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AERIAL SEARCHES OF BUSINESS PREMISES: A BIRD'S EYE VIEW OF THE FOURTH AMENDMENT

It is the fourth amendment to the United States Constitution which protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures."¹ Although the amendment specifically refers to "houses," business and commercial premises are likewise entitled to protection against unreasonable searches and seizures.² Attempts to isolate

1. U.S. CONST. amend. IV. The fourth amendment 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.

Id. The fourth amendment is made applicable to the states through the Due Process Clause of the fourteenth amendment. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). If evidence is obtained as a result of a violation of the fourth amendment, it is the exclusionary rule which calls for the suppression of this evidence. See *Weeks v. United States*, 232 U.S. 383, 393-94 (1914). Moreover, under the "fruit of the poisonous tree" doctrine, information gathered in an illegal search that leads to the subsequent issuance of a search warrant will render that warrant invalid. See *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963).

Historically, the protection the Framers of the Constitution sought through the fourth amendment had its origin in "the abuses connected with the writs of assistance and general warrants employed by British officials in the colonies prior to the American Revolution." See Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 NYU L. REV. 968, 969 (1968). See also *Boyd v. United States*, 116 U.S. 616, 624-30 (1886) (detailed description of abuses associated with general warrants and writs of assistance). In the seminal English case of *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), general warrants were described as so broad as to be incapable of justification; these warrants would be issued as blanks under the authority of a magistrate, and the specifics would then be filled out when the warrants were used. See Comment, *Aerial Surveillance and the Fourth Amendment*, 17 J. MAR. L. REV. 455, 459-60 (1984). The Supreme Court in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), observed: "The particular offensiveness [the general warrants] engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." *Marshall*, 436 U.S. at 311; accord *Oliver v. United States*, ___ U.S. ___, ___, 104 S. Ct. 1735, 1740 n.8 (1984). In addition, the writs of assistance enabled customs officials to conduct broad searches for contraband or smuggled goods with very little justification. See Comment, *supra*, at 460. See generally Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379, 414-15 (1967) (historical background of search and seizure); Comment, *supra*, at 457-58 (origin and meaning of "to be secure").

2. See *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *United States v. FMC Corp.*, 428 F. Supp. 615, 618 (W.D. N.Y. 1977); 1 W. LA FAVE, SEARCH AND SEIZURE § 2.4(b) (1978); LA FAVE AND

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violations of the fourth amendment must begin with the inquiry of whether or not the conduct amounts to a "search."³ The inquiry becomes more complex when the alleged search is not a ground level intrusion,⁴ but is perpetrated by the more advanced method of aerial surveillance.⁵ When the aerial vantage point assumed by government officials is further aided by the use of sophisticated surveillance devices such as high resolution cameras, the intrusive nature of aerial searches becomes more apparent.⁶

In *Dow Chemical Co. v. United States*,⁷ the United States Court of Appeals for the Sixth Circuit held that the Environmental Protection Agency's aerial surveillance and photography of the Dow plant did not amount to a fourth amendment search.⁸ This Article

ISRAEL, CRIMINAL PROCEDURE, § 3.2(e) (1984).

3. See Comment, *supra* note 1, at 474.

4. See, e.g., *Marshall v. Barlow's Inc.*, 436 U.S. 307, 309-10 (1978) (inspection of work area of factory); *Wilson v. Health & Hosp. Corp.*, 620 F.2d 1201, 1207 (7th Cir. 1980) (warrantless search of real property by health officials); *Wattenburg v. United States*, 388 F.2d 853, 855-56 (9th Cir. 1968) (warrantless search of lodge operator's premises); *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 343-44, 420 N.E.2d 55, 56, 438 N.Y.S.2d 257, 258 (1981) (warrantless search of landlord's property).

5. See, e.g., *United States v. Allen*, 675 F.2d 1373, 1377-78 (9th Cir. 1980) (warrantless helicopter surveillance by Coast Guard of defendant's ranch), *cert. denied*, 454 U.S. 833 (1981); *United States v. Bassford*, 601 F. Supp. 1324, 1326 (D. Me. 1985) (aerial surveillance of marijuana plot); *United States v. Mullinex*, 508 F. Supp. 512, 512-13 (E.D. Ky. 1980) (aerial surveillance of defendant's farm); *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1085, 208 Cal. Rptr. 93, 94 (1984) (aerial photography of marijuana plants), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2672 (1985); *People v. Lashmett*, 71 Ill. App. 3d 429, 430-31, 389 N.E.2d 888, 889 (1979) (aerial view of farm machinery), *cert. denied*, 444 U.S. 1081 (1980). The topic of aerial surveillance has received the attention of several commentators as well. See, e.g., Note, *Aerial Surveillance: Overlooking the Fourth Amendment*, 50 *FORDHAM L. REV.* 271 (1981) (general discussion of intrusiveness of aerial surveillance) [hereinafter cited as Note, *Overlooking*]; Note, *Fourth Amendment Implications of Warrantless Aerial Surveillance*, 17 *VAL. U.L. REV.* 309 (1983) (examination of constitutionality of warrantless aerial surveillance) [hereinafter cited as Note, *Implications*]; Note, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 *VAND. L. REV.* 409 (1982) (constitutional analysis of warrantless aerial surveillance in light of relevant case law) [hereinafter cited as Note, *Constitutional Analysis*]; Comment, *Aerial Surveillance: A Plane View of the Fourth Amendment*, 18 *GONZ. L. REV.* 307 (1982-83) (discussion of role of aerial surveillance in diminishing privacy); Comment, *supra* note 1 (general discussion of use of aircraft to search property).

6. See *infra* note 31 and accompanying text. See generally Note, *The EPA's Use of Aerial Photography Violates the Fourth Amendment: Dow Chemical Co. v. United States*, 15 *CONN. L. REV.* 327 (1983) (discussion of district court decision in *Dow* regarding EPA's use of aerial photography) [hereinafter cited as Note, *Aerial Photography*]; Note, *Telescopes, Binoculars, and the Fourth Amendment*, 67 *CORNELL L. REV.* 379 (1982) (discussion of police use of telescopes and binoculars to observe activity unobservable with naked eye) [hereinafter cited as Note, *Telescopes*].

7. 749 F.2d 307 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2700 (1985).

