewalks. While in both cases the police may have a legal right to occupy the physical space from which their observations are made, the two situations **[*454]** are not necessarily comparable in terms of whether expectations of privacy from such vantage points should be considered reasonable. Public roads, even those less traveled by, are clearly demarked public thoroughfares. Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid **[**699]** disclosing private activities to those who pass by. They can build a tall fence, for example, and thus ensure private enjoyment of the curtilage without risking public observation from the road or sidewalk. If they do not take such precautions, they cannot reasonably expect privacy from public observation. In contrast, even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the "precautions customarily taken by those seeking privacy." *Rakas v. Illinois, 439 U.S. 128, 152 (1978)* (Powell, J., concurring). The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation.

LEdHN[3C] [3C]In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not **[***845]** "one that society is prepared to recognize as 'reasonable.'" *Katz, supra, at 361*.Thus, in determining "'whether the government's intrusion infringes upon the personal and societal values protected by the *Fourth Amendment*,'" *Ciraolo, supra, at 212* (quoting *Oliver, supra, at 182-183*), it is not conclusive to observe, **[*455]** as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante*, at 451. Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly exposed[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

In my view, the defendant must bear the burden of proving that his expectation of privacy was a reasonable one, and thus that a "search" within the meaning of the *Fourth Amendment* even took place. Cf. *Jones v. United States, 362 U.S. 257, 261 (1960)* ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy"); *Nardone v. United States, 308 U.S. 338, 341 (1939)*.

LEdHN[1D] [1D]Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that -- particularly public observations from helicopters circling over the curtilage of a home -- may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.

Dissent by: BRENNAN; BLACKMUN

Dissent

[*456] JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The Court holds today that police officers need not obtain a warrant based on **[**700]** probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the *Fourth Amendment to the Constitution*, which safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," tolerates such an intrusion on privacy and personal security.

I

LEdHN[3D] [3D]The opinion for a plurality of the Court reads almost as if *Katz v. United States, 389 U.S. 347 (1967)*, had **[***846]** never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. *Katz* teaches, however, that the relevant inquiry is whether the police surveillance "violated the privacy upon which [the defendant] justifiably relied," *id., at 353* -- or, as Justice Harlan put it, whether the police violated an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" *Id., at 361* (concurring opinion). The result of that inquiry in any given case depends ultimately on the judgment "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, Perspectives on the *Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974); see also 1 W. LaFave, Search and Seizure § 2.1(d), pp. 310-314 (2d ed. 1987).

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed **[*457]** backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante*, at 451. This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly.

LEdHN[2B] [2B]I agree, of course, that "[w]hat a person knowingly exposes to the public . . . is not a subject of *Fourth Amendment* protection." *Katz, supra, at 351*. But I cannot agree that one "knowingly exposes [an area] to the public" solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging *Fourth Amendment* theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see

into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of *Katz*. The reason why there is no reasonable expectation of privacy in an area that is exposed to the public is that little diminution in "the amount of privacy and freedom remaining to citizens" will result from police surveillance of something that any passerby readily sees. To pretend, as the plurality opinion does, that the same is true when the police use a helicopter to peer over high fences is, at best, disingenuous. Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is **[***847]** the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determining **[*458]** whether Riley suffered a serious loss of **[**701]** privacy and personal security through the police action?

In *California v. Ciraolo, 476 U.S. 207 (1986)*, we held that whatever might be observed from the window of an airplane flying at 1,000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could insure in anything on the ground observable with the naked eye from so high. Indeed, we compared those airways to "public thoroughfares," and made the obvious point that police officers passing by a home on such thoroughfares were not required by the *Fourth Amendment* to "shield their eyes." *Id., at 213*. Seizing on a reference in *Ciraolo* to the fact that the police officer was in a position "where he ha[d] a right to be," *ibid.*, today's plurality professes to find this case indistinguishable because FAA regulations do not impose a minimum altitude requirement on helicopter traffic; thus, the officer in this case too made his observations from a vantage point where he had a right to be. [1]

It is a curious notion that the reach of the *Fourth Amendment* can be so largely defined by administrative regulations issued for purposes of flight safety. [2] It is more curious still **[*459]** that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the *Fourth Amendment*. [3] But the plurality's **[***848]** willingness to end its inquiry when it finds that the officer was in a position he had a right to be in is misguided for an even more **[**702]**

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[1] What the plurality now states as a firm rule of ***Fourth Amendment*** jurisprudence appeared in *Ciraolo*, 476 U.S., at 213, as a passing comment:

"Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E. g., United States* v. *Knotts*, 460 U.S. 276, 282 (1983)."

This rule for determining the constitutionality of aerial surveillance thus derives ultimately from *Knotts*, a case in which the police officers' feet were firmly planted on the ground. What is remarkable is not that one case builds on another, of course, but rather that a principle based on terrestrial observation was applied to airborne surveillance without any consideration whether that made a difference.

[2] The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet (1,000 feet over congested areas), while helicopters may be operated below those levels. See *ante*, at 451, n. 3. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

[3] In *Oliver* v. *United States*, 466 U.S. 170 (1984), for example, we held that police officers who trespassed upon posted and fenced private land did not violate the ***Fourth Amendment***, despite the fact that their action was subject to criminal sanctions. We noted that the interests vindicated by the ***Fourth Amendment*** were not identical with those served by the common law of trespass. See *id.*, at 183-184, and n. 15; see also *Hester* v. *United States*, 265 U.S. 57 (1924) (trespass in "open fields" does not violate the

fundamental reason. Finding determinative the fact that the officer was where he had a right to be is, at bottom, an attempt to analogize surveillance from a helicopter to surveillance by a police officer standing on a public road and viewing evidence of crime through an open window or a gap in a fence. In such a situation, the occupant of the home may be said to lack any **[*460]** reasonable expectation of privacy in what can be seen from that road -- even if, in fact, people rarely pass that way.

LEdHN[3E] [3E]The police officer positioned 400 feet above Riley's backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley's fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access. In such circumstances it makes no more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in *Katz* by the legality of the officer's position outside the telephone booth. The simple inquiry whether the police officer had the legal right to be in the position from which he made his observations cannot suffice, for we cannot assume that Riley's curtilage was so open to the observations of passersby in the skies that he retained little privacy or personal security to be lost to police surveillance. The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not "one that society is prepared to recognize as 'reasonable.'" *Katz, 389 U.S., at 361* (Harlan, J., concurring). [4] While, as we held in *Ciraolo*, air traffic at elevations of 1,000 feet or more may be so common that whatever could be seen with the naked eye from that elevation is unprotected by the *Fourth Amendment*, it is a large step from there to say that the Amendment offers no protection against low-level helicopter surveillance of enclosed curtilage **[*461]** areas. To **[***849]** take this step is error enough. That the plurality does so with little analysis beyond its determination that the police complied with FAA regulations is particularly unfortunate.

II

Equally disconcerting is the lack of any meaningful limit to the plurality's holding. It is worth reiterating that the FAA regulations the plurality relies on as establishing that the officer was where he had a right to be set no minimum flight altitude for helicopters. It is difficult, therefore, to see what, if any, helicopter surveillance would run afoul of the plurality's rule that there exists no reasonable expectation of privacy as long as the helicopter is where it has a right to be.

Only in its final paragraph does the plurality opinion suggest that there might be some limits to police helicopter surveillance beyond those imposed by FAA regulations:

> "Neither is there any intimation here that the helicopter interfered with

Fourth Amendment). In *Olmstead* v. *United States*, 277 U.S. 438, 466-469 (1928), the illegality under state law of a wiretap that yielded the disputed evidence was deemed irrelevant to its admissibility. And of course *Katz* v. *United States*, 389 U.S. 347 (1967), which overruled *Olmstead*, made plain that the question whether or not the disputed evidence had been procured by means of a trespass was irrelevant. Recently, in *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 239, n. 6 (1986), we declined to consider trade-secret laws indicative of a reasonable expectation of privacy. Our precedent thus points not toward the position adopted by the plurality opinion, but rather toward the view on this matter expressed some years ago by the Oregon Court of Appeals: "We . . . find little attraction in the idea of using FAA regulations because they were not formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety." *State* v. *Davis*, 51 Ore. App. 827, 831, 627 P. 2d 492, 494 (1981).

[4] Cf. *California* v. *Greenwood*, 486 U.S. 35, 54 (1988) (BRENNAN, J., dissenting) ("The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents . . .").

> respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the *Fourth Amendment*." *Ante*, at 452. [5]

[703]** I will deal with the "intimate details" below. For the rest, one wonders what the plurality believes the purpose of the *Fourth Amendment* to be. If through noise, wind, dust, and threat of injury from helicopters the State "interfered with respondent's normal use of the greenhouse or of other parts **[*462]** of the curtilage," Riley might have a cause of action in inverse condemnation, but that is not what the *Fourth Amendment* is all about. Nowhere is this better stated than in JUSTICE WHITE'S opinion for the Court in *Camara v. Municipal Court, 387 U.S. 523, 528 (1967)*: "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." See also *Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)* (same); *Schmerber v. California, 384 U.S. 757, 767 (1966)* ("The overriding function of the *Fourth Amendment* is to protect personal privacy and dignity against unwarranted intrusion by the State"); *Wolf v. Colorado, 338 U.S. 25, 27 (1949)* ("The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the *Fourth Amendment* . . ."), overruled on other grounds, *Mapp v. Ohio, 367 U.S. 643 (1961)*; *Boyd v. United States, 116 U.S. 616, 630 (1886)* ("It is not the **[***850]** breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . .").

If indeed the purpose of the restraints imposed by the *Fourth Amendment* is to "safeguard the privacy and security of individuals," then it is puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed. Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all -- and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would today's **[*463]** plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the *Fourth Amendment* is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.

III

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." *Ante*, at 452. What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the *Fourth* **[**704]** *Amendment* or in our cases is there any warrant for imposing a requirement that the activity

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[5] Without actually stating that it makes any difference, the plurality also notes that "there is nothing in the record or before us to suggest" that helicopter traffic at the 400-foot level is so rare as to justify Riley's expectation of privacy. *Ante*, at 451. The absence of anything "in the record or before us" to suggest the opposite, however, seems not to give the plurality pause. It appears, therefore, that it is the FAA regulations rather than any empirical inquiry that is determinative.

observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the *Fourth Amendment's* protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very **[*464]** nice people," *United States v. Rabinowitz, 339 U.S. 56, 69 (1950)* (dissenting opinion), and nowhere is this observation more apt than in the area of the *Fourth Amendment*, whose words have necessarily **[***851]** been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the *Fourth Amendment* imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." 58 Minn. L. Rev., at 403. [6]

IV

LEdHN[3F] [3F]I find little to disagree with in JUSTICE O'CONNOR's concurrence, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of **[*465]** public observation of his backyard from aerial traffic at 400 feet.

What separates me from JUSTICE O'CONNOR is essentially an empirical matter concerning the extent of public use of the airspace at that altitude, together with the question of how to resolve that issue. I do not think the constitutional claim should fail simply because "there is reason to believe" that there is "considerable" public flying this close to earth or because Riley "introduced no evidence to the contrary before the Florida courts." *Ante*, at 455 (O'CONNOR, J., concurring in judgment). I should think that this might be an apt occasion for the application of Professor Davis' distinction between "adjudicative" and "legislative" facts. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402-410 (1942); see also Advisory Committee's Notes on *Fed. Rule Evid. 201*, 28 U. S. C. App., pp. 683-684. If so, I think we could take judicial notice that, while there may be an occasional privately owned helicopter that flies over populated areas at an altitude of 400 feet, such flights are a rarity and are almost entirely limited to approaching or leaving airports or to reporting traffic congestion near major roadways. And, as the concurrence agrees, **[**705]** *ante*, at 455, the extent of police surveillance traffic cannot serve as a bootstrap to demonstrate public use of the airspace.

If, however, we are to resolve the **[***852]** issue by considering whether the appropriate party carried its burden of proof, I again think that Riley must prevail. Because the State has greater access to information concerning

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[6] See also *United States* v. *White*, 401 U.S. 745, 789-790 (1971) (Harlan, J., dissenting):

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. . . . The interest [protected by the ***Fourth Amendment***] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously . . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

customary flight patterns and because the coercive power of the State ought not be brought to bear in cases in which it is unclear whether the prosecution is a product of an unconstitutional, warrantless search, cf. *Bumper v. North Carolina, 391 U.S. 543, 548 (1968)* (prosecutor has burden of proving consent to search), the burden of proof properly rests with the State and **[*466]** not with the individual defendant. The State quite clearly has not carried this burden. [7]

V

The issue in this case is, ultimately, "how tightly the *fourth amendment* permits people to be driven back into the recesses of their lives by the risk of surveillance." Amsterdam, *supra*, at 402. The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. While JUSTICE O'CONNOR's opinion gives reason to hope that this altitude may constitute a lower limit, I find considerable cause for concern in the fact that a plurality of four Justices would remove virtually all constitutional barriers to police surveillance from the vantage point of helicopters. The *Fourth Amendment* demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Nineteen Eighty-Four 4 (1949).

[*467] Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.

JUSTICE BLACKMUN, dissenting.

LEdHN[3G] [3G]The question before the Court is whether the helicopter surveillance over Riley's property constituted a "search" within the meaning of the *Fourth Amendment*. Like JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE STEVENS, and JUSTICE O'CONNOR, I believe that answering this question depends upon whether Riley has a **[***853]** "reasonable expectation of privacy" that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much.

The inquiry then becomes how to determine whether Riley's expectation was a reasonable one. JUSTICE BRENNAN, the two Justices who have joined him, and JUSTICE O'CONNOR all believe that the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet. Again, I agree.

How is this factual issue to be decided? JUSTICE BRENNAN suggests that we may **[**706]** resolve it ourselves without any evidence in the record on this point. I am wary of this approach. While I, too, suspect that for most American communities it is a rare event when nonpolice helicopters fly over one's curtilage at an altitude of 400 feet, I am not convinced that we should establish a *per se* rule for the entire Nation based on judicial suspicion alone. See Coffin, Judicial Balancing, *63 N. Y. U. L. Rev. 16, 37 (1988)*.

But we need not abandon our judicial intuition entirely. The opinions of both JUSTICE BRENNAN and JUSTICE O'CONNOR, by their use of "cf." citations, implicitly recognize that none of our prior decisions tells us who has the burden of proving whether Riley's expectation of privacy

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[7] The issue in *Jones v. United States, 362 U.S. 257, 261 (1960)*, cited by JUSTICE O'CONNOR, was whether the defendant had standing to raise a ***Fourth Amendment*** challenge. While I would agree that the burden of alleging and proving facts necessary to show standing could ordinarily be placed on the defendant, I fail to see how that determination has any relevance to the question where the burden should lie on the merits of the ***Fourth Amendment*** claim.

was reasonable. In the absence of precedent on the point, it is appropriate for us to take into account our estimation of the **[*468]** frequency of nonpolice helicopter flights. See 4 W. LaFave, Search and Seizure § 11.2(b), p. 228 (2d ed. 1987) (burdens of proof relevant to *Fourth Amendment* issues may be based on a judicial estimate of the probabilities involved). Thus, because I believe that private helicopters rarely fly over curtilages at an altitude of 400 feet, I would impose upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy. Indeed, I would establish this burden of proof for any helicopter surveillance case in which the flight occurred below 1,000 feet -- in other words, for any aerial surveillance case not governed by the Court's decision in *California v. Ciraolo, 476 U.S. 207 (1986)*.

In this case, the prosecution did not meet this burden of proof, as JUSTICE BRENNAN notes. This failure should compel a finding that a *Fourth Amendment* search occurred. But because our prior cases gave the parties little guidance on the burden of proof issue, I would remand this case to allow the prosecution an opportunity to meet this burden.

The order of this Court, however, is not to remand the case in this manner. Rather, because JUSTICE O'CONNOR would impose the burden of proof on Riley and because she would not allow Riley an opportunity to meet this burden, she joins the plurality's view that no *Fourth Amendment* search occurred. The judgment of the Court, therefore, is to reverse outright on the *Fourth Amendment* issue. Accordingly, for the reasons set forth above, I respectfully dissent.

References

68 Am Jur 2d, Searches and Seizures 8, *207 Federal Procedural Forms, L Ed, Criminal Procedure 20:611-20:6148 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 241, 242, 250, 258USCS, Constitution, Amendment 4*US L Ed Digest, Search and Seizure 2Index to Annotations, Aviation; Curtilage; Observation; Privacy; Search and Seizure; Surveillance Annotation References:What is within "curtilage" of house or other building, so as to be within protection from unreasonable searches and seizures, under *Federal Constitution's Fourth Amendment*. *94 L Ed 2d 913.Validity of seizure under Fourth Amendment* "plain view" doctrine. *75 L Ed 2d 1018.Aerial observation or surveillance as violative of Fourth Amendment* guaranty against unreasonable search and seizure. *56 ALR Fed 772.*

United States v. Dunn

Supreme Court of the United States

January 20, 1987, Argued ; March 3, 1987, Decided

No. 85-998

Reporter
480 U.S. 294; 107 S. Ct. 1134; 94 L. Ed. 2d 326; 1987 U.S. LEXIS 1057; 55 U.S.L.W. 4251

UNITED STATES v. DUNN

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *782 F.2d 1226*, reversed.

Core Terms

barn, curtilage, fourth amendment, fence, outbuildings, open field, gate, premises, front, yards, privacy, ranch, reasonable expectation of privacy, domestic, enclosed, expectation of privacy, dwelling, farmhouse, netting, locked, wooden, farm, intrusion, contents, searched, factors, inside, fourth amendment protection, warrantless, buildings

Case Summary

Procedural Posture
The United States Court of Appeals for the Fifth Circuit reversed defendant's conviction for drug-related offenses on the grounds that certain evidence obtained as a result of drug enforcement agents' entry onto an area surrounding defendant's barn should have been suppressed. The government appealed.

Overview
Drug enforcement agents began investigating defendant after he purchased large quantities of chemicals used to manufacture illegal drugs. The agents watched defendant place the chemicals in a barn on his ranch and observed a laboratory. Agents then made a warrantless entry on the property to confirm their suspicions. After obtaining a warrant, the agents arrested defendant. Defendant was convicted of drug-related offenses. The appellate court reversed defendant's conviction finding that the evidence should have been suppressed because it was seized pursuant to the unlawful warrantless entry. The appellate court also found that the barn was within the protective ambit of the *Fourth Amendment* because it was within the curtilage of the residence. On appeal, the court held that the barn lay outside the curtilage of the ranch house. The barn was 50 yards from the fence surrounding the house and 60 yards from the house itself. The barn did not lie within the area surrounding the house that was enclosed by a fence. Agents also knew that the barn was not being used for intimate activities of the home.

Outcome
The court reversed the decision because the area surrounding the barn did not lie within the curtilage of defendant's ranch house. The *Fourth Amendment* protections afforded defendant's house could not be expanded to include the area surrounding the barn.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > General Overview

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN1 The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the *Fourth Amendment*. The *Fourth Amendment's* protection accorded persons, houses, papers, and effects did not extend to the open fields. The distinction between a person's house and open fields is as old as the common law.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN2 The *Fourth Amendment* protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. The central component of this inquiry is whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN3 Curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. It is not the case that combining these factors produces a finely tuned formula that, when mechanically applied, yields a correct answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration, whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of *Fourth Amendment* protection.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN4 Fencing configurations are important factors in defining the curtilage, but the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN5 For most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage, as the area around the home to which the activity of home life extends, is a familiar one easily understood from our daily experience.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN6 An open field is neither a house nor an effect, and, therefore, the government's intrusion upon the open fields is not one of those unreasonable searches proscribed by the text of the *Fourth Amendment*. It is expressly not the case that the erection of fences on an open field creates a constitutionally protected privacy interest. The term open fields may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither open nor a field as those terms are used in common speech.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN7 Warrantless naked-eye aerial observation of a home's curtilage did not violate the *Fourth Amendment*. The *Fourth Amendment* has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.

Lawyers' Edition Display

Decision

Peering, without warrant, into barn's front held not to violate *Fourth Amendment*, because (1)

barn was not within curtilage, and (2) observations from open fields did not violate any other privacy expectation.

