AERIAL SURVEILLANCE AND THE FOURTH AMENDMENT—*California v. Ciraolo**

I. INTRODUCTION

Law enforcement officials have increasingly turned to aerial surveillance as a means of combating crime.[1] Aerial surveillance often enables police to view areas that they otherwise would be unable to view without a warrant. Consequently, considerable conflict has developed over whether this means of surveillance constitutes a search under the fourth amendment.[2] In *California v. Ciraolo*,[3] the United States Supreme Court held that naked-eye aerial observations of the curtilage of a home, when made from navigable airspace, do not constitute a search protected by the fourth amendment.[4]

Ciraolo is significant not only for the resulting impact on individuals and law enforcement officials, but also because it underscores the Court's continuing trend toward narrowing the scope of the fourth amendment.[5] This Note analyzes the Court's opinion in *Ciraolo* and concludes that, although the Court applied the reasonable expectation of privacy test enunciated in *Katz v. United States*,[6] it overlooked the central thrust of the second prong of the test, and thus failed to properly balance the individual's privacy interest against the utility of the governmental surveillance. As a result, *Ciraolo* constitutes a distorted interpretation of *Katz* that fails to adequately preserve fourth amendment protections against developments in governmental surveillance.

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[1] INTELLIGENCE REQUIREMENTS FOR THE 1980'S: ELEMENTS OF INTELLIGENCE (R. Godson ed. 1979); Recent Developments, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409 (1982).

[2] *Compare, e.g.*, People v. Agee, 153 Cal. App. 3d 1169, 200 Cal. Rptr. 827 (1984) *with* State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977).

[3] 106 S. Ct. 1809 (1986).

[4] *Id.* at 1813. The Court's holding is limited to naked-eye observations made from navigable airspace. Observations aided by technology that disclose objects or activities otherwise imperceptible to the naked eye may well be invasive. *See id.* at 1813-14 n.3. *See also* Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986).

[5] Oliver v. United States, 466 U.S. 170 (1984); Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976).

[6] 389 U.S. 347 (1967).

II. THE CURTILAGE AND THE FOURTH AMENDMENT

*A. Pre-*Katz *Era*

For a number of years the Supreme Court reasoned there was no fourth amendment search unless there was a physical intrusion into a "constitutionally protected area."[7] The protected areas were deemed to be those enumerated in the fourth amendment itself: persons, houses, papers, and effects.[8] Under this literal pre-*Katz* approach, the protections afforded to one's "house" encompassed not only the interior of the house but also all structures and land within its curtilage.[9] As a result, the curtilage doctrine became an important common law property doctrine used in evaluating fourth amendment challenges.

The curtilage at common law was defined essentially as it is today. In short, a common sense approach was adopted wherein the land and buildings within reasonable proximity to the home were included, while land and buildings remote from the home were not part of the curtilage.[10] Thus, under the pre-*Katz* physical intrusion approach, a search was unconstitutional if the police trespassed on the curtilage, but if no intrusion on the curtilage occurred, there was no fourth amendment violation.[11]

B. Katz *Era*

In *Katz v. United States,*[12] the Supreme Court removed the trespass requirement as a prerequisite to a fourth amendment violation.[13] In *Katz,* the FBI attached an electronic listening device to the exterior of a public telephone booth in order to listen to the defendant's telephone conversation. Although the parties characterized the issue as whether a public telephone booth is a constitutionally protected area, the Court rejected this approach because:

> [T]his effort to decide whether or not a given area, viewed in the abstract, is constitutionally protected deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

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[7] *See, e.g.,* Silverman v. United States, 365 U.S. 505 (1981).
[8] Olmstead v. United States, 277 U.S. 438, 465 (1928).
[9] Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968).
[10] 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 559 (W. Stokes & E. Ingersoll 1847).
[11] Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956); Hobson v. United States, 226 F.2d 890, 894 (8th Cir. 1955).
[12] 389 U.S. 347 (1967).
[13] *Id.* at 353.

> . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[14]

The Court concluded that "the reach of the [fourth amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[15] The Court held that the government's electronic eavesdropping violated the privacy upon which the defendant justifiably relied.[16] As a result, the government's eavesdropping constituted an unreasonable search in violation of the fourth amendment.[17]

In his noteworthy concurring opinion, Justice Harlan set forth a two-pronged test for determining the extent of fourth amendment protection. According to Harlan, the prerequisites for a reasonable expectation of privacy included "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[18] The Supreme Court subsequently adopted Harlan's two-pronged test.[19]

By basing fourth amendment analysis on the protection of people, rather than on the protection of places, the Court aligned the scope of the fourth amendment with its underlying purpose of protecting people from unreasonable governmental intrusions. A rigid, literal approach had been replaced by a more flexible, policy-oriented approach. This new test suggested a fundamental expansion of the fourth amendment.

The first prong of the Harlan test has not proved particularly troublesome for the courts. Courts have focused on the individual's conduct in order to determine if he exhibited an actual, subjective expectation of privacy.[20] In general, courts have only required individuals to protect against observations from commonly expected vantage points in order to have manifested a subjective expectation of privacy.[21] In short, satisfaction of the first prong of the Harlan test is dependent upon the facts of each particular case.

The second prong of the Harlan test has proved more elusive and troublesome. In *United States v. White*,[22] Justice Harlan indicated that the second prong must "be answered by assessing the nature of a particular practice and the likely extent of its impact on the indi-

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[14] *Id.* at 351-52.
[15] *Id.* at 353.
[16] *Id.* at 352.
[17] *Id.* at 359.
[18] *Id.* at 361 (Harlan, J., concurring).
[19] Smith v. Maryland, 442 U.S. 735, 740 (1979).
[20] *See, e.g., id.* at 740.
[21] *See* State v. Pointer, 95 Idaho 707, 711-13, 578 P.2d 969, 973-74 (1974) (defendant had no reasonable expectation of privacy where curtilage only surrounded by a low picket fence). *Cf.* Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (where occupants had drawn curtains so as to preclude ground level observations, court held it a search for officers to climb onto a second-story trellis and peer into defendant's hotel room).
[22] 401 U.S. 745 (1971) (Harlan, J., dissenting).

vidual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[23] As one commentator noted, "the ultimate issue under *Katz* is a value judgment, namely, whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[24]

Katz made it apparent that the curtilage doctrine would no longer act as a barrier to limit the scope of the fourth amendment. Under the reasoning of *Katz,* it would be possible to have a reasonable expectation of privacy in an area outside the curtilage. *Katz* thus signaled a decline in the importance of the curtilage doctrine, and many courts deemed it unwise to undertake a curtilage analysis after *Katz.*[25]

C. Oliver *Era*

In *Oliver v. United States,*[26] the Court stated that "the special protection accorded by the fourth amendment . . . is not extended to the open fields."[27] The Court held that the open fields approach was consistent with *Katz* because "an individual may not legitimately demand privacy for activity conducted out of doors in fields, except in the area immediately surrounding the home."[28] The bright line rule adopted in *Oliver* was contrary to the thrust of *Katz,* which rejected such an approach in favor of a case-by-case analysis. Implicitly recognizing this deviation from *Katz,* the *Oliver* majority concluded that a case-by-case approach would make it too "difficult for the policeman to discern the scope of his authority."[29]

Regardless of the wisdom of *Oliver,* it signaled a renewed significance in the curtilage doctrine when the courts face an open fields issue. If the area is found to be an open field, then the fourth amendment does not protect activities conducted therein and the two-part *Katz* analysis is unnecessary. What remained to be decided was the extent of protection the *Katz* test would provide for activities conducted within the curtilage.

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[23] *Id.* at 786. In Delaware v. Prouse, 440 U.S. 648, 654 (1979), the Court adopted Harlan's balancing formula.

[24] Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 403 (1974).

[25] *See, e.g.,* United States v. Arboleda, 633 F.2d 985 (2d Cir. 1980); People v. Sneed, 32 Cal. App. 3d 535, 541, 108 Cal. Rptr. 146, 149 (1973).

[26] 466 U.S. 170 (1984).

[27] *Id.* at 176.

[28] *Id.* at 178.

[29] *Id.* at 181.