8. *Id.* at 313.

will discuss the aerial surveillance of business premises within the context of the court's decision in *Dow*. In light of the case law that has developed in the area of aerial searches,⁹ it is suggested that technologically-aided aerial surveillance of business premises constitutes an unreasonable search which should be accorded full fourth amendment protection.¹⁰ Hence, this Article will suggest that the effectiveness of aerial surveillance as a law enforcement tool notwithstanding, aerial searches of business premises should defer to the safeguards of a warrant requirement.¹¹

I. THE DEVELOPING LAW

"Search" within the meaning of the fourth amendment has been defined in a variety of ways.¹² Traditionally, a search is defined as "some exploratory investigation, or an invasion and quest, a looking for or seeking out."¹³ The Supreme Court, in *Katz v. United States*,¹⁴ declared a more carefully reasoned principle for determining violations of the fourth amendment. Justice Harlan, in his concurring opinion, articulated what has become the most frequently invoked standard for determining a fourth amendment search: first, the person must have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.¹⁵ As a general

9. See *supra* note 5; see also *infra* note 70. See generally Granberg, *Is Warrantless Aerial Surveillance Constitutional?*, 55 CAL. ST. B.J. 451 (1980) (general discussion of warrantless aerial surveillance). The vast majority of aerial surveillance cases have involved marijuana fields. See, e.g., *United States v. Bassford*, 601 F. Supp. 1324 (D. Me. 1985); *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980); *Dean v. Superior Court*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1974).

10. See *infra* notes 26-88 and accompanying text.

11. See *infra* notes 89-95 and accompanying text.

12. See 1 W. LA FAVE, *supra* note 2, § 2.1(a); Comment, *supra* note 1, at 475; see also *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (search implies "quest by an officer of the law").

13. 1 W. LA FAVE, *supra* note 2, at 222 (citing 79 C.J.S. *Searches and Seizures* § 1 (1952)). The traditional definition has been gleaned from cases which have stated that a search implies some exploratory investigation, *Smith v. United States*, 2 F.2d 715, 716 (4th Cir. 1924); *Russell v. Cox*, 326 F. Supp. 27, 30 (W.D. Va. 1971), or an invasion and quest, *United States v. Cook*, 213 F. Supp. 568, 571 (E.D. Tenn. 1962); *State v. Quinn*, 111 S.C. 174, 97 S.E. 62, 64 (1918), a looking for or seeking out, *State v. Reagan*, 328 S.W.2d 26, 28 (Mo. 1959); *State v. Hawkins*, 362 Mo. 152, 240 S.W.2d 688, 692 (1951).

14. 389 U.S. 347 (1967).

15. *Id.* at 361 (Harlan, J., concurring). From the two pronged test articulated in Justice Harlan's concurring opinion we get the reasonable expectation of privacy standard. See *id.* (Harlan, J., concurring). In *Katz*, a seminal fourth amendment decision, the Court held that

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proposition, a search of private property will be construed as "unreasonable" if the search is not conducted pursuant to a valid search warrant.¹⁶ The Supreme Court has extended this warrant requirement to commercial premises as well, within the context of an administrative entry.¹⁷ The Court has acknowledged that "[t]he 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."¹⁸

Recently, the Supreme Court affirmed the "open fields" exception to the fourth amendment.¹⁹ That is, the Court upheld the

a person who had made a call from a public telephone booth was protected from electronic eavesdropping on his conversation when the police had no warrant supported by probable cause. *Id.* at 353.

In effect, the Court in *Katz* did away with the trespass doctrine in fourth amendment analysis which made a physical penetration of the premises determinative. *See Olmstead v. United States*, 277 U.S. 438, 466 (1928); Note, *Telescopes*, *supra* note 6, at 380-82.

The court in *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980), recognized that *Katz* compels a more sensitive reading of the fourth amendment. 493 F. Supp. at 1081. *See also* 1 W. LA FAVE, *supra* note 2, § 2.4(a), at 355 (*Katz* calls for more careful reasoning).

16. *E.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Mun. Court*, 387 U.S. 523, 528-29 (1967). It is important to note the difference between a reasonable search and a reasonable expectation of privacy. *See Dow*, 749 F.2d at 312; *see also* Note, *Implications*, *supra* note 5, at 319 ("A search and a violation of the fourth amendment are not synonymous."). A reasonable search refers to whether probable cause existed to conduct the search or whether the officials went beyond the limits of the warrant. *Dow*, 749 F.2d at 312. A reasonable expectation of privacy, on the other hand, helps determine whether there was a search in the first place. *Id.*

17. *See* *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967); *cf. Camara*, 387 U.S. 523 (1967) (warrantless inspection of personal residence unconstitutional). In *See*, a person refused to allow a City of Seattle Fire Department representative to enter and inspect his commercial warehouse without a warrant. *See*, 387 U.S. at 541. Upon his refusal, the owner of the warehouse was arrested and charged with a violation of Seattle's Fire Code. *Id.* The Court held:

[T]he basic component of a reasonable search under the Fourth Amendment — that it not be enforced without a suitable warrant procedure is applicable in this context, as in others, to business as well as to residential premises. Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.

Id. at 546.

18. *See*, 387 U.S. at 543. By acknowledging the businessman's constitutional right to go about his business free from unreasonable official entries upon his private commercial property, the *See* Court, it is submitted, is consistent with the protection the Framers of the Constitution sought through the fourth amendment. *See supra* note 1.

19. *See* *Oliver v. United States*, ___ U.S. ___, 104 S. Ct. 1735, 1737 (1984); *accord* *United States v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984). In *Oliver*, two narcotics agents went to *Oliver's* farm to investigate reports that he was growing marijuana. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1738. They drove past his house to a locked gate which had a "No Trespassing" sign on it. *Id.* The agents used a footpath which led around one side of

notion that "an individual may not legitimately demand privacy for activities conducted out of doors in fields,"²⁰ except in the curtilage — the area immediately surrounding the home.²¹ Conse-

the gate for several hundred yards. *Id.* Eventually they found a field of marijuana over a mile from Oliver's home; he was ultimately arrested for manufacturing a controlled substance under 21 U.S.C. § 841(a)(1) (1982). *Id.* Applying the second prong of the *Katz* test, the Court concluded that an individual has "no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Id.* at 1742.

The *Oliver* decision reaffirms a notion that the Supreme Court articulated over sixty years ago in *Hester v. United States*, 265 U.S. 57 (1924). In a rather brief decision, the Supreme Court held that the special protection accorded by the fourth amendment did not extend to the open fields. *Id.* at 59; accord *United States v. Berrong*, 712 F.2d 1370 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 2397 (1984); *United States v. Basile*, 569 F.2d 1053 (9th Cir.), *cert. denied*, 436 U.S. 920 (1978). Since the *Hester* decision, courts have applied the open fields doctrine to almost every type of land which does not fall within the curtilage — the area immediately surrounding the home. See, e.g., *Care v. United States*, 231 F.2d 22, 24-25 (10th Cir.) (still found in cave located 125 yards from house not accorded fourth amendment protection), *cert. denied*, 351 U.S. 932 (1956); *Conrad v. State*, 63 Wis.2d 616, 621, 218 N.W.2d 252, 254 (1974) (search for body under rock pile located 450 feet from house not accorded fourth amendment protection). See generally 1 W. LA FAVE *supra* note 2, § 2.4(a), at 332 (general discussion of open fields). For a general discussion of the curtilage concept see *infra* notes 21, 57-58 and accompanying text.