Summary

By means of electronic beepers and aerial photography, phenylacetic acid and other supplies which could be used in drug preparation were traced to the vicinity of a barn on a suspect's 198-acre ranch. The barn was located about 60 yards away from the suspect's ranch house residence, which was itself about one-half mile from a public road. The ranch had both a perimeter fence and several interior fences, including a fence which surrounded the ranch house but did not enclose the barn. On the evening of November 5, 1980, law enforcement officials, without a warrant, entered the ranch property, crossed several fences, smelled phenylacetic acid and heard a motor running, and approached the barn. The officers did not enter the barn, but, shining a flashlight, peered into the front of the barn and observed what one officer thought to be a drug laboratory. The officers left, made two similar visits on November 6, obtained a search warrant, and, on November 8, seized chemicals and equipment at the barn and ranch house. The United States District Court for the Western District of Texas denied the suspect's motion to suppress all evidence seized pursuant to the warrant, and the suspect was convicted of several federal drug-related charges. In 1982, on appeal, the United States Court of Appeals for the Fifth Circuit reversed the conviction, expressing the view that (1) the barn in question lay within the curtilage of the ranch house and thus within the protective ambit of the *Fourth Amendment to the United States Constitution*, (2) no other exigent circumstances existed to justify the officers' warrantless searches, and (3) the evidence gathered on November 8, by virtue of a warrant issued on the basis of information collected during the unconstitutional entries and viewings, ought to have been excluded from the case (*674 F2d 1093*). *The United States Supreme Court (467 US 1201, 81 L Ed 2d 340, 104 S Ct 2380*) vacated the judgment of the Court of Appeals for reconsideration in light of another Supreme Court *Fourth Amendment* decision. On remand, the Court of Appeals initially determined that (1) the barn was not within the curtilage, but (2) the conviction still ought to be reversed, because the officers, by approaching the barn and peering into it, violated the suspect's reasonable expectation of privacy in the barn, as part of the suspect's place of business (*766 F2d 880*). Eventually, however, after the Federal Government had filed a petition for certiorari, the Court of Appeals reinstated its original 1982 opinion, expressing the view that the barn was inside the protected curtilage (*782 F2d 1226*).

On certiorari, the United States Supreme Court reversed. In an opinion by White, J., joined by Rehnquist, Ch. J., and Blackmun, Powell, Stevens, and O'Connor, JJ., and joined in part (as to all but holding 1(c) below) by Scalia, J., it was held that (1) the barn and the area around it lay outside the protected curtilage of the suspect's ranch house, so that the warrantless observation of the barn and surrounding area did not constitute a search of the curtilage in violation of the *Fourth Amendment*, where (a) the barn was located a substantial distance away from the ranch house, (b) the barn did not lie within the area that was enclosed by a fence which surrounded the ranch house, (c) the officers possessed objective data which indicated that the barn was not being used for intimate activities of the home, and (d) the suspect did little to protect the barn area from observation by those standing in the open fields; and (2) even assuming that the suspect had an expectation of privacy in the barn which was independent of the curtilage doctrine, the *Fourth Amendment* was not violated, where the officers never entered the barn or any other structure on the premises, and merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front.

Scalia, J., concurring, joined the opinion of White, J., except as to holding 1(c) above, and expressed the view that, for the purpose of determining whether the barn lay within the curtilage of the ranch house, it was significant that the barn was not being used for intimate activities of the home, but whether law enforcement officials knew it was not especially significant.

Brennan, J., joined by Marshall, J., dissented, expressing the view that (1) the barn and

surrounding area invaded by law enforcement officers lay within the protected curtilage of the suspect's ranch house, because, for curtilage purposes, a barn was an integral part of a farm home; and (2) the officers infringed on the suspect's reasonable expectation of privacy in the barn and its contents, where the barn was an essential part of the suspect's business.

Headnotes

SEIZURE §8 > curtilage -- barn in vicinity of ranch house -- necessity of warrant -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]

A barn and the area around it lie outside the protected curtilage of a suspect's ranch house, so that the warrantless observation, by law enforcement officers, of the barn and surrounding area do not constitute a search of the curtilage in violation of the *Fourth Amendment to the United States Constitution*, where (1) the barn was located a substantial distance away, 50 yards from a fence surrounding the house, and 60 yards from the house itself; (2) the barn did not lie within the area that was enclosed by the fence which surrounded the ranch house; (3) the officers possessed objective data--such as aerial photographs of a truck apparently ready for unloading, the smell of an acid used in drug preparation, and the sound of a motor running--which indicated the barn was not being used for intimate activities of the home; and (4) the suspect did little to protect the barn area from observation by those standing in the open fields, since the ranch's various interior fences were designed to corral livestock, not to prevent observation. (Scalia, J., dissented in part from this holding; Brennan and Marshall, JJ., dissented from this holding.)

SEIZURE §8 > open fields -- view into barn -- necessity of warrant -- > Headnote:

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]***LEdHN[2C]*** [2C]***LEdHN[2D]*** [2D]***LEdHN[2E]*** [2E]

Even assuming that a suspect's barn is an essential part of his business and enjoys *Fourth Amendment* protection under an expectation of privacy which is independent of a claim that the barn lies within the curtilage of a ranch house in the vicinity, the *Fourth Amendment to the United States Constitution* is not violated by the warrantless observation of the barn and surrounding area by law enforcement officers, where (1) the officers crossed over the suspect's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the waist-high, locked front gate of the barn, and (2) the officers never entered the barn or any other structure on the premises, and merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front; the officers' use of the beam of a flashlight, directed through the essentially open front of the barn, does not transform their observations into an unreasonable search within the meaning of the *Fourth Amendment*. (Brennan and Marshall, JJ., dissented from this holding.)

SEIZURE §8 > curtilage of home -- factors -- > Headnote:

LEdHN[3A] [3A]***LEdHN[3B]*** [3B]

The *Fourth Amendment to the United States Constitution* protects the curtilage of a home; curtilage questions should be resolved with particular reference to four factors: (1) the proximity to the home of the area which is claimed to be curtilage, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by; combining these factors does not produce a finely tuned, mechanically applied formula, and these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration--whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of *Fourth Amendment* protection. (Brennan and Marshall, JJ., dissented in part from this holding.)

SEIZURE §8 > open fields -- > Headnote:

LEdHN[4] [4]

An open field is neither a "house" nor an "effect," and, therefore, the government's intrusion upon

the open fields is not one of those unreasonable searches proscribed by the text of the *Fourth Amendment to the United States Constitution*; the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage; an open field need be neither "open" nor a "field" as those terms are used in common speech.

SEIZURE §8 > site of observation -- > Headnote:

LEdHN[5] [5]

For purposes of the search and seizure requirements of the *Fourth Amendment to the United States Constitution*, there is no constitutional difference between police observations conducted (1) while in a public place, and (2) while standing in the open fields.

Syllabus

In 1980, Drug Enforcement Administration agents, having discovered that one Carpenter had bought large quantities of chemicals and equipment used to make controlled substances, placed tracking "beepers" in some of the equipment and one of the chemical containers, which, when transported in Carpenter's truck, led the agents to respondent's ranch. Aerial photographs of the ranch showed the truck backed up to a barn behind the ranch house. The ranch was completely encircled by a perimeter fence, and contained several interior barbed wire fences, including one around the house approximately 50 yards from the barn, and a wooden fence enclosing the front of the barn, which had an open overhang and locked, waist-high gates. Without a warrant, officers crossed the perimeter fence, several of the barbed wire fences, and the wooden fence in front of the barn. They were led there by the smell of chemicals, and, while there, could hear a motor running inside. They did not enter the barn but stopped at the locked gate and shined a flashlight inside, observing what they took to be a drug laboratory. They then left the ranch, but entered it twice the next day to confirm the laboratory's presence. They obtained a search warrant and executed it, arresting respondent and seizing chemicals and equipment, as well as bags of amphetamines they discovered in the house. After the District Court denied respondent's motion to suppress all evidence seized pursuant to the warrant, respondent and Carpenter were convicted of conspiracy to manufacture controlled substances and related offenses. However, the Court of Appeals reversed, holding that the barn was within the residence's curtilage and therefore within the *Fourth Amendment's* protective ambit.

Held:

1. The area near the barn is not within the curtilage of the house for *Fourth Amendment* purposes. Extent-of-curtilage questions should be resolved with particular reference to the following four factors, at least to the extent that they bear upon whether the area claimed to be curtilage is so intimately tied to the home itself that it should be placed under the home's "umbrella" of protection: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby. Applying the *first* factor to the instant case, the barn's substantial distance from the fence surrounding the house (50 yards) and from the house itself (60 yards) supports no inference that it should be treated as an adjunct of the house. *Second*, the barn did not lie within the fence surrounding the house, which plainly demarks the area that is part and parcel of the house, but stands out as a distinct and separate portion of the ranch. *Third*, it is especially significant that the officers possessed objective data indicating that the barn was not being used as part of respondent's home, in that the aerial photographs showed that Carpenter's truck was backed up to the barn, apparently to unload its contents which included the chemical container, and the officers detected strong chemical odors coming from, and heard a motor running in, the barn. *Fourth*, respondent did little to protect the barn area from observation by those standing outside, the ranch's fences being of the type used to corral livestock, not to ensure privacy. Pp. 300-303.

2. Respondent's contention that, because the barn is essential to his business, he possessed an expectation of privacy in it and its contents

independent from his home's curtilage, is without merit. Even assuming that the barn could not be entered lawfully without a warrant, respondent's argument ignores the fact that, prior to obtaining the warrant, the officers never entered the barn but conducted their observations from the surrounding open fields after crossing over respondent's ranch-style fences. The Court's prior decisions have established that the Government's intrusion upon open fields is not an unreasonable search; that the erection of fences on an open field -- at least of the type involved here -- does not create a constitutionally protected privacy interest; that warrantless naked-eye observation of an area protected by the *Fourth Amendment* is not unconstitutional; and that shining a flashlight into a protected area, without probable cause to search the area, is permissible. Pp. 303-305.

Counsel: Roy T. Englert, Jr., argued the cause for the United States. With him on the briefs were Solicitor General Fried, Assistant Attorney General Trott, and Deputy Solicitor General Bryson.

Louis Dugas, Jr., argued the cause and filed a brief for respondent.

Judges: WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined, and in all but the paragraph headed "Third" in Part II of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part, post, p. 305. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 305.

Opinion by: WHITE

Opinion

[*296] [*331] [**1137]** JUSTICE WHITE delivered the opinion of the Court.

LEdHN[1A] [1A] ***LEdHN[2A]*** [2A]We granted the Government's petition for certiorari to decide whether the area near a barn, located approximately 50 yards from a fence surrounding a ranch house, is, for *Fourth Amendment* purposes, within the curtilage of the house. The Court of Appeals for the Fifth **[***332]** Circuit held that the barn lay within the house's curtilage, and that the District Court should have suppressed certain evidence obtained as a result of law enforcement officials' intrusion onto the area immediately surrounding the barn. *782 F.2d 1226 (1986)*. We conclude that the barn and the area around it lay outside the curtilage of the house, and accordingly reverse the judgment of the Court of Appeals.

I

Respondent Ronald Dale Dunn and a codefendant, Robert Lyle Carpenter, were convicted by a jury of conspiring to manufacture phenylacetone and amphetamine, and to possess amphetamine with intent to distribute, in violation of *21 U. S. C. § 846*. Respondent was also convicted of manufacturing these two controlled substances and possessing amphetamine with intent to distribute. The events giving rise to respondent's apprehension and conviction began in 1980 when agents from the Drug Enforcement Administration (DEA) discovered that Carpenter had purchased large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone. DEA agents obtained warrants from a Texas state judge authorizing installation of miniature electronic transmitter tracking devices, or "beepers," in an electric hot plate stirrer, a drum of acetic anhydride, and a container holding phenylacetic acid, a precursor to phenylacetone. All of these items had been ordered by **[*297]** Carpenter. On September 3, 1980, Carpenter took possession of the electric hot plate stirrer, but the agents lost the signal from the "beeper" a few days later. The agents were able to track the "beeper" in the container of chemicals, however, from October 27, 1980, until November 5, 1980, on which date Carpenter's pickup truck, which was carrying the container, arrived at respondent's ranch. Aerial photographs of the ranch property showed Carpenter's truck backed up to a barn behind the ranch house. The agents also began receiving transmission signals from the "beeper" in the hot plate stirrer that they had lost in early September and determined that the stirrer was on respondent's ranch property.

Respondent's ranch comprised approximately 198 acres and was completely encircled by a

perimeter fence. The property also contained several interior fences, constructed mainly of posts and multiple strands of barbed wire. The ranch residence was situated 1/2 mile from a public road. A fence encircled the residence and a nearby small greenhouse. Two barns were located approximately 50 yards from this fence. The front of the larger of the two barns was enclosed by a wooden fence and had an open overhang. Locked, waist-high gates barred entry into the barn proper, and netting material stretched from the ceiling to the top of the wooden gates.

On the evening of November 5, 1980, law enforcement officials made a warrantless entry onto respondent's ranch property. A DEA agent accompanied by an officer from the Houston Police Department crossed over the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, the DEA agent smelled what he believed to be phenylacetic acid, the odor coming from **[***333]** the direction of the barns. The officers approached the smaller of the barns -- crossing over a barbed wire fence -- and, looking **[**1138]** into the barn, observed only empty boxes. The officers then proceeded to the larger barn, crossing another **[*298]** barbed wire fence as well as a wooden fence that enclosed the front portion of the barn. The officers walked under the barn's overhang to the locked wooden gates and, shining a flashlight through the netting on top of the gates, peered into the barn. They observed what the DEA agent thought to be a phenylacetone laboratory. The officers did not enter the barn. [1] At this point the officers departed from respondent's property, but entered it twice more on November 6 to confirm the presence of the phenylacetone laboratory.

On November 6, 1980, at 8:30 p.m., a Federal Magistrate issued a warrant authorizing a search of respondent's ranch. DEA agents and state law enforcement officials executed the warrant on

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[1] In denying respondent's motion to suppress all evidence obtained as a result of the search warrant, the District Court Judge stated that the law enforcement officials, during their incursions onto respondent's property, "did not invade the premises, that is, the houses or the barns. . . ." Tr. 216. The Court of Appeals did not disturb this finding. At the suppression hearing, the DEA agent described the officers' approach to the large barn on November 5:

"A. We came back around, we crossed a small wooden type fence here, which put us right underneath a type of a tin overhang and in front of us was a wooden locked gate. . . .

. . . .

"Q. How high was that gate?

"A. It probably came up to my waist, estimated.

"Q. Was that gate open or shut?

"A. It was shut and it was locked.

"Q. Was there anything above that gate?

"A. Yes, there was.

"Q. What was that?

"A. A fish netting, kind of a netting, that was hanging from the ceiling down to the gate.

"Q. Did you cross over that gate and go into the barn?

"A. No.

"Q. Did you stand outside the gate?

"A. We stood right at the gate."

App. 17-18.

November 8, 1980. [2] The officers arrested respondent [*299] and seized chemicals and equipment, as well as bags of amphetamines they discovered in a closet in the ranch house.

The District Court denied respondent's motion to suppress all evidence seized pursuant to the warrant and respondent and Carpenter were convicted. In a decision rendered in 1982, the Court of Appeals reversed respondent's conviction. *United States v. Dunn, 674 F.2d 1093*. The court concluded that the search warrant had been issued based on information obtained during the officers' unlawful warrantless entry onto respondent's ranch property and, therefore, all evidence seized pursuant to the warrant should have been suppressed. Underpinning this conclusion was the court's reasoning that "the barn in question was within the curtilage of the residence and was within the protective ambit of the *fourth amendment*." *Id., at 1100*. We granted the Government's petition for certiorari, vacated the judgment of the Court of Appeals, and remanded the case for further consideration in light of *Oliver v. United States, 466 U.S. 170 (1984)*. *467 U.S. 1201 (1984)*. On remand, the Court of Appeals reaffirmed its judgment that the evidence seized pursuant to the warrant should have been suppressed, [***334] but altered the legal basis supporting this conclusion: the large barn was not within the curtilage of the house, but by standing outside the barn and peering into the structure, the officers nonetheless violated respondent's "reasonable expectation of privacy in his barn and its contents." *766 F.2d 880, 886 (1985)*. The Government again filed a petition for certiorari. On January 17, 1986, before this Court acted on the petition, the Court of Appeals recalled and vacated its judgment issued on remand, stating that it would enter a new judgment in due course. *781 F.2d 52*. On February 4, 1986, the Court of Appeals reinstated the original opinion rendered in 1982, asserting that "[upon] studied [**1139] reflection, we now conclude and hold that the barn was inside the protected curtilage." *782 F.2d, at 1227*. The Government thereupon submitted a supplement to its petition for certiorari, revising the question presented [*300] to whether the barn lay within the curtilage of the house. We granted the petition, *477 U.S. 903*, and now reverse.

II

HN1 The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the *Fourth Amendment*. *Hester v. United States, 265 U.S. 57, 59 (1924)*, held that the *Fourth Amendment's* protection accorded "persons, houses, papers, and effects" did not extend to the open fields, the Court observing that the distinction between a person's house and open fields "is as old as the common law. 4 Bl. Comm. 223, 225, 226." [3]

LEdHN[3A] [3A]We reaffirmed the holding of *Hester* in *Oliver v. United States, supra.* There, we recognized that ***HN2*** the *Fourth Amendment* protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. *466 U.S., at 180*. We identified the central component of this inquiry as whether the area harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Ibid*. (quoting *Boyd v. United States, 116 U.S. 616, 630 (1886)*).

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[2] Prior to the actual search of the barn and ranch house, the agents entered the property for further observations.

[3] In the section of Blackstone's Commentaries which the Court cited, Blackstone described the elements of common-law burglary, and elaborated on the element that a breaking occur in a mansion or dwelling house. In defining the terms "mansion or dwelling-house," Blackstone wrote that "no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence. . . ." 4 W. Blackstone, Commentaries *225. Blackstone observed, however, that "if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall." *Ibid*.

[*301] ***LEdHN[1B]*** [1B]***LEdHN[3B]*** [3B]Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that ***HN3*** curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area [***335] is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *California v. Ciraolo, 476 U.S. 207, 221 (1986)* (POWELL, J., dissenting) (citing *Care v. United States, 231 F.2d 22, 25* (CA10), cert. denied, *351 U.S. 932 (1956)*; *United States v. Van Dyke, 643 F.2d 992, 993-994 (CA4 1981)*).[4] We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage [**1140] questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of *Fourth Amendment* protection. Applying these factors to respondent's barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

[*302] *First*. The record discloses that the barn was located 50 yards from the fence surrounding the house and 60 yards from the house itself. *766 F.2d, at 882-883*; *782 F.2d, at 1228*. Standing in isolation, this substantial distance supports no inference that the barn should be treated as an adjunct of the house.

Second. It is also significant that respondent's barn did not lie within the area surrounding the house that was enclosed by a fence. We noted in *Oliver, supra*, that ***HN5*** "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage -- as the area around the home to which the activity of home life extends -- is a familiar one easily understood from our daily experience." *466 U.S., at 182, n. 12*. Viewing the physical layout of respondent's ranch in its entirety, see *782 F.2d, at 1228*, it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Conversely, the barn -- the front portion itself enclosed by a fence -- and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence.

Third. It is especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. The aerial photographs showed that the [***336] truck Carpenter had been driving that contained the container of phenylacetic acid was backed up to the barn, "apparently," in the words of the Court of Appeals, "for the unloading of its contents." *674 F.2d, at 1096*. When on respondent's property, the officers' suspicion was further directed toward the barn because of "a very strong odor" of phenylacetic acid. App. 15. As the DEA agent approached the barn, he "could hear a motor running, like a pump motor of some sort. . . ." *Id*., at 17. Furthermore, the officers detected an "extremely strong" odor of phenylacetic acid coming from a small crack in the [*303] wall of the barn. *Ibid*. Finally, as the officers were standing in front of the barn, immediately prior to looking into its interior

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[4] We decline the Government's invitation to adopt a "bright-line rule" that "the curtilage should extend no farther than the nearest fence surrounding a fenced house." Brief for United States 14. ***HN4*** Fencing configurations are important factors in defining the curtilage, see *infra*, at 302, but, as we emphasize above, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home. Application of the Government's "first fence rule" might well lead to diminished ***Fourth Amendment*** protection in those cases where a structure lying outside a home's enclosing fence was used for such domestic activities. And, in those cases where a house is situated on a large parcel of property and has no nearby enclosing fence, the Government's rule would serve no utility; a court would still be required to assess the various factors outlined above to define the extent of the curtilage.

through the netting material, "the smell was very, very strong . . . [and the officers] could hear the motor running very loudly." *Id*., at 18. When considered together, the above facts indicated to the officers that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home.

Fourth. Respondent did little to protect the barn area from observation by those standing in the open fields. Nothing in the record suggests that the various interior fences on respondent's property had any function other than that of the typical ranch fence; the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas.

III

LEdHN[2B] [2B]Respondent submits an alternative basis for affirming the judgment below, one that was presented to but ultimately not relied upon by the Court of Appeals. Respondent asserts that he possessed an expectation of privacy, independent from his home's curtilage, in the barn and its contents, because the barn is an essential part of his business. Brief for Respondent 9. Respondent overlooks the significance of *Oliver v. **[**1141]** United States, 466 U.S. 170 (1984)*.