III. *California v. Ciraolo*

A. Facts and Case History

Acting upon an anonymous telephone tip, the Santa Clara police went to the defendant's house to determine if marijuana was, in fact, growing in his backyard. The police were unable to observe the contents of defendant's backyard from ground level because of two fences that completely enclosed the yard. Later that day, the police flew over the defendant's home in a private plane for the express purpose of observing and photographing his backyard. At an altitude of 1000 feet, the police were able to observe, without visual aids, marijuana plants growing in the backyard. On the basis of this naked-eye observation, the police obtained a search warrant and seized the marijuana plants.[30]

The defendant moved to suppress the evidence based on the grounds that: (1) the warrantless aerial observation of the curtilage violated the fourth amendment; and (2) the evidence seized was the direct result of the unlawful search.[31] The trial court denied the suppression motion and the defendant pled guilty to a charge of cultivation of marijuana.[32]

The California Court of Appeals reversed on the ground that the warrantless aerial observation of the backyard violated the fourth amendment.[33] The appellate court began by distinguishing open field observations from curtilage observations. Relying on *Oliver*,[34] the court reasoned that, although an individual cannot have an expectation of privacy in an open field, he is entitled to demand privacy for activities conducted in the area immediately surrounding his home.[35] Thus, the court noted that cases upholding aerial surveillance of open fields were inapposite to the present dispute.[36] Finally, the court distinguished routine aerial patrols from police aircraft focusing on a particular home.[37] The latter violated an individual's reasonable expectation of privacy while the former may not.[38] As a result, the court concluded that the warrantless aerial observation of the defendant's backyard constituted an unreasona-

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[30] *Ciraolo*, 106 S. Ct. at 1810-11. The probable cause determination was based only on the officer's testimony about his observations. An aerial photo depicting the backyard was attached to the affidavit, but it did not support the warrant since it failed to reveal the nature of the plants. *Id.* at 1812 n.1.

[31] *See* People v. Ciraolo, 161 Cal. App. 3d 1081, 1085-86, 208 Cal. Rptr. 93, 94-95 (1984).

[32] California v. Ciraolo, 106 S. Ct. 1809, 1811 (1986).

[33] *Ciraolo*, 161 Cal. App. 3d at 1090, 208 Cal. Rptr. at 98.

[34] 466 U.S. 170 (1984).

[35] *Ciraolo*, 161 Cal. App. 3d at 1087, 208 Cal. Rptr. at 96.

[36] *Id.* at 1088-89, 208 Cal. Rptr. at 97.

[37] *Id.* at 1089, 208 Cal. Rptr. at 97-98.

[38] *Id.*

ble search and reversed the conviction.[39]

After being denied review in the California Supreme Court, the State gained review in the United States Supreme Court. The United States Supreme Court, in an opinion written by Chief Justice Burger, reversed the California appellate court.

B. United States Supreme Court

Relying on *Katz,*[40] the Supreme Court noted that a person has a constitutionally protected reasonable expectation of privacy if: (1) the individual has manifested a subjective expectation of privacy in the object of the search; and (2) the expectation is one that society is willing to recognize as reasonable.[41]

Despite asserting that the defendant clearly manifested a subjective expectation of privacy,[42] the Court nevertheless raised the issue of whether such a finding was warranted. The Court noted that "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus."[43] Thus, the Court reasoned that whether the defendant "manifested a subjective expectation of privacy from *all* observations of his backyard, or instead manifested merely a hope that no one would observe his unlawful gardening pursuits is not entirely clear in these circumstances."[44] Since, however, the lower court's finding was not challenged, the Court did not reach a conclusion on the issue.[45]

Turning to the second prong of the *Katz* test, the Court began by noting that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home . . . where privacy expectations are most heightened."[46] The Court, however, added that merely because the observed area is within the curtilage does not itself bar all police observation: "The Fourth Amendment . . . has never been extended to require law enforcement to shield their eyes when passing by a home on public thoroughfares."[47] Relying on *United States v. Knotts,*[48] the Court concluded that just because "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."[49] Applying this rationale to the facts of *Ciraolo,* the Court