For a discussion and criticism of the *Oliver* decision, see Note, *Oliver and the Open Fields Doctrine*, 7 CAMPBELL L. REV. 253 (1984) [hereinafter cited as Note, *Open Fields*]; Note, *Fourth Amendment Protection Extends to a Landowner of a Field Where a Reasonable Expectation of Privacy is Manifested by Substantial Measures Taken to Exclude the Public: Oliver v. United States*, 28 HOW. L.J. 313 (1985) [hereinafter cited as Note, *Fourth Amendment Protection*]; Comment, *Supreme Court's Treatment of Open Fields: A Comment on Oliver and Thornton*, 12 FLA. ST. U.L. REV. 637 (1984).

Fifty years after its decision in *Hester*, the Supreme Court reapplied the open fields doctrine in a case involving commercial premises. See *Air Pollution Variance Bd. v. W. Alfalfa Corp.*, 416 U.S. 861, 865 (1974). In *Air Pollution Variance Bd.*, an inspector of the Department of Health entered the corporate respondent's outdoor premises without its knowledge or consent in order to test the smoke emitted from the chimneys. *Id.* at 862-63. The Court held that the fourth amendment does not extend to "sights seen in the 'open fields'." *Id.* at 865. The inspector did not enter the respondent's plant or offices, but merely "sighted what anyone in the city who was near the plant could see in the sky." *Id.* at 864-65.

20. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1741. See *supra* note 19.

21. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1741; see *supra* note 19. The common law concept of curtilage is defined as "the inclosed space of ground and buildings immediately surrounding a dwellinghouse." BLACK'S LAW DICTIONARY 346 (5th ed. 1979); see *Fullbright v. United States*, 392 F.2d 432, 435 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); *Rosenclanz v. United States*, 356 F.2d 310, 313 (1st Cir. 1966); *Care v. United States*, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956). See generally Comment, *supra* note 19, at 648-49 (virtual uniformity in application of curtilage criteria by courts); 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, 813 (1985) (individual protected in curtilage because of its intimate relationship with the home). But see *Wattenburg v. United States*, 388 F.2d 853, 858 (9th Cir. 1968) (curtilage historically unrelated to fourth amendment analysis). The court in *Wattenburg* announced that the curtilage test was "predicated upon a common law concept which has no historical relevancy to the fourth amend-

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quently, warrantless aerial surveillance also has been justified by the application of this exception.²² It has been suggested, that in light of the *Katz* reasonable expectation of privacy standard, the open fields doctrine no longer has any independent meaning.²³ Moreover, the standard which emerges from spatial considerations such as open fields and curtilage ignores the privacy that the fourth amendment is tailored to protect.²⁴

ment guaranty." 388 F.2d at 858. Instead, curtilage was discussed in connection with common law burglary. *Id.* at 858 n.5 (citing 4 W. BLACKSTONE, COMMENTARIES *225).

Recently, the curtilage concept came into play in an aerial surveillance case. *See People v. Ciralo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984), cert. granted, ___ U.S. ___, 105 S. Ct. 2672 (1985). In *Ciralo*, the police received an anonymous tip that marijuana plants were seen growing in defendant's backyard. A police officer first went to the house on foot, but he was unable to see anything because of two fences which completely enclosed the defendant's backyard. *Id.* at 1085, 208 Cal. Rptr. at 94. The police officer then flew over the property in an airplane in order to photograph what was enclosed by defendant's fence. *Id.* The police officer managed to observe and photograph the marijuana plants as the plane flew at an altitude of 1000 feet. On the basis of this information, the police officer obtained a search warrant of defendant's home. The defendant's motion to suppress the plants as evidence was denied, and he appealed. *Id.* Applying the common law concept of curtilage together with the *Katz* reasonable expectation of privacy test, the court held that the warrantless overflight constituted an unreasonable search. *Id.* at 1087-90, 208 Cal. Rptr. at 96-98. The court reasoned that the backyard was indeed part of the curtilage, and the existence of the fences were objective manifestations of the defendant's reasonable expectation of privacy. *Id.* at 1089, 208 Cal. Rptr. at 97.

22. *People v. Lashmett*, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979). *But see People v. Ciralo*, 161 Cal. App. 3d 1081, 1087-90, 208 Cal. Rptr. 93, 96-98.

23. *See Wattenburg*, 388 F.2d at 857; Note, *Fourth Amendment Protections*, *supra* note 19, at 335; Note, *How Open are Open Fields?* *United States v. Oliver*, 14 U. Tol. L. Rev. 133, 163 (1982); Note, *Implications*, *supra* note 5, at 334-38; Comment, *supra* note 5, at 315.

It has been suggested that the *Oliver* decision may signal the demise of the *Katz* reasonable expectation of privacy rule. *See Note, Oliver v. United States: Good Fences Make Good Open Fields*, 11 J. CONTEMP. L. 531, 545 (1985) [hereinafter cited as Note, *Good Fences*]; Note, *Oliver v. United States: The Open Fields Doctrine Survives Katz*, 63 N.C.L. Rev. 549 (1985). It is submitted that the courts should not encourage this trend away from the reasonable expectation of privacy rule, since it would lead to anomalous results. *See, e.g., Conrad v. State*, 63 Wis. 2d 616, 623, 218 N.W.2d 252, 256 (1974) (reasonable expectation of privacy doctrine is in "contradistinction" to open fields doctrine). In *Conrad*, the police entered defendant's field and dug fifteen holes until they found a body. While the majority termed the search "outrageous," it upheld the refusal to suppress the evidence on "open fields" grounds. *Id.* at 624, 218 N.W.2d at 256; *see also United States v. DeBacker*, 493 F.Supp. at 1080-81 (court rejects strict open fields application); 1 W. LA FAVE, *supra* note 2, § 2.4(a), at 333-34 (discussion of *Conrad*).

It is further suggested that a return to a strict application of the open fields doctrine would also force the abstract determination of where the curtilage ends and an open field begins. *See Note, Confusing Views: Open View, Plain View, and Open Fields Doctrines in Tennessee*, 14 MEM. ST. U.L. Rev. 337, 373 (1984). *See also Note, Open Fields*, *supra* note 19, at 263 (*Oliver* Court failed to consider time lost by officers wondering how far curtilage extended and where open field began).

