



1986

# In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment - *California v. Ciraolo*

Saundra R. Steinberg

Follow this and additional works at: <https://scholar.smu.edu/smulr>

## Recommended Citation

Saundra R. Steinberg, *In Plane View: Is Aerial Surveillance a Violation of the Fourth Amendment - California v. Ciraolo*, 40 Sw L.J. 1133 (1986)

<https://scholar.smu.edu/smulr/vol40/iss4/8>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# IN PLANE VIEW: IS AERIAL SURVEILLANCE A VIOLATION OF THE FOURTH AMENDMENT? *CALIFORNIA* *V. CIRAOLO*

On September 2, 1982, Detective Shutz of the Santa Clara Police Department received an anonymous telephone message that marijuana plants were growing in the backyard of Dante Carlo Ciralo, a Santa Clara resident. Initially Detective Shutz, trained in identifying marijuana, conducted a ground level investigation of the area surrounding Ciralo's home. He failed to observe any marijuana plants growing, however, because two fences, an outer one approximately six feet high and an inner one approximately ten feet high, completely enclosed Ciralo's backyard. Later the same day Detective Shutz chartered a private plane to fly over the Ciralo neighborhood. Santa Clara County Narcotics Task Force Agent Rodriguez, an expert in identifying marijuana cultivation from the air, accompanied Shutz on the flight. The officers flew over the Ciralo home within navigable airspace at an altitude of 1000 feet. As the officers flew over, they identified and photographed marijuana plants eight to ten feet high growing in a fifteen by twenty-five foot plot in Ciralo's backyard. On September 8, 1982, based on information gathered during the aerial observation, Detective Shutz obtained a search warrant for Ciralo's home.<sup>1</sup> In executing the warrant the next day the police seized the seventy-three plants that grew in Ciralo's backyard. The plants were undisputedly identified as marijuana.

Ciralo pleaded guilty to a charge of cultivating marijuana after the trial court denied his motion to suppress the evidence of the search. The California Court of Appeals reversed on the ground that the warrantless aerial surveillance of Ciralo's backyard constituted an unreasonable search in violation of the fourth amendment.<sup>2</sup> The court based its decision on the fact that the marijuana garden was within the curtilage<sup>3</sup> of Ciralo's home.<sup>4</sup> The court of appeals also pointed out that the height of Ciralo's two fences provided objective criteria from which the court could conclude that Ciralo

---

1. An affidavit containing observations gathered during the overflight provided the basis for issuance of the search warrant. The affidavit contained a description of the anonymous tip, the officers' naked-eye observations, and a photograph of Ciralo's backyard and house and nearby homes.

2. *California v. Ciralo*, 161 Cal. App. 3d 1081, 1090, 208 Cal. Rptr. 93, 98 (1984).

3. In *Oliver v. United States*, 466 U.S. 170 (1984), the Supreme Court defined "curtilage" as "the land immediately surrounding and associated with the home." *Id.* at 180.

4. 161 Cal. App. 3d at 1089, 208 Cal. Rptr. at 97.

manifested a reasonable expectation of privacy.<sup>5</sup> The California Supreme Court denied the state's petition for review. The United States Supreme Court granted certiorari. *Held reversed*: Naked-eye aerial observation of a fenced backyard does not violate the owner's fourth amendment right to be free from unreasonable searches and seizures. *California v. Ciraolo*, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

## I. HISTORICAL DEVELOPMENT OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The fourth amendment to the United States Constitution provides a specific prohibition against unreasonable searches and seizures.<sup>6</sup> Prior to 1967 the Supreme Court strictly construed the fourth amendment in developing a standard for determining areas that would be protected against unreasonable search and seizure.<sup>7</sup> The Court originally limited constitutionally protected areas<sup>8</sup> only to one's person, house, papers, and effects.<sup>9</sup>

Early Supreme Court cases based the fourth amendment prohibition of unreasonable searches and seizures on the concept of physical trespass onto

5. *Id.* at 1089, 208 Cal. Rptr. at 97.

6. U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For a detailed account of the history of the fourth amendment see W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.1 (1st ed. 1978) (discussion of origins and purposes of fourth amendment protections); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 30-42 (1966) (historical account of fourth amendment's development from colonial era to ratification in 1791); N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-78 (1937) (detailed history of fourth amendment development).