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[39] *Id.* at 1090, 208 Cal. Rptr. at 98.
[40] 389 U.S. 347 (1967).
[41] *Ciraolo,* 106 S. Ct. at 1811.
[42] *Id.*
[43] *Id.* at 1812.
[44] *Id.*
[45] *Id.* at 1811-12.
[46] *Id.* at 1812.
[47] *Id.*
[48] 460 U.S. 276 (1983).
[49] *Ciraolo,* 106 S. Ct. at 1812.

noted that, since anyone could observe the defendant's backyard from navigable airspace, the defendant's expectation of privacy from such observations was not one society was willing to recognize as reasonable.[50] Thus, the Court reinstated the conviction.[51]

IV. ANALYSIS

The Supreme Court's decision in *Ciraolo* reflects the Court's continuing trend toward narrowing the scope of the fourth amendment.[52] Despite utilization of the two-pronged *Katz* test, the Court's analysis is inconsistent with the spirit of *Katz*. The central premise underlying the *Ciraolo* decision is that an officer's observations from a public vantage point do not constitute a fourth amendment search. The Court bolsters this conclusion with language from *Katz*, stating that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[53] Neither of these general principles are objectionable in theory, yet a closer examination of the Court's application of these principles to *Ciraolo* reveals some deficiencies in the Court's analysis.

A. Subjective Expectation of Privacy

The Court's suggestion that the defendant might not have possessed a subjective expectation of privacy from *all* views, since a policeman perched on a double decker bus might have been able to see into the defendant's backyard, is troubling. Such logic suggests an unusually high burden for satisfying the first prong of the *Katz* test. An individual should not be required to protect against observations from vantage points not ordinarily utilized by the public. Although it is not a search for a policeman to engage in observations from a public street,[54] a neighbor's property,[55] or the "normal means of access to and egress from the house,"[56] courts have consistently held that it is a search when police resort to unusual means to gain a view of another's property.[57] *Katz* should not be interpreted as requiring an individual to take extraordinary precautions

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[50] *Id.* at 1813.
[51] *Id.*
[52] *See supra* note 5 and accompanying text.
[53] *Ciraolo,* 106 S. Ct. at 1812 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
[54] People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968).
[55] Turner v. State, 499 S.W.2d 182 (Tex. Ct. App. 1973).
[56] Lorenzana v. Superior Court, 9 Cal. 3d 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).
[57] *See, e.g.,* Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970) (holding it was a search for officers to climb onto a second-story trellis so they could see over the drawn curtains of defendant's hotel room).

to manifest a subjective expectation of privacy. Hopefully, the Court's hypothetical of a policeman perched on top of a double decker bus represents only an unfortunate overstatement by the Court.

Perhaps the Court intended to suggest that an individual's subjective expectation of privacy from aerial surveillance should be evaluated by his conduct *vis a vis* observations from the air (hereinafter referred to as the aerial approach). Although some courts have adopted such a view,[58] the better approach would be to use the individual's efforts to prevent observations from ground level or nearby structures as a measure of the individual's subjective expectation of privacy (hereinafter referred to as the ground-level approach).

To begin with, the overwhelming number of observations by the public of curtilage activities are made from the ground. There is no reason for a homeowner to suspect that ordinary airplane passengers are viewing his backyard activities. Thus, the ground-level approach is consistent with the view that an individual should only be required to protect against the commonly expected types of observations in order to manifest a subjective expectation of privacy from all views.[59]

Moreover, adoption of the aerial approach would eliminate the possibility of an individual ever being able to exhibit a subjective expectation of privacy from aerial observations of the outdoor activities within the curtilage. Individuals would be required to erect roofs over their yards in order to exhibit a subjective expectation of privacy from aerial observations. Such a technologically imposed change would seem contrary to the spirit of *Katz,* which sought to preserve the fourth amendment protections against developments in governmental surveillance.

B. Reasonable Expectation of Privacy

Turning to the second prong of the *Katz* test, the Court relied on the "open view" doctrine[60] as the sole basis for concluding that the defendant's subjective expectation of privacy was not one that society was willing to recognize as reasonable. Under the open view doctrine, observations of clearly visible objects made from a public vantage point do not constitute a fourth amendment search.[61] Applying this rationale to *Ciraolo,* the Court concluded the defen-

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[58] *See, e.g.,* State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977).