24. *See United States v. Basile*, 569 F.2d 1053, 1058 (11th Cir.) (Hufstedler, J., dissent-

II. THE *Dow* Case: A Recent Paradigm

The *Dow Chemical Co. v. United States*²⁵ case is an important focal point for a discussion of aerial searches of commercial premises. The *Dow* case provides a combination of facts heretofore not confronted by the courts.²⁶ That is, the United States Court of Appeals for the Sixth Circuit had to decide whether technologically-aided aerial observation of a commercial facility within the context of an administrative inspection violated the fourth amendment.²⁷

In *Dow*, the Environmental Protection Agency (EPA) began an investigation of one of Dow's plants to determine whether emissions from two coal-burning power houses violated the federal air quality standards established under the Clean Air Act.²⁸ After having made an on-site inspection and after having received drawings of the layout of the power houses and boilers, the EPA called Dow to arrange a second inspection.²⁹ When Dow discovered that the EPA inspectors planned to take photographs of the plant, Dow refused to grant entry. Without securing a warrant, the EPA hired an aerial survey corporation to take aerial photographs of the Dow plant.³⁰ Equipped with a high-precision camera,³¹ the pilot made at least six passes over the plant and took approximately

ing), *cert. denied*, 436 U.S. 920 (1978); *supra* note 1. "[U]nder *Katz* . . . , the Fourth Amendment inquiry is not about geography, but about the state of mind of the person asserting the Fourth Amendment claim and the reasonableness of that person's expectation of privacy in respect of the area or thing searched." *Basile*, 569 F.2d at 1058 (Hufstedler, J., dissenting).

25. 749 F.2d 307 (6th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S. Ct. 2700 (1985).

26. See Comment, *supra* note 1, at 489; *infra* notes 28-32 and accompanying text. The district court decision in *Dow*, has been described as "the first high-tech aerial surveillance case to be reported." Comment, *supra* note 1, at 489.

27. See *Dow*, 749 F.2d at 311.

28. *Id.* at 309-10.

29. *Id.* at 310.

30. *Id.* The purposes the EPA stated for the aerial surveillance were to create visual documentation of emissions and to get a perspective of the layout of the plant and its geographic relationship to the surrounding area. *Id.* The EPA also indicated to the aerial survey corporation the specific altitudes and angles at which to take the pictures. *Id.*

31. *Id.* In *Dow* the pilot used a Wild RC-10 aerial mapping camera for the survey. *Id.* The district court in *Dow*, 536 F. Supp. 1355 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S. Ct. 2700 (1985), indicated that the camera used cost over \$22,000 and "is described by the company as the 'finest precision aerial camera available.'" *Id.* at 1357 (citing HANDBOOK ON AERIAL SURVEYS AND PHOTOGRAMMETRY-ABRAMS AERIAL SURVEY CORPORATION).

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seventy-five color pictures of the facility.³² In reversing the district court's ruling that the EPA's detailed photography constituted an unreasonable search under the fourth amendment,³³ the United States Court of Appeals for the Sixth Circuit determined that Dow had no reasonable expectation of privacy that merited fourth amendment protection.³⁴

A. *Minding One's Business: An Analysis of the Dow Case*

The *Dow* court properly began its inquiry by recognizing that the *Katz* test³⁵ should be used to determine whether the EPA's conduct constituted a search.³⁶ In applying the first prong of the test (whether Dow had exhibited an actual expectation of privacy), the court observed that "Dow took great pains to be free from ground level intrusions by building a perimeter security fence and employing security guards."³⁷ Though Dow had implemented elaborate and expensive security measures,³⁸ the court concluded that having taken no measure for aerial security, Dow had no actual expectation of privacy from the air.³⁹ The court reached this conclusion by searching for two elements it said were necessary to establish an actual expectation of privacy. The *Dow* court reasoned that it must be established first, what the person had an expectation of privacy in, and second, what the person wanted to

32. *Dow*, 749 F.2d at 310. The plane made at least six passes over the plant at 12,000, 3,000, and 1,200 feet. *Id.* The pictures contained high resolution and detail and when enlarged and viewed under magnification, the pictures showed equipment and power lines as small as one-half inch in diameter. *Id.*

33. *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1375 (E.D. Mich. 1982).

34. *Dow*, 749 F.2d at 313.

35. *See supra* note 15 and accompanying text.

36. *Dow*, 749 F.2d at 311.

37. *Id.* at 312.

38. *Id.* The district court in *Dow* catalogued fifteen measures that Dow implemented in an attempt to exhibit its expectation of privacy, 536 F. Supp. at 1364-65, including a requirement that cameras at all times and in all places in the facility were prohibited by anyone other than an authorized representative of Dow. *Id.* at 1365. Dow also required any person visiting for technical reasons to get a technical pass which provided that the visitor would not divulge any technical information learned as a result of the visit. *Id.*

39. *Dow*, 749 F.2d at 312-13. The court suggested that Dow could have shielded the observed area between the buildings in order to be free from aerial observation. *See id. But see infra* note 98 and accompanying text. *See also* *Dean v. Superior Court*, 35 Cal. App. 3d 112, 116, 110 Cal. Rptr. 585, 588 (1974). The *Dean* court aptly observed: "Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion." *Id.* at 116, 112 Cal. Rptr. at 588.

protect his privacy from.⁴⁰ The court concluded that Dow's security measures⁴¹ indicated that it had an actual expectation of privacy *in* certain parts of its plant;⁴² Dow's objective behavior, the court opined, indicated no expectation to be free *from* aerial observers.⁴³ It is submitted that the second element,⁴⁴ namely, what the person wanted to protect his privacy *from*, loses sight of an important proposition found in *Katz*: "what a [person] seeks to preserve as private even in an area accessible to the public, may be constitutionally protected."⁴⁵ It is clear that Dow took every precaution to shield itself from every conceivable form of ground level intrusion,⁴⁶ thus asserting a privacy interest which courts should carefully consider⁴⁷ if the fourth amendment is to enjoy continued vitality.⁴⁸ Leaving one's privacy at the mercy of the state of the art available to officials will invariably "set up a contest between government and private citizen to test which party can outmaneuver the other in a game of hide and seek."⁴⁹ Clearly,

40. *Dow*, 749 F.2d at 312. The *Dow* court suggested that a person may have an expectation of privacy *in*, for example, a home, office, phone booth or airplane. *Id.* The court also stated that it must be established what the person sought to protect his privacy *from*, for example, non-employees of a firm. *Id.*

41. *See supra* note 38 and accompanying text.

42. *Dow*, 749 F.2d at 312. The court stated that Dow had an expectation of privacy in certain parts of its plant to be free from ground level intrusions. *Id.*

43. *Id.*

44. It is suggested that the first element is not problematic since having to establish an expectation *in* something is comparable to having to exhibit your actual expectation of privacy within the meaning of the first prong in *Katz*. *See supra* note 15 and accompanying text.

45. *Katz*, 389 U.S. at 351-52.

46. *See supra* note 38 and accompanying text.

47. *See generally* Note, *Constitutional Analysis*, *supra* note 5, at 431-32 (shielding one's property from every view except aerial view should be given substantial consideration); Comment, *supra* note 1, at 483 (requiring complete enclosure is unreasonable under fourth amendment analysis).

48. *See generally* Mascolo, *supra* note 1, at 428 (concept of search must be broadly conceived); 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, 87 (1974) (fourth amendment rights should be liberally construed).