7. See Note, *Oliver v. United States: Will Expectations of Privacy Shield Criminal Acts No More?*, 36 MERCER L. REV. 1401, 1402-03 (1985) (analysis of early Supreme Court cases in which Court interpreted wording of fourth amendment literally in applying it to decisions).

The concept that certain places required greater protection than others stems back to the period of time prior to the American Revolution. The authors of the fourth amendment were very cognizant of British officials' abusive use of writs of assistance and general warrants in the colonies before the War of Independence. See N. LASSON, *supra* note 6, at 51-78. Therefore, the authors of the fourth amendment carefully worded the amendment to insure the protection of people's security "in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. CONST. amend. IV.

8. Justice Frank, in his dissenting opinion in *United States v. On Lee*, 193 F.2d 306, 314 (2d Cir. 1951), first used the term "constitutionally protected areas" to describe the scope of the fourth amendment's protection.

9. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 357 (1974). Over the years, courts have expanded the definition of constitutionally protected areas to include apartments, hotel rooms, stores, and warehouses. See, e.g., *Clinton v. Virginia*, 377 U.S. 158, 158 (1964) (*per curiam*) (warrantless search of apartment held to be violation of fourth amendment); *Stoner v. California*, 376 U.S. 483, 490 (1964) (warrantless search of hotel room violative of fourth amendment); *Preston v. United States*, 376 U.S. 364, 368 (1964) (warrantless search of car unreasonable under fourth amendment).

constitutionally protected areas.<sup>10</sup> Federal agents invading a home in search of illegal conduct constituted a blatant example of an unconstitutional search.<sup>11</sup> If, however, the federal agents looked for evidence of illegal conduct in an open field, such conduct did not constitute a search since open fields were not a traditionally protected area.<sup>12</sup> In *Hester v. United States*,<sup>13</sup> for example, the Supreme Court invoked a strict reading of the fourth amendment in ruling that the amendment's protection did not extend to an open field.<sup>14</sup> In *Hester* revenue officers staked out a field near the home of the defendant's father. When the agents saw the defendant hand a bottle of illicit whiskey to a suspected customer, the agents seized the bottle and arrested Hester. The Court held that police may constitutionally search an open field because they only commit a technical trespass on the property.<sup>15</sup> The Court held that the fourth amendment's protection of "persons, houses, papers, and effects" did not extend to open fields.<sup>16</sup>

The Court did not relax its fourth amendment analysis despite developments in technology that allowed intrusion into constitutionally protected areas without physical trespass. In an early surveillance case, *Olmstead v. United States*,<sup>17</sup> the Supreme Court held that wiretapping telephone lines outside of a defendant's property did not constitute a search since no physical invasion or trespass of a traditionally protected area occurred.<sup>18</sup> The Supreme Court also applied the constitutionally protected areas standard to other methods of surveillance. In *Goldman v. United States*<sup>19</sup> the Court held that placing a detectaphone against a wall to hear conversations in the office next door did not violate the fourth amendment since no physical trespass occurred.<sup>20</sup> The *Goldman* dissent, however, maintained that the Court

---

10. *Silverman v. United States*, 365 U.S. 505, 512 (1961) (attachment of listening device on homeowner's property constituted physical trespass and violated fourth amendment); *Lee v. United States*, 343 U.S. 747, 751-52 (1952) (federal agents' use of concealed microphone to tape petitioner in incriminating conversation on petitioner's property not fourth amendment violation since no physical trespass occurred within constitutionally protected area); *Goldman v. United States*, 316 U.S. 129, 135 (1942) (placement of eavesdropping device against office wall to hear conversations in adjoining office did not violate fourth amendment since no unauthorized physical encroachment within constitutionally protected area occurred); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (evidence of conspiracy obtained by wiretapping telephone lines of defendant's residence and office did not violate fourth amendment because no physical intrusion on defendant's private property occurred).

11. See *Hester v. United States*, 265 U.S. 57, 58-59 (1924); Note, *Fourth Amendment Implications of Warrantless Aerial Surveillance*, 17 VAL. U.L. REV. 309, 313 (1983).

12. See *Hester v. United States*, 265 U.S. 57, 58-59 (1924).

13. 265 U.S. 57 (1924).

14. *Id.* at 59.