LEdHN[2C] [2C]***LEdHN[4]*** [4]We may accept, for the sake of argument, respondent's submission that his barn enjoyed *Fourth Amendment* protection and could not be entered and its contents seized without a warrant. But it does not follow on the record before us that the officers' conduct and the ensuing search and seizure violated the Constitution. *Oliver* reaffirmed the precept, established in *Hester*, that ***HN6*** an open field is neither a "house" nor an "effect," and, therefore, "the government's intrusion upon the open fields is not one of those 'unreasonable searches' **[*304]** proscribed by the text of the *Fourth Amendment*." *466 U.S., at 177*. The Court expressly rejected the argument that the erection of fences on an open field -- at least of the variety involved in those cases and in the present case -- creates a constitutionally protected privacy interest. *Id., at 182-183*. "[The] term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id., at 180, n. 11*. It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several **[***337]** similarly constructed interior fences, prior to stopping at the locked front gate of the barn. As previously mentioned, the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.

LEdHN[2D] [2D]***LEdHN[5]*** [5]Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Similarly, the fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was protected by the *Fourth Amendment* does not affect our conclusion. Last Term, in *California v. Ciraolo, 476 U.S. 207 (1986)*, we held that ***HN7*** warrantless naked-eye aerial observation of a home's curtilage did not violate the *Fourth Amendment*. We based our holding on the premise that the *Fourth Amendment* "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id., at 213*. Importantly, we deemed it irrelevant that the police observation at issue **[*305]** was directed specifically at the identification of marijuana plants growing on an area protected by the *Fourth Amendment*. *Ibid*. Finally, the plurality opinion in *Texas v. Brown, 460 U.S. 730, 739-740 (1983)*, notes that it is "beyond dispute" that the action of a police officer in shining his flashlight to illuminate the interior of a car, without probable cause to search the car, "trenched upon no right secured . . . by the *Fourth Amendment*."

The holding in *United States v. Lee, 274 U.S. 559, 563 (1927)* is of similar import. Here, the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of *Fourth Amendment*.

LEdHN[1C] [1C] ***LEdHN[2E]*** [2E]The officers lawfully viewed the interior of respondent's barn, and their observations were properly considered by the Magistrate in issuing a search warrant for respondent's premises. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Concur by: SCALIA

Concur

JUSTICE SCALIA, concurring in part.

I join JUSTICE WHITE's opinion with the exception of the paragraph in Part II headed **[**1142]** *"Third*." It does not seem to me "especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home." *Ante*, at 302. What is significant is that the barn was not being so used, whether or not the law enforcement officials knew it. The officers' perceptions might be relevant to whether intrusion upon curtilage was nevertheless reasonable, but they are no more relevant to whether the barn was curtilage than to whether the house was a house.

Dissent by: BRENNAN

Dissent

[*338]** JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Government agents' intrusions upon Ronald Dunn's privacy and property violated the *Fourth Amendment* for **[*306]** two reasons. First, the barnyard invaded by the agents lay within the protected curtilage of Dunn's farmhouse. Second, the agents infringed upon Dunn's reasonable expectation of privacy in the barn and its contents. Our society is not so exclusively urban that it is unable to perceive or unwilling to preserve the expectation of farmers and ranchers that barns and their contents are protected from (literally) unwarranted government intrusion.

I

I briefly recount the relevant facts.

Respondent's ranch of 198 acres is encircled by a perimeter fence. The residence and its outbuildings are located in a clearing surrounded by woods, one-half mile from a road, down a chained, locked driveway. Neither the farmhouse nor its outbuildings are visible from the public road or from the fence that encircles the entire property. Once inside this perimeter fence, it is necessary to cross at least one more "substantial" fence before approaching Dunn's farmhouse or either of his two barns. *United States v. Dunn, 674 F.2d 1093, 1100 (CA5 1982)*.

The front of the barn involved here is enclosed by a wooden fence. Its back and sides

"were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time of [the] [agent's] visits . . . , the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting [under the barn's overhang]. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." *766 F.2d 880, 883 (CA5 1985)*.

[*307] The issues are whether the barn was within the protected curtilage of the house, and whether the conduct of the Drug Enforcement Agency (DEA) agents -- "circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fishnet and wooden gate front enclosure" -- infringed upon Dunn's reasonable expectation of privacy in the barn or its contents. *Id., at 884*.

II

A

In *Oliver v. United States, 466 U.S. 170 (1984)*, the Court affirmed its holding in *Hester v. United States, 265 U.S. 57 (1924)*, that the *Fourth Amendment* protects the home and its curtilage, but not the "open fields." We explained that curtilage is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *466 U.S., at 180* **[***339]** (quoting *Boyd v. United States, 116 U.S. 616, 630 (1886)*).

The Court states that curtilage questions are often resolved through evaluation of **[**1143]** four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Ante*, at 301. The Court applies this test and concludes that Dunn's barn and barnyard were not within the curtilage of his dwelling. This conclusion overlooks the role a barn plays in rural life and ignores extensive authority holding that a barn, when clustered with other outbuildings near the residence, is part of the curtilage.

State and federal courts have long recognized that a barn, like many other outbuildings, is "a domestic building constituting an integral part of that group of structures making up the farm home." *Walker v. United States, 225 F.2d 447, 449 (CA5 1955)*. Consequently, the general rule is that the **[*308]** "[curtilage] includes all outbuildings used in connection with a residence, such as garages, sheds, [and] *barns* . . . connected with and in close vicinity of the residence." *Luman v. Oklahoma, 629 P. 2d 1275, 1276 (Okla. Crim. App. 1981)* (emphasis added).

The overwhelming majority of state courts have consistently held that barns are included within the curtilage of a farmhouse. See, *e. g.*, *Brown v. Oklahoma City, 721 P. 2d 1346, 1349 (Okla. App. 1986)* ("[Curtilage] . . . includes, among other things, garages, sheds, barns and the like"); *McGlothlin v. State, 705 S. W. 2d 851, 857 (Tex. App. 1986)* (barn located 100 yards from residence is within curtilage); *State v. Fierge*, 673 S. W. 2d 855, 856 (Mo. App. 1984) ("[Curtilage] includes all outbuildings used in connection with the residence, such as garages, sheds, barns, yards, and lots connected with or in the close vicinity of the residence"); *State v. Simpson, 639 S. W. 2d 230, 232 (Mo. App. 1982)* (same); *Luman v. Oklahoma, supra* (same); *Bunn v. State, 153 Ga. App. 270, 272, 265 S. E. 2d 88, 90 (1980)* ("'[curtilage'] includes the yards and grounds of a particular address, its garages, barns, buildings, etc."); *State v. Vicars, 207 Neb. 325, 330, 299 N. W. 2d 421, 425 (1980)* (calf shed located 100 feet from the house and separated from it by chain link fence which surrounded the yard was within curtilage); *State v. Browning, 28 N. C. App. 376, 379, 221 S. E. 2d 375, 377 (1976)* (curtilage of the home includes "'at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings'") (quoting *State v. Frizzelle, 243 N. C. 49, 51, 89 S. E. 2d 725, 726 (1955)*); *Norman v. State, 134 Ga. App. 767, 768, 216 S. E. 2d 644, 645 (1975)* (truck containing moonshine liquor located 200 feet from farmhouse and 100 feet from barn was within curtilage); *Brinlee v. State, 403 P. 2d 253, 256 (Okla. Crim. App. 1965)* (cattle located 100 yards from home in a lot adjacent to the barn were within curtilage); *State v. Lee, 120 Ore. 643, 648, 253 P. 533, 534 (1927)* ("Premises other than dwellings have **[*309]** been held within the protection of the *Fourth Amendment*[,] for example a barn. As construed by **[***340]** the courts from the earliest to the latest times the words 'dwelling' or 'dwelling-house' have been construed to include not only the main but all the cluster of buildings convenient for the occupants of the premises, generally described as within the curtilage").

Federal courts, too, have held that barns, like other rural outbuildings, lie within the curtilage of the farmhouse. See *United States v. Berrong, 712 F.2d 1370, 1374 (CA11 1983)* ("[the] 'outer limits of the curtilage' have been expressly defined to be 'the outer walls of the extreme outbuildings'") (quoting *United States v. Williams, 581 F.2d 451, 454 (CA5 1978)*); *Rosencranz v. United States, 356 F.2d 310, 313 (CA1 1966)* (barn located an unknown distance

from house and separated from it by a driveway deemed within curtilage); *Walker v. United States, supra* (barn located 70 to 80 yards from house, separated from house by private driveway, and surrounded by separate fence is within curtilage); *United States v. Swann, 377 F.Supp. 1305, 1306 (Md. 1974)* (barns and **[**1144]** outbuildings on farm were part of curtilage); *United States v. King, 305 F.Supp. 630, 634 (ND Miss. 1969)* (barns and other outbuildings of unknown distance from house within curtilage).

Thus, case law demonstrates that a barn is an integral part of a farm home and therefore lies within the curtilage. The Court's opinion provides no justification for its indifference to the weight of state and federal precedent.

The above-cited authority also reveals the infirmities in the Court's application of its four-part test. First, the distance between the house and the barn does not militate against the barn or barnyard's presence in the curtilage. Many of the cases cited involve a barn separated from a residence by a distance in excess of 60 yards. Second, the cases make evident that the configuration of fences is not determinative of the status of an outbuilding. Here, where the barn was connected to the house by a "well walked" and a "well driven" **[*310]** path, App. to Supp. to Pet. for Cert. 51a, and was clustered with the farmhouse and other outbuildings in a clearing surrounded by woods, the presence of intervening fences fades into irrelevance.

The third factor in the test -- the nature of the uses to which the area is put -- has been badly misunderstood and misapplied by the Court. The Court reasons that, because the barn and barnyard were not actually in domestic use, they were not within the curtilage. This reveals a misunderstanding of the level of generality at which the constitutional inquiry must proceed and is flatly inconsistent with the Court's analysis in *Oliver*.

In *Oliver*, the Court held that, as a general matter, the open fields "are unlikely to provide the setting for activities whose privacy is sought to be protected by the *Fourth Amendment*." *466 U.S., at 179, n. 10*. The Court expressly refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected. *Id., at 181*. In the instant case, the Court is confronted with the general rule that a barn *is* in domestic use. To be consistent with *Oliver*, the Court should refuse to do a case-by-case **[***341]** analysis of the expectation of privacy in any particular barn and follow the general rule that a barn is in domestic use. What should be relevant here, as in *Oliver*, is the typical use of an area or structure. The Court's willingness to generalize about the absence of a privacy interest in the open fields and unwillingness to generalize about the existence of a privacy interest in a barn near a residence are manifestly inconsistent and reflect a hostility to the purpose of the *Fourth Amendment*.

Moreover, the discovery that Dunn's barn was actually used as a drug laboratory is irrelevant to the question whether the area is typically in domestic use. No one would contend that, absent exigent circumstances, the police could intrude upon a home without a warrant to search for a drug **[*311]** manufacturing operation. The *Fourth Amendment* extends that same protection to outbuildings in the curtilage of the home.

Even accepting that courts should do a case-by-case inquiry regarding the use of buildings within the curtilage, the Court's analysis is faulty. The Court finds it significant that, because of the strong odor and the noise of a motor emanating from the barn, the officers knew that the barn was not in domestic use. But these Government agents *were already within the curtilage* when they detected the odor of phenylacetic acid. They were wandering about in the area between the barns and the farmhouse, an area that is itself part of the curtilage. The Court cannot abrogate the general rule that a barn is in the curtilage with evidence gathered after the intrusion has occurred. [1]

[1145]** Finally, neither the smell of the chemicals nor the sound of the motor running

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[1] Cf. *United States v. Mullin, 329 F.2d 295, 298 (CA4 1964)* ("We are not dissuaded from this view [that the smokehouse was part of the curtilage] by testimony of Government witnesses that after entering the

would remove the protection of the *Fourth Amendment* from an otherwise protected structure. A barn, like a home, may simultaneously be put to domestic and nondomestic uses, even the manfuacture of drugs. Dual use does not strip a home or any building within the curtilage of *Fourth Amendment* protection. As this Court said in *Taylor v. United States, 286 U.S. 1, 6 (1932)*, where a garage adjacent to a city residence and within its curtilage was searched for illegal alcohol, "[prohibition] officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable **[*312]** search." [2] What the evidence cited by the Court might suggest is that the DEA agents had probable cause to **[***342]** enter the barn or barnyard *before they made any unconstitutional intrusion*. If so -- and I do not concede it -- they should have obtained a warrant.

With regard to the fourth factor of the curtilage test, I find astounding the Court's conclusion that "[respondent] did little to protect the barn area from observation by those standing in the open fields." *Ante*, at 303. Initially, I note that the fenced area immediately adjacent to the barn in this case is not part of the open fields, but is instead part of the curtilage and an area in which Dunn had a reasonable expectation of privacy. See *infra*, at 314-319. Second, Dunn in fact took elaborate measures to ensure his privacy. He locked his driveway, fenced in his barn, and covered its open end with a locked gate and fishnetting. The Court of Appeals found that "[to] see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." *766 F.2d, at 883*. The *Fourth Amendment* does not require the posting of a 24-hour guard to preserve an expectation of privacy.

The Court of Appeals correctly concluded that Dunn's barn and barnyard were within the curtilage of the farmhouse. This Court's reversal of that determination reflects a fundamental misunderstanding of the typical role of a barn in rural domestic life. [3]

[*313] **[**1146]** B

Today's decision has an unforeseen consequence. In narrowing the meaning given to the concept of curtilage, the Court also narrows the scope of searches permissible under a warrant authorizing a search of building premises. Police officers often proceed as if a warrant that authorizes a

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smokehouse they found it to be in a dilapidated condition, unfit (in their opinion) for the storage of meat. *The critical moment was the appearance of the smokehouse before entry; subsequent observations as to its condition are irrelevant*. See also United States v. Di Re, 332 U.S. 581 . . . (1948)") (emphasis added).

[2] In addition, the sound of a motor running is not inherently inconsistent with the use of the barn for domestic purposes. Household activities on a farm may differ from those conducted in an urban apartment, but they retain their domestic character. A barn is an integral part of a particular way of life, and its many standard uses are part of a distinctive domestic economy.

[3] This case bears out the prediction made in *Oliver* v. *United States*, 466 U.S. 170, 196, and n. 20 (1984) (MARSHALL, J., dissenting), that police officers making warrantless entries upon private land will be obliged "to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone" and that officers will have difficulty in doing so. I continue to believe that the rule suggested in dissent in *Oliver* is most faithful to the ***Fourth Amendment*** analysis set forth in *Katz* v. *United States*, 389 U.S. 347 (1967), and provides the clearest answer to the question of when persons possess a reasonable expectation of privacy in their property: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth [Amendment]." 466 U.S., at 195. By rejecting this rule, "the Court is willing to sanction the introduction of evidence seized pursuant to a potentially criminal activity (trespassing) in order to convict an individual of a slightly more serious crime." Comment, Curtilage or Open Fields?: *Oliver* v. *United States* Gives Renewed Significance to the Concept of Curtilage in ***Fourth Amendment*** Analysis, 46 U. Pitt. L. Rev. 795, 810, n. 87 (1985). "For good or for ill, [the Government] teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

search of the premises or the dwelling also authorizes a search of any outbuildings (such as garages, barns, sheds, smokehouses) because such buildings are commonly deemed within the curtilage. See *Gumina v. State, 166 Ga. App. 592, 595, 305 S. E. 2d 37, 39 (1983)* ("[Even] if the [trailers] had not been described at all [in the warrant], the officers would have been authorized **[***343]** to search them as part of the curtilage or premises of the residence"); *Barton v. State, 161 Ga. App. 591, 592, 288 S. E. 2d 914, 915 (1982)* (curtilage includes yards, grounds, gardens, barn, and outbuildings; all may be searched though not specifically described in warrant, so long as warrant has been obtained to search premises); *State v. Vicars, 207 Neb. 325, 299 N. W. 2d 421 (1980)* (calf shed located 100 feet from house on opposite side of chain link fence that surrounded the yard is within curtilage so search warrant **[*314]** authorizing search of dwelling also authorizes search of outbuilding); *Bellamy v. State, 134 Ga. App. 340, 214 S. E. 2d 383, 384 (1975)* ("'Curtilage' comes down from early English days. An outbuilding on the grounds is within the 'curtilage' and may be searched under such a warrant, though not described specifically"); *Meek v. Pierce, 19 Wis. 300, 302 (1865)* ("It would destroy the utility of the proceeding, if, beside the building principally named, all other buildings and places of concealment upon the same premises, occupied in connection with it and by the same person, could not also be searched, and by virtue of the same warrant"). After today, reliance upon this general rule is illegitimate, and warrants must specify that a search of the farmer's outbuildings is also contemplated.

III

Even if Dunn's barn were not within the curtilage of his farmhouse, his reasonable expectation of privacy in the barnyard would bring the *Fourth Amendment* into play.

It is well established that the *Fourth Amendment* protects a privacy interest in commercial premises. See *Oliver v. United States, 466 U.S., at 178, n. 8* (the protection of privacy interests in business premises is "based on societal expectations that have deep roots in the history of the Amendment"). [4] The questions in this case are whether a barn is a commercial structure and, if so, how far its owner's expectations of privacy reasonably extend.

The Court assumes that respondent possessed an expectation of privacy in his barn and its contents because the barn was an essential part of his business. This assumption is **[*315]** plainly correct. A ranch or a farm is a business like any other. As the Court of Appeals, like many other courts to consider the question, [5] concluded:

[*344]** **[**1147]** "A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of business. It is and ought to be constitutionally protected from warrantless

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[4] See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (the historical foundation of the ***Fourth Amendment*** reveals that "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence"); *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967) ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property").

[5] See also *Walker v. United States*, 225 F.2d 447, 453 (CA5 1955) (Rives, J., dissenting) ("I can see no reason why a farmer should be afforded less protection in the barn where he actually does business, whether located within the curtilage or not, than is accorded a city dweller in his office"); *Janney v. United States*, 206 F.2d 601, 603 (CA4 1953) (the defendant's barn was protected because "the [Fourth] Amendment extends not only to the dwelling house of a defendant, but also to the structures used by him in connection with his . . . place of business"); *United States v. Broadhurst*, 612 F.Supp. 777, 790 (ED Cal. 1985) (the argument "that farmers or other citizens living and working in rural settings . . . are not protected in their business enterprises by the ***Fourth Amendment*** to the same degree as their urban counterparts" could not prevail); *Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980) (the defendant's "barn, as an integral part of petitioner's farming business, enjoyed the same ***fourth amendment*** protection as do other business premises").

searches if the owner or occupier takes reasonable steps to effect privacy." *766 F.2d, at 885*.

This established, we inquire whether the owner of a commercial building has a reasonable expectation of privacy *in the area surrounding or adjacent to that building*. [6] Since **[*316]** *Katz v. United States, 389 U.S. 347 (1967)*, this Court has applied the *Fourth Amendment* whenever "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland, 442 U.S. 735, 740 (1979)*. This is a two-part inquiry. First, the individual must exhibit a subjective expectation of privacy in the object of the challenged search. See *Smith v. Maryland, supra, at 740*. [7] Dunn has met this standard. See *supra, at 312*.

Second, "the expectation [must] be one that society is prepared to recognize as 'reasonable.'" *Katz, supra, at 361* (Harlan, J., concurring). For a homeowner to preserve *Fourth Amendment* protection in the area immediately surrounding the residence, he or she must not conduct an activity or leave an item in the plain view of those outside that area. The occupant of a commercial building must take the *additional* step of affirmatively barring the public from the area because a business operator has a reasonable expectation of privacy only in those areas from which the public has been excluded. [8] When a business or commercial structure is not open to the public,

"[application] of the *Katz* justified-expectation-of-privacy test . . . requires consideration of where the **[***345]** police were at the time of surveillance and how the surveillance was conducted. If police using the naked eye or ear are able to see or hear while located on adjoining **[*317]** property or even on property of the business which is readily accessible to the general public, this is not a search. . . .

"On the other hand, if the police engage in a much more intense form of surveillance, especially from places not ordinarily used by the public, this is a search under Katz." 1 W. LaFave, Search and Seizure § 2.4(b), pp. 433-434 (2d ed. 1987) (emphasis added; footnotes **[**1148]** omitted). [9]

See *Norman v. State, 379 So. 2d 643, 647 (Fla. 1980)* (petitioner had a reasonable expectation of privacy in his barn because the "barn, as an integral part of petitioner's farming business, enjoyed the same *fourth amendment* protection as do other business premises" and because he

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[6] The usual manner of deciding whether intrusions on land near a dwelling are reasonable is to determine whether an officer is within the curtilage or in the open fields. It is plain that the open fields doctrine is not properly applied to land which has been developed. See *Oliver*, 466 U.S., at 180, n. 11, and 178 (emphasis added) ("It is clear . . . that the term 'open fields' may include *any unoccupied or undeveloped area* outside of the curtilage." "[An] individual may not legitimately demand privacy for activities conducted *out of doors in fields*"); see *id.*, at 196 (MARSHALL, J., dissenting) ("[We] may now expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of 'unoccupied or undeveloped area' to which the 'open fields exception' is now deemed applicable").