49. *United States v. Broadhurst*, 612 F. Supp. 777, 792 (E.D. Cal. 1985); *see Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1974). The court in *People v. Agee*, 153 Cal. App. 3d 1169, 200 Cal. Rptr. 827 (1984), described the problem best:

If limitations on privacy can be technologically leaped, as by the use of aircraft to lift the state's gaze above a restrictive fence, the extent of one's privacy is no greater than the sophistication of equipment possessed by the state. If privacy is left at the mercy of technology the Fourth Amendment will soon be moribund.

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this is not the aim of the fourth amendment.⁵⁰

In addition to the actual expectation of privacy that one exhibits in certain premises, the second prong of the *Katz* test, which requires that the expectation be one that society is prepared to recognize as reasonable,⁵¹ must also be satisfied.⁵² Having taken into account Dow's size and location, the court concluded that it was not reasonable for Dow to expect privacy in the observed regions of the plant.⁵³ The court refused to apply the curtilage doctrine to a commercial setting,⁵⁴ reasoning that Dow's privacy interest in its plant is not equal to the privacy interest associated with a dwelling.⁵⁵ It is submitted, however, that in light of the

200 Cal. Rptr. at 835. See also *Dean*, 35 Cal. App. 3d at 116, 110 Cal. Rptr. at 588 (fourth amendment needs constant accommodation to intensifying technology); Note, *supra* note 48, at 72. One commentator observed:

Thus we have the specter of a fourth amendment which protects any man who retreats into his home to be free from unreasonable intrusion. Any man, that is, who is wealthy enough to afford a windowless, soundproof house, built on an extensive area of land, and surrounded by high fences, and a man who is willing to live the life of a hermit, staying inside his house at all times, prepared to take affirmative action to counter any new technological methods of intrusion with which the government might be equipped.

Note, *supra* note 48, at 72; see Note, *Good Fences*, *supra* note 23, at 544 (with every new advance in technology would come a reduction in privacy).

50. See *supra* note 1; see also Note, *supra* note 48, at 72 (fourth amendment does not require one to live life in a fort).

51. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring). See generally 1 W. LA FAVE, *supra* note 2, § 2.1(a), at 230-31 (general discussion of second prong of *Katz* test).

52. See 1 W. LA FAVE, *supra* note 2, § 2.1(d); Comment, *supra* note 1, at 470-71.

53. *Dow*, 749 F.2d at 313. The court noted that Dow's plant covered 2000 acres and was located in an urban area near an airport. Thus, the court compared the Dow plant to open fields. *Id.*

54. *Id.* at 314. For a general discussion of the curtilage concept see *supra* note 21 and accompanying text.

55. *Dow*, 749 F.2d at 314. In arguing that Dow's expectation of privacy was unreasonable, the court alluded to a statement made in *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981), concerning a commercial owner's privacy interest in his property. See *Dow*, 749 F.2d at 314. The Supreme Court in *Donovan* opined that the "expectation of privacy that the owner of commercial premises enjoys in that property differs significantly from the sanctity accorded an individual's home." 452 U.S. at 598-99. It is suggested, however, that this observation does not emasculate the proposition that Dow's expectation of privacy in the observed areas of the plant was reasonable. The Court in *Donovan* was attempting to explain that there are some instances where the owner of commercial premises should not reasonably expect privacy. *Id.* If, for example, he is operating within an industry which is highly regulated, his expectation might be unreasonable. See *infra* notes 74-76 and accompanying text. Moreover, the *Donovan* Court went on to acknowledge the fact that inspections of commercial property may be unreasonable "if they are not authorized by law or are unnecessary for the furtherance of federal interests." 452 U.S. at 599. In order to further support its opinion that Dow's expectation of privacy in the interior of its buildings

Supreme Court's recognition that fourth amendment protections should be extended to commercial buildings,⁵⁶ the businessman should be entitled to constitutional protection in the area immediately surrounding his building if adequate measures were taken to be free from public intrusion.⁵⁷ While a perfunctory application of geographic concepts is not suggested, the protection afforded the "curtilage" of business premises should be justified by reference to the businessman's legitimate expectation of privacy in that area as defined in *Katz*.⁵⁸ Once an area has been deemed part of the curtilage,⁵⁹ courts have extended fourth amendment protection by concluding that the landowner may reasonably expect privacy

is different from that which inheres in a dwelling, the *Dow* court relied on the fact that a lesser showing of probable cause is required to secure an administrative warrant than is required to secure a criminal warrant. *Dow*, 749 F.2d at 314. The probable cause needed to obtain an administrative warrant was first described in *Camara*. See *Camara v. Mun. Court*, 387 U.S. at 538. Thereafter, the Supreme Court interpreted that requirement in *Marshall*. See *Marshall v. Barlow's Inc.*, 436 U.S. at 320. The *Marshall* Court posited:

Probable cause in the criminal law sense is not required. For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based 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].'

Id. (citing *Camara*, 387 U.S. at 538).

It is suggested that while a lesser showing of probable cause is required to secure an administrative warrant, this is not indicative of a less intense privacy interest. Rather, it is suggested that the lesser showing of probable cause considers the "less hostile intrusion" involved in an administrative inspection as compared with a police officer's search for evidence of a crime. See *Camara*, 387 U.S. at 530; McManis and McManis, *Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant?*, 26 AM. U. L. REV. 942, 964 (1977). See generally La Fave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 11-20 (general discussion of whether right to inspect should arise only upon existence of probable cause).

56. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); See, 387 U.S. 541 (1967); Comment, *supra* note 21, at 814.

57. See Comment, *supra* note 21, at 814-15 (curtilage includes area immediately surrounding any building entitled to fourth amendment protection); see also *United States v. Marbury*, 732 F.2d 390, 398 (5th Cir. 1984). The *Marbury* court indicated the possibility of a curtilage within the context of commercial property when it described the effected property as "the plainly noncurtilage portions of this large tract." 732 F.2d at 398 (regarding large commercial gravel pit).

58. See, e.g., *United States v. FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977) (agent's entry onto commercial premises surrounded by eight foot fence with barbed wire a search). See 1 W. LA FAVE, *supra* note 2, § 2.4(b), at 342. Prof. La Fave observes: [M]echanical application of the curtilage concept so as to deprive business lands of any Fourth Amendment protection is inappropriate after *Katz*. The question now is whether the police intruded upon a justified expectation of privacy." 1 W. LA FAVE, *supra* note 2, § 2.4(b), at 342; Comment, *supra* note 21, at 815.