15. *Id.* at 58-59. Even though the officers were physically on Hester's land, Hester's own actions disclosed the illegal articles. The officers' presence could be termed a technical trespass, but not an illegal trespass. The evidence was not obtained by entry of Hester's house. *Id.*

16. *Id.* at 59.

17. 277 U.S. 438 (1928).

18. *Id.* at 466. The agents did not conduct the *Olmstead* wiretapping in the conspirators' building, but in the basement of a nearby building. The Supreme Court held that no search took place since the tapping connections occurred on public property, and since no trespass occurred on the defendant's private property. *Id.* at 464-66.

19. 316 U.S. 129 (1942).

20. *Id.* at 134.

should have expanded the fourth amendment protections. Since advances in technology allowed police greater access to individuals' privacy, the search of a constitutionally protected area such as the home or office no longer required physical entry.<sup>21</sup> The dissent argued that the Court's holding that police could enter protected areas without physical trespass warranted a re-examination of the constitutionally protected areas standard.<sup>22</sup>

The Court eventually departed from strict application of the physical trespass onto a constitutionally protected area requirement. In *Silverman v. United States*<sup>23</sup> the Supreme Court held that the use of a spike mike<sup>24</sup> constituted a search. Federal agents inserted the spike through a wall adjoining defendant's home until it made contact with a heating duct. The surveillance device in contact with the duct acted as a microphone that enabled the officers to hear conversations going on in the house. The Court held that the government's unauthorized physical intrusion and encroachment upon defendant's property constituted a violation of the fourth amendment, although no actual physical trespass occurred upon Silverman's home.<sup>25</sup>

In 1967 the Supreme Court adopted the modern approach to fourth amendment protections in the landmark case of *Katz v. United States*.<sup>26</sup> The Court shifted its fourth amendment focus away from the constitutionally protected areas standard toward a review of an individual's reasonable expectations of privacy.<sup>27</sup> In *Katz* FBI agents, in an attempt to uncover illicit activities, attached a listening device to a public telephone booth to record Katz's telephone conversations. As a result of these recordings Katz was charged with violating a federal statute that prohibits the use of a telephone to transmit wagering information.<sup>28</sup> Premising its opinion in *Katz* on the proposition that the fourth amendment protects people, not places,<sup>29</sup> the Court ruled that using the wiretap without a warrant invaded Katz's expectation of privacy.<sup>30</sup> The Court, therefore, held the wiretap unconstitutional.<sup>31</sup> The Court specifically noted that what a person knowingly exposes to the public, even in his own home or office, is not subject to fourth amendment protection.<sup>32</sup> The Court also noted, however, that if a person wants to

---

21. *Id.* at 138-39 (Murphy, J. dissenting).

22. *Id.* at 138 (conditions of modern life warranted expansion of fourth amendment if people were to enjoy full benefit of privacy provided by Constitution); see Note, *supra* note 11, at 313.

23. 365 U.S. 505 (1961).

24. A spike mike is a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. *Id.* at 506.

25. *Id.* at 510-11.

26. 389 U.S. 347 (1967).

27. *Id.* at 351.

28. *Id.* at 347.

29. *Id.* at 351.

30. *Id.* at 353.

31. *Id.*; see Note, *The EPA's Use of Aerial Photography Violates the Fourth Amendment: Dow Chemical Co. v. United States*, 15 CONN. L. REV. 327, 337 (1983).

32. 389 U.S. at 353. A homeowner does not completely lose fourth amendment protection by inviting people into his home for the transaction of illegal business. *Recznik v. City of Lorain*, 393 U.S. 166, 169 (1968). The fourth amendment, however, does not provide protection against the risk that one of the guests is an undercover police officer, since the amendment

keep something private, even in an area publicly accessible, it may be constitutionally protected.<sup>33</sup> According to the Court, Katz had justifiably relied on the privacy of the telephone booth.<sup>34</sup> The *Katz* opinion, however, failed to define when a court could determine that an individual had justifiably relied on the privacy of a place, or how the courts should apply the reasonable expectation of privacy test in subsequent fourth amendment cases.<sup>35</sup>

