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Florida v. Riley: The Emerging Standard for Aerial Surveillance of the Curtilage

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RECENT DEVELOPMENT

Florida v. Riley: The Emerging Standard for Aerial Surveillance of the Curtilage

I. INTRODUCTION	275
II. LEGAL BACKGROUND	278
A. <i>Constitutionally Protected Areas and the Physical Trespass Doctrine</i>	279
B. <i>Katz and the Reasonable Expectation of Privacy Test</i>	281
C. <i>The Supreme Court's Post-Katz Analysis: The Re-emergence of Property-Based Distinctions</i>	282
D. <i>Ciraolo: Aerial Surveillance and the Reasonable Expectation of Privacy Test</i>	284
III. <i>Florida v. Riley</i>	287
A. <i>Facts and Holding</i>	287
B. <i>The Court's Analysis</i>	288
IV. ANALYSIS	291
A. <i>The Emerging Frequency Standard</i>	291
B. <i>The Burden of Proof</i>	294
V. CONCLUSION	295

I. INTRODUCTION

The expression, “a man’s home is his castle,” embodies one of the most cherished individual liberties in American society, the right to enjoy privacy and freedom from unreasonable government intrusion in the confines of one’s home.¹ Recognizing the importance of this right, the

1. *Silverman v. United States*, 365 U.S. 505, 511 (1961) (recognizing “the right of a man to retreat into his home and there be free from unreasonable governmental intrusion”); *see also infra*

first Senate adopted the fourth amendment,² which protects individuals from unreasonable searches and seizures.³

Initially, the United States Supreme Court narrowly construed the fourth amendment as protecting only physical intrusions of persons, houses, papers, and effects.⁴ Later, the Court expanded coverage of the fourth amendment to include the area immediately adjacent to the home⁵ and used in connection with it.⁶ This area is referred to as the curtilage⁷ and for fourth amendment purposes is considered part of the home itself.⁸ The curtilage does not extend to distant areas that could

notes 50-54 and accompanying text.

2. The original version of the fourth amendment indicated that the Framers were primarily concerned about overreaching warrants, not warrantless searches. The Senate, however, adopted the present version. See Note, *California v. Ciraolo: The Demise of Private Property*, 47 LA. L. REV. 1365, 1366 (1987). For a discussion of the history of the fourth amendment, see generally T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969); and Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259 (1950).

3. The fourth amendment of the United States Constitution states:

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.

U.S. CONST. amend. IV. The fourth amendment is applicable to the states by incorporation through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

4. See Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 715 (1985) (stating that "[i]nitially, the Court relied heavily upon the restrictive terminology of the fourth amendment, . . . thus 'indicat[ing] with some precision the places and things encompassed by its protections'" (brackets in original) (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984))).

5. In *Oliver* the Court determined that a marijuana patch a mile away from the defendant's home was not within the curtilage of the home, but rather was in the open fields. *Oliver*, 466 U.S. at 178-80. In *United States v. Dunn*, 480 U.S. 294 (1987), the Court applied four factors to determine whether a barn fell within the curtilage: "(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passers-by." *Id.* at 294-95. The Court held that a barn was not within the curtilage when it was isolated from the home, was not enclosed within the same fence as the home, did not objectively appear to be used for intimate activities associated with the home, and had not been protected from observation. *Id.* at 295.

6. See 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.2(c) (1984 & Supp. 1989).

7. *Black's Law Dictionary* defines curtilage as "[t]he inclosed space of ground and buildings immediately surrounding a dwellinghouse." BLACK'S LAW DICTIONARY 346 (5th ed. 1979). The term is derived from Latin and French:

The word curtilage is derived from the Latin cohors (a place enclosed around a yard) and the old French cortillage or courtilage which today has been corrupted into courtyard. Originally it referred to the land and outbuildings immediately adjacent to a castle that were in turn surrounded by a high stone wall.

United States v. Romano, 388 F. Supp. 101, 104 n.4 (E.D. Pa. 1975). The Supreme Court has defined the curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); see also 4 W. BLACKSTONE, *COMMENTARIES* 225 (1902).

8. *Oliver*, 466 U.S. at 179.

be considered open fields,⁹ which are not protected under the fourth amendment¹⁰ because they do not harbor the intimate activities that the fourth amendment is intended to protect from governmental interference or surveillance.¹¹

In recent years the increased use of aircraft by government officials to detect illegal activity in areas obstructed from view at ground level¹² has threatened to reduce the amount of privacy traditionally enjoyed in the curtilages of personal residences. In *California v. Ciraolo*¹³ the Court adopted a restrictive view of the amendment's protections, holding that police do not need a warrant to search curtilage areas from the air as long as the police operate at a legal altitude.¹⁴ Last term, in *Florida v. Riley*,¹⁵ a plurality of the Court affirmed the *Ciraolo* standard.¹⁶ Significantly, however, Justice O'Connor, who concurred in the judgment, and four dissenting justices¹⁷ determined that the proper standard to be applied in aerial surveillance cases should focus on the frequency of public flights at the altitude at which the officials were operating, rather than on whether the altitude was within legal limits.¹⁸

This Recent Development examines the development of the curtilage doctrine to its present status. Part II examines the development of fourth amendment protection, particularly *Katz v. United States*,¹⁹ in which the Court determined that the scope of fourth amendment protection is governed by reference to objectively reasonable expectations of privacy.²⁰ Part II also analyzes the aerial surveillance standards of *California v. Ciraolo*.²¹ Part III examines the recent decision of *Florida v. Riley* and compares the various opinions in the case. Finally, Part IV advocates a new standard to be applied to cases involving aerial surveillance of residential curtilages.

9. *Id.* at 178 (contending that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home").

10. *Id.* at 179.

11. *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) (citing *Oliver*, 466 U.S. at 179).