59. See *supra* note 21 and accompanying text; Comment, *supra* note 21, at 818 n.119.

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in that area.⁶⁰

Whether one's expectation of privacy is reasonable should also depend on the technology used by officials to aid the observation.⁶¹ The *Dow* court mitigated the effect of the EPA's use of sophisticated photographic equipment from the air, since it had already concluded that Dow had no legitimate privacy interest in the observed area.⁶² It has been held, however, that the use of aids to view that which would not have been observable by the naked eye violates a reasonable expectation of privacy.⁶³ In *Dow*, the high-precision camera used captured images which could later be analyzed under magnified conditions.⁶⁴ Consequently, "the camera saw a great deal more than the human eye could ever see."⁶⁵ Focusing on the reasonableness of this conduct, the district court in *Dow* observed: "In this age of ever-advancing and potentially unlimited technology the government should be made aware that it does not possess carte blanche authority to utilize sophisticated surveillance methods to keep watch over citizens or busi-

60. See *People v. Ciralo*, 161 Cal. App. 3d 1081, 1089-90, 208 Cal. Rptr. 93, 97-98, cert. granted, ___ U.S. ___, 105 S. Ct. 2672 (1985).

61. See, e.g., *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) (FBI agents used 800 millimeter telescope with a 60 millimeter opening); *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979) (police officer used 10-power binoculars). See also 1 W. LA FAVE, *supra* note 2, § 2.2(c), at 259; Granberg, *supra* note 9, at 452; Note, *Aerial Photography*, *supra* note 6, at 342; Note, *Overlooking*, *supra* note 5, at 289; Note, *Constitutional Analysis*, *supra* note 5, at 436-37; Comment, *supra* note 5, at 326.

62. *Dow*, 749 F.2d at 314-15.

63. *Kim*, 415 F. Supp. 1252 (D. Hawaii 1976); *Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979); see also *United States v. Taborda*, 635 F.2d 131, 139 (2d Cir. 1980) (enhanced viewing of interior of home violates expectation of privacy). See generally Note, *Telescopes*, *supra* note 6, at 386-88 (general discussion of *Arno*, *Kim*, and *Taborda*). But see *United States v. Lacey*, 669 F.2d 46, 51 (2d Cir. 1982) (observation by binoculars not proscribed where defendant had otherwise exposed himself to public view); *Commonwealth v. Hernley*, 216 Pa. Super. 177, ___ 263 A.2d 904, 906 (1970) (police officer's use of binoculars to view illegal manufacture of gambling sheets not unreasonable search), cert. denied, 401 U.S. 914 (1971).

64. *Dow*, 536 F. Supp. at 1367; see also *supra* note 31 and accompanying text.

65. *Dow*, 536 F. Supp. at 1367. The district court in *Dow* observed that when flying at the levels at which the plane flew "the eye can only discern only the basic sizes, shapes and outlines and colors of the objects below." *Id.* See generally Comment, *supra* note 1, at 489. In relation to the *Dow* case one commentator has observed: "Photographic searches . . . have now reached the point where photographs are taken of suspect property, then enlargements of those photographs may be 'searched' in detail. The technological efficiency of this method makes it the most intrusive form of aerial search." Comment, *supra* note 1, at 489.

nesses not suspected of any criminal activity."⁶⁶ It is submitted, therefore, that commercial privacy includes protection from unanticipated methods of surveillance, and this expectation of privacy should be considered reasonable by society.⁶⁷

Another factor the *Dow* court mentioned, indicating that Dow's expectation of privacy was unreasonable, was the location of the Dow plant. The court observed that Dow had taken no precautions against aerial intrusions even though the facility was located near an airport and within the landing and taking off pattern of the planes.⁶⁸ On this point, it is submitted that the court mistakenly equates routine aerial flight with the intensive aerial surveillance conducted by the EPA.⁶⁹ The possibility of casual observation by the public should not allow government officials to conduct directed surveillance activities as the EPA did in *Dow*.⁷⁰

66. *Dow*, 536 F. Supp. at 1368. See also *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting). Dissenting in *White*, Justice Douglas observed:

Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held 'reasonable' within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of 'commerce' would be hopeless when it comes to the management of modern affairs at the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.

United States v. White, 401 U.S. at 756 (Douglas, J., dissenting).

67. *Dow*, 536 F. Supp. at 1366-67; cf. *E.I. duPont de Nemours & Co. Inc. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971). In the context of aerial photography used to discover trade secrets, the *duPont* court acknowledged the importance of protecting commercial privacy from unanticipated methods of surveillance: "Commercial privacy must be protected from espionage which could not have been reasonably anticipated or prevented. . . . [W]e need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available." *duPont*, 431 F.2d at 1016; see also *Arno*, 90 Cal. App. 3d 505, 512, 153 Cal. Rptr. 624, 628 (1979) (police officer's use of 10-power binoculars to see activities in office building too intrusive).

68. *Dow*, 749 F.2d at 312.

69. See Note, *Aerial Photography*, *supra* note 6, at 342.

70. See *United States v. Broadhurst*, 612 F. Supp. 777, 794 (E.D. Cal. 1985); *Agee*, 200 Cal. Rptr. at 836. The court in *Agee* reasoned: "The chilling effect on privacy of the observation of behavior by public authorities is categorically different in kind from the casual visibility of the protected area by some limited segment of the public." *Agee*, 200 Cal. Rptr. at 836; cf. *Marshall*, 436 U.S. at 315 (the fact that employees could observe certain activities did not justify warrantless entry by government officials); *Wilson v. Health & Hosp. Corp.*, 620 F.2d 1201 (7th Cir. 1980) (fact that members of public could have discovered violations by trespassing on property did not legitimize invalid search).

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While complete privacy is not possible if there is a possibility that the public will fly over, it is only a reasonable expectation of privacy that is required.⁷¹ As one commentator observed: "The expectation need only be reasonable; it need not be unassailable."⁷²

It is submitted that the law of administrative searches is instructive in determining the reasonableness of Dow's manifested expectation of privacy. From the general rule that search warrants are required to conduct administrative inspections,⁷³ exceptions have been carved out for "pervasively regulated"⁷⁴ industries "long subject to close supervision."⁷⁵ This exception is based on a the-

Several writers and commentators have noted the difference between casual observation and directed surveillance. See *LA FAVE AND ISRAEL*, *supra* note 2, § 3.2, at 172; Mascolo, *supra* note 1, at 419; Note, *Implications*, *supra* note 5, at 315; Comment, *supra* note 1, at 473. See generally Comment, *Police Helicopter Surveillance*, 15 *ARIZ. L. REV.* 145 (1973) (helicopter surveillance should be eliminated from residential areas).

Courts have relied on different factors when allowing the aerial surveillance. The height of the aircraft is one factor. See, e.g., *United States v. Bassford*, 601 F. Supp. 1324, 1331 (D. Me. 1985) (airplane at 1000 feet considered brief surveillance); *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) (plane at 50 feet considered reasonable); *Williams v. State*, 157 Ga. App. 476, —, 277 S.E.2d 923, 925 (1981) (plane at "lawful height" negated defendant's expectation of privacy); *State v. Stachler*, 58 Hawaii 412, —, 570 P.2d 1323, 1328-29 (1977) (plane at 300 feet reasonable). *But see* *People v. Sneed*, 32 Cal. App. 3d 535, 542, 108 Cal. Rptr. 146, 151 (1973) (helicopter at 20-25 feet was manifestly exploratory in nature); Note, *Constitutional Analysis*, *supra* note 5, at 425-26 (altitude of surveillance standard inapplicable in light of *Katz*).