[7] The Court has noted that in some situations the absence of any subjective expectation of privacy would not defeat an individual's ***Fourth Amendment*** claim. See *Smith* v. *Maryland*, 442 U.S., at 740. See also Amsterdam, Perspectives on the ***Fourth Amendment***, 58 Minn. L. Rev. 349, 384 (1974).

[8] This requirement comports with the Court's usual view of the relationship between commercial premises and the ***Fourth Amendment***. The Government must obtain a search warrant only when it wishes to search those areas of commercial premises from which the public has been excluded. See *See* v. *City of Seattle, supra*, at 545. See also Comment, 46 U. Pitt. L. Rev., at 815, n. 113.

[9] For example, in *Commonwealth* v. *Soychak*, 221 Pa. Super. 458, 462-463, 289 A. 2d 119, 122-123 (1972), a police officer, suspicious that gambling activities were taking place inside a certain club, climbed onto the roof of a building and peered through the louvers of a ventilating fan. The court held that despite the fact that the club had "failed to completely block the view of police investigators," its operators nonetheless possessed a reasonable expectation of privacy.

"took overt steps to designate his farm and barn as a place not open to the public").

The Court applied this distinction between protected commercial premises (from which the public is excluded) and unprotected commercial premises (to which the public has access) in its analysis last Term in *Dow Chemical Co*. v. *United States, 476 U.S. 227, 237-238 (1986)*. In that case the Court held that "EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the *Fourth Amendment*." *Id., at 229*. In so holding, the Court emphasized that "the narrow issue raised" was the lawfulness of observation *"without* physical entry" and that "[any] actual physical entry by EPA into *any enclosed area* would raise significantly different questions." *Id., at 237* (emphasis added). For that reason, the Court determined **[*318]** that the question of invasion of the so-called "business curtilage" was not presented. *Id., at 239, n. 7*. [10]

Looking into a building from a vantage point inaccessible to the public -- here by climbing over the "substantial" wooden fence enclosing the front of the barn to intrude on Dunn's farmyard -- is an unacceptable invasion of a reasonable privacy interest. When, as here, the public is excluded from an area immediately surrounding or adjacent to a business structure, that area is not -- contrary to the Court's position -- part of the open fields. "[Occupants] of business and commercial premises should not be put to the choice of taking extraordinary methods of sealing off those premises or else submitting to unrestrained police surveillance." 1 LaFave, *supra*, at 434. [11]

[*319] A barn, like a factory, a plant, or **[***346]** a warehouse, is a business place not open to **[**1149]** the general public. Like these other business establishments, the barn, and any area immediately surrounding or adjacent to it from which the public is excluded, should receive protection. A business operator is undisputably entitled to constitutional protection *within* the premises when steps have been taken to ensure privacy. It is equally clear that he or she is entitled to protection in those areas immediately surrounding the building when obvious efforts have been made to exclude the public. [12]

IV

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[10] Cf. *Air Pollution Variance Bd. of Colo*. v. *Western Alfalfa Corp*., 416 U.S. 861, 865 (1974) (inspector's entry onto corporation land to make an opacity reading of emissions of corporate smokestacks was not a search because the inspector was *not* "on premises from which the public was excluded" and "sighted what anyone in the city who was near the plant could see in the sky -- plumes of smoke").

[11] It matters little if this protected area is denominated a "business curtilage" or if the Court holds that the business occupant has a reasonable expectation of privacy there. An area was historically considered part of the curtilage only if used for domestic purposes because the ***Fourth Amendment*** was thought to protect only the "'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S., at 180 (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)). Now that it is plain that commercial buildings, too, are covered by the ***Fourth Amendment***, there is no reason to restrict the application of the curtilage concept to areas surrounding dwellings and used only for domestic purposes. See Comment, 46 U. Pitt. L. Rev., at 816.

In *United States* v. *Swart*, 679 F.2d 698 (CA7 1982), for example, the Court of Appeals utilized both a "business curtilage" concept and a *Katz* reasonable expectation-of-privacy analysis to hold that the warrantless search of business premises violated the ***Fourth Amendment***. In that case, police officers searched the area surrounding a garage and sheds that constituted a business for repairing and rebuilding cars and trucks. The court held that the search violated the ***Fourth Amendment*** because the cars "may have been within the curtilage of the business buildings," and because the occupant of the premises had a reasonable expectation of privacy in the cars located on his property which "was not diminished by the fact that the cars were on closed business premises." 679 F.2d, at 702.

[12] When a rural business structure such as a barn is also located within the curtilage of a farm residence, there is plainly a substantial likelihood that the business enterprise is also closely related to domestic life. This fact compounds the need for the Court to protect the individual's expectation of privacy in the business structure. See *United States* v. *Broadhurst*, 612 F.Supp., at 790, n. 11.

The *Fourth Amendment* prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wished to guard their privacy. [13] In this case, in order to look inside respondent's barn, the DEA agents traveled one-half mile off a public road over respondent's fenced-in property, crossed over three additional wooden and barbed wire fences, stepped under the eaves of the barn, and then used a flashlight to peer through otherwise opaque fishnetting. For the police habitually to engage in such surveillance -- without a warrant -- is constitutionally intolerable. Because I believe that farmers' and ranchers' expectations of privacy in their barns **[*320]** and other outbuildings are expectations society would regard as reasonable, and because I believe that sanctioning the police behavior at issue here does violence to the purpose and promise of the Fourth *Amendment, I* dissent.

References

What is within "curtilage" of house or other building, so as to be within protection from unreasonable searches and seizures, under *Federal Constitution's Fourth Amendment68 Am Jur 2d, Searches and Seizures 16*, *19*, *20*, *23*, *258 Federal Procedure, L Ed, Criminal Procedure 22:155-22:1597 Federal Procedural Forms, L Ed, Criminal Procedure 20:611, 20:612, 20:6218 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 241, 243, 252, 258; 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71-865 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 8 Am Jur Trials 573, Defense of Narcotics CasesUSCS, Constitution, Amendment 4*US L Ed Digest, Search and Seizure 8, 9, 25Index to Annotations, Criminal Law; Curtilage; Drugs and Narcotics; Exclusion and Suppression of Evidence; Observation; Plain View Doctrine; Privacy; Search and Seizure; Surveillance Annotation References:Supreme Court's development of "open fields doctrine" with respect to *Fourth Amendment* search and seizure protections. *80 L Ed 2d 860.Validity of seizure under Fourth Amendment* "plain view" doctrine. *75 L Ed 2d 1018.Use of electronic tracking device (beeper) to monitor location of object or substance other than vehicle or aircraft as constituting search violating Fourth Amendment*. *70 ALR Fed 747.Aerial observation or surveillance as violative of Fourth Amendment* guaranty against unreasonable search and seizure. *56 ALR Fed 772.Odor of narcotics as providing probable cause for warrantless search. 5 ALR4th 681*.

[13] As Professor Amsterdam has observed, "[the] question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." Amsterdam, *supra* n. 7, at 403.

Dow Chem. Co. v. United States

Supreme Court of the United States

December 10, 1985, Argued ; May 19, 1986, Decided

No. 84-1259

Reporter
476 U.S. 227; 106 S. Ct. 1819; 90 L. Ed. 2d 226; 1986 U.S. LEXIS 155; 54 U.S.L.W. 4464; 24 ERC (BNA) 1385; 16 ELR 20679

DOW CHEMICAL CO. v. UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Disposition: *749 F.2d 307*, affirmed.

Core Terms

aerial, photographs, photography, plant, curtilage, inspection, camera, trade secret, privacy, open field, surveillance, intrusions, buildings, expectation of privacy, privacy interest, technology, reasonable expectation of privacy, premises, clean air, industrial, commercial property, manufacturing, observable, warrantless inspection, protections, exposed, enclosed, purposes, aerial surveillance, aerial photograph

Case Summary

Procedural Posture

On certiorari from United States Court of Appeals, Sixth Circuit, petitioner challenged ruling that respondent neither exceeded its authority under the Clean Air Act, *42 U.SC.S. § 7414*, nor violated petitioner's *U.S. Const. amend. IV* rights when respondent took aerial photographs of petitioner's industrial complex while investigating environmental law violations.

Overview

Petitioner operated a large chemical manufacturing facility that was guarded against ground ground-level public views of the complex. When respondent was denied an inspection of respondent's powerplants, respondent employed a commercial aerial photographer to take photographs of the facility from navigable airspace, without having obtained a search warrant. Petitioner brought suit alleging that respondent exceeded its investigatory authority, granted by the Clean Air Act, *42 U.S.C.S. § 7414*, and that respondent violated *U.S. Const. amend. IV*. The trial court granted petitioner summary judgment. The appellate court reversed. On appeal, the Court affirmed holding that respondent's use of aerial photography was within its statutory authority, as a regulatory and enforcement agency required no explicit authorization to employ methods of observation available to the public. Additionally, the taking of photographs of petitioner's complex from navigable airspace was not a search prohibited by *U.S. Const. amend. IV*.

Outcome

Affirmed; respondent's use of aerial photography was within its statutory authority, as a regulatory and enforcement agency required no explicit authorization to employ methods of observation available to the public. Additionally, the taking of photographs of petitioner's complex from navigable airspace was not a search prohibited by the *Fourth Amendment*.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

Real Property Law > Inverse Condemnation > Constitutional Issues

Torts > Business Torts > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN1 State tort law governing unfair competition does not define the limits of the *Fourth Amendment*, *U.S. Const. amend. IV*.

Environmental Law > Air Quality > General Overview

Environmental Law > Assessment & Information Access > Audits & Site Assessments

HN2 See *42 U.S.C.S. § 7414*.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Inspections

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > Air Quality > Enforcement > General Overview

HN3 When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Inspections

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > Air Quality > Enforcement > General Overview

HN4 Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Inspections

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > Assessment & Information Access > Audits & Site Assessments

HN5 The Environmental Protection Agency, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Inspections

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Environmental Law > Air Quality > General Overview

Environmental Law > Assessment & Information Access > Audits & Site Assessments

Trade Secrets Law > Protected Information > Drawings

HN6 The use of aerial observation and photography is within the Environmental Protection Agency's statutory authority, under *42 U.S.C.S. § 7414*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN7 Plainly a business establishment or an industrial or commercial facility enjoys certain protections under *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN8 The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

HN9 Open fields do not provide the setting for those intimate activities that *U.S. Const. amend. IV* is intended to shelter from governmental interference or surveillance.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN10 To fall within the "open fields" doctrine the area need be neither "open" nor a "field" as those terms are used in common speech.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN11 The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN12 The government has greater latitude to conduct warrantless inspections of commercial property because the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Inspections

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN13 What is observable by the public is observable without a warrant, by the government inspector as well.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

Transportation Law > Air Transportation > Airspace > Ownership

HN14 The open areas of an industrial plant complex with numerous plant structures spread over thousands of acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Criminal Law & Procedure > Search & Seizure > General Overview

HN15 The taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by *U.S. Const. amend. IV*.

Lawyers' Edition Display

Decision

Aerial photography of industrial complex by Environmental Protection Agency held not to exceed Agency's investigative authority under *42 USCS 7414* nor to violate *Fourth Amendment*.

Summary

A corporation which operated a 2,000-acre chemical manufacturing facility, heavily secured against entry on the ground but partially exposed to visual observation from the air, filed suit against the United States when it learned that the Environmental Protection Agency (EPA), in order to check emissions from the facility's power plants, had employed a commercial aerial photographer to take photographs of the facility from legal airspace using a precision aerial mapping camera, without having obtained a search warrant. The United States District Court for the Eastern District of Michigan, granting the corporation's motion for summary judgment and enjoining the EPA from continuing such photography or from disseminating, releasing, or copying the photographs already taken, held that the EPA had exceeded its authority under 114 of the Clean Air Act (*42 USCS 7414*), which authorizes site inspections, and also had conducted a search which violated the *Fourth Amendment* (*536 F Supp 1355*). The United States Court of Appeals for the Sixth Circuit reversed, holding that the corporation did not have a reasonable expectation of privacy from

the air with respect to those parts of the facility which were not enclosed in buildings, and that the use of enhanced aerial photography was within the general investigative authority of the EPA in the absence of any language in 114 which clearly prohibited such a technique (*749 F2d 307*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., joined by White, Rehnquist, Stevens, and O'Connor, JJ., and joined in part (as to holding 1 below) by Brennan, Marshall, Blackmun, and Powell, JJ., it was held (1) that the use of aerial observation and photography is within the EPA's statutory authority, as a regulatory and enforcement agency like the EPA requires no explicit authorization to employ methods of observation commonly available to the public at large; and (2) that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the *Fourth Amendment*.

Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., concurred in part and dissented in part, expressing the view (1) that the use of aerial photography as an inspection technique, absent *Fourth Amendment* constraints, does not exceed the EPA's authority under the Clean Air Act, but (2) that warrantless aerial photography of a private commercial enclave, using a sophisticated camera capable of recording a great deal more than the human eye could ever see, violates legitimate privacy interests and is unlawful under the *Fourth Amendment*.

Headnotes

ENVIRONMENTAL LAW §24 > air pollution -- EPA investigations -- aerial photography -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]

The Environmental Protection Agency does not exceed its investigatory authority under the Clean Air Act (42 USCS 7401-7626) when it takes photographs of an industrial plant complex with an aerial mapping camera from an airplane in navigable airspace, even though the specific inspection provisions of 114 of the Act (*42 USCS 7414*) assertedly do not authorize such techniques; as a regulatory and enforcement agency, invested by Congress with general investigatory powers, the EPA needs no explicit statutory provision to employ methods of observation commonly available to the public at large.

SEARCH AND SEIZURE §2 > aerial surveillance -- industrial plant -- > Headnote:

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]***LEdHN[2C]*** [2C]

The taking of photographs of an industrial plant complex with an aerial mapping camera, from an airplane in navigable airspace, is not a search prohibited by the *Fourth Amendment*; the mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. (Powell, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

SEARCH AND SEIZURE §8 > aerial photography of industrial plant -- trade secrets -- > Headnote:

LEdHN[3A] [3A]***LEdHN[3B]*** [3B]

That aerial photography of an industrial complex may be barred by state trade-secrets laws with respect to competitors is not relevant to the analysis of such photography under the *Fourth Amendment* where the photographs are sought by the government for purposes of regulation, as such laws would bar photography only where there was an intent to use any trade secrets so discovered; such laws do not constitute society's express determination that all photography of such a facility violates reasonable expectations of privacy. (Powell, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

ADMINISTRATIVE LAW §19 > investigatory powers -- > Headnote:

LEdHN[4] [4]

When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission; regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation

traditionally employed or useful to execute the authority granted.

SEARCH AND SEIZURE §8 > commercial property -- > Headnote:

LEdHN[5A] [5A]***LEdHN[5B]*** [5B]

A business establishment or an industrial or commercial facility enjoys certain protections under the *Fourth Amendment*; the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.

SEARCH AND SEIZURE §9 > curtilage of private house -- > Headnote:

LEdHN[6] [6]

The curtilage area surrounding a private house is entitled to protection under the *Fourth Amendment* as a place where the occupants have a reasonable expectation of privacy that society is prepared to accept.

SEARCH AND SEIZURE §8 > open fields -- > Headnote:

LEdHN[7] [7]

Open fields do not provide the setting for those intimate activities that the *Fourth Amendment* is intended to shelter from government interference or surveillance; to fall within the open fields doctrine, an area need be neither "open" nor a "field" as those terms are used in common speech.

SEARCH AND SEIZURE §8 > industrial buildings -- > Headnote:

LEdHN[8] [8]

For purposes of *Fourth Amendment* analysis, the owner of a large industrial complex has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, an expectation which society is prepared to observe.

SEARCH AND SEIZURE §8 > industrial complex -- > Headnote:

LEdHN[9A] [9A]***LEdHN[9B]*** [9B]

An enclosed industrial plant complex does not fall precisely within the "open fields" doctrine under the *Fourth Amendment*, but with regard to aerial surveillance it is more analogous to an open field than it is to the curtilage of a dwelling.

SEARCH AND SEIZURE §8 > warrantless inspections -- commercial property -- > Headnote:

LEdHN[10] [10]

The government has greater latitude to conduct warrantless inspections of commercial property, because the expectation of privacy that the owner of commercial property enjoys therein differs significantly from the sanctity accorded an individual's home; unlike a homeowner's interest in his dwelling, the interest of the owner of commercial property is not one in being free from any inspections; what is observable by the public is observable, without a warrant, to the government inspector as well.

Syllabus

Petitioner operates a 2,000-acre chemical plant consisting of numerous covered buildings, with outdoor manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. Petitioner maintains elaborate security around the perimeter of the complex, barring ground-level public views of the area. When petitioner denied a request by the Environmental Protection Agency (EPA) for an on-site inspection of the plant, EPA did not seek an administrative search warrant, but instead employed a commercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of the facility from various altitudes, all of which were within lawful navigable airspace. Upon becoming aware of the aerial photography, petitioner brought suit in Federal District Court, alleging that EPA's action violated the *Fourth Amendment* and was beyond its statutory investigative authority. The District Court granted summary judgment for petitioner, but the Court of Appeals reversed, holding that EPA's aerial observation did not exceed its investigatory authority and that the aerial photography of petitioner's plant complex without a warrant was not a search prohibited by the *Fourth Amendment*.

Held:

1. The fact that aerial photography by petitioner's competitors might be barred by state trade secrets law is irrelevant to the questions presented in this case. Governments do not generally seek to appropriate trade secrets of the private sector, and the right to be free of appropriation of trade secrets is protected by law. Moreover, state tort law governing unfair competition does not define the limits of the *Fourth Amendment*. Pp. 231-233.

2. The use of aerial observation and photography is within EPA's statutory authority. When Congress invests an agency such as EPA with enforcement and investigatory authority, it is not necessary to identify explicitly every technique that may be used in the course of executing the statutory mission. Although § 114(a) of the Clean Air Act, which provides for EPA's right of entry to premises for inspection purposes, does not authorize aerial observation, that section appears to expand, not restrict, EPA's general investigatory powers, and there is no suggestion in the statute that the powers conferred by § 114(a) are intended to be exclusive. EPA needs no explicit statutory provision to employ methods of observation commonly available to the public at large. Pp. 233-234.

3. EPA's taking, without a warrant, of aerial photographs of petitioner's plant complex from an aircraft lawfully in public navigable airspace was not a search prohibited by the *Fourth Amendment*. The open areas of an industrial plant complex such as petitioner's are not analogous to the "curtilage" of a dwelling, which is entitled to protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *California* v. *Ciraolo, ante*, p. 207. The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant. For purposes of aerial surveillance, the open areas of an industrial complex are more comparable to an "open field" in which an individual may not legitimately demand privacy. *Oliver v. United States, 466 U.S. 170*. Here, EPA was not employing some unique sensory device not available to the public, but rather was employing a conventional, albeit precise, commercial camera commonly used in mapmaking. The photographs were not so revealing of intimate details as to raise constitutional concerns. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. Pp. 234-239.

Counsel: Jane M. Gootee argued the cause for petitioner. With her on the briefs were James H. Hanes and Bernd W. Sandt.

Alan I. Horowitz argued the cause for the United States. With him on the brief were Acting Solicitor General Wallace, Assistant Attorney General Habicht, Deputy Solicitor General Frey, Dirk D. Snel, and Anne S. Almy. *

Judges: BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 240.

Opinion by: BURGER

Opinion

[*229] [*231] [**1822]** CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEdHN[1A] [1A] ***LEdHN[2A]*** [2A]We granted certiorari to review the holding of the Court of Appeals (a) that the Environmental Protection Agency's aerial observation of petitioner's plant complex did not exceed EPA's statutory investigatory authority, and (b) that EPA's aerial photography of petitioner's 2,000-acre plant

* Briefs of amici curiae urging reversal were filed for the Chamber of Commerce of the United States of America et al. by Robin S. Conrad and Constance E. Brooks; and for the Michigan Manufacturers' Association et al. by John M. Cannon, Susan W. Wanat, and Ann Plunkett Sheldon.

complex without a warrant was not a search under the *Fourth Amendment*.

I

Petitioner Dow Chemical Co. operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any **[***232]** low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two powerplants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. See 49 U. S. C. App. § 1304; 14 CFR § 91.79 (1985).

[*230] EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the *Fourth Amendment* and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the ground that EPA had no authority to take aerial photographs and that doing so was a search violating the *Fourth Amendment*. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. *536 F.Supp. 1355 (ED Mich. 1982)*.

The District Court accepted the parties' concession that EPA's "'quest for evidence'" was a "search," *id., at 1358*, and limited its analysis to whether the search was unreasonable under *Katz v. United States, 389 U.S. 347 (1967)*. Proceeding on the assumption that a search in *Fourth Amendment* terms had been conducted, the court found that Dow manifested an expectation of privacy in its exposed plant areas because it intentionally surrounded them with buildings and other enclosures. *536 F.Supp., at 1364-1366*.