12. See Zeese, *Aerial Searches for Marijuana*, 9 SEARCH & SEIZURE L. REP. 33 (1982) (reporting that thousands of aerial searches have been conducted in the United States since the late 1970s).

13. 476 U.S. 207 (1986).

14. *Id.* at 215.

15. 109 S. Ct. 693 (1989) (plurality decision); see *infra* notes 114-58 and accompanying text.

16. *Id.* at 697 (plurality opinion).

17. Justice Brennan authored a dissenting opinion that was joined by Justices Stevens and Marshall. *Id.* at 699 (Brennan, J., dissenting). Justice Blackmun wrote a separate dissent. *Id.* at 705 (Blackmun, J., dissenting).

18. *Id.* at 699 (O'Connor, J., concurring); *id.* at 704 (Brennan, J., dissenting); *id.* at 705-06 (Blackmun, J., dissenting).

19. 389 U.S. 347 (1967).

20. See *infra* notes 57-71 and accompanying text.

21. 476 U.S. at 207.

II. LEGAL BACKGROUND

The fourth amendment has been both praised for its brevity and criticized for its ambiguity.²² It does not define "unreasonable" nor does it define the relationship between the first clause, which proscribes unreasonable searches and seizures, and the second clause, which sets forth the requirements for the issuance of warrants.²³ Furthermore, unlike the fifth amendment, the fourth amendment makes no mention of excluding evidence obtained in contravention of its provisions.²⁴

To discern the Framers' intent, the Supreme Court has construed the amendment as declaring unreasonable all searches conducted without a warrant,²⁵ unless conducted pursuant to one of the explicitly established and well-defined exceptions.²⁶ Evidence obtained in violation of this rule must be excluded at trial²⁷ in an effort to deter police abuse and maintain judicial integrity.²⁸

Whether the amendment applies in any given circumstance inherently depends upon the meaning attached to the limiting words "search and seizure."²⁹ Unless the government has conducted a "search or seizure," the amendment's protection against unreasonable intrusion does not apply.³⁰ The meaning attached to these words, therefore, governs the reach of the amendment and reflects society's current balance of an individual's right of privacy and security against the government's interest in detecting and preventing crime.³¹

22. See generally J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* (1966).

23. 1 W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.1(a) (1987).

24. *Id.*

25. See *New York v. Belton*, 453 U.S. 454, 457 (1981) (stating that "[i]t is first a principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so").

26. See *Katz*, 389 U.S. at 357.

27. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

28. See *Harrison v. United States*, 392 U.S. 219, 224 n.10 (1968) (asserting that "it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is 'the imperative of judicial integrity'" (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1961))); see also *Mapp*, 367 U.S. at 659.

29. See Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1078 n.3 (1987).

30. See Note, *supra* note 2, at 1367.

31. Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 709, 709 (1977).

A. *Constitutionally Protected Areas and the Physical Trespass Doctrine*

Initially, the Supreme Court defined the term "search" in light of English property rights and tort law.³² The amendment was held to apply only when there was a physical trespass of "constitutionally protected areas."³³ These areas were never clearly defined, but apparently were intended to include those places, such as the home, which society expected to remain private and free from government intrusion.³⁴ In addition, the Court extended protection to the curtilage, which is an area closely allied with the home.³⁵

Property beyond the home and curtilage received no protection under the fourth amendment, even when a trespass occurred. In *Hester v. United States*³⁶ two revenue agents entered land belonging to Hester's father without a warrant.³⁷ From a secluded vantage point, the agents observed Hester conduct a sale of illegal liquor.³⁸ When the agents made their presence known, Hester fled and dropped a bottle of liquor taken from a nearby car.³⁹ The agents confiscated the bottle and it was admitted into evidence at trial.⁴⁰ The Court rejected Hester's fourth amendment defense, holding that the fourth amendment's protection of persons, homes, and personal effects does not extend to the open fields.⁴¹

The Court first articulated the distinction between the curtilage and open fields in *Olmstead v. United States*, while also clearly defining the limits of the fourth amendment in terms of the physical trespass of a protected area.⁴² In that case, four prohibition officers tapped telephone wires leading to Olmstead's phone.⁴³ The taps had been installed where the telephone wires passed over a public street in order to

32. Comment, *Aerial Surveillance and the Fourth Amendment*, 17 J. MARSHALL L. REV. 455, 462 n.34 (1984); see also *Entick v. Carrington*, 95 Eng. Rep. 807 (1765) (permitting a trespass action for breaking and entering Entick's home pursuant to an invalidly authorized search warrant).

33. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 266 n.64 (1984). See generally *Olmstead v. United States*, 277 U.S. 438 (1928).

34. Wasserstrom, *supra* note 33, at 266 n.64.

35. See *supra* note 7.

36. 265 U.S. 57 (1924).

37. *Id.* at 58.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 59. The Court held that "the special protection afforded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.*

42. 277 U.S. 438 (1928).

43. *Id.* at 456-57.

avoid physical intrusion of Olmstead's property.⁴⁴ Through the taps, the officers overheard conversations implicating Olmstead in a conspiracy to buy and distribute liquor in violation of the National Prohibition Act.⁴⁵ The Court refused to exclude evidence of the conversations as the product of an unconstitutional search because the evidence was obtained without any physical trespass of protected property.⁴⁶ The Court held that Olmstead could not invoke the fourth amendment because there had been no official search and seizure of his papers or tangible property and no physical intrusion into his house or curtilage.⁴⁷ Because the wiretap had been affixed to the telephone lines beyond the protected areas of Olmstead's house and curtilage, no search occurred within the meaning of the fourth amendment.⁴⁸ Interpreted together with *Hester*, *Olmstead* limited the protection of the fourth amendment to the boundaries of the curtilage.⁴⁹

In 1960 the Court began to move away from the strict application of property concepts in fourth amendment cases. In *Silverman v. United States*⁵⁰ District of Columbia police officers had suspected the defendant of using a certain location as the headquarters for an illegal gambling operation.⁵¹ The police had gained permission to use the vacant adjoining row house to observe Silverman's activities.⁵² After inserting a foot-long, spike microphone through the adjoining wall, the police overheard conversations that incriminated Silverman.⁵³ Evidence of the conversations was admitted at trial and played a substantial role in Silverman's conviction.⁵⁴

Silverman argued that the use of the spike microphone was unconstitutional because the physical penetration of the wall was a trespass of a protected area. The Court, however, refused to base its holding on whether a technical trespass had occurred under local property laws, determining that fourth amendment rights cannot be measured in terms of the nuances of tort or real property law.⁵⁵ Instead, the Court reversed the conviction on the ground that the fourth amendment was

44. *Id.*

45. *Id.*

46. *Id.* at 464.