Another factor courts have considered when allowing aerial surveillance is the frequency of the flights over the property. See, e.g., *United States v. Allen*, 675 F.2d 1373, 1377 (9th Cir. 1980) (Coast Guard helicopters routinely crossed airspace), *cert. denied*, 454 U.S. 833 (1981); *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) (airplane flights over local farm land not infrequent); *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974) (police helicopter patrol part of protection afforded citizens of Los Angeles).

71. See Note, *Katz in Open Fields: United States v. Oliver*, 20 *AM. CRIM. L. REV.* 485 (1983); Note, *Open Fields*, *supra* note 19, at 494.

72. Note, *supra* note 71, at 494.

73. See *supra* notes 17-18 and accompanying text.

74. *United States v. Biswell*, 406 U.S. 311, 316 (1972). In *Biswell*, the respondent was licensed to deal in sporting weapons; a federal agent sought entry into a locked gun storeroom in order to inspect firearms pursuant to the Gun Control Act of 1968. *Id.* at 311-12. When the agent went into the storeroom he found two sawed-off rifles which the owner was not licensed to possess. *Id.* at 312. The warrantless search of business premises under the Gun Control Act of 1968 was challenged as unconstitutional under the fourth amendment. The Supreme Court held that close scrutiny of firearms traffic was "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *Id.* at 315. Therefore, the Court held, when a dealer opts to participate in a "pervasively regulated" business and when the inspections advance important federal interests, the inspection may be conducted without a warrant. *Id.* at 316-17.

75. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970). In *Colonnade*,

ory of consent which suggests that those businesses "entering a heavily regulated field do so with the knowledge that their establishments may be subject to warrantless searches."⁷⁶ Recently the Court reaffirmed this notion by declaring that "warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."⁷⁷

In *Dow*, the EPA officials were attempting to determine whether emissions coming from the plant violated air quality standards under the Clean Air Act (the Act).⁷⁸ The EPA's authority to regulate the chemical industry is not "pervasive"⁷⁹ as compared with the government's control over the alcohol,⁸⁰ firearms,⁸¹ and mining⁸² industries. The Act, in particular, provides for the regulation of a "broad, heterogeneous class of industries."⁸³ Since the

the petitioner was authorized to serve liquor in his catering establishment. Suspecting a violation of the federal excise tax law, a federal agent asked that the manager unlock the liquor storeroom in order to inspect it pursuant to 26 U.S.C. § 5146(b) (1980). *Id.* at 72-73. The owner of the establishment brought suit to obtain the seized liquor and to suppress it as evidence. *Id.* at 72. The Court observed:

We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures. . . . It resolved the issue [under the existing statutes] not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

Id. at 77. More recently, the Supreme Court decided that warrantless inspections required by the Mine Safety and Health Act did not violate the fourth amendment. *See* *Donovan v. Dewey*, 452 U.S. 594, 599-605 (1981). The Supreme Court in *Donovan* noted that the *Colonnade-Biswell* exception does not require a long history of regulation; rather, it is the pervasiveness and regularity of the federal scheme that determines whether a warrant is necessary. *Id.* at 606.

76. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1078 (7th Cir. 1983); *see* *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973); *Biswell*, 406 U.S. at 316; *Dow*, 749 F.2d at 311 n.1; *Martin, EPA and Administrative Inspections*, 7 FLA. ST. U.L. REV. 123, 130-31 (1979).

77. *Donovan*, 452 U.S. at 599.

78. Clean Air Act, 42 U.S.C. §§ 7401-7620; *see* *Dow*, 749 F.2d at 310.

79. *Dow*, 536 F. Supp. at 1361.

80. *Colonnade*, 397 U.S. at 72-74; *see* *supra* note 75.

81. *Biswell*, 406 U.S. at 311-12; *see* *supra* note 74.

82. *Donovan*, 452 U.S. at 596-97; *see* *supra* note 75.

83. Note, *FDA, EPA, OSHA Inspections-Practical Considerations in Light of Marshall v. Barlow's Inc.*, 39 MD. L. REV. 715, 729 (1980); *see* 42 U.S.C. §§ 7411(a)(2), (a)(3), (b)(1) (Supp. II 1978). The Clean Air Act's wide coverage is indicated in the EPA's authority to set standards for "any building, structure, facility or installation which emits or may emit

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Act covers a host of different industries there is no definitive history of pervasive regulation for all the businesses that fall within the Act's purview.⁸⁴ One commentator has correctly observed that even if the nature of the regulatees under the Act did not proscribe warrantless searches, the language of the statute does.⁸⁵ That is, the Act provides that the EPA must either obtain a compliance order or bring a civil action if anyone refuses an inspection.⁸⁶ The Supreme Court has acknowledged this limitation on the EPA's power to conduct warrantless inspections, albeit in another context.⁸⁷ It has been held that the pervasiveness of past regulation affects a proprietor's reasonable expectation of privacy.⁸⁸ Having concluded that Dow was not operating within a pervasively regulated industry, it is submitted that this further es-

any air pollutant' that is constructed or modified after the promulgation of the EPA standards." Note, *supra*, at 729 n.92 (citing 42 U.S.C. §§ 7411(a)(2), (a)(3), (b)(1) (Supp. II 1978)).

84. *Dow*, 536 F. Supp. at 1361-62; see Martin, *supra* note 76, at 730-31; Note, *supra* note 83, at 729. The district court in *Dow* likened the EPA's power to regulate entities such as Dow to the power the Department of Labor has under the Occupational Safety and Health Act, 29 U.S.C. § 657(a) (1970) (OSHA). *Dow*, 536 F. Supp. at 1360-61; see Martin, *supra* note 76, at 130-31. But see Comment, *OSHA v. The Fourth Amendment: Should Search Warrants be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283, 307 (1977) (EPA's inspection powers might be nearer to meeting "pervasive regulation" than OSHA) (written before *Marshall* decision). The seminal case involving OSHA, and the case upon which the district court in *Dow* relied is *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). In *Marshall*, the Supreme Court dealt with section 8(a) of the Act which granted the Secretary of Labor the power to search the work area of any employment facility within the Act's purview in order to look for safety hazards and violations of OSHA. *Marshall*, 436 U.S. at 309. An OSHA inspector entered Barlow's, Inc. and told Barlow he wanted to search the working area of his business. The inspector had no search warrant, so Barlow refused to admit him, relying on his fourth amendment rights. *Id.* at 310. The Secretary of Labor sought and received an order to compel Barlow to admit the inspector. Barlow again refused and sought an injunction against the warrantless searches. *Id.* The Court held that OSHA inspections without a warrant violated the fourth amendment. *Id.* at 324. The Court noted that the *Colonnade* exception for industries "long subject to close supervision" did not apply because the business was involved in interstate commerce. *Id.* at 313-14.