Justice Harlan's concurrence in *Katz* established a more concrete basis for fourth amendment protection.<sup>36</sup> He interpreted the reasonable expectation of privacy test as having two elements. The first requirement was that a person must exhibit an actual subjective expectation of privacy.<sup>37</sup> The second element required that the expectation be one that society considered reasonable.<sup>38</sup> If these two elements were not satisfied, a fourth amendment search did not occur, and no warrant was necessary.<sup>39</sup> Although substantial opposition to Justice Harlan's test exists,<sup>40</sup> some opinions of the Supreme Court have adopted this two-part test when resolving fourth amendment issues.<sup>41</sup> In his dissent in *United States v. White*<sup>42</sup> Justice Harlan stated that in applying the second part of the *Katz* test the courts should base an assessment of a socially reasonable expectation of privacy on a variety of factors including the public's interest in freedom from government intrusion.<sup>43</sup>

The *Katz* decision caused confusion among state and lower federal courts

does not protect a wrongdoer who mistakenly believes that a person the wrongdoer voluntarily makes privy to illegal activity will not reveal it. *United States v. White*, 401 U.S. 745, 750 (1971).

33. 389 U.S. at 351-52. According to *Katz*, if a person justifiably relies on a place, seemingly any place, as private, and the government intrudes upon that place, a search has occurred. The search is presumptively unreasonable in the absence of a search warrant. *Id.* at 361.

34. *Id.* at 353.

35. See Note, *supra* note 11, at 311.

36. 389 U.S. at 360.

37. *Id.* at 361.

38. *Id.*

39. See *Smith v. Maryland*, 442 U.S. 735, 745-56 (1979). In *Smith* the installation of a pen register, a device used to record numbers dialed from the suspect's home, did not violate the fourth amendment. The Court held that since the petitioner did not have a legitimate expectation of privacy as required by the *Katz* test, no search occurred, and thus, no fourth amendment violation existed. *Id.*

40. See Note, *supra* note 11, at 343 (description of various problems confronted by courts in applying the Harlan test); see also Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, a Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 74 (1974) (critical analysis of the Harlan twofold test and potential misuse by courts); Note, *Criminal Procedure—Oliver v. United States: The Open Fields Doctrine Survives Katz*, 63 N.C.L. REV. 546, 552-53 (1985) [hereinafter Note, *Criminal Procedure*] (although Court applied Harlan's two-part test, second part of the test proved troublesome).

41. See *Oliver v. United States*, 466 U.S. 170, 177 (1984); *Michigan v. Clifford*, 464 U.S. 287, 292 (1984); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *United States v. Thomas*, 729 F.2d 120, 122 (2d Cir.), *cert. denied*, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984); *De Rochemont v. Commissioner*, 628 F. Supp. 957, 962 (N.D. Ind. 1986); *United States v. Wylder*, 590 F. Supp. 926, 927 (D. Or. 1984).

42. 401 U.S. 745 (1971).

43. *Id.* at 786. Justice Harlan asserted that the nature of the government intrusion and its probable impact on the individual's sense of security must be weighed against the usefulness of the intrusion for effective law enforcement. *Id.*; see Note, *Criminal Procedure, supra* note 40, at 553.

in decisions involving warrantless searches of open fields.<sup>44</sup> In *Oliver v. United States*<sup>45</sup> the Supreme Court seized the opportunity to clarify the confusion surrounding the applicability of the *Katz* standard to open fields.<sup>46</sup> In *Oliver* the Supreme Court consolidated appeals from two factually similar lower court decisions.<sup>47</sup> In each case police officers, disregarding no-trespass signs, entered private land and discovered marijuana growing in fields. Both landowners were arrested and indicted, one for the illegal manufacture of marijuana<sup>48</sup> and the other for violating a state statute barring distribution of illicit drugs.<sup>49</sup>

In deciding *Oliver* the court determined that no contradiction existed between *Katz* and *Hester* and preserved the open fields doctrine as an exception to the fourth amendment.<sup>50</sup> The Court reconciled the *Katz* decision with *Hester* by applying the second part of Justice Harlan's test for the reasonable expectation of privacy.<sup>51</sup> The Court determined that privacy in an open field is not an interest society would recognize as reasonable,<sup>52</sup> and held that the proper test for determining whether an expectation of privacy is legitimate is whether the intrusion by the government into a certain area infringes upon the personal and societal values protected by the fourth amendment.<sup>53</sup> While noting that no single factor was determinative, the majority looked to several factors in determining whether a given place may be subject to unrea-