47. *Id.* at 466.

48. *Id.*

49. See 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, 800 (1985).

50. 365 U.S. 505 (1960).

51. *Id.* at 506.

52. *Id.*

53. *Id.*

54. *Id.* at 507.

55. *Id.* at 511.

designed to protect a basic concept of privacy, not a defined physical area.⁵⁶ Thus, although early Court decisions limited the protection of the fourth amendment to houses and their immediately surrounding area, *Silverman* indicated that the stage was set for expansion of the fourth amendment beyond the strict limits of physical trespass.

B. *Katz and the Reasonable Expectation of Privacy Test*

In light of numerous advances in technology, the Court determined in *Katz v. United States*⁵⁷ that traditional trespass concepts could no longer effectively guide fourth amendment analysis.⁵⁸ The Court redefined the scope of the amendment in terms of an individual's reasonable expectations of privacy.

In *Katz* the defendant had been convicted of transmitting wagering information across state lines in violation of a federal statute.⁵⁹ The Federal Bureau of Investigation (FBI) had obtained incriminating evidence by attaching an electronic listening device to the outside of a public telephone booth that Katz had used to place his calls.⁶⁰ The government argued that because there had been no physical penetration of the phone booth, the fourth amendment did not prohibit introduction of the evidence.⁶¹ Katz contended that the search violated the fourth amendment because the telephone booth was a "constitutionally protected area."⁶²

The Court rejected both of these contentions and looked instead to the core of the amendment and determined that its purpose is to protect people, not places.⁶³ Consequently, the Court held that incantation of the phrase "constitutionally protected area" does not promote proper application of the fourth amendment.⁶⁴ The Court reasoned that items which are knowingly exposed to the public cannot be protected by the fourth amendment, even if they are within areas, such as the home, which are traditionally protected. Conversely, the Court held that items which a person attempts to protect as private may be within the scope

56. *Id.* (holding that the fourth amendment was intended to protect "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

57. 389 U.S. 347 (1967).

58. For a discussion of the impact of modern technology, such as telephones, electronic listening devices, wiretaps, and electronic tracking devices on fourth amendment jurisprudence, see Comment, Dow Chemical and Ciralo: *For Government Investigators the Sky's No Limit*, 36 CATH. U.L. REV. 667 (1987).

59. *Katz*, 389 U.S. at 348. The relevant federal statute is 18 U.S.C. § 1084 (1988).

60. *Id.* at 348.

61. *Id.* at 351-52.

62. *Id.* at 349.

63. *Id.* at 351.

64. *Id.*

of the amendment, even if they are in areas that are accessible to the public.⁶⁵

The Court specifically overruled *Olmstead*,⁶⁶ holding that even though the FBI listening device did not physically penetrate the phone booth, the telephone conversations were inadmissible.⁶⁷ Once Katz closed the phone booth door behind him, he had a justifiable right to believe that his conversation would be free from governmental intrusion.⁶⁸

The constitutional standard that has emerged from *Katz* was not set forth in the majority opinion, however, but in Justice Harlan's concurrence.⁶⁹ Justice Harlan was concerned more with reasonable expectations of privacy than with justifiable ones. He set forth a two-prong test to determine when a person has an expectation of privacy in an activity that warrants constitutional protection. First, a person must have exhibited an actual expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.⁷⁰

Justice Harlan did not provide specific factors for determining when an expectation of privacy will be considered to be reasonable. He clearly agreed with the majority, however, that property-based distinctions should no longer dictate the reach of the fourth amendment.⁷¹ The progeny of cases since *Katz*, however, has failed to follow the *Katz* rationale, producing a resurgence of property-based distinctions in fourth amendment jurisprudence.

C. *The Supreme Court's Post-Katz Analysis: The Reemergence of Property-Based Distinctions*

In *Oliver v. United States*⁷² the Supreme Court reaffirmed its holding in *Hester* that activities conducted in open fields are not protected

65. *Id.* (holding that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (citation omitted)).

66. *Id.* at 353.

67. *Id.*

68. *Id.*

69. See *Smith v. Maryland*, 442 U.S. 735 (1979) (applying Justice Harlan's reasonable expectation of privacy test for the first time).

70. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

71. *Id.* Justice Harlan noted that property interests became important because the protection of people was best accomplished by reference to a place. *Id.*

One commentator contends that Justice Harlan concurred in *Katz* because he wanted to replace completely the constitutionally protected areas test with a privacy test. The majority, on the other hand, sought to evaluate the individual privacy interests in addition to analyzing the area in question. See generally Comment, *supra* note 31.