The District Court held that this expectation of privacy was reasonable, as reflected in part by trade secret protections restricting Dow's commercial competitors from aerial photography of these exposed areas. *Id., at 1366-1369*. The court emphasized that use of "the finest precision aerial camera available" permitted EPA to capture on film "a great deal more than the human eye could ever see." *Id., at 1367*.

The Court of Appeals reversed. *749 F.2d 307 (CA6 1984)*. It recognized that Dow indeed had a subjective expectation of privacy in certain areas from *ground*-level **[**1823]** intrusions, but the court was not persuaded that Dow had a subjective expectation of being free from *aerial* surveillance since Dow had taken no precautions against such observation, in contrast to its elaborate ground-level precautions. *Id., at 313*. The court rejected the argument that it was not feasible to shield any of the critical parts of the exposed plant areas from aerial surveys. *Id., at 312-313*. The Court of Appeals, **[*231]** however, did not explicitly reject the District Court's factual finding as to Dow's subjective expectations.

[*233]** Accepting the District Court finding of Dow's privacy expectation, the Court of Appeals held that it was not a reasonable expectation "[when] the entity observed is a multi-building complex, and the area observed is the outside of these buildings and the spaces in between the buildings." *Id., at 313*. Viewing Dow's facility to be more like the "open field" in *Oliver v. United States, 466 U.S. 170 (1984)*, than a home or an office, it held that the common-law curtilage doctrine did not apply to a large industrial complex of closed buildings connected by pipes, conduits, and other exposed manufacturing equipment. *749 F.2d, at 313-314*. The Court of Appeals looked to "the peculiarly strong concepts

of intimacy, personal autonomy and privacy associated with the home" as the basis for the curtilage protection. *Id., at 314*. The court did not view the use of sophisticated photographic equipment by EPA as controlling.

The Court of Appeals then held that EPA clearly acted within its statutory powers even absent express authorization for aerial surveillance, concluding that the delegation of general investigative authority to EPA, similar to that of other law enforcement agencies, was sufficient to support the use of aerial photography. *Id., at 315*.

II

The photographs at issue in this case are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them. In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques. Whether they may be employed by competitors to penetrate trade secrets is not a question presented in this case. Governments do not generally seek to appropriate trade secrets of the private **[*232]** sector, and the right to be free of appropriation of trade secrets is protected by law.

LEdHN[3A] [3A]Dow nevertheless relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this protection is relevant to our analysis of such photography under the *Fourth Amendment*. That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here. ***HN1*** State tort law governing unfair competition does not define the limits of the *Fourth Amendment*. Cf. *Oliver v. United States, supra* (trespass law does not necessarily define limits of *Fourth Amendment*). The Government is seeking these photographs in order to regulate, not to compete with, Dow. If the Government were to use the photographs to compete with Dow, Dow might have a *Fifth Amendment* "taking" claim. Indeed, Dow alleged such a claim in its complaint, but the District Court dismissed it without prejudice. But even trade secret laws would not bar all forms of photography of this industrial complex; rather, only photography with an intent to use any trade secrets revealed by the photographs may be proscribed. Hence, there is no prohibition of photographs taken by a casual passenger on an airliner, or those taken by a **[***234]** company producing maps for its mapmaking purposes.

Dow claims first that EPA has no authority to use aerial photography to implement its statutory authority for "site inspection" under § 114(a) of the Clean Air **[**1824]** Act, *42 U. S. C. § 7414(a)*; [1] second, Dow claims EPA's use of aerial photography **[*233]** was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field, " and that it had a reasonable expectation of privacy from such photography protected by the *Fourth Amendment*.

III

LEdHN[4] [4] Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters relating to clean air and water standards. ***HN3*** When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and

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[1] ***HN2*** Section 114(a)(2) provides:

"(2) the Administrator or his authorized representative, upon presentation of his credentials --

"(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

"(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1)."

every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

HN4 Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. Environmentalstandards such as clean air and clean water cannot be enforced only in libraries and laboratories, helpful as those institutions may be.

Under § 114(a)(2), the Clean Air Act provides that "upon presentation of . . . credentials," EPA has a "right of entry to, upon, or through any premises." *42 U. S. C. § 7414(a)(2)(A)*. Dow argues this limited grant of authority to enter does not **[*234]** authorize any aerial observation. In particular, Dow argues that unannounced aerial observation deprives Dow of its right to be informed that an inspection will be made or has occurred, and its right to claim confidentiality of the information contained in the places to be photographed, as provided in §§ 114(a) and (c), *42 U. S. C. §§ 7414(a)* and *(c)*. It is not claimed that EPA has disclosed any of the photographs outside the agency.

LEdHN[1B] [1B]Section 114(a), however, appears **[***235]** to expand, not restrict, EPA's general powers to investigate. Nor is there any suggestion in the statute that the powers conferred by this section are intended to be exclusive. There is no claim that EPA is prohibited from taking photographs from a ground-level location accessible to the general public. ***HN5*** EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large: we hold that ***HN6*** the use of aerial observation and photography is within EPA's statutory authority. [2]

[1825]** IV

We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights under the *Fourth Amendment*. In making this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no *Fourth Amendment* problem.

In *California* v. *Ciraolo, ante*, p. 207, decided today, we hold that naked-eye aerial observation from an altitude of **[*235]** 1,000 feet of a backyard within the curtilage of a home does not constitute a search under the *Fourth Amendment*.

LEdHN[5A] [5A]In the instant case, two additional *Fourth Amendment* claims are presented: whether the common-law "curtilage" doctrine encompasses a large industrial complex such as Dow's, and whether photography employing an aerial mapping camera is permissible in this context. Dow argues that an industrial plant, even one occupying 2,000 acres, does not fall within the "open fields" doctrine of *Oliver* v. *United States* but rather is an "industrial curtilage" having constitutional protection equivalent to that of the curtilage of a private home. Dow further contends that any aerial photography of this "industrial curtilage" intrudes upon its reasonable expectations of privacy. ***HN7*** Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the *Fourth Amendment*. See *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)*; *See* v. *City of Seattle, 387 U.S. 541 (1967)*.

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[2] Assuming the Clean Air Act's explicit provisions for protecting trade secrets obtained by EPA as the result of its investigative efforts is somehow deemed inapplicable to the information obtained here, see 42 U. S. C. § 7414(c), Dow's fear that EPA might disclose trade secrets revealed in these photographs appears adequately addressed by federal law prohibiting such disclosure generally under the Trade Secrets Act, 18 U. S. C. § 1905, and the Freedom of Information Act, ***5 U. S. C. § 552(b)(4)***. See *Chrysler Corp*. v. *Brown*, 441 U.S. 281 (1979).

LEdHN[6] [6]Two lines of cases are relevant to the inquiry: the curtilage doctrine and the "open fields" doctrine. ***HN8*** The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *Ciraolo, supra*.

LEdHN[7] [7]As the curtilage doctrine evolved to protect much the same kind of privacy as that covering the **[***236]** interior of a structure, the contrasting "open fields" doctrine evolved as well. From *Hester v. United States, 265 U.S. 57 (1924)*, to *Oliver v. United States, 466 U.S. 170 (1984)*, the Court has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling: "open ***HN9*** fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance." *Oliver, 466 U.S., at 179*. In *Oliver*, we held that "an individual may not legitimately demand privacy for activities out of doors in fields, except in the area **[*236]** immediately surrounding the home." ***HN10*** *Id., at 178*. To fall within the "open fields" doctrine the area "need be neither 'open' nor a 'field' as those terms are used in common speech." *Id., at 180, n. 11*.

LEdHN[8] [8]Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe. *E. g., See* v. *City of Seattle, supra.* Moreover, it could hardly be expected that Dow would erect a huge cover over a 2,000-acre tract. In contending that its entire enclosed plant complex is an "industrial curtilage," Dow argues that its exposed manufacturing facilities are analogous to the curtilage surrounding a home because it has taken every possible step to bar access from ground level. The Court of Appeals held that whatever the limits of an "industrial curtilage" barring *ground*-level intrusions into Dow's private areas, the open areas exposed here were more analogous to "openfields" than to a curtilage for purposes of aerial observation. *749 F.2d, at 312-314*. In *Oliver*, the Court described the curtilage of a dwelling as "the area to which extends the **[**1826]** intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *466 U.S., at 180* (quoting *Boyd v. United States, 116 U.S. 616, 630 (1886)*). See *California* v. *Ciraolo, supra*. ***HN11*** The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

LEdHN[5B] [5B] ***LEdHN[9A]*** [9A]Admittedly, Dow's enclosed plant complex, like the area in *Oliver*, does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both. [3] Dow's inner **[*237]** manufacturing areas are elaborately **[***237]** secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[the] businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle, supra, at 543*. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a

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[3] In *Oliver*, we observed that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage -- as the area around the home to which the activity of home life extends -- is a familiar one easily understood from our daily experience." 466 U.S., at 182, n. 12. While we did not attempt to definitively mark the boundaries of what constitutes an open field, we noted that "[it] is clear . . . that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage." *Id.*, at 180, n. 11. As *Oliver* recognized, the curtilage surrounding a home is generally a well-defined, limited area. In stark contrast, the areas for which Dow claims enhanced protection cover the equivalent of a half dozen family farms.

2,000-acre outdoor manufacturing facility *without* physical entry. [4]

LEdHN[10] [10] We pointedout in *Donovan v. Dewey, 452 U.S. 594, 598-599 (1981)*, that ***HN12*** the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly **[*238]** from the sanctity accorded an individual's home." We emphasized that unlike a homeowner's interest in his dwelling, "[the] interest of the owner of commercial property is not one in being free from any inspections." *Id., at 599*. And with regard to regulatory inspections, we have held that ***HN13*** "[what] is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall v. Barlow's, Inc., 436 U.S., at 315* (footnote omitted).

Oliver recognized that in the open field context, "the public and police lawfully may survey lands from the air." *466 U.S., at 179* (footnote omitted). Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly **[**1827]** used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as 1/2-inch in diameter.

LEdHN[2B] [2B] ***LEdHN[3B]*** [3B]It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise **[***238]** constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. [5] **[*239]** An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other

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[4] We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial surveillance. Contrary to the partial dissent's understanding, *post*, at 241-242, the Court of Appeals emphasized:

"Dow did not take *any* precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off. If elaborate and expensive measures for ground security show that Dow has an actual expectation of privacy in ground security, as Dow argues, then taking *no* measure for aerial security should say something about its actual privacy expectation in being free from aerial observation." 749 F.2d 307, 312 (CA6 1984) (emphasis added).

Simply keeping track of the identification numbers of any planes flying overhead, with a later followup to see if photographs were taken, does not constitute a "[procedure] designed to protect the facility from aerial photography." *Post*, at 241.

[5] The partial dissent emphasizes Dow's claim that under magnification power lines as small as 1/2-inch in diameter can be observed. *Post*, at 243. But a glance at the photographs in issue shows that those power lines are observable only because of their stark contrast with the snow-white background. No objects as small as 1/2-inch in diameter such as a class ring, for example, are recognizable, nor are there any identifiable human faces or secret documents captured in such a fashion as to implicate more serious privacy concerns. ***Fourth Amendment*** cases must be decided on the facts of each case, not by extravagant generalizations. "[We] have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the ***Fourth Amendment***." *United States v. Karo, 468 U.S. 705, 712 (1984)*. On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors. [6]

LEdHN[9B] [9B]We conclude that ***HN14*** the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; [7] such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

LEdHN[2C] [2C]We hold that ***HN15*** the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the *Fourth Amendment*.

Affirmed.

Concur by: POWELL (In Part)

Dissent by: POWELL (In Part)

Dissent

[*240] JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part, and dissenting in part.

The *Fourth Amendment* protects private citizens from arbitrary surveillance by their Government. For nearly 20 years, this Court has **[***239]** adhered to a standard that ensured that *Fourth Amendment* rights would retain their vitality as technology expanded the Government's capacity to commit unsuspected intrusions into private areas and activities. Today, in the context of administrative aerial photography of **[**1828]** commercial premises, the Court retreats from that standard. It holds that the photography was not a *Fourth Amendment* "search" because it was not accompanied by a physical trespass and because the equipment used was not the most highly sophisticated form of technology available to the Government. Under this holding, the existence of an asserted privacy interest apparently will be decided solely by reference to the manner of surveillance used to introduce on that interest. Such an inquiry will not protect *Fourth Amendment* rights, but rather will permit their gradual decay as technology advances.

I

Since the 1890's, petitioner Dow Chemical Company (Dow) has been manufacturing chemicals at a facility in Midland, Michigan. Its complex covers 2,000 acres and contains a number of chemical process plants. Many of these are "open-air" plants, with reactor equipment, loading and storage facilities, transfer lines, and motors located in the open areas between buildings. Dow claims that the technology used in these plants constitutes confidential business information, and that the design and configuration of the equipment located there reveal details of Dow's secret manufacturing processes. [1]

[*241] Short of erecting a roof over the Midland complex, Dow has, as the Court states,

[6] The partial dissent relies heavily on Dow's claim that aerial photography of its facility is proscribed by trade secret laws. *Post*, at 248-249, and n. 11. While such laws may protect against use of photography by competitors in the same trade to advance their commercial interests, in no manner do "those laws constitute society's express determination" that *all* photography of Dow's facility violates reasonable expectations of privacy. *Post*, at 249. No trade secret law cited to us by Dow proscribes the use of aerial photography of Dow's facilities for law enforcement purposes, let alone photography for private purposes unrelated to competition such as mapmaking or simple amateur snapshots. See *supra*, at 232.

[7] Our holding here does not reach the issues raised by the Court of Appeals for the Seventh Circuit's holding regarding a "business curtilage" in *United States* v. *Swart*, 679 F.2d 698 (CA7 1982); that case involved actual physical entry onto the business premises.

[1] The record establishes that Dow used the open-air design primarily for reasons of safety. Dow determined that, if an accident were to occur and hazardous chemicals were inadvertently released, the concentration of toxic and explosive fumes within enclosed plants would constitute an intolerable risk to employee health and safety. Moreover, as the Court correctly observes, Dow found that the cost of

undertaken "elaborate" precautions to secure the facility from unwelcome intrusions. *Ante*, at 229. In fact, Dow appears to have done everything commercially feasible to protect the confidential business information and property located within the borders of the facility. Security measures include an 8-foot-high chain link fence completely surrounding the facility that is guarded by security personnel and monitored by closed-circuit television, alarm systems that are triggered by unauthorized entry into the facility, motion detectors that indicate movement of persons within restricted areas, a prohibition on use of camera equipment by anyone other than authorized Dow personnel, and a strict policy under which no photographs of the facility may be taken or released without prior management review and approval. [2] In addition to these precautions, the open-air plants were placed within the internal portion of the 2,000-acre **[***240]** complex to conceal them from the view of members of the public outside the perimeter fence.

Dow's security program also includes procedures designed to protect the facility from aerial photography. Dow has instructed its employees that it is "concerned when other than commercial passenger flights pass over the plant property." App. 14. When "suspicious" overflights occur, such as where a plane makes several passes over the facility, employees try to obtain the plane's identification number and description. **[*242]** Working with personnel from the State Police and local airports, Dow employees then locate the pilot to determine if he has photographed the facility. If Dow learns that he has done so, Dow takes steps to prevent dissemination of photographs that show details of its proprietary technology. [3]

[1829]** The controversy underlying this litigation arose out of the efforts of the Environmental Protection Agency (EPA) to check emissions from the power houses located within Dow's Midland complex for violations of federal air quality standards. After making one ground-level inspection with Dow's consent, and obtaining schematic drawings of the power houses from Dow, EPA requested Dow's permission to conduct a second inspection during which EPA proposed to photograph the facility. Dow objected to EPA's decision to take photographs and denied the request. EPA then informed Dow that it was considering obtaining a search warrant to gain entry to the plant. Inexplicably, EPA did not follow that procedure, but instead hired a private firm to take aerial photographs of the facility.

Using a sophisticated aerial mapping camera, [4] this firm took approximately 75 color photographs of various parts of **[*243]** the plant. The District Court found that "some of the photographs taken from directly above the plant at 1,200 feet are capable of enlargement to a scale of 1 inch equals 20 feet *or greater*, without

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enclosing the facility would be prohibitive. *Ante*, at 229, 236. The record reflects that the cost of roofing just one of the open-air plants would have been approximately $ 15 million in 1978. The record further shows that enclosing the plants would greatly increase the cost of routine maintenance. App. 74-75.

[2] On these and other security measures protecting the Midland facility, the District Court found that Dow has "spent at least 3.25 million dollars in each of the last ten years" preceding this litigation. 536 F.Supp. 1355, 1365 (ED Mich 1982).

[3] When Dow discovers that aerial photographs have been taken, it requests the photographer to turn over the film. Dow then develops the film and reviews the photographs. If the photographs depict private business information, Dow retains them and the negatives. In the event that the photographer refuses to cooperate, Dow commences litigation to protect its trade secrets.

[4] The District Court believed it was "important to an understanding of this case to provide a description of the highly effective equipment used" in photographing Dow's facility. *Id.*, at 1357, n. 2. "The aircraft used was a twin engine Beechcraft," which is "able to 'provide photographic stability, fast mobility and flight endurance required for precision photography.'" *Ibid*. (citation omitted). The camera used "cost in excess of $ 22,000.00 and is described by the company as the 'finest precision aerial camera available.' . . . The camera was mounted to the floor inside the aircraft and was capable of taking several photographs in precise and rapid succession." *Ibid*. (citation omitted). This technique facilitates stereoscopic examination, a type of examination that permits depth perception.

significant loss of detail or resolution. When enlarged in this manner, and viewed under magnification, it is possible to discern equipment, pipes, and power lines as small as 1/2 inch in diameter." *536 F.Supp. 1355, 1357 (ED Mich. 1982)* (emphasis in original). Observation of these minute details is, as the District Court found, "a near physical impossibility" from anywhere "but *directly above*" the complex. *Ibid*. (emphasis in original). Because of the complicated **[***241]** details captured in the photographs, the District Court concluded, "the camera saw a great deal more than the human eye could ever see," even if the observer was located directly above the facility. [5] *Id., at 1367*.

Several weeks later, Dow learned about the EPA-authorized overflight from an independent source. Dow filed this lawsuit, alleging that the aerial photography was an unreasonable search under the *Fourth Amendment* and constituted an inspection technique outside the scope of EPA's authority under the Clean Air Act, *42 U. S. C. §§ 7413*, *7414*. [6] The District Court upheld Dow's position on both issues and entered a permanent injunction restraining EPA from conducting future aerial surveillance and photography of the Midland facility. The Court of Appeals for the Sixth Circuit reversed. *749 F.2d 307 (1984)*. It concluded that, while Dow had a reasonable expectation of privacy with respect to **[*244]** ground-level intrusion into the enclosed buildings within its facility, it did not have such an expectation with respect to aerial observation and photography. [7] The court also held **[**1830]** that EPA's use of aerial photography did not exceed its authority under § 114 of the Clean Air Act, *42 U. S. C. § 7414*. We granted certiorari to review both of these holdings. *472 U.S. 1007 (1985)*.

The Court rejects Dow's constitutional claim on the ground that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the *Fourth Amendment*." *Ante*, at 239. [8] The Court does not explicitly reject application of the reasonable expectation of privacy standard of *Katz v. United States, 389 U.S. 347 (1967)*, in this context; nor does it explain how its result squares with *Katz* and its progeny. Instead, the Court relies on questionable assertions concerning the manner of the surveillance, and on its conclusion that the Midland facility more closely resembles an "open field" than it does the "curtilage" of a private home. The Court's decision marks a drastic reduction in the *Fourth Amendment* protections previously afforded to private commercial **[***242]** premises under our decisions. Along with *California* v. *Ciraolo, ante*, p. 207, also decided today, the decision may signal a significant retreat from the rationale of prior *Fourth Amendment* decisions.

[*245] II

Fourth Amendment protection of privacy interests in business premises "is . . . based upon societal expectations that have deep roots

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[5] As the District Court explained, when a person is "flying at 1,200 or 5,000 feet, [his] eye can discern only the basic sizes, shapes, outlines, and colors of the objects below." *Id., at 1367*. The aerial camera used in this case, on the other hand, "successfully captured vivid images of Dow's plant which EPA could later analyze under enlarged and magnified conditions." *Ibid*.

[6] Dow also claimed that the aerial photography constituted a "taking" of its property without due process of law in violation of the ***Fifth Amendment***. The District Court dismissed that claim without prejudice, and it is not before us.

[7] The Court of Appeals' holding rested in part on its erroneous observation that Dow had taken no steps to protect its privacy from aerial intrusions. See 749 F.2d, at 312-313. Moreover, the court apparently assumed that Dow would have to build some kind of barrier against aerial observation in order to have an actual expectation of privacy from aerial surveillance. *Ibid*. The court did not explain the basis for this assumption or discuss why it disagreed with the District Court's conclusion that commercial overflights posed virtually no risk to Dow's privacy interests.