---

44. See Note, *Criminal Procedure*, *supra* note 40, at 553. *Katz*, repudiating the property basis for fourth amendment protection, made the viability of the open field doctrine questionable. The *Katz* opinion impliedly raised the possibility of a reasonable expectation of privacy in an open field. *Id.* But see *United States v. Long*, 674 F.2d 848, 852-53 (11th Cir. 1982) (convictions for marijuana importation upheld when no legitimate expectation of privacy existed in open barn); *United States v. Lace*, 669 F.2d 46, 50-51 (2d. Cir.) (no legitimate expectation of privacy in private land clearly visible from public road and easily observable by outsiders who could enter property at will), *cert. denied*, 459 U.S. 854 (1982); *Commonwealth v. Janek*, 242 Pa. Super. 340, 363 A.2d 1299, 1300 (1976) (seizure of evidence from a field upheld despite seclusion of area and posted warnings against trespassing).

45. 466 U.S. 170 (1984).

46. See *id.* at 177-82; Note, *The Return to Open Season for Police in the Open Field*, 50 MO. L. REV. 425, 430 (1985).

47. 466 U.S. at 178-79. The lower court decisions were *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982), and *State v. Thornton*, 453 A.2d 489 (Me. 1982).

48. *Oliver*, 686 F.2d at 358.

49. *Thornton*, 453 A.2d at 490.

50. 466 U.S. at 184; see Note, *Criminal Procedure*, *supra* note 40, at 556.

51. 466 U.S. at 176-78; see Note, *Criminal Procedure*, *supra* note 40, at 556.

52. 466 U.S. at 177. The Court noted:

[o]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas. And both petitioner *Oliver* and respondent *Thornton* concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

*Id.* (footnotes omitted).

53. *Id.* at 182-83.

sonable governmental invasions.<sup>54</sup> The first factor was the intention of the drafters of the fourth amendment;<sup>55</sup> the second, the uses to which an area has been put;<sup>56</sup> and the third, societal understanding that certain areas deserve protection.<sup>57</sup> The Court distinguished open fields from areas surrounding the home, which are defined as curtilage and are protected under the fourth amendment.<sup>58</sup> The Court described the curtilage as the area used for intimate activities sought to be protected by the framers of the Constitution.<sup>59</sup> Such activities would include activities associated with the sanctity of the home.<sup>60</sup> The Court concluded that an individual cannot legitimately demand privacy for activities carried on outdoors in fields, except in the area immediately surrounding his home.<sup>61</sup>

Recognizing the traditional expectation of privacy within a dwelling, the Supreme Court in *United States v. Knotts*<sup>62</sup> held that such expectation of privacy did not extend to visual observation of a dwelling conducted from public places.<sup>63</sup> In *Knotts* police officers placed a beeper<sup>64</sup> in a drum of chloroform purchased by a suspect. The officers believed that the suspect used the chloroform to manufacture illicit drugs. The officers, by visual surveillance and by monitoring the beeper signals, followed the car in which the suspect had placed the chloroform to the suspect's cabin. After three days of visually surveying the cabin and movements outside the cabin, the officers secured a search warrant. The search of the cabin led to Knott's conviction. The Supreme Court held that the three-day surveillance of the cabin did not constitute a search under the fourth amendment on the basis that the officers' visual surveillance of Knotts from a public place did not invade any of his legitimate expectations of privacy.<sup>65</sup>

The Supreme Court reaffirmed the curtilage doctrine in *Dow Chemical Co. v. United States*.<sup>66</sup> In *Dow* the Environmental Protection Agency (EPA) employed a commercial aerial photographer to take photographs of one of Dow's chemical plants after Dow denied the agency's request for an on-site inspection. Without an administrative search warrant the EPA instructed the photographer to photograph Dow's facility from various altitudes, all within navigable airspace. The Court held that no search occurred as contemplated under the fourth amendment.<sup>67</sup>

---

54. *Id.* at 177-78 (citing with approval *Rakas v. Illinois*, 439 U.S. 128, 152-53 (1978)).

55. *Id.* at 178.

56. *Id.*

57. *Id.* at 179; see *supra* note 52.

58. 466 U.S. at 180; see Note, *supra* note 7, at 1410.

59. 466 U.S. at 180 (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

60. *Id.*

61. *Id.*

62. 460 U.S. 276 (1983).

63. *Id.* at 282.

64. "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *Id.* at 277.