72. 466 U.S. 170 (1984). See generally Comment, *supra* note 49.

by the fourth amendment. In that case, two Kentucky state police officers had investigated Oliver's property after receiving a tip that Oliver was cultivating marijuana.⁷³ Oliver's property was fenced and marked with a "No Trespassing" sign.⁷⁴ The officers found a patch of marijuana more than a mile away from Oliver's home, growing in an area of Oliver's field that was completely secluded from public view by woods, fences, and embankments.⁷⁵

Despite the seclusion of the field and Oliver's manifested expectation of privacy, the Court ruled that the search occurred in an open field and that fourth amendment protections do not extend to such areas.⁷⁶ The Court defined a reasonable expectation of privacy as turning not on whether an individual intended to conceal ostensibly "private" activities, but on whether the government's intrusion infringed upon values protected by the fourth amendment.⁷⁷ The Court listed several factors to consider in determining whether society is willing to recognize a privacy interest, including the Framers' intent, the ways in which an individual has used an area, and whether the area is one that our societal values promote as deserving the most scrupulous protection from government intrusion.⁷⁸ Based upon these factors, the Court determined that individuals may not legitimately expect privacy during outdoor activities conducted in fields, except in those areas that immediately surround the home.⁷⁹ Thus, even though Oliver may have exhibited an expectation of privacy, his case failed the second prong of the *Katz* test because society is not willing to recognize a privacy interest in the open fields.

While ostensibly adhering to the *Katz* rationale, the Court arguably decided *Oliver* in a manner inconsistent with *Katz*. Under a literal application of the *Katz* test, the search should have been held unconstitutional. The *Katz* Court stated that what a person intends to protect as private, even in an area accessible to the public, is shielded by the fourth amendment from unwarranted searches.⁸⁰ The marijuana field in *Oliver* was completely secluded from ground-level public observation. Furthermore, entry to Oliver's property was clearly prohibited by posted no-trespassing signs. By holding that the field was beyond the protection of the fourth amendment, the Court created a per se excep-

73. *Oliver*, 466 U.S. at 173.

74. *Id.*

75. *Id.* at 174.

76. *Id.* at 176-80.

77. *Id.* at 182-83.

78. *Id.* at 178.

79. *Id.*

80. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

tion to the *Katz* analysis: as an irrebuttable presumption, open fields are not protected, no matter how reasonable the person's expectation of privacy. This exception turns solely on the nature of the property at issue,⁸¹ and is inconsistent with the *Katz* decision, which was designed to prevent exactly this type of talismanic approach to construing the fourth amendment.⁸²

The Supreme Court further discussed the curtilage doctrine in *Dow Chemical Co. v. United States*.⁸³ In *Dow Chemical* the Environmental Protection Agency hired a commercial aerial photographer to take photographs of Dow's two thousand acre chemical plant in Midland, Michigan without first seeking a warrant.⁸⁴ Flying at various lawful altitudes, the photographer used a standard precision aerial mapping camera to photograph the facility.⁸⁵ Dow claimed that the aerial photography was an unconstitutional search because the fenced-in plant was adjacent to and part of the Dow manufacturing facility and as such deserved the same constitutional protection as the curtilage of a private home.⁸⁶

The Court disagreed with Dow's characterization of the area, finding that an industrial complex spread over two thousand acres is not analogous to the curtilage of a dwelling but is more like an open field.⁸⁷ Because the aircraft was flying at a lawful altitude when the pictures were taken, the Court determined that the search was constitutionally permissible.⁸⁸

As in *Oliver*, the Court applied a per se analysis, ignoring Dow's clearly manifested intent to keep its property and activities private. The Court reaffirmed its holding in *Oliver* that areas outside a home and curtilage are not protected by the fourth amendment.⁸⁹ The Court, however, did not define the amount of privacy a person could reasonably expect *within* the curtilage.

D. *Ciraolo: Aerial Surveillance and the Reasonable Expectation of Privacy Test*

*Ciraolo v. United States*⁹⁰ was the Court's first ruling on the constitutionality of an aerial surveillance of the curtilage of a private dwell-

81. See Comment, *Affirmation of the Open Fields Doctrine: The Oliver Twist*, 46 OHIO ST. L.J. 729, 748 (1985).

82. *Katz*, 389 U.S. at 350.

83. 476 U.S. 227 (1986).

84. *Id.* at 229.

85. *Id.*

86. *Id.* at 235.

87. *Id.* at 239.

88. *Id.*

89. *Id.* at 235-36.

90. 476 U.S. 207 (1986).

ing. In *Ciraolo* the Santa Clara, California police department had received an anonymous tip that Ciraolo was cultivating marijuana in his backyard. The yard was enclosed by two fences that completely obstructed view of the yard from ground level.⁹¹ To see Ciraolo's yard, the investigating officers had to hire the owner of a private plane to fly them over it.⁹² At an altitude of one thousand feet, the officers, who were trained in marijuana detection, readily identified marijuana plants growing in the enclosure.⁹³ Based upon these observations, the officers obtained a search warrant and seized the marijuana.⁹⁴

The California Court of Appeals held that the aerial observation violated the fourth amendment.⁹⁵ Citing *Oliver*, the court first held that the marijuana garden was within the curtilage of Ciraolo's home.⁹⁶ Next, the court held that the height and existence of the fences were sufficient evidence to show that the defendant had manifested a reasonable expectation of privacy within his yard.⁹⁷ Because the flyover was not part of a routine patrol, but rather a focused observation of Ciraolo's house, the court held that the aerial observation was an intentional and unauthorized invasion of the defendant's home and thus violated his constitutionally protected reasonable expectation of privacy.⁹⁸

The United States Supreme Court held that Ciraolo met the first prong of the *Katz* test, but failed the second. The fences were a clear indication to the Court that Ciraolo intended his activities within the yard to remain private. Nevertheless, the Court held that the aerial surveillance was not unconstitutional because society is not willing to recognize as reasonable Ciraolo's expectation that the curtilage would be free from *all* observations.⁹⁹ The Court relied on *United States v. Knotts*¹⁰⁰ and *Katz* for the proposition that objects and activities exposed to the plain view of outsiders do not receive protection under the

91. *Id.* at 209.

92. *Id.*

93. *Id.*

94. *Id.* at 209-10.