[8] I agree with the Court's determination that the use of aerial photography as an inspection technique, absent ***Fourth Amendment*** constraints, does not exceed the scope of EPA's authority under the Clean Air Act, 42 U. S. C. § 7414(a), and to this extent I join Part III of the Court's opinion.

in the history of the Amendment." *Oliver v. United States, 466 U.S. 170, 178, n. 8 (1984)*. In *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)*, we observed that the "particular offensiveness" of the general warrant and writ of assistance, so despised by the Framers of the Constitution, "was acutely felt by the merchants and businessmen whose premises and products were inspected" under their authority. *Id., at 311*. Against that history, "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." *Id., at 312*. Our precedents therefore leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusion. See *G.M. Leasing Corp*. v. *United States, 429 U.S. 338, 353 (1977)*; *See* v. *City of Seattle, 387 U.S. 541, 543 (1967)*.

In the context of administrative inspections of business premises, the Court has recognized an exception to the *Fourth Amendment* rule that warrantless searches of property not accessible to members of the public are presumptively unreasonable. Since the interest of the owner of commercial property is "in being free from *unreasonable* intrusions onto his property by agents of the government," not in being free from any inspections whatsoever, the Court has held that "the assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes." *Donovan v. Dewey, 452 U.S. 594, 599 (1981)* (emphasis in original). Thus, where Congress has made a reasonable determination that a system of warrantless inspections is necessary to enforce its regulatory purpose, and where "the federal regulatory presence is **[**1831]** sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections," **[*246]** warrantless inspections may be permitted. *Id., at 600*. This exception does not apply here. The Government does not contend, nor does the Court hold, that the Clean Air Act authorizes a warrantless inspection program that adequately protects the privacy interests of those whose premises are subject to inspection.

Instead, the Court characterizes our decisions in this area simply as giving the Government "'greater latitude to conduct warrantless inspections of commercial property'" because privacy interests in such property differ significantly from privacy interests in the home. *Ante*, at 237 (citation omitted). This reasoning misunderstands the relevant precedents. The exception we have recognized for warrantless inspections, limited to pervasively regulated businesses, see *Donovan v.* **[***243]** *Dewey, supra; United States v. Biswell, 406 U.S. 311 (1972)*; *Colonnade Catering Corp*. v. *United States, 397 U.S. 72 (1970)*, is not founded solely on the differences between the premises occupied by such businesses and homes, or on a conclusion that administrative inspections do not intrude on protected privacy interests and therefore do not implicate *Fourth Amendment* concerns. Rather, the exception is based on a determination that the reasonable expectation of privacy that the owner of a business does enjoy may be adequately protected by the regulatory scheme itself. *Donovan v. Dewey, supra, at 599*. We have never held that warrantless intrusions on commercial property generally are acceptable under the *Fourth Amendment*. On the contrary, absent a sufficiently defined and regular program of warrantless inspections, the *Fourth Amendment's* warrant requirement is fully applicable in the commercial context. *Marshall v. Barlow's, Inc., supra, at 312-315, 324*; *G. M. Leasing Corp*. v. *United States, supra, at 358*; *See* v. *City of Seattle, supra, at 543-546*.

III

Since our decision in *Katz* v. *United States*, the question whether particular governmental conduct constitutes a **[*247]** *Fourth Amendment* "search" has turned on whether that conduct intruded on a constitutionally protected expectation of privacy. *Smith v. Maryland, 442 U.S. 735 (1979)*; *United States v. United States District Court, 407 U.S. 297 (1972)*. In the context of governmental inspection of commercial property, the Court has relied on the standard of *Katz* to determine whether an inspection violated the *Fourth Amendment* rights of the owner of the property. See *Marshall v. Barlow's, Inc., supra, at 313, 315*. Today, while purporting to consider the *Fourth Amendment* question raised here under

the rubric of *Katz*, the Court's analysis of the issue ignores the heart of the *Katz* standard.

A

The Court correctly observes that Dow has an expectation of privacy in the buildings located on the Midland property and that society is prepared to recognize that expectation as reasonable. *Ante*, at 236. Similarly, in view of the numerous security measures protecting the entire Dow complex from intrusion on the ground, the Court properly concludes that Dow has a reasonable expectation in being free from such intrusion. *Ante*, at 236-237. Turning to the issue presented in this case, however, the Court erroneously states that the *Fourth Amendment* protects Dow only from "actual physical entry" by the Government "into any enclosed area." *Ibid*.

This statement simply repudiates *Katz*. The reasonable expectation of privacy standard was designed to ensure that the **[**1832]** *Fourth Amendment* continues to protect privacy in an era when official surveillance can be accomplished without any physical penetration of or proximity to the area under inspection. Writing for the Court in *Katz*, Justice Stewart **[***244]** explained that *Fourth Amendment* protections would mean little in our modern world if the reach of the Amendment "[turned] upon the presence or absence of a physical intrusion into any given enclosure." *389 U.S., at 353*. Thus, the Court's observation that the aerial photography was not accompanied by a physical trespass is irrelevant to the analysis **[*248]** of the *Fourth Amendment* issue raised here, just as it was irrelevant in *Katz*. Since physical trespass no longer functions as a reliable proxy for intrusion on privacy, it is necessary to determine if the surveillance, whatever its form, intruded on a reasonable expectation that a certain activity or area would remain private.

B

An expectation of privacy is reasonable for *Fourth Amendment* purposes if it is rooted in a "source outside of the *Fourth Amendment*, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." [9] *Rakas v. Illinois, 439 U.S. 128, 143-144, n. 12 (1978)*. Dow argues that, by enacting trade secret laws, society has recognized that it has a legitimate interest in preserving the privacy of the relevant portions of its open-air plants. As long as Dow takes reasonable steps to protect its secrets, the law should enforce its right against theft or disclosure of those secrets. [10]

As discussed above, our cases holding that *Fourth Amendment* protections extend to business property have expressly relied on our society's historical understanding that owners **[*249]** of such property have a legitimate interest in being free from unreasonable governmental inspection. *Marshall v. Barlow's, Inc., 436 U.S., at 311-313*; see *Oliver v. United States, 466 U.S., at 178, n. 8*. Moreover, despite the Court's misconception of the nature of Dow's argument concerning the laws protecting the trade secrets within its open-air plants, [11] Dow plainly is correct to argue that those laws constitute society's express

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[9] Our decisions often use the words "reasonable" and "legitimate" interchangeably to describe a privacy interest entitled to ***Fourth Amendment*** protection. See *California* v. *Ciraolo, ante*, at 219-220, n. 4 (POWELL, J., dissenting).

[10] As the District Court observed: "Society has spoken in this area through Congress, the State Legislatures, and the courts. Federal law, under the Trade Secrets Act, 18 U. S. C. § 1905, makes it a crime for government employees to disclose trade secret information. The Clean Air Act itself, in Section 114(c), 42 U. S. C. § 7414(c), addresses this concern for [proprietary] information. Moreover, EPA has adopted regulations providing for protection of trade secrets. 40 CFR 2.201- 2.309. Michigan law, in addition to recognizing a tort action, also makes it a crime to appropriate trade secrets, M. C. L. A. § 752.772, as well as to invade one's privacy by means of surveillance. M. C. L. A. §§ 750.539a-539b. These legislative and judicial pronouncements are reflective of a societal acceptance of Dow's privacy expectation as reasonable." 536 F.Supp., at 1367.

[11] Contrary to the Court's assertion, Dow does not claim that ***Fourth Amendment*** protection of its facility is coextensive with the scope of trade secret statutes. *Ante*, at 232. Rather, Dow argues that the existence

determination that commercial entities have a legitimate interest in the privacy of certain kinds of property. Dow has taken every feasible step to protect information claimed to constitute [***245] trade secrets from the public and particularly from its competitors. Accordingly, Dow has a reasonable expectation of privacy in its commercial facility in the sense required by the *Fourth Amendment*. EPA's conduct in this case intruded on that expectation because the aerial photography captured information [**1833] that Dow had taken reasonable steps to preserve as private.

C

In this case, the Court does not claim that Dow's expectation of privacy is unreasonable because members of the public fly in airplanes. Whatever the merits of this position in *California* v. *Ciraolo, ante*, p. 207, it is inapplicable here, for it is not the case that "[any] member of the public flying in this airspace who cared to glance down" could have obtained the information captured by the aerial photography of Dow's facility. *California* v. *Ciraolo, ante*, at 213. As the District Court expressly found, the camera used to photograph the facility "saw a great deal more than the human eye could [*250] ever see." [12] *536 F.Supp., at 1367*. See *supra, at 242-243*, and n. 5. Thus, the possibility of casual observation by passengers on commercial or private aircraft provides no support for the Court's rejection of Dow's privacy interests.

The Court nevertheless asserts that Dow has no constitutionally protected privacy interests in its open-air facility because the facility more closely resembles an "open field" than a "curtilage." Of course, the Dow facility resembles neither. The purpose of the curtilage doctrine is to identify the limited outdoor area closely associated with a home. See *Oliver v. United States, supra, at 180*. The doctrine is irrelevant here since Dow makes no argument that its privacy interests are equivalent to those in the home. Moreover, the curtilage doctrine has never been held to constitute a limit on *Fourth Amendment* protection. Yet, the Court applies the doctrine, which affords heightened protection to homeowners, in a manner that eviscerates the protection traditionally given to the owner of commercial property. The Court offers no convincing explanation for this application.

Nor does the open field doctrine have a role to play in this case. Open fields, as we held in *Oliver*, are places in which people do not enjoy reasonable expectations of privacy and therefore are open to warrantless inspections from ground [*251] and air alike. *Oliver v. United States, supra, at 180-181*. Here, the Court concedes that [***246] Dow was constitutionally protected against warrantless intrusion by the Government on the ground. The complex bears no resemblance to an open field either in fact or within the meaning of our cases.

The other basis for the Court's judgment -- assorted observations concerning the technology used to photograph Dow's plant -- is even less convincing. The Court notes that EPA did not use "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations." *Ante*, at 238. Nor did EPA use "satellite technology" or another type of "equipment not generally available to the public." *Ibid*. Instead, as the Court states, the surveillance was accomplished by using "a conventional, albeit precise, commercial camera

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of those statutes provides support for its claim that society recognizes commercial privacy interests as reasonable.

[12] The Court disregards the fact that photographs taken by the sophisticated camera used in this case can be significantly enlarged without loss of acuity. As explained in n. 4, *supra*, the technique used in taking these pictures facilitates stereoscopic examination, which provides the viewer of the photographs with depth perception. Moreover, if the photographs were taken on transparent slides, they could be projected on a large screen. These possibilities illustrate the intrusive nature of aerial surveillance ignored by the Court today. The only ***Fourth Amendment*** limitation on such surveillance under today's decision apparently is based on the *means* of surveillance. The Court holds that Dow had no reasonable expectation of privacy from surveillance accomplished by means of a $ 22,000 mapping camera, but that it does have a reasonable expectation of privacy from satellite surveillance and photography. This type of distinction is heretofore wholly unknown in ***Fourth Amendment*** jurisprudence.

commonly used in mapmaking." *Ibid*. These observations shed no light on the antecedent question whether Dow had a reasonable expectation of privacy. *Katz* measures *Fourth Amendment* rights by reference to the privacy **[**1834]** interests that a free society recognizes as reasonable, not by reference to the method of surveillance used in the particular case. If the Court's observations were to become the basis of a new *Fourth Amendment* standard that would replace the rule in *Katz*, privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society. [13]

[*252] IV

I would reverse the decision of the Court of Appeals. EPA's aerial photography penetrated into a private commercial enclave, an area in which society has recognized that privacy interests legitimately may be claimed. The photographs captured highly confidential information that Dow had taken reasonable and objective steps to preserve as private. Since the Clean Air Act does not establish a defined and regular program of warrantless inspections, see *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)*, EPA should have sought a warrant from a neutral judicial officer. [14] The Court's holding that the warrantless photography does not **[***247]** constitute an unreasonable search within the meaning of the *Fourth Amendment* is based on the absence of any physical trespass -- a theory disapproved in a line of cases beginning with the decision in *Katz* v. *United States. E. g., United States v. United States District Court, 407 U.S. 297 (1972)*. These cases have provided a sensitive and reasonable means of preserving interests in privacy cherished by our society. The Court's decision today cannot be reconciled with our precedents or with the purpose of the *Fourth Amendment*.

References

2 Am Jur 2d, Administrative Law 87; 16 Am Jur 2d, Constitutional Law 601 - 606; 61A Am Jur 2d, Pollution Control 118; 68 Am Jur 2d, Searches and Seizures 15, 19, 20, 342 Federal Procedure, L Ed, Administrative Procedure 2:19-2:21, 2:25USCS, Constitution, Amendment 4; 42 USCS 7414US L Ed Digest, Environmental Law 24; Search and Seizure 2, 8, 15Index to Annotations, Aviation; Environmental Law; Investigations and Interrogations; Pollution; Search and Seizure Annotation References:Validity of seizure under Fourth Amendment "plain view" doctrine. *75 L Ed 2d 1018.Aerial observation or surveillance as violative of Fourth Amendment* guaranty against unreasonable search and seizure. *56 ALR Fed 772*.

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[13] With all respect, the Court's purported distinction -- for purposes of ***Fourth Amendment*** analysis -- between degrees of sophistication in surveillance equipment simply cannot be supported in fact or by the reasoning of any prior ***Fourth Amendment*** decision of this Court. The camera used by the firm hired by EPA is described by the Court as a "conventional" camera commonly used in mapmaking. *Ante*, at 238. The Court suggests, if not holds, that its decision would have been different if EPA had used "satellite technology" or other equipment not "available to the public." *Ibid*. But the camera used in this case was highly sophisticated in terms of its capability to reveal minute details of Dow's confidential technology and equipment. The District Court found that the photographs revealed details as "small as 1/2 inch in diameter." See *supra*, at 243. Satellite photography hardly could have been more informative about Dow's technology. Nor are "members of the public" likely to purchase $ 22,000 cameras.

[14] Our cases have explained that an administrative agency need not demonstrate "[probable] cause in the criminal law sense" to obtain a warrant to inspect property for compliance with a regulatory scheme. *Marshall* v. *Barlow's, Inc*., 436 U.S., at 320. Rather, an administrative warrant may issue "not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Ibid*. (footnote omitted; quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967)).

United States v. Pinson

United States Court of Appeals for the Eighth Circuit

January 11, 1994, Submitted ; May 23, 1994, Filed

No. 93-2851

Reporter
24 F.3d 1056; 1994 U.S. App. LEXIS 11737

United States of America, Appellee, v. Joseph Pinson, Appellant.

Subsequent History: [**1] Rehearing Denied June 21, 1994, Reported at: 1994 U.S. App. LEXIS 15479. Certiorari Denied December 11, 1994, Reported at: 1994 U.S. LEXIS 8844.

Prior History: Appeal from the United States District Court for the Eastern District of Missouri. District No. S1-91-00282CR(8). Honorable Donald J. Stohr, District Judge.

Disposition: Affirmed

Core Terms

heat, marijuana, sentence, expectation of privacy, detected, district court, search warrant, temperature, emanating, infrared, indoor

Case Summary

Procedural Posture
Defendant was charged with manufacturing over 100 marijuana plants in violation of 21 U.S.C.S. §§ 841(a)(1) and 841(b)(1)(B). The United States District Court for the Eastern District of Missouri denied defendant's motion to suppress evidence and he was convicted in a jury trial. Defendant appealed.

Overview
Defendant contended that the government's aerial surveillance of his residence with an electronic device known as a Forward Looking Infrared Device (FLIR) constituted an illegal search in violation of U.S. Const. amend IV. Defendant further claimed that the district court erred in its refusal to grant a downward departure under the "lesser harms" exception to U.S. Sentencing Guidelines Manual § 5K2.11. The court affirmed defendant's conviction and sentence for manufacturing over 100 marijuana plants in violation of 21 U.S.C.S. §§ 841(a)(1) and 841(b)(1)(B). The court found that: 1) because the FLIR did nothing more than gauge and reflect the amount of heat that emanated from the residence, there was no intrusion into the premises and, therefore, no search took place of defendant's property; 2) defendant had no reasonable expectation of privacy in the heat emanating from his residence; and 3) the district court would have been permitted to depart downward from the mandatory minimum sentence for 21 U.S.C.S. 841(b)(1)(B) only upon a motion by the government under 18 U.S.C.S. § 3553(e), and, therefore, did not err in refusing to depart downward where the government made no such motion.

Outcome
The court affirmed defendant's conviction and sentence.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

HN1 A party claiming to have suffered an unlawful invasion in violation of the *Fourth Amendment* must establish as a threshold matter that he had a legitimate expectation of privacy in the object searched or seized. An expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

HN2 A thermal detection device that does no more than gauge and reflect the amount of heat that emanates from a residence creates no intrusion into the premises and, thus, does not constitute a "search" under the *Fourth Amendment*.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

Criminal Law & Procedure > ... > Departures From Guidelines > Downward Departures > Lesser Harm

HN3 *U.S. Sentencing Guidelines Manual § 5K2.11* provides that in order to avoid a perceived greater harm, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct. However, where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.

Criminal Law & Procedure > ... > Controlled Substances > Manufacture > Elements

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

Criminal Law & Procedure > ... > Departures From Guidelines > Downward Departures > Substantial Assistance

HN4 A district court may depart below a statutory mandatory minimum only upon a motion by the government under *18 U.S.C.S. § 3553(e)*.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > General Overview

Criminal Law & Procedure > ... > Departures From Guidelines > Downward Departures > Substantial Assistance

HN5 See *18 U.S.C.S. § 3553(e)*.

Counsel: Counsel who presented argument on behalf of the appellant was Murray Stone of St. Louis, Missouri.

Counsel who presented argument on behalf of the appellee was Kenneth R. Tihen of St. Louis, Missouri. The names of Edward L. Dowd, Jr., Kenneth R. Tihen and Frans Von Kaenel of St. Louis, Missouri, appear on the brief of the appellee.

Judges: Before BOWMAN, Circuit Judge, and BRIGHT and ROSS, Senior Circuit Judges.

Opinion by: ROSS

Opinion

[*1057] ROSS, Senior Circuit Judge.

Appellant Joseph Pinson appeals from the jury verdict finding him guilty of one count of manufacturing over 100 marijuana plants in violation of *21 U.S.C. §§ 841(a)(1)* and *841(b)(1)(B)*. On appeal, Pinson claims the government's aerial surveillance of his residence with an electronic device known as a Forward Looking Infrared Device (FLIR) constituted an illegal search in violation of his *Fourth*

Amendment rights. Pinson also challenges the district court's [1] refusal to grant a downward departure under the "lesser harms" exception of *U.S.S.G § 5K2.11*. After careful consideration of the briefs, record and arguments of the parties, we affirm both the conviction and the sentence.

I.

On July 30, **[**2]** 1991, pursuant to a federal search warrant, agents of the Drug Enforcement Agency (DEA) and St. Louis city police officers searched Pinson's residence, located at 2034 Knox in St. Louis, Missouri. The affidavit in support of the search warrant showed that the investigation into Pinson's activities began on June 10, 1991, when Officers Whitson and Geiger of the Missouri State Highway Patrol learned that, in February 1989, Pinson had received three United Parcel Service packages from companies that were known suppliers of indoor hydroponic growing equipment. These companies were also known to advertise in *High Times* magazine, a publication that promotes the cultivation and use of marijuana. The affidavit also showed that the DEA Task Force had subpoenaed electrical utility records for Pinson's residence, as well as for other residences in the vicinity. Those records showed that 2034 Knox had an unusually high electrical usage, which the attesting detective stated was indicative of the extra electrical lighting needed for indoor cannabis cultivation.

The affidavit also provided that based on this information, the DEA decided to use an FLIR mounted on the underside of a St. Louis **[**3]** County Police Department helicopter. The helicopter performed aerial surveillance of Pinson's residence on July 25, 1991, at approximately 1:20 a.m. The affidavit established that the FLIR observation revealed that the covered window on the third floor displayed an excessive amount of heat as did the roof and a skylight of the residence.

The July 30, 1991 execution of the search warrant revealed an indoor marijuana growing operation on the third floor or attic of the residence. Marijuana plants, processed marijuana, cash, miscellaneous growing equipment, and magazines and books concerning marijuana cultivation were seized from the home pursuant to the search warrant. Pinson testified that the indoor marijuana growing operation was set up and maintained to treat his alleged asthma problems.