65. *Id.* at 280-85.

66. 106 S. Ct. 1819, 1825-27, 90 L. Ed. 2d 226, 235-38 (1986). The Supreme Court decided *Dow* as a companion case to *Ciraolo*.

67. *Id.* at 1827, 90 L. Ed. 2d at 238.



According to the Court, the open areas of an industrial plant are not the same as the curtilage of a dwelling.<sup>68</sup> The Court reemphasized the *Oliver* Court's definition of curtilage as conceptually limited to the sanctity of the home.<sup>69</sup> The Court further reasoned that the activities conducted in outdoor areas or spaces between the buildings or structures of a manufacturing plant do not enjoy the same fourth amendment protection as the intimate activities associated with the home and its curtilage.<sup>70</sup> The Court concluded that, for the purpose of aerial surveillance, the open areas of an industrial manufacturing plant are more analogous to an open field than to the curtilage of a home;<sup>71</sup> thus, the aerial surveillance was not a search as contemplated under the fourth amendment.<sup>72</sup>

## II. CALIFORNIA V. CIRAOLLO

In *California v. Ciraolo* the Supreme Court clarified and reaffirmed the holdings and rationale of *Katz* and *Oliver* as applied to the aerial observation of activities within the curtilage of a home.<sup>73</sup> The question facing the Court in *Ciraolo* was whether the fourth amendment protects the curtilage of a dwelling from all observation, including aerial surveillance.<sup>74</sup> The majority opinion, written by Chief Justice Burger,<sup>75</sup> first recognized that Justice Harlan's two-part test announced in *Katz*<sup>76</sup> was the proper basis for the analysis of whether a person has a constitutionally protected reasonable expectation of privacy.<sup>77</sup> The Court conceded that Ciraolo's backyard was within the definition of curtilage as defined in *Oliver*.<sup>78</sup> That area, however, was not immune from all warrantless observations by police, including the naked-eye observation of the backyard from an altitude of 1,000 feet.<sup>79</sup>

Applying Justice Harlan's two-part test, the Court determined first, whether Ciraolo had manifested a subjective expectation of privacy, and second, whether society was willing to recognize that expectation as reasonable.<sup>80</sup> The Court conceded that Ciraolo manifested a subjective expectation of privacy from observations from street-level views, basing its observation on the fact that respondent had erected a ten-foot fence.<sup>81</sup> The Court, however, could not construe this fact to be a manifestation of Ciraolo's expectation of privacy from all observations of his backyard.<sup>82</sup> Ciraolo's fence,

---

68. *Id.*

69. *Id.* at 1825, 90 L. Ed. 2d at 236 (citing *Oliver*, 466 U.S. at 180); see *supra* text accompanying note 59.

70. 106 S. Ct. at 1825, 90 L. Ed. 2d at 236.

71. *Id.* at 1827, 90 L. Ed. 2d at 238.

72. *Id.*

73. 106 S. Ct. at 1811-12, 90 L. Ed. 2d at 215-16.

74. *Id.* at 1811, 90 L. Ed. 2d at 214.

75. Justices White, Rehnquist, Stevens, and O'Connor joined the opinion of the Court.

76. 389 U.S. at 360; see *supra* text accompanying notes 36-39.

77. 106 S. Ct. at 1811, 90 L. Ed. 2d at 215 (quoting *Katz*, 389 U.S. at 360).

78. *Id.* at 1812, 90 L. Ed. 2d at 216 (citing *Oliver*, 466 U.S. at 180).

79. 106 S. Ct. at 1812, 90 L. Ed. 2d at 216.

80. *Id.*; see *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

81. 106 S. Ct. at 1811, 90 L. Ed. 2d at 215.

82. *Id.* at 1812, 90 L. Ed. 2d at 216.

regardless of its height, did not shield views of the yard from above.