95. *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1090, 208 Cal. Rptr. 93, 98 (1984), *rev'd* 476 U.S. 207 (1986).

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

97. *Id.*

98. *Id.* at 1089-90, 208 Cal. Rptr. at 97-98.

99. *Ciraolo*, 476 U.S. at 214.

100. 460 U.S. 276, 285 (1983) (holding that police did not violate the respondent's reasonable expectation of privacy when they traced him with the aid of an electronic beeper, because the device revealed nothing "that would not have been visible to the naked eye").

Based on language in *Knotts*, the *Ciraolo* Court concluded that "[t]he mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Ciraolo*, 476 U.S. at 213 (citing *Knotts*, 460 U.S. at 282).

fourth amendment. Because the police were operating at a legal altitude¹⁰¹ and because anyone flying above Ciralo's yard at that altitude could look down into the yard, the Court held that Ciralo had knowingly exposed the marijuana within the meaning of the plain view doctrine.¹⁰² The fact that police observation was aimed specifically at Ciralo's yard was deemed to be irrelevant.¹⁰³

Writing in dissent, Justice Powell failed to see how the fact that the police observations took place within public airspace could deprive the curtilage of its constitutional protection.¹⁰⁴ Justice Powell criticized the majority for departing from the *Katz* analytical framework¹⁰⁵ and noted that past decisions established that the inquiry "must often be decided by 'reference to a place.'"¹⁰⁶ Because Ciralo's yard was within the curtilage of his home, an area where expectations of privacy are almost always legitimate, Justice Powell believed Ciralo's expectation of privacy was reasonable.¹⁰⁷

Justice Powell also dismissed the majority's application of the plain view doctrine.¹⁰⁸ Powell reasoned that privacy interests are not reduced by business and private flights because travelers on such flights get at most a fleeting, anonymous glimpse of the areas over which they fly.¹⁰⁹ By contrast, the police flight in this case focused on a particular location.¹¹⁰ Justice Powell determined that society was not prepared to force individuals to bear the risk of this sort of government intrusion into their private living areas.

The *Ciralo* standard for warrantless aerial surveillance turns exclusively on the altitude of the overflight. As long as government officials fly over the property at a legal altitude, as defined by the Federal Aviation Administration (FAA), anything visible to the naked eye is admissible as evidence. Proponents of this standard argue that it is consis-

101. *Ciralo*, 476 U.S. at 213. "Legal altitude" refers to minimum flight altitudes as determined by the Federal Aviation Administration (FAA). See 14 C.F.R. § 91.79(c) (1989). Navigable airspace is defined as the space above the altitude limit set by regulation. See 49 U.S.C. § 1301(29) (1982).

102. *Ciralo*, 476 U.S. at 213-15.

103. *Id.* at 213.

104. *Id.* at 217 (Powell, J., dissenting).

105. *Id.* at 219.

106. *Id.* at 220 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., dissenting)).

107. *Id.* Justice Powell reached this conclusion by linking together two previous holdings. In *Payton v. New York*, 445 U.S. 573, 589 (1980), the Court held that a home is a place where expectations of privacy virtually always will be legitimate. In *Oliver v. United States*, 466 U.S. 170, 180 (1984), the Court stated that the curtilage is part of the home for fourth amendment purposes.

108. *Ciralo*, 476 U.S. at 223-24 (Powell, J., dissenting).

109. *Id.* at 224.

110. *Id.* at 224-25.

tent with the plain view doctrine. In addition, they claim that aerial surveillance should not be prohibited as unconstitutional because it is often the only method available to the police to detect illegal activity.¹¹¹ Opponents argue that the *Ciraolo* standard ignores entirely the individual's reasonable expectation of privacy in the curtilage.¹¹² They also contend that *Katz* was intended to prevent exactly this type of government invasion, in which modern technology permits observation of activity that would otherwise be private.¹¹³ In the face of these criticisms, *Florida v. Riley*¹¹⁴ provided the Court with an opportunity to reconsider the *Ciraolo* standard.

III. *Florida v. Riley*

A. *Facts and Holding*

Riley lived in a mobile home located on a five-acre tract of rural property in Pasco County, Florida.¹¹⁵ Ten to twenty feet behind the mobile home, Riley maintained a greenhouse.¹¹⁶ Only two sides of the greenhouse were enclosed, but its contents were obscured from view at ground level by trees, shrubs, and the mobile home.¹¹⁷ The roof of the greenhouse consisted of translucent and opaque panels, but two of the panels, amounting to approximately ten percent of the total roof area, were missing.¹¹⁸ The mobile home and greenhouse were surrounded by a wire fence, and a "DO NOT ENTER" sign was posted at the entrance to the property.¹¹⁹

The county sheriff's office received an anonymous tip that Riley was growing marijuana on his property.¹²⁰ An officer was dispatched to investigate the tip, but discovered that he could not see the contents of the greenhouse from the public street adjacent to the property.¹²¹ The officer then obtained the use of a helicopter and circled twice over the greenhouse at an altitude of approximately four hundred feet.¹²² By looking through the uncovered portion of the roof and the open sides of

111. See Smith, *Warrantless Aerial Surveillance: Searching for Constitutional Standards*, 52 J. AIR L. & COM. 257, 296 (1986).

112. See generally Note, *supra* note 2.

113. See generally Comment, *supra* note 58.

114. 109 S. Ct. 693 (1989) (plurality decision).