At the suppression hearing, Officer Patterson testified that the FLIR device provides only comparisons of surface temperatures. The device cannot actually measure temperature, but can merely compare the amount of heat radiated from various objects. Officer Patterson further testified that high intensity discharge lights, which use between four hundred and one thousand watt bulbs, are necessary **[**4]** for indoor marijuana growing operations. The use of these bulbs generates heat of approximately 150 degrees or more. Due to the fact that the optimum growing temperature for marijuana is between 68 and **[*1058]** 72 degrees, the excess heat generated by the high-wattage bulbs must be vented in order to properly maintain the indoor marijuana growing operation.

On appeal, Pinson argues that the use of the FLIR to detect the heat emanating from his home without first obtaining a warrant constituted an unreasonable search and seizure in violation of the *Fourth Amendment*. [2] ***HN1*** A party claiming to have suffered an unlawful invasion in violation of the *Fourth Amendment* must establish as a threshold matter that he had a legitimate expectation of privacy in the object searched or seized. An expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable. *Katz v. United States, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)* (Harlan, J., concurring).

[5]** Here, the government argues that Pinson did not have a reasonable expectation of privacy

[1] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

[2] Pinson does not challenge the sufficiency of the affidavit on appeal and we make no determination of that issue.

in the heat that was radiating from his house into the surrounding air space. It contends the heat-sensing device did not invade Pinson's home nor its curtilage, nor did it emit rays into his home. Instead, according to the government, the law enforcement officers merely used the device to enhance their ability to detect variations in temperature emanating from the surface of the house.

In *United States v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991)*, *aff'd on other grounds sub nom.*, *United States v. Feeney, 984 F.2d 1053 (9th Cir. 1993)*, the district court considered a similar challenge to a search warrant based, in large part, on evidence of heat emanations from a residence gained through the use of an infrared heat-sensing device. Like the device used in this case, the device in *Penny-Feeney* detected differences in temperature on the surface of objects being observed. Because the ***HN2*** device "did no more than gauge and reflect the amount of heat that emanated [] from" the residence, the court held there was no intrusion into **[**6]** the premises and, thus, the use of the thermal detection device did not constitute a "search" under the *Fourth Amendment*. *Id. at 225-26*.

The *Penny-Feeney* court further held that even if defendants were capable of demonstrating a subjective expectation of privacy in the "abandoned heat" or "heat waste," there would be no *Fourth Amendment* violation because, as cases such as *California v. Greenwood, 486 U.S. 35, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (1988)* suggest, "such an expectation [of privacy] would not be one that society would be willing to accept as objectively reasonable." *Penny-Feeney, 773 F. Supp. at 226*. In *Greenwood*, the United States Supreme Court considered whether the *Fourth Amendment* prohibits the warrantless search and seizure of bagged garbage left for collection outside a private residence and concluded that the defendants did not have a reasonable expectation of privacy "in the inculpatory items that they discarded." *Greenwood, 486 U.S. at 39-41*. Similarly, in this case there is **[**7]** no reasonable expectation of privacy in heat which Pinson voluntarily vented outside.

We also find the use of the infrared surveillance analogous to the warrantless use of police dogs trained to sniff and identify the presence of drugs. *See*, *e.g.*, *United States v. Place, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983)* (the use of nonintrusive equipment, such as a police-trained dog, does not constitute a search for purposes of the *Fourth Amendment*). Just as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera.

We conclude that Pinson did not have a reasonable expectation of privacy in the heat emanated from his home. Here, the FLIR device detected the differences in surface temperature from the heat being cast off or thrown away from the house. In this way, the use of the FLIR device is analogous to **[*1059]** the detection of odors emanating from luggage or the search of garbage left outside for collection. Any subjective expectation of privacy Pinson may have had in the **[**8]** heat radiated from his house is not one that society is prepared to recognize as "reasonable." The detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within. None of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery. [3]

Because Pinson failed to show that his subjective expectation of privacy is one that society finds **[**9]** objectively reasonable, his claim that the search warrant was issued in violation of his *Fourth Amendment* right is denied.

II.

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[3] Because we find the use of the infrared device analogous to a canine sniff or a garbage search, we are not persuaded by recent conclusions from other courts which have held that warrantless infrared surveillance violates the ***Fourth Amendment***. *See* *State v. Young*, 123 Wash. 2d 173, 867 P.2d 593 (Wash. 1994); *United States v. Ishmael*, 843 F. Supp. 205 (E.D. Texas 1994).

Pinson also contends that the district court erred in failing to grant a downward departure under ***HN3*** *U.S.S.G. § 5K2.11*, which provides that in order to avoid a perceived greater harm, "a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct." However, "where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." *Id*. Here, Pinson contends that his marijuana cultivation and use avoided the perceived greater harm of his suffering from asthma.

Pinson contends the district court abused its discretion in denying a sentence reduction on this basis because the court mistakenly construed his motion for downward departure as premised on *U.S.S.G. § 5K1.1*, rather than *§ 5K2.11*. Therefore, according to Pinson, in the absence of a request for a reduction in sentence from the United States Attorney, as required by *§ 5K1.1*, the court felt powerless to grant the motion.

The statute under which Pinson was convicted of manufacturing in excess of 100 **[**10]** marijuana plants provides for a mandatory minimum sentence of five years. *See 21 U.S.C. § 841(b)(1)(B)(vii)*. ***HN4*** A district court may depart below a statutory mandatory minimum only upon a motion by the government under *18 U.S.C. § 3553(e)*. [4] *See United States v. Rodriguez-Morales, 958 F.2d 1441, 1445* (8th Cir.), *cert. denied*, *113 S. Ct. 375 (1992)*. Because there was no government motion pursuant to *section 3553(e)*, the district court was without authority to depart below the mandatory minimum sentence prescribed by statute and therefore did not err in refusing to do so.

[11]** III.

Based on the foregoing, the conviction and sentence imposed by the district court are affirmed.

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[4] ***HN5*** ***18 U.S.C. § 3553(e)*** provides in relevant part:

> (e) **Limited authority to impose a sentence below a statutory minimum.--**Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Cal. v. Ciraolo

Supreme Court of the United States

December 10, 1985, Argued ; May 19, 1986, Decided

No. 84-1513

Reporter
476 U.S. 207; 106 S. Ct. 1809; 90 L. Ed. 2d 210; 1986 U.S. LEXIS 154; 54 U.S.L.W. 4471

CALIFORNIA v. CIRAOLO

Prior History: CERTIORARI TO COURT OF APPEALS OF CALIFORNIA, FIRST APPELLATE DISTRICT.

Disposition: *161 Cal. App. 3d 1081, 208 Cal. Rptr. 93*, reversed.

Core Terms

curtilage, yard, privacy, surveillance, activities, marijuana, expectation of privacy, observations, intrusion, photograph, aerial, fence, backyard, reasonable expectation of privacy, aircraft, altitude, plants, constitutionally protected, invasion, plane, feet, fly, aerial surveillance, navigable airspace, privacy interest, intrude, naked eye, conversations, warrantless, electronic

Case Summary

Procedural Posture
Plaintiff, the State of California, petitioned for writ of certiorari from decision of the Court of Appeals of California, First Appellate District, which reversed trial court's denial of defendant's motion to suppress evidence of search on ground that the warrantless aerial observation of defendant's yard violated *U.S. Const. amend. IV*.

Overview
The trial court denied defendant's motion to suppress evidence of a search, and defendant pled guilty to a charge of cultivation of marijuana. The appellate court reversed on the ground that the warrantless aerial observation which led to the issuance of a search warrant violated *U.S. Const. amend. IV*. On certiorari, the Court held that, although defendant's yard was within the curtilage of his home, this did not bar police observation. The Court stated that *Fourth Amendment* protection of the home had never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor did the mere fact that defendant had erected a 10-foot fence around his yard preclude an officer's observations from a public vantage point where he had a right to be and which rendered activities clearly visible. Defendant's expectation that his yard was protected from observation was unreasonable and not an expectation that society was prepared to honor.

Outcome
The court reversed the appellate court's judgment and found that defendant's motion to suppress was properly denied.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN1 The touchstone of *U.S. Const. amend. IV* analysis is whether a person has a constitutionally protected reasonable expectation of privacy, as articulated in Katz. Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? As to this second inquiry under Katz, the test of legitimacy is not whether the

individual chooses to conceal assertedly "private" activity, but instead whether the government's intrusion infringes upon the personal and societal values protected by *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN2 At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Transportation Law > Air Transportation > Airspace > Navigable Airspace

HN3 That the area is within the curtilage does not itself bar all police observation. *U.S. Const. amend. IV* protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. What a person knowingly exposes to the public, even in his own home or office, is not a subject of *U.S. Const. amend. IV* protection.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Transportation Law > Air Transportation > Airspace > Airways

HN4 A man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Transportation Law > Air Transportation > Airspace > Airways

HN5 *U.S. Const. amend. IV* does not require the police traveling in the public airways to obtain a warrant in order to observe what is visible to the naked eye.

Lawyers' Edition Display

Decision

Warrantless aerial observation of individual's fenced-in backyard held not to violate *Fourth Amendment*.

Summary

Investigating a tip that the accused was growing marijuana plants in his backyard, and finding that they could not observe anything from ground level because the accused's yard was surrounded by a 6-foot outer fence and a 10-foot inner fence, police officers secured a private plane, flew over the yard at an altitude of 1,000 feet, and made naked-eye observations which provided the basis for a search warrant. After a California trial court denied the accused's motion to suppress the plants seized in the ensuing search, the accused pleaded guilty to a charge of cultivating marijuana. The California Court of Appeal, First District, reversed, holding that this warrantless aerial surveillance of the curtilage of the accused's home violated his rights under the *Fourth Amendment*. The Court of Appeal distinguished cases allowing warrantless aerial surveillance of open fields, ruled that the height and existence of the fences demonstrated the accused's reasonable expectation of privacy by any standard, and found it significant that the surveillance had not been the result of a routine patrol but had been conducted for the express

purpose of observing this enclosure within the accused's curtilage (*161 Cal App 3d 1081, 208 Cal Rptr 93*).

On certiorari, the United States Supreme Court reversed. In an opinion by Burger, Ch. J., joined by White, Rehnquist, Stevens, and O'Connor, JJ., it was held that the *Fourth Amendment* is not violated by warrantless naked-eye observation of a fenced-in backyard within the curtilage of a home from an airplane operating in public airspace at an altitude of 1,000 feet, regardless of the fact that such observation is not part of a routine patrol but is particularly directed at identifying marijuana plants in that yard.

Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissented, expressing the view that the fact that the airspace is open to all persons for travel in airplanes should not deprive citizens of their privacy interest in outdoor activities within an enclosed curtilage.

Headnotes

SEARCH AND SEIZURE §2 > private dwelling -- aerial surveillance -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]***LEdHN[1D]*** [1D]

The *Fourth Amendment* is not violated by warrantless naked-eye observation of a fenced-in backyard within the curtilage of a home from an airplane operating in public airspace at an altitude of 1,000 feet, regardless of the fact that such surveillance is not part of a routine patrol but is specifically directed at identifying marijuana plants in that particular yard. (Powell, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

SEARCH AND SEIZURE §5 > expectation of privacy -- > Headnote:

LEdHN[2] [2]

The touchstone of *Fourth Amendment* analysis is whether a person has a constitutionally protected reasonable expectation of privacy; this rule involves a two-part inquiry: first, as to whether the individual has manifested a subjective expectation of privacy in the object of the challenged search, and second, as to whether society is willing to recognize that expectation as reasonable.

SEARCH AND SEIZURE §9 > private dwelling -- fences -- > Headnote:

LEdHN[3] [3]

For purposes of applying the protections of the *Fourth Amendment*, a homeowner who places a 6-foot-high outer fence and a 10-foot-high inner fence around his backyard has clearly met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful cultivation of marijuana in the yard; however, since a 10-foot fence might not shield the yard from observers on top of a truck or bus, it is not clear whether the homeowner has manifested a subjective expectation of privacy from all observations of his yard, or has merely manifested a hope that no one would observe his unlawful activity.

SEARCH AND SEIZURE §5 > reasonable expectation of privacy -- > Headnote:

LEdHN[4] [4]

In determining whether an individual's expectation of privacy in the object of a challenged search is reasonable, and thus subject to *Fourth Amendment* protection, the test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead is whether the government's intrusion infringes on the personal and societal values protected by the *Fourth Amendment*.

SEARCH AND SEIZURE §9 > private dwelling -- curtilage -- > Headnote:

LEdHN[5A] [5A]***LEdHN[5B]*** [5B]

At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life; the protection afforded the curtilage under the *Fourth Amendment* is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened; however, the fact that an area is within the curtilage does not itself bar all police observation.

SEARCH AND SEIZURE §9 > private dwelling -- curtilage -- > Headnote:

LEdHN[6] [6]

An area immediately adjacent to a suburban home, surrounded by high double fences, is within the curtilage of the home for purposes of *Fourth Amendment* analysis.

SEARCH AND SEIZURE §9 > private dwelling -- police observation -- > Headnote:

LEdHN[7] [7]

The *Fourth Amendment* protection of the home does not require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.

SEARCH AND SEIZURE §5 > concealed activities -- > Headnote:

LEdHN[8] [8]

The mere fact that an individual has taken measures to restrict some views of his activities does not, under the *Fourth Amendment*, preclude a law enforcement officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

SEARCH AND SEIZURE §5 > public exposure -- > Headnote:

LEdHN[9] [9]

What a person knowingly exposes to the public, even in his home or office, is not a subject of *Fourth Amendment* protection.

Syllabus

The Santa Clara, Cal., police received an anonymous telephone tip that marijuana was growing in respondent's backyard, which was enclosed by two fences and shielded from view at ground level. Officers who were trained in marijuana identification secured a private airplane, flew over respondent's house at an altitude of 1,000 feet, and readily identified marijuana plants growing in the yard. A search warrant was later obtained on the basis of one of the officer's naked-eye observations; a photograph of the surrounding area taken from the airplane was attached as an exhibit. The warrant was executed, and marijuana plants were seized. After the California trial court denied respondent's motion to suppress the evidence of the search, he pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed on the ground that the warrantless aerial observation of respondent's yard violated the *Fourth Amendment*.

Held: The *Fourth Amendment* was not violated by the naked-eye aerial observation of respondent's backyard. Pp. 211-215.

(a) The touchstone of *Fourth Amendment* analysis is whether a person has a constitutionally protected reasonable expectation of privacy, which involves the two inquiries of whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *Katz v. United States, 389 U.S. 347*. In pursuing the second inquiry, the test of legitimacy is not whether the individual chooses to conceal assertedly "private activity," but whether the government's intrusion infringes upon the personal and societal values protected by the *Fourth Amendment*. Pp. 211-212.

(b) On the record here, respondent's expectation of privacy from *all* observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent's home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner. The police were able to observe the plants readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The *Fourth Amendment* simply

does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye. Pp. 212-215.

Counsel: Laurence K. Sullivan, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, and Eugene W. Kaster, Deputy Attorney General.

Marshall Warren Krause, by appointment of the *Court, 472 U.S. 1025*, argued the cause for respondent. With him on the brief was Pamela Holmes Duncan. *

Judges: BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 215.

Opinion by: BURGER

Opinion

[*209] [*214] [**1810]** CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEdHN[1A] [1A]We granted certiorari to determine whether the *Fourth Amendment* is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

I

On September 2, 1982, Santa Clara Police received an anonymous telephone tip that marijuana was growing in respondent's backyard. Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard. Later that day, Officer Shutz, who was assigned to investigate, secured a private plane and flew over respondent's house at an altitude of 1,000 feet, within navigable airspace; he was accompanied by Officer Rodriguez. Both officers **[**1811]** were trained in marijuana identification. From the overflight, the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard; they photographed the area with a standard 35mm camera.

On September 8, 1982, Officer Shutz obtained a search warrant on the basis of an affidavit describing the anonymous tip and their observations; a photograph depicting respondent's house, the backyard, and neighboring homes was attached to the affidavit as an exhibit. The warrant was **[*210]** executed the next day and 73 plants were seized; it is not disputed that these were marijuana.

After the trial court denied respondent's motion to suppress the evidence of the search,

* Briefs of amici curiae urging reversal were filed for the State of Indiana et al. by Linley E. Pearson, Attorney General of Indiana, William E. Daily and Lisa M. Paunicka, Deputy Attorneys General, Charles A. Graddick, Attorney General of Alabama, Charles M. Oberly, Attorney General of Delaware, Michael J. Bowers, Attorney General of Georgia, Neil F. Hartigan, Attorney General of Illinois, Robert T. Stephan, Attorney General of Kansas, David L. Armstrong, Attorney General of Kentucky, William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, Francis X. Bellotti, Attorney General of Massachusetts, William L. Webster, Attorney General of Missouri, Robert M. Spire, Attorney General-Designate of Nebraska, Brian McKay, Attorney General of Nevada, Stephen E. Merrill, Attorney General of New Hampshire, Paul Bardacke, Attorney General of New Mexico, Anthony Celebrezze, Attorney General of Ohio, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Travis Medlock, Attorney General of South Carolina, Jeffrey Amestoy, Attorney General of Vermont, Gerald L. Baliles, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, and Archie G. McClintock, Attorney General of Wyoming; for Americans for Effective Law Enforcement Inc. et al. by Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, and Daniel B. Hales; for the Criminal Justice Legal Foundation by Christopher N. Heard; and for the Washington Legal Foundation by Daniel J. Popeo and George C. Smith.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by C. Douglas Floyd, Alan L. Schlosser, and Charles S. Sims; for the Civil Liberties Monitoring Project by Amitai Schwartz; and for the National Association of Criminal Defense Lawyers by John Kenneth Zwerling.

respondent pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed, however, on the ground that the warrantless aerial *observation* of respondent's yard which led to the issuance of the warrant violated the *Fourth Amendment*. *161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984)*. That court held first that respondent's backyard marijuana garden was within the "curtilage" of his home, under *Oliver v. United States, 466 U.S. 170 (1984)*. The court emphasized that the height and existence of the two fences constituted **[***215]** "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." *161 Cal. App. 3d, at 1089, 208 Cal. Rptr., at 97*.

Examining the particular method of surveillance undertaken, the court then found it "significant" that the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [respondent's] curtilage." *Ibid*. It held this focused observation was "a direct and unauthorized intrusion into the sanctity of the home" which violated respondent's reasonable expectation of privacy. *Id., at 1089-1090, 208 Cal. Rptr., at 98* (footnote omitted). The California Supreme Court denied the State's petition for review.

We granted the State's petition for certiorari, *471 U.S. 1134 (1985)*. We reverse.

The State argues that respondent has "knowingly exposed" his backyard to aerial observation, because all that was seen was visible to the naked eye from any aircraft flying overhead. The State analogizes its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look.

[*211] The California Court of Appeal, as we noted earlier, accepted the analysis that unlike the casual observation of a private person flying overhead, this flight was focused specifically on a small suburban yard, and was not the result of any routine patrol overflight. Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden within the curtilage without covering his yard. Such covering, he argues, would defeat its purpose as an outside living area; he asserts he has not "knowingly" exposed himself to aerial views.

II

LEdHN[2] [2]***HN1*** The touchstone of *Fourth Amendment* analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States, 389 U.S. 347, 360 (1967)* (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith v. Maryland, 442 U.S. 735, 740 (1979)*.

LEdHN[3] [3]Clearly -- and understandably -- respondent has met the test of manifesting his own subjective intent and desire to maintain **[**1812]** privacy as to his unlawful agricultural pursuits. However, we need not address that issue, for the State has not challenged the finding of the California Court of Appeal that respondent had such an expectation. It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent "took normal precautions to maintain his privacy." *Rawlings v. Kentucky, 448 U.S. 98, 105 (1980)*.

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on **[***216]** the top of a truck or a two-level bus. Whether respondent therefore manifested **[*212]** a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

LEdHN[4] [4]We turn, therefore, to the second inquiry under *Katz, i. e.*, whether that expectation

is reasonable. In pursuing this inquiry, we must keep in mind that "[the] test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the *Fourth Amendment*." *Oliver, supra, at 181-183*.

LEdHN[5A] [5A]***LEdHN[6]*** [6]Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the *Fourth Amendment* without a warrant. [1] The history and genesis of the curtilage doctrine are instructive. "At ***HN2*** common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver, supra, at 180* (quoting *Boyd v. United States, 116 U.S. 616, 630 (1886)*). See 4 Blackstone, Commentaries *225. The **[*213]** protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage. Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

LEdHN[5B] [5B] ***LEdHN[7]*** [7] ***LEdHN[8]*** [8] ***LEdHN[9]*** [9]***HN3*** That the area is within the curtilage does not itself bar all police observation. The *Fourth Amendment* protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E. g., United* **[***217]** *States v. Knotts, 460 U.S. 276, 282* **[**1813]** (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of *Fourth Amendment* protection." *Katz, supra, at 351*.