85. Note, *supra* note 83, at 729; see *infra* note 86 and accompanying text.

86. See 42 U.S.C. § 7413(a)(3) (1980).

87. See *Marshall*, 436 U.S. at 321-22 n.18. Albeit in the context of an OSHA inspection, the *Marshall* Court stated:

Another example [of a statute which envisions judicial enforcement] is the Clean Air Act, which grants federal district courts jurisdiction 'to require compliance' with the Administrator of the Environmental Protection Agency's attempt to inspect under 42 U.S.C. § 7414 (1976 ed., Supp. I), when the Administrator has commenced a 'civil action' for injunctive relief or to recover a penalty.

Id. (citing 42 U.S.C. § 7413(b)(4) (1976 ed., Supp. I)).

88. *Bionic Auto Parts*, 721 F.2d at 1079.

establishes Dow's expectation of privacy as reasonable.

B. *Balancing The Competing Interests*

The ultimate consideration in cases involving aerial observation comes down to a balancing process between law enforcement interests and the privacy rights of citizens.⁸⁹ Searches which are not conducted pursuant to a valid search warrant are *per se* unreasonable under the fourth amendment.⁹⁰ Whether in the context of administrative searches or not, a warrant provides assurance from a neutral magistrate that the inspection is reasonable.⁹¹ With the potential for abuse that warrantless aerial searches provide, officials should not be permitted to do from the air what they would not be permitted to do on the ground.⁹² On the facts of the *Dow* case, it is submitted that any inconvenience which would have resulted from requiring the EPA to obtain a warrant before conducting its investigation would have been no greater than the effort it took to hire an aerial survey corporation.⁹³ Moreover, the language of the Clean Air Act itself already contemplates resorting to judicial enforcement when entry is refused.⁹⁴ Since fourth amendment protection against unreasonable searches and seizures is so paramount, intrusive practices such as warrantless aerial surveillance of commercial premises should be prevented where law enforcement objectives would not be compromised if a warrant

89. See *Camara*, 387 U.S. at 536-37; *Broadhurst*, 612 F. Supp. at 794-95; 3 W. LA FAVE, *supra* note 2, § 10.1(c), at 192; Note, *Implications*, *supra* note 5, at 310; Comment, *supra* note 1, at 480.

90. See *supra* note 16 and accompanying text.

91. See *Marshall*, 436 U.S. at 323; Rothstein and Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341, 350 (1975).

92. *Agee*, 200 Cal. Rptr. at 835; see also Mascolo, *supra* note 1, at 428. "[T]he Fourth Amendment did not merely protect against actual searches, but also against other procedures of figurative searches, which sought to accomplish the objects of a search without affording the constitutional safeguards surrounding it." Mascolo, *supra* note 1, at 428 (citing LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 52-53 (1966)). "It is inconceivable that the fourth amendment would prohibit arbitrary governmental intrusions in one form, only to allow the very same abuse to take place in another form." Note, *supra* note 48, at 87. Searches by aircraft are offensive to the fourth amendment because police are able to "observe objects not viewable in the absence of a physical invasion of property." Comment, *supra* note 1, at 482.

93. See text accompanying note 30.

94. See *supra* notes 85-87 and accompanying text; 3 W. LA FAVE, *supra* note 2, § 10.2, at 234-35; Martin, *supra* note 76, at 736-37.

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were required.⁹⁵

III. PROPOSED STANDARDS FOR COMMERCIAL PREMISES

Drawing on the *Dow* case as a suitable paradigm, several factors applicable to all commercial premises may be gleaned from the case. When a warrantless aerial surveillance of business premises has been conducted, an application of the *Katz* two-prong test to determine whether the conduct amounted to a search is appropriate.⁹⁶ The first prong should be analyzed in light of the businessman's attempts to shield the observed area from public view.⁹⁷ Since all lands are susceptible to casual aerial observation, requiring a businessman to build the functional equivalent of an "opaque bubble" over his premises is misguided.⁹⁸ The second prong, which focuses on the reasonableness of the manifested expectation of privacy,⁹⁹ should involve a close look at how the aerial surveillance was conducted.¹⁰⁰ First, if the area observed immediately surrounds the commercial building and adequate measures were taken to exclude the public¹⁰¹ fourth amendment protection should be extended, since landowners may reasonably expect privacy in those areas. Second, any technology used to aid

95. See *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Dissenting in *Brinegar*, Justice Jackson observed:

[Fourth Amendment rights], I protest, are not mere second class rights but belong in the catalog of indispensable freedoms. Among [the] deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror into every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Id. (Jackson, J., dissenting).

It is submitted that simply because it would be more burdensome to get a warrant first is no justification for warrantless aerial surveillance. Cf. *People v. Spinelli*, 35 N.Y.2d 77, 82, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 748 (1974). The *Spinelli* court noted:

We do a great disservice to the highly professional and efficient law enforcement officials of this state to determine that they cannot perform their job effectively without impinging upon a very important constitutional right. Duties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state.

Id. at 82, 315 N.E.2d at 795, 358 N.Y.S.2d at 748.

96. See text accompanying note 15.

97. See *supra* notes 36-48 and accompanying text.

98. See *Allen*, 675 F.2d at 1380.

99. See *supra* notes 51-60 and accompanying text.

100. See *supra* notes 61-67 and accompanying text.

101. See *supra* notes 56-60 and accompanying text.

the observation must be scrutinized,¹⁰² since the "lengths to which the police must go serve to define and confirm the reasonableness of the expectation."¹⁰³ Third, it must be determined whether the business premises are located clearly within the area where routine airflight is conducted for law enforcement purposes.¹⁰⁴ If the airflight that occurs over the commercial property is that to which we are all susceptible, the businessman's manifested expectation of privacy should be deemed reasonable.¹⁰⁵ Finally, if the inspection was conducted in order to monitor compliance with a particular administrative regulation, the pervasiveness of that particular industry's regulatory scheme should help determine the reasonableness of the businessman's expectation of privacy.¹⁰⁶

IV. CONCLUSION

Having been afforded jealously guarded fourth amendment rights, the owner of commercial premises should not be made to tolerate greater and more varied methods of intrusion. The spirit of the fourth amendment clearly contemplates the protection of businesses¹⁰⁷ and so a proprietor's privacy interest should be safeguarded accordingly.

Nancy Cifone

102. See *supra* notes 61-67 and accompanying text.

103. Note, *Overlooking*, *supra* note 5, at 289.

104. Cf. *Allen*, 675 F.2d at 1377 (Coast Guard routinely crossed airspace); *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974) (police helicopter patrol part of protection afforded citizens of Los Angeles).

105. See *supra* notes 68-72 and accompanying text.

106. See *supra* notes 73-88 and accompanying text.

107. See *supra* note 1.