115. *Id.* at 695 (plurality opinion).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

the greenhouse, the officer spotted what he believed to be marijuana.¹²³ Based on his observations, the officer obtained a search warrant and discovered marijuana growing in the greenhouse.¹²⁴ The United States Supreme Court held that the officer's aerial surveillance of the greenhouse did not violate the fourth amendment and ruled that the evidence seized in the search was admissible.¹²⁵

B. The Court's Analysis

Though the Court held that the evidence was admissible, only a plurality of the Court agreed on the proper application of *Ciraolo*¹²⁶ to the facts.¹²⁷ Justice O'Connor concurred in the judgment, but advocated a different standard to be applied in cases involving aerial surveillance of residential curtilages.¹²⁸ Justices Brennan and Blackmun, writing separately in dissent, agreed with Justice O'Connor's standard but not her application of the standard to the facts.¹²⁹

The plurality agreed with the lower court that *Ciraolo* controlled the instant case.¹³⁰ After finding that Riley met the first prong of the *Katz* test,¹³¹ the plurality determined that he did not meet the second prong.¹³² The plurality first cited *Ciraolo* for the proposition that the curtilage is not protected from aerial observation by the government when the observation takes place from a legal altitude.¹³³ The decision noted that *Riley* involved observation from a helicopter rather than a fixed wing aircraft but determined that this distinction was not significant.¹³⁴ The plurality also observed that private and commercial helicopter flights are routine in the public airspace of the United States and that no evidence indicated that such flights should not be expected in Pasco County, Florida.¹³⁵ Because the FAA had not set a minimum

123. *Id.*

124. *Id.*

125. *Id.* at 697. The trial court granted Riley's motion to suppress the evidence as the fruit of an unconstitutional search. *See Stato v. Riley*, 476 So. 2d 1354, 1354 (Fla. Dist. Ct. App. 1985). The Florida District Court of Appeals reversed, but certified the case for review. *Id.* at 1356. On certification, the Florida Supreme Court reversed the appellate court and reinstated the trial court's suppression order. *State v. Riley*, 511 So. 2d 282 (Fla. 1987).

126. *Ciraolo v. United States*, 476 U.S. 207 (1986).

127. *See infra* notes 129-38 and accompanying text.

128. *See infra* notes 139-46 and accompanying text.

129. *See infra* notes 147-58 and accompanying text.

130. *Riley*, 109 S. Ct. at 695 (plurality opinion). Justice White authored the plurality opinion. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in the opinion.

131. *Id.* at 696; *cf. supra* notes 90-113 and accompanying text.

132. *Riley*, 109 S. Ct. at 696 (plurality opinion).

133. *Id.* "Legal altitude" in this discussion refers to "public airways" as defined by the FAA. *See supra* note 101.

134. *Riley*, 109 S. Ct. at 696 (plurality opinion).

135. *Id.*

altitude for helicopter flight, the plurality determined that, under *Ciraolo*, the officer's observation from the helicopter at four hundred feet took place from a public vantage point.¹³⁶ The officer was free to observe anything that might be seen from that location.¹³⁷ In addition, because Riley left two sides of the structure and part of the roof open, exposing the contents of the greenhouse to view from the air, the plurality determined that Riley did not have an expectation of privacy that society was prepared to recognize as reasonable.¹³⁸

Justice O'Connor concurred that Riley's claim failed the second prong of the *Katz* test, but disagreed with the plurality's application of the *Ciraolo* standard.¹³⁹ Justice O'Connor believed that the plurality erred by resting the scope of the fourth amendment too heavily on compliance with FAA regulations, which were intended to promote air safety rather than to protect the privacy interests that underlie the amendment.¹⁴⁰ Under the plurality's standard, the only way to preserve the privacy of the curtilage would be to enclose it completely,¹⁴¹ which would destroy the usefulness of the area.¹⁴² Justice O'Connor argued that the proper inquiry should not focus on whether the government official was flying at a legal altitude, but on whether the government official was flying over the property at an altitude regularly flown by the public.¹⁴³ If the public regularly flies over the property, an individual's expectation of privacy from aerial observation would not be one that society is prepared to recognize as reasonable under the plain view doctrine.¹⁴⁴ Justice O'Connor placed the burden of proving the frequency and altitude of public flights over the property on the defendant.¹⁴⁵ Justice O'Connor concluded that because the public regularly uses airspace at four hundred feet and above and because Riley produced no evidence to the contrary, Riley's expectation of privacy from aerial surveillance was not reasonable.¹⁴⁶

136. *Id.* at 696-97.

137. *Id.* The plurality noted that the only exception to this generality occurs when the surveillance interferes with the normal use of the property. If the helicopter was operated in such a manner as to kick up dust or create unduly loud noise, the search would not be permissible under the fourth amendment. *Id.* at 697.

138. *Id.* at 696.

139. *Id.* at 697 (O'Connor, J., concurring).

140. *Id.*

141. *Id.* at 698.

142. *Id.*

143. *Id.* at 698-99.

144. *Id.* at 698.

145. *Id.* at 699. For a discussion of the burden of proof, see *infra* notes 165-71 and accompanying text.

146. *Riley*, 109 S. Ct. at 699 (O'Connor, J., concurring). However, Justice O'Connor noted that "public use of altitudes lower than that—particularly public observations from helicopters

In a vigorous dissent, Justice Brennan reiterated that the plurality had mistakenly focused on the position of the government observer and had ignored entirely the frequency with which the public used the air-space over Riley's curtilage.¹⁴⁷ Justice Brennan argued that the reason the *Katz* Court determined that a person can have no reasonable expectation of privacy in an area exposed to the public was that privacy interests would be only slightly diminished by police surveillance of an area that any passerby could readily see.¹⁴⁸ Justice Brennan contended that the plurality mistakenly interpreted *Katz* to mean that if even one person could see into the curtilage without trespassing, the owner of the curtilage could have no constitutionally protected reasonable expectation of privacy in the area.¹⁴⁹ Justice Brennan strenuously disagreed with this analysis and argued that holding Riley's privacy could potentially be invaded from the skies was very different from holding that society was not prepared to recognize Riley's expectation of privacy as reasonable.¹⁵⁰ Using a sophisticated piece of machinery to view the greenhouse, Justice Brennan argued, could not be likened to a police officer standing on a public road viewing the greenhouse through a hole in the fence.¹⁵¹

Justice Brennan contended that the correct analysis would be to determine whether public observation of Riley's backyard was so commonplace that his expectation of privacy could not be considered reasonable.¹⁵² Contrary to Justice O'Connor, however, Justice Brennan believed that the State should bear the burden of proving that public flights at the altitude in question are not uncommon, rather than forcing the defendant to prove the contrary, because the State has greater access to flight pattern information.¹⁵³ Florida had not offered any evidence to prove that helicopter flights at four hundred feet were common; therefore, Justice Brennan determined that Riley's fourth

circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations." *Id.* Justice O'Connor further averred that the police observations must be accomplished by the "naked eye." *Id.* She therefore would exclude observations enhanced by products of modern technology.