LEdHN[1B] [1B]The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, see 49 U. S. C. App. § 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen **[*214]** everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor. [2]

LEdHN[1C] [1C]

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[1] Because the parties framed the issue in the California courts below and in this Court as concerning only the reasonableness of aerial observation generally, see Pet. for Cert. i, without raising any distinct issue as to the photograph attached as an exhibit to the affidavit in support of the search warrant, our analysis is similarly circumscribed. It was the officer's observation, not the photograph, that supported the warrant. Officer Shutz testified that the photograph did not identify the marijuana as such because it failed to reveal a "true representation" of the color of the plants: "you have to see it with the naked eye." App. 36.

[2] The California Court of Appeal recognized that police have the right to use navigable airspace, but made a pointed distinction between police aircraft focusing on a particular home and police aircraft engaged in a "routine patrol." It concluded that the officers' "focused" observations violated respondent's reasonable expectations of privacy. In short, that court concluded that a regular police patrol plane identifying respondent's marijuana would lead to a different result. Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a

The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz v. United States, 389 U.S., at 361-362*, that the *Fourth Amendment* should not be limited to proscribing only physical intrusions onto private property. *Post*, at 215-216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz, supra, at 362*, were plainly not aimed at simple visual observations from a public place. Indeed, since *Katz* the Court has required warrants for electronic surveillance aimed at intercepting private conversations. See *United States v. United States District Court, 407 U.S. 297 (1972)*.

Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed [*215] by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. As Justice Harlan emphasized,

"a ***HN4*** man's home is, for most purposes, a place where he expects [***218] privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Katz, supra, at 361*.

LEdHN[1D] [1D]One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy. In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. ***HN5*** The *Fourth Amendment* simply does not require the police traveling in the public airways at this altitude [**1814] to obtain a warrant in order to observe what is visible to the naked eye. [3]

Reversed.

Dissent by: POWELL

Dissent

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Concurring in *Katz v. United States, 389 U.S. 347 (1967)*, Justice Harlan warned that any decision to construe the [*216] *Fourth Amendment* as proscribing only physical intrusions by police onto private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id., at 362*. Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a *Fourth Amendment* violation has occurred, I dissent.

I

As the Court's opinion reflects, the facts of this case are not complicated. Officer Shutz investigated an anonymous report that marijuana was growing in the backyard of respondent's home. A tall fence prevented Shutz

ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the ***Fourth Amendment***.

[3] In *Dow Chemical Co*. v. *United States, post*, p. 227, decided today, we hold that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace similarly does not require a warrant under the ***Fourth Amendment***. The State acknowledges that "[aerial] observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Brief for Petitioner 14-15.

from looking into the yard from the street. The yard was directly behind the home so that the home itself furnished one border of the fence. Shutz proceeded, without obtaining a warrant, to charter a plane and fly over the home at an altitude of 1,000 feet. Observing marijuana plants growing in the fenced-in yard, Shutz photographed respondent's home and yard, as well as homes and yards of neighbors. The photograph clearly shows that the enclosed yard also contained a small swimming pool and patio. **[***219]** Shutz then filed an affidavit, to which he attached the photograph, describing the anonymous tip and his aerial observation of the marijuana. A warrant issued, [1] and a search of the yard confirmed Shutz' aerial observations. Respondent was arrested for cultivating marijuana, a felony under California law.

Respondent contends that the police intruded on his constitutionally protected expectation of privacy when they conducted aerial surveillance of his home and photographed his backyard without first obtaining a warrant. The Court **[*217]** rejects that contention, holding that respondent's expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable airspace. In my view, the Court's holding rests on only one obvious fact, namely, that the airspace generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage.

II

A

The *Fourth Amendment* protects "[the] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While the familiar history of the Amendment need not be recounted here, [2] **[**1815]** we should remember that it reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." *Johnson v. United States, 333 U.S. 10, 14 (1948)*. Since that choice was made by the Framers of the Constitution, our cases construing the *Fourth Amendment* have relied in part on the common law for instruction on "what sorts of searches the Framers . . . regarded as reasonable." *Steagald v. United States, 451 U.S. 204, 217 (1981)*. But we have repeatedly refused to freeze "'into constitutional law those enforcement practices that existed at the time of the *Fourth Amendment's* passage.'" *Id., at 217, n. 10*, quoting *Payton v. New York, 445 U.S. 573, 591, n. 33 (1980)*. See *United States v. United States District Court, 407 U.S. 297, 313 (1972)*. Rather, we have construed the Amendment "'in light of contemporary norms and conditions,'" *Steagald v. United States, supra, at 217, n. 10*, quoting *Payton v. New York, supra, at 591, n. 33*, in order to prevent "any stealthy encroachments" on our citizens' right to be free of arbitrary official intrusion, **[*218]** *Boyd v. United States, 116 U.S. 616, 635 (1886)*. Since the landmark decision in *Katz* v. *United States*, the Court has fulfilled its duty to protect *Fourth Amendment* rights by asking if police surveillance has intruded on an **[***220]** individual's reasonable expectation of privacy.

As the decision in *Katz* held, and dissenting opinions written by Justices of this Court prior to *Katz* recognized, *e. g.*, *Goldman v. United States, 316 U.S. 129, 139-141 (1942)* (Murphy, J., dissenting); *Olmstead v. United States, 277 U.S. 438, 474 (1928)* (Brandeis, J., dissenting), a standard that defines a *Fourth Amendment* "search" by reference to whether police have physically invaded a "constitutionally protected area" provides no real protection against surveillance techniques made possible through technology. Technological advances have enabled police to see people's activities and associations, and to hear their conversations, without being in physical proximity. Moreover, the capability now exists for police to conduct intrusive surveillance without any physical penetration of the walls of

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[1] The warrant authorized Shutz to search the home and its attached garage, as well as the yard, for marijuana, narcotics paraphernalia, records relating to marijuana sales, and documents identifying the occupant of the premises.

[2] See, *e. g.*, *Payton v. New York, 445 U.S. 573, 583-585, n. 20 (1980)*.

homes or other structures that citizens may believe shelters their privacy. [3] Looking to the *Fourth Amendment* for protection against such "broad and unsuspected governmental incursions" into the "cherished privacy of law-abiding citizens," *United States* v. *United States District Court, supra*, at **[*219]** 312-313 (footnote omitted), the Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass. *Katz* announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy.

Our decisions following the teaching of *Katz* illustrate that this inquiry "normally embraces two discrete questions." *Smith* **[**1816]** *v. Maryland, 442 U.S. 735, 740 (1979)*. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Ibid*., quoting *Katz v. United States, 389 U.S., at 361* (Harlan, J., concurring). The second is whether that subjective expectation "is 'one that society is prepared to recognize as "reasonable."'" *442 U.S., at 740*, quoting *Katz v. United States, supra, at 361* (Harlan, J., concurring). While the Court today purports to reaffirm this analytical framework, its conclusory rejection of respondent's expectation of privacy in the yard of his residence as one that "is unreasonable," *ante*, at 213, represents a turning away from the principles that have guided our *Fourth Amendment* inquiry. The Court's **[***221]** rejection of respondent's *Fourth Amendment* claim is curiously at odds with its purported reaffirmation of the curtilage doctrine, both in this decision and its companion case, *Dow Chemical Co*. v. *United States, post* , p. 227, and particularly with its conclusion in *Dow* that society is prepared to recognize as reasonable expectations of privacy in the curtilage, *post*, at 235.

The second question under *Katz* has been described as asking whether an expectation of privacy is "legitimate in the sense required by the *Fourth Amendment*." [4] *Oliver v.* **[*220]** *United States, 466 U.S. 170, 182 (1984)*. The answer turns on "whether the government's intrusion infringes upon the personal and societal values protected by the *Fourth Amendment*." *Id., at 182-183*. While no single consideration has been regarded as dispositive, "the Court has given weight to such factors as the intention of the Framers of the *Fourth Amendment*, . . . the uses to which the individual has put a location, . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." [5] *Id., at 178*. Our decisions have made clear that this inquiry often must be decided by "reference to a 'place,'" *Katz*

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[3] As was said more than four decades ago: "[The] search of one's home or office no longer requires physical entry for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forbears and which inspired the ***Fourth Amendment***. . . . Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by the Government and intimate personal matters are laid bare to view." *Goldman* v. *United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting). Since 1942, science has developed even more sophisticated means of surveillance.

[4] In Justice Harlan's classic description, an actual expectation of privacy is entitled to ***Fourth Amendment*** protection if it is an expectation that society recognizes as "reasonable." *Katz* v. *United States*, 389 U.S., at 361 (Harlan, J., concurring). Since *Katz*, our decisions also have described constitutionally protected privacy interests as those that society regards as "legitimate," using the words "reasonable" and "legitimate" interchangeably. *E. g., Oliver* v. *United States*, 466 U.S. 170 (1984); *Rakas* v. *Illinois*, 439 U.S. 128, 143-144, n. 12 (1978).

[5] "Legitimation of expectations of privacy by law must have a source outside of the ***Fourth Amendment***, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Ibid*. This inquiry necessarily focuses on personal interests in privacy and liberty recognized by a free society.

v. United States, supra, at 361 (Harlan, J., concurring); see *Payton v. New York, 445 U.S., at 589*, and that a home is a place in which a subjective expectation of privacy virtually always will be legitimate, *ibid*.; see, *e. g., United States v. Karo, 468 U.S. 705, 713-715 (1984)*; *Steagald v. United States, 451 U.S., at 211-212*. "At the very core [of the *Fourth Amendment*] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States, 365 U.S. 505, 511 (1961)*.

B

This case involves surveillance of a home, for as we stated in *Oliver* v. *United States*, the curtilage "has been considered part of the home itself for *Fourth Amendment* purposes." *466 U.S., at 180*. In *Dow Chemical Co*. v. *United States*, **[*221]** decided today, the Court **[**1817]** reaffirms that the "curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure." **[***222]** *Post*, at 235. The Court in *Dow* emphasizes, moreover, that society accepts as reasonable citizens' expectations of privacy in the area immediately surrounding their homes. *Ibid*.

In deciding whether an area is within the curtilage, courts "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e. g., United States v. Van Dyke, 643 F.2d 992, 993-994 (CA4 1981)*; *United States v. Williams, 581 F.2d 451, 453 (CA5 1978)*; *Care v. United States, 231 F.2d 22, 25* (CA10), cert. denied, *351 U.S. 932 (1956)*." *Oliver v. United States, supra, at 180*. The lower federal courts have agreed that the curtilage is "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling." [6] *United States v. LaBerge, 267 F.Supp. 686, 692 (Md. 1967)*; see *United States v. Van Dyke, 643 F.2d 992, 993, n. 1 (CA4 1984)*. Those courts also have held that whether an area is within the curtilage must be decided by looking at all of the facts. *Ibid*., citing *Care v. United States, supra, at 25*. Relevant facts include the proximity between the area claimed to be curtilage and the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *Care v. United States, supra, at 25*; see also *United States v. Van Dyke, supra, at 993-994*.

[*222] III

A

The Court begins its analysis of the *Fourth Amendment* issue posed here by deciding that respondent had an expectation of privacy in his backyard. I agree with that conclusion because of the close proximity of the yard to the house, the nature of some of the activities respondent conducted there, [7] and because he had taken steps to shield those activities from the view of passersby. The Court then implicitly acknowledges that society is prepared to recognize his expectation as reasonable with respect to ground-level surveillance, holding that the yard was within the curtilage, an area in which privacy interests have been afforded the "most heightened" protection. *Ante*, at 213. As the foregoing discussion of the curtilage doctrine demonstrates, respondent's yard unquestionably was within the curtilage. Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without **[***223]** first

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[6] The Oxford English Dictionary defines curtilage as "a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings." 2 Oxford English Dictionary 1278 (1933).

[7] The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence. Tr. on Appeal 5-8 (Aug. 15, 1983).

securing a warrant. See *United States v. Van Dyke, supra*; see also *United States v. Williams, 581 F.2d 451 (CA5 1978)*.

The Court concludes, nevertheless, that Shutz could use an airplane -- a product of modern technology -- to intrude visually into respondent's yard. The Court argues that respondent had no reasonable expectation of privacy from aerial observation. It notes that Shutz was "within public navigable airspace," *ante*, at 213, when he looked into and photographed **[*223]** respondent's yard. It then relies on the fact that the surveillance was not accompanied by a **[**1818]** physical invasion of the curtilage, *ibid*. Reliance on the *manner* of surveillance is directly contrary to the standard of *Katz*, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society. Since *Katz*, we have consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable. *E. g., United States v. United States District Court, 407 U.S., at 313*.

The Court's holding, therefore, must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. *Ante*, at 213-214. The Court does not explain why it finds this fact to be significant. One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air. The Court finds support for this conclusion in *United States v. Knotts, 460 U.S. 276 (1983)*. *Ante*, at 213.

This line of reasoning is flawed. First, the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. [8] The risk that a passenger on such a plane might observe **[*224]** private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court's suggestion, *ante*, at 213, people do not "'knowingly [expose]'" their residential yards "'to the public'" merely by failing to build barriers that prevent aerial surveillance.

The Court's reliance on *Knotts* reveals the second problem with its **[***224]** analysis. The activities under surveillance in *Knotts* took place on public streets, not in private homes. *460 U.S., at 281-282*. Comings and goings on public streets are public matters, and the Constitution does not disable police from observing what every member of the public can see. The activity in this case, by contrast, took place within the private area immediately adjacent to a home. Yet the Court approves purposeful police surveillance of that activity and area similar to that approved in *Knotts* with respect to public activities and areas. The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. [9] But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, **[**1819]** business, or pleasure, not for the

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[8] Of course, during takeoff and landing, planes briefly fly at low enough altitudes to afford fleeting opportunities to observe some types of activity in the curtilages of residents who live within the strictly regulated takeoff and landing zones. As all of us know from personal experience, at least in passenger aircrafts, there rarely -- if ever -- is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by Officer Shutz in this case. The Court's analogy to commercial and private overflights, therefore, is wholly without merit.

[9] Some of our precedents have held that an expectation of privacy was not reasonable in part because the individual had assumed the risk that certain kinds of private information would be turned over to the police. *United States v. Miller, 425 U.S. 435, 443 (1976)*. None of the prior decisions of this Court is a precedent

purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for [*225] the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas. [10]

B

Since respondent had a reasonable expectation of privacy in his yard, aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a "search" within the meaning of the *Fourth Amendment*. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States v. Karo, 468 U.S., at 717*. This case presents no such exception. The indiscriminate nature of aerial surveillance, illustrated by Officer Shutz' photograph of respondent's home and enclosed yard as well as those of his neighbors, poses "far too serious a threat to privacy interests in the home to escape entirely some sort of *Fourth Amendment* oversight." *Id., at 716* (footnote omitted). Therefore, I would affirm the judgment of the [***225] California Court of Appeal ordering suppression of the marijuana plants.

IV

Some may believe that this case, involving no physical intrusion on private property, presents "the obnoxious thing in its mildest and least repulsive form." *Boyd v. United [*226] States, 116 U.S., at 635*. But this Court recognized long ago that the essence of a *Fourth Amendment* violation is "not the breaking of [a person's] doors, and the rummaging of his drawers," but rather is "the invasion of his indefeasible right of personal security, personal liberty and private property." *Id., at 630*. Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in *Katz* was designed to prevent silent and unseen invasions of *Fourth Amendment* privacy rights in a variety of settings, we have consistently afforded heightened protection to a person's right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the longstanding presumption that warrantless intrusions into the home are unreasonable. [11] I dissent.

References

*16 Am Jur 2d, Constitutional Law 601-606; 68 Am Jur 2d, Searches and Seizures 16, 347 Federal Procedural Forms, L Ed, Criminal Procedure 20:611-20:6148 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 241-243, 247, 250, 252, 258; 22 Am Jur Pl & Pr Forms (Rev), Search and Seizure, Forms 71-83, 86USCS, Constitution, Amendment 4*US L ed Digest, Search and Seizure 2, 9, 15, 25Index to Annotations, Aviation; Observation; Privacy; Search and Seizure; SurveillanceAnnotation References:Validity of seizure under *Fourth Amendment* "plain view" doctrine. *75 L Ed 2d*

for today's decision. As JUSTICE MARSHALL has observed, it is our duty to be sensitive to the risks that a citizen "should be forced to assume in a free and open society." *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (dissenting opinion).

[10] The Court's decision has serious implications for outdoor family activities conducted in the curtilage of a home. The feature of such activities that makes them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will. Aerial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage. It would appear that, after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes.

[11] Of course, the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there. But the ***Fourth Amendment*** requires police to secure a warrant before they may intrude on that privacy to search for evidence of suspected crime. *United States v. Karo*, 468 U.S. 705, 713-715 (1984).

1018.Aerial observation or surveillance as violative of Fourth Amendment guaranty against unreasonable search and seizure. *56 ALR Fed 772.*

Hester v. United States

Supreme Court of the United States

Submitted April 24, 1924. ; May 5, 1924, Decided

No. 243.

Reporter
265 U.S. 57; 44 S. Ct. 445; 68 L. Ed. 898; 1924 U.S. LEXIS 2577

HESTER *v.* UNITED STATES.

Prior History: ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

ERROR to a judgment of the District Court sentencing the plaintiff in error who was convicted by a jury of concealing distilled spirits, in violation of Rev. Stats., § 3296.

Core Terms

whiskey, bottle, jug, concealed, distilled, witnesses, contents, pursued, seizure, quart, jar

Case Summary

Procedural Posture
Defendant filed a writ of error based on a judgment of the United States District Court for the Western District of South Carolina, which convicted defendant of concealing distilled spirits.

Overview
Defendant was convicted by a district court of concealing distilled spirits. Defendant argued on appeal that the district court had erred in refusing to exclude the testimony of two witnesses and to direct a verdict for him. Defendant further argued that the district court had violated his rights under the *Fourth* and *Fifth Amendments of the Constitution of the United States*. The Court found that the witnesses were revenue officers who had picked up a jug of moonshine that defendant had discarded while running. Defendant argued that the evidence was inadmissible because the officers did not have a warrant for search or arrest. The Court stated, in affirming defendant's conviction, that there was no seizure of the jug because the officers examined the contents of the jug after it had been abandoned. The fact that the examination of the jug took place on land belonging to defendant's father did not violate the *Fourth Amendment* because the special protection accorded by the *Fourth Amendment* did not extend to the open fields.

Outcome
The Court affirmed the district court's judgment.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Open Fields

HN1 The special protection accorded by the *Fourth Amendment* to the people in their "persons, houses, papers, and effects," is not extended to the open fields.

Lawyers' Edition Display

Headnotes

Evidence -- liquor taken without warrant -- unlawful search. --

Headnote:

The *4th* and *5th Amendments to the Federal Constitution* do not exclude evidence as to the contents of receptacles which officers saw in possession of one accused of concealing distilled

spirits, and of his companion, in an open field, and which such persons dropped and broke when pursued by the officers.

[For other cases, see Search and Seizure, 1-11, in Digest Sup. Ct. 1923 Supp.]

Search -- protection to person in open field. --

Headnote:

The protection extended by the *4th Amendment to the Federal Constitution* of security in person, houses, papers, and effects, does not extend to open fields.

[For other cases, see Search and Seizure, 1-11, in Digest Sup. Ct. 1923 Supp.]

Syllabus

1. In a prosecution for concealing spirits, admission of testimony of revenue officers as to finding moonshine whiskey in a broken jug and other vessels near the house where the defendant resided and as to suspicious occurrences in that vicinity at the time of their visit, held not violative of the *Fourth* or *Fifth Amendments*, even though the witnesses held no warrant and were trespassers on the land, the matters attested being merely acts and disclosures of defendant and his associates outside the house. P. 58.

2. The protection accorded by the *Fourth Amendment* to the people in their "persons, houses, papers, and effects," does not extend to open fields. Id.

Affirmed.

Counsel: Mr. Richard A. Ford for plaintiff in error. Mr. H. P. Burbage was also on the brief.

Mr. Solicitor General Beck and Mrs. Mabel Walker Willebrandt, Assistant Attorney General, for the United States.

Opinion by: HOLMES

Opinion

[*57] **[**446]** **[***899]** MR. JUSTICE HOLMES delivered the opinion of the Court.

The plaintiff in error, Hester, was convicted of concealing distilled spirits &c. under Rev. Stats., § 3296.The case is brought here directly from the District Court on the single ground that by refusing to exclude the testimony of two witnesses and to direct and verdict for the defendant, the plaintiff in error, the Court violated his **[*58]** rights under the *Fourth* and *Fifth Amendments of the Constitution of the United States*.

The witnesses whose testimony is objected to were revenue officers. In consequence of information they went toward the house of Hester's father, where the plaintiff in error lived, and as they approached saw one Henderson drive near to the house. They concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained what the officers, being experts, recognized as moonshine whiskey, that is whiskey illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whiskey there left it, but found outside a jar that had been thrown out and broken and that also contained whiskey. While the officers were there other cars stopped at the house but **[***900]** were spoken to by Hester's father and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle -- and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself **[*59]** does not require an

answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, ***HN1*** the special protection accorded by the *Fourth Amendment* to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.