The Court's opinion next turned to the second element of the *Katz* test, the analysis of whether the respondent's expectation was reasonable. The Court, echoing *Oliver*, reemphasized that the legitimacy of an individual's expectation of privacy does not flow from his choice to conceal assertedly private activity, but rather from the impermissibility of governmental intrusion upon personal and societal values protected by the fourth amendment.<sup>83</sup> In this case society was not prepared to protect Ciraolo's expectation that his garden was protected from all observation.<sup>84</sup>

The majority based its holding on the fact that, although the respondent's backyard was concededly within the curtilage of his home, the fence did not bar all observation by the police.<sup>85</sup> Even though an individual manifests his expectations of privacy by taking measures to restrict some views of his activities, such measures do not preclude a governmental officer from making observations from a public vantage point where he has a right to be.<sup>86</sup> The public vantage point in this case, the Court pointed out, was the navigable airspace in which Officers Shutz and Rodriguez flew in order to view Ciraolo's backyard.<sup>87</sup> The Court further explained that any member of the public flying in the airspace could have observed what the officers viewed.<sup>88</sup> The fact that the officers were trained experts in the detection of marijuana was irrelevant.<sup>89</sup> The Court reasoned that the officers' observations were precisely what a governmental agent needed to provide in order to obtain a warrant.<sup>90</sup>

The majority, dismissed the dissent's contention that the majority opinion ignored Justice Harlan's warning in his *Katz* concurrence.<sup>91</sup> Justice Harlan had warned that the Court should not limit the fourth amendment's application to physical intrusions onto private property.<sup>92</sup> The majority stated that Justice Harlan's concurrence was not aimed at simple visual observations from a public place, but at electronic interference with private conversations.<sup>93</sup> The majority opinion reasoned that although the Court, subsequent to *Katz*, required warrants for electronic surveillances of private conversations,<sup>94</sup> Justice Harlan would not consider an aircraft to be an electronic development that could "stealthily intrude upon an individual's privacy."<sup>95</sup>

---

83. *Id.* (citing *Oliver*, 466 U.S. at 182-83); see *supra* notes 45-61.

84. 106 S. Ct. at 1813, 90 L. Ed. 2d at 217.

85. *Id.* at 1812, 90 L. Ed. 2d at 216.

86. *Id.* The Court relied on *United States v. Knotts*, 460 U.S. 276, 282 (1983), for its premise that fourth amendment protection does not extend to the visual observation of activities from a public place. *Id.*; see *supra* notes 62-65 and accompanying text.

87. 106 S. Ct. at 1813, 90 L. Ed. 2d at 217.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Katz*, 389 U.S. at 361-62 (Harlan, J., concurring).

93. 106 S. Ct. at 1813, 90 L. Ed. 2d at 217.

94. *Id.*; see *United States v. United States Dist. Court*, 407 U.S. 297, 324 (1972) (warrantless surveillances of conspirators' conversations violated the fourth amendment).

95. 106 S. Ct. at 1813, 90 L. Ed. 2d at 218.

The Court concluded its opinion by stating that the fourth amendment did not require police, traveling in the public airways, first to obtain a warrant before observing what is visible to the naked eye.<sup>96</sup> The Court held that Ciraolo unreasonably expected that his marijuana plants could be constitutionally protected from naked eye observation from an altitude of 1000 feet.<sup>97</sup>

The *Ciraolo* dissent, written by Justice Powell,<sup>98</sup> contended that a fourth amendment violation occurred when the Santa Clara police officers observed Ciraolo's backyard from the air.<sup>99</sup> The dissenting opinion criticized the majority's application of the *Katz* test,<sup>100</sup> arguing that *Katz* and subsequent decisions established a new standard that defined a fourth amendment search.<sup>101</sup> That standard, the dissent explained, changed from one that turned on whether police conducted the surveillance by invading a constitutionally protected area to a standard that turned on whether the surveillance in question invaded a constitutionally protected reasonable expectation of privacy.<sup>102</sup>

The majority and dissenting opinions diverged on the Court's opinion that Ciraolo was unreasonable to expect privacy from aerial observation. The dissent criticized the majority opinion's reliance on the fact that Officer Shutz made his observations from public navigable airspace. The dissent pointed out that the Court's reliance on the manner of surveillance was in direct contrast to the *Katz* standard, which focused on the interests of the individual and allowed society to identify a constitutionally protected right of privacy.<sup>103</sup> Justice Powell concluded that the majority opinion rested solely on the fact that, because members of the public, flying in planes, can look down at homes as they fly over them, citizens must bear the risk that activities in their backyards will be observed.<sup>104</sup> The dissent refused to impose such a risk on homeowners, emphasizing that people use public airspace for travel, business, or pleasure, not for the purpose of observing activities occurring in residential backyards.<sup>105</sup>

The dissent agreed with the majority that the respondent's backyard was within the curtilage of his home and that he had a legitimate expectation of privacy there with respect to warrantless surveillances from ground level.<sup>106</sup> Justice Powell, however, found that the majority's rejection of Ciraolo's claim of protection was at odds with the Court's reaffirmation of the curtilage doctrine in Ciraolo's case and in the companion case, *Dow Chemical Co.*

---

96. *Id.*

97. *Id.*

98. Justices Brennan, Marshall, and Blackmun joined in the dissent.

99. 106 S. Ct. at 1814, 90 L. Ed. 2d at 218.