147. *Id.* at 704 (Brennan, J., dissenting). Justices Marshall and Stevens joined in the dissenting opinion.

148. *Id.* at 700.

149. *Id.*

150. *Id.* at 701. Justice Brennan wrote, "[t]o say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not 'one that society is prepared to recognize as "reasonable."' " *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)).

151. *Id.*

152. *Id.*

153. *Id.* at 704 & n.7.

amendment rights were violated.¹⁵⁴

Justice Blackmun agreed with the standard set forth by Justices O'Connor and Brennan, but offered a different criterion for determining which party carries the burden of proving the frequency of public flights at the relevant altitude.¹⁵⁵ Justice Blackmun rejected the application of a per se rule that would place the burden of proof on either party in all aerial surveillance cases. Instead, he suggested that the State should carry the burden for all flights below one thousand feet because flights at this altitude are generally rare.¹⁵⁶ Conversely, Justice Blackmun felt that flights at altitudes over one thousand feet, or those governed by *Ciraolo*, are sufficiently frequent that the defendant should bear the burden of proof.¹⁵⁷ Because Florida would have borne the burden of proof in the instant case and did not offer evidence to meet it, Justice Blackmun would have held that the aerial surveillance at issue was unconstitutional.¹⁵⁸

IV. ANALYSIS

A. *The Emerging Frequency Standard*

The frequency standard enunciated by Justice O'Connor and the four dissenting Justices represents an emerging majority within the Court regarding the scope of the fourth amendment's protection of the curtilage. This standard is superior to the plurality's analysis because it adheres more closely to the *Katz* reasonable expectation of privacy rationale.

The plurality asserted that because Riley had exposed a small section of his greenhouse to the air, he had no constitutionally protected expectation of privacy in it.¹⁵⁹ Although *Katz* did hold that the fourth amendment does not protect areas knowingly exposed to the public,¹⁶⁰ a person does not necessarily knowingly expose an area to the public merely because it may be observed from an aircraft flying over it at a legal altitude. Under the plurality's analysis, if a single pilot can somehow maneuver an aircraft into position to see into the curtilage with the naked eye, no matter how difficult it would be to do so, the person being observed has no constitutionally protected expectation of privacy.¹⁶¹

154. *Id.* at 704.

155. *Id.* at 705 (Blackmun, J., dissenting).

156. *Id.*

157. *Id.*

158. *Id.* at 705-06.

159. *Id.* at 696 (plurality opinion); see *supra* notes 130-38 and accompanying text.

160. *Katz v. United States*, 389 U.S. 347, 351 (1967); see *supra* notes 57-71 and accompanying text.

161. *Riley*, 109 S. Ct. at 702-03 (Brennan, J., dissenting).

This analysis completely reads the term "reasonable" out of the *Katz* standard. Fourth amendment protection should not hinge on the absence of any possibility that the curtilage can be observed, but rather on whether the curtilage might reasonably be observed. If no one ever flies over the property, the defendant cannot be said to have knowingly exposed his activities to plain view. Furthermore, Justice O'Connor correctly pointed out that under the plurality's analysis, the curtilage will not be protected from government intrusion unless it is completely enclosed.¹⁶² Such a requirement totally frustrates the usefulness and enjoyment of maintaining an outdoor patio or yard. In addition, it ignores one hundred years of jurisprudence that has recognized the curtilage as an important extension of the home in which intimate activities are conducted.¹⁶³

The frequency standard preserves the "reasonableness" element of the *Katz* test because the linchpin of this analysis is the frequency of nongovernment flights at the altitude in question. The requirement that the frequency determination be made with reference only to nonpolice flights is significant. If the standard were determined by the frequency of government flights, the government could eliminate all expectations of privacy through routine patrols every possible altitude. Also significant is the fact that the frequency determination is made with reference only to flights over the *defendant's* property.¹⁶⁴ If the defendant lives in a rural area, several miles from any airport or heliport, it is unlikely that the public regularly will fly over his or her property at altitudes low enough to observe the activities being conducted by the defendant with the naked eye. On those facts, the defendant's expectation of freedom from aerial observation cannot be said to be unreasonable.

The frequency standard is a step in the right direction but it falls short of providing a general standard that adequately recognizes when a person's expectation of privacy from aerial surveillance is reasonable. The frequency standard does not take into account flight pattern information or the manner of the aerial observation. Flight pattern information is significant in determining reasonable expectations of privacy because aircraft may fly regularly over residential property but only on specific flight paths. For example, an individual living near an airport can expect aircraft to fly over or near his or her property on a regular

162. *Id.* at 698 (O'Connor, J., concurring).

163. See *supra* notes 35-113 and accompanying text.

164. In articulating this part of the "frequency" standard, Justice O'Connor noted that it is not "conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public. . . ." *Riley*, 109 S. Ct. at 698-99 (O'Connor, J., concurring) (emphasis added).

basis. If the airport has only a limited number of takeoff and landing patterns from its runways, the individual may be able to build a structure that shields the curtilage from the observation of planes flying on these patterns. Unless the structure completely encloses the property, however, it will not conceal the property from planes flying on different flight patterns. Under a strict application of the frequency standard, the individual's expectation of privacy will not be constitutionally protected because, even though regular flights over the property cannot see inside the shelter, a plane flying at a different flight angle could observe the property. The *Katz* reasonableness test was not intended to permit such an incongruous result. Because the individual took steps to protect the property and because public aircraft do not fly regularly over the property at an angle that would allow observation of the curtilage, the individual's expectation of privacy should be recognized as reasonable.

The frequency standard also does not address adequately the manner of the police surveillance. The public may fly regularly over property, but if the manner in which the police use an aircraft to observe the property is not consistent with the manner in which the public typically flies over the property, the owner's expectation of privacy should not be dismissed as unreasonable. The helicopter, with its unique ability to hover and execute extensive maneuvers in a confined space, serves as a good illustration. Even if helicopters operate regularly in an area, generic helicopter flights over an urban neighborhood are quite different from a helicopter hovering over a particular parcel of land, carefully inspecting it from various angles. A helicopter flying over a backyard catches only a brief glimpse of its contents, whereas a helicopter hovering over the yard can observe freely everything that is not completely enclosed. Public use of helicopters to scrutinize private residences is certainly rare, but the frequency standard would permit such highly intrusive surveillance by the police as long as public helicopters operate regularly in the area in any manner.¹⁶⁵

A proper analysis for determining whether the fourth amendment protects a residential curtilage from unwarranted aerial surveillance should take into account four factors: (1) the altitude of the overflight; (2) the frequency of public flights over the property; (3) the flight patterns used by the public when flying over the property; and (4) the manner in which the aircraft is used to observe the property in compar-

165. *Riley* illustrates this problem. The police had to fly over Riley's greenhouse twice before they could gain an adequate glimpse of its contents. *Id.* at 693. Even if Justice O'Connor was correct that public helicopter use is not rare at 400 feet, the frequency standard she applied to determine the reasonableness of Riley's expectation may have produced an incorrect result because it is highly unlikely that members of the public regularly use helicopters to hover over residential property.

ison to the manner in which the public generally flies over the property. This standard requires greater scrutiny into the reasonableness of the government's aerial surveillance and thus better protects reasonable expectations of privacy.

B. *The Burden of Proof*

Although Justice O'Connor and the four dissenting Justices adopted the same standard for determining the reasonableness of privacy expectations in aerial surveillance cases, they disagreed as to which party should bear the burden of proof regarding the frequency of public flights over the observed property. Justice O'Connor contended that the defendant should bear the burden of proof,¹⁶⁶ but Justice Brennan contended that the State should bear it.¹⁶⁷ Justice Blackmun contended that the State should bear the burden of proof for any helicopter surveillance conducted below one thousand feet, or those cases not covered by *Ciraolo*, and the defendant should bear it for any aerial surveillance conducted at an altitude greater than one thousand feet.¹⁶⁸ Resolution of this issue may determine whether the Justices join together in the future to adopt the frequency standard.

Justice Brennan's allocation of the burden of proof appears to be the most sound in declaring that the State should shoulder the burden of proof. As stated by Justice Brennan, the State has greater access to information concerning regular flight patterns and altitudes¹⁶⁹ and therefore is in a better position to provide proof. Justice Blackmun's approach, though original, places too much emphasis on the altitude of the flight.¹⁷⁰ The fact that the aerial surveillance at one thousand feet in *Ciraolo* was constitutionally permissible has no logical significance with regard to determining which party should bear the burden of proof. If the burden of proof was assigned to the parties in this fashion, every time the FAA revised its minimum altitude regulations, the burdens of proof would change.¹⁷¹ Regardless of whether the court resolves the burden of proof question uniformly, the clear message to prospective litigants is that evidence about the frequency of public flights is now an essential factor in the Court's analysis of the scope of fourth

166. *Id.* at 699.

167. *Id.* at 704 (Brennan, J., dissenting).

168. *Id.* at 705 (Blackmun, J., dissenting).

169. *Id.* at 704 (Brennan, J., dissenting).

170. *See supra* notes 155-58 and accompanying text.

171. The warrantless aerial surveillance in *Ciraolo* was constitutionally permissible because the plane was operating at 1000 feet in an area where the minimum flight altitude was 500 feet. *See supra* note 101. If the FAA revised its regulations to set the minimum flight altitude at 1500 feet, the surveillance in *Ciraolo* would no longer be constitutionally permissible and Blackmun's assignment of the burdens of proof would have to be revised.

amendment protection afforded residential curtilages.

V. CONCLUSION

The curtilage has evolved from a sanctuary deserving the same constitutional protection as that afforded the home to its current status as little more than a buzzword holding no actual legal significance.¹⁷² Under the Court's holdings in *Ciraolo* and *Riley*, no reasonable expectation of privacy inheres in the curtilage unless it is completely shrouded from view. These decisions raise questions of whether society is prepared to adopt such a limited view of the privacy that can be expected in such areas. Although the *Riley* plurality's opinion perhaps evinces images of an Orwellian Big Brother state,¹⁷³ the positions taken by Justice O'Connor and the four dissenting Justices offers hope that future fourth amendment jurisprudence may not evolve in that direction. Their opinions suggest that the Court may be shifting away from blind concentration on the apprehension of criminals and back to a more reasoned approach that emphasizes an individual's right to privacy in his home and curtilage.

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172. See Note, *California v. Ciraolo: Blanketing the Curtilage*, 32 St. Louis U.L.J. 247, 261 (1987).

173. In concluding his dissent, Justice Brennan offered the following excerpt as a response to the direction the Court took in *Ciraolo* and *Riley* regarding the permissibility of warrantless aerial surveillances:

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

Riley, 109 S. Ct. at 705 (Brennan, J., dissenting) (quoting G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)).