100. *Id.* at 1815, 90 L. Ed. 2d at 220.

101. *Id.* at 1816, 90 L. Ed. 2d at 220-21; see *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972).

102. 106 S. Ct. at 1815, 90 L. Ed. 2d at 220.

103. *Id.* at 1817-18, 90 L. Ed. 2d at 223.

104. *Id.* at 1818, 90 L. Ed. 2d at 223.

105. *Id.*

106. *Id.* at 1817, 90 L. Ed. 2d at 222.

*v. United States*.<sup>107</sup> According to the dissent, previous decisions inquiring into the legitimacy of an individual's expectation of privacy concentrated on determining whether the government's intrusion infringed upon personal and societal values protected by the fourth amendment.<sup>108</sup> The determination of the inquiry, the dissent continued, was often based on a reference to a place, and a home is a place in which a subjective expectation of privacy is almost always legitimate.<sup>109</sup>

The dissent also criticized the Court's reliance on *United States v. Knotts*.<sup>110</sup> Justice Powell pointed out that the activities in *Knotts* took place on public streets, not in private homes; whereas, the activity observed in *Ciraolo* took place within the curtilage of respondent's home, a private area.<sup>111</sup> The dissent, therefore, explained the majority's reasoning as being 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.<sup>112</sup> The dissent, however, found it hard to believe that society is prepared to force individuals to bear the risk of aerial surveillance of their backyards by police without a warrant.<sup>113</sup> In its conclusion the dissent found that *Ciraolo* had a reasonable expectation of privacy in his yard and thus concluded that the aerial surveillance by the police without a warrant and for the purpose of discovering evidence of a crime constituted a search conducted in violation of the fourth amendment.<sup>114</sup>

### III. CONCLUSION

In *California v. Ciraolo* the Supreme Court held that the fourth amendment does not protect an area within the curtilage of a home from warrantless naked eye surveillance from a public vantage point. The Court based its findings on the fact that although *Ciraolo* manifested some expectation of privacy, the measures he took only barred observation from some views. Thus, the Court held that *Ciraolo* was unreasonable to expect the fourth amendment to protect his backyard against visual intrusion from all views. The Court ruled that society would not accept *Ciraolo's* expectations as reasonable. Even though *Ciraolo's* backyard was within the curtilage of his home, that fact, of itself, did not bar all observation by police.

The Supreme Court in *Katz* designed a standard that preserved the essence of fourth amendment protection: the right of the individual reasonably to expect privacy and thus freedom from governmental intrusion. Even

---

107. *Id.* at 1819, 1825-27, 90 L. Ed. 2d at 226, 235-38; see *supra* notes 66-72 and accompanying text.

108. See *Oliver*, 466 U.S. at 182; *Payton v. New York*, 445 U.S. 573, 589 (1980); *supra* text accompanying note 53.

109. 106 S. Ct. at 1817, 90 L. Ed. 2d at 221; see also *Silverman v. United States*, 365 U.S. 505, 511 (1961). At the center of the fourth amendment is a person's right to retreat into his own home and be free from unreasonable governmental intrusions. *Id.*

110. 460 U.S. 276, 282 (1983); see *supra* notes 62-65 and accompanying text.

111. 106 S. Ct. at 1818, 90 L. Ed. 2d at 224.

112. *Id.* at 1818-19, 90 L. Ed. 2d at 224.

113. *Id.*

114. *Id.*

before *Katz* the Court had consistently upheld the right to privacy and freedom from intrusion in one's home. *Ciraolo* is a large incursion into the essence of fourth amendment protection. Individuals must now bear the risk that private activities conducted in the home and surrounding areas may be watched by police without a warrant unless all possible views are obstructed.

*Sandra R. Steinberg*