[59] *See supra* notes 54-57 and accompanying text.

[60] The open view doctrine should be distinguished from the plain view doctrine. The latter allows the warrantless seizure of objects if there is: (1) a valid prior intrusion; and (2) inadvertent discovery of the incriminating objects. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The open view doctrine, however, addresses whether there has been a fourth admendment search at all, and the *Coolidge* requirements are irrelevant.

[61] Katz v. United States, 389 U.S. 347, 351 (1967).

dant's "expectation that his garden was protected from aerial observation is unreasonable and is not an expectation that society is prepared to honor."[62]

The Court's mechanical application of the open view doctrine in *Ciraolo* represents a superficial treatment of the issues and overlooks the underlying objectives of the second prong of the *Katz* test. The Court relied solely on *United States v. Knotts*[63] as authority for applying the open view doctrine.[64] *Knotts* involved ground level surveillance of activities on public streets and is not convincing precedent for extending the open view doctrine to aerial observations of the private areas adjoining the home. An individual's privacy interest for activites conducted on a public street is ordinarily not comparable to that involved for activities conducted within the curtilage.

Despite the unpersuasiveness of *Knotts,* there are cases holding that observations into the curtilage or the interior of the home do not constitute a search if made from a public vantage point.[65] The issue arises, however, as to whether the use of aerial surveillance should distinguish *Ciraolo* from this line of cases. Surveillance from public airspace allows the police to observe many activities that probably would not otherwise be exposed to the public, whereas surveillance from the ground only allows the police to observe activities that probably have already been exposed to the public. In addition, aerial surveillance can pose new threats to a person's sense of security.[66] In short, the Court failed to fully address the extension of the open view doctrine and instead merely assumed that the doctrine should apply to aerial surveillance.

Even more troublesome is the Court's reasoning that application of the open view doctrine necessitates the conclusion that Ciraolo's expectation of privacy was not one that society is willing to recognize as reasonable. As Justice Harlan explained, the second prong of the *Katz* test should "be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[67] The Court, however, failed to balance these competing issues, thereby overlooking the central objective of the second prong of the *Katz* test. Instead, the Court concluded that the open view doctrine, by itself, justified the conclusion that the defendant's subjective expectation of privacy was not one that society is prepared to honor.[68]

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[62] *Ciraolo,* 106 S. Ct. at 1813.

[63] 460 U.S. 276 (1983).

[64] 106 S. Ct. at 1812.

[65] *See supra* notes 54-56 and accompanying text.

[66] *See* NORML v. Mullen, 608 F. Supp. 945 (N.D. Cal. 1985). In that case, a federal court found that the use of helicopters by police to warrantlessly observe homes and curtilages "at best disturb, and at worst terrorize, the hapless residents below." *Id.* at 957.

[67] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

[68] *Ciraolo,* 106 S. Ct. at 1813.

One need only return to the Court's decision in *Oliver* to fully appreciate the deficiencies in the *Ciraolo* Court's reasonable expectation analysis. Although the *Oliver* Court mentioned that open fields were generally open to public view, as support for its conclusion that the defendant's expectation of privacy was not one that "society recognizes as reasonable,"[69] it did not rely exclusively on this rationale. The Court also noted that "open fields do not provide the setting for those intimate activities that the [fourth amendment] is intended to shelter from government interference or surveillance" and that "[t]here is no societal interest in protecting the privacy of those activities . . . that occur in open fields."[70] Based on *all* of these reasons, the *Oliver* Court held that "the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable."[71]

In contrast, *Ciraolo* involved observation of activities occurring within the curtilage of the home. This area provides the type of setting for personal activities that the fourth amendment is intended to shelter from unreasonable governmental surveillance. Even the *Ciraolo* Court noted that individuals' privacy expectations "are most heightened" for activities occurring within the curtilage.[72] Furthermore, given the limited size of the curtilage, the law enforcement benefits derived from aerial surveillance of curtilage activities would seem to be significantly less than the benefits derived from surveillance of open fields.

In light of these circumstances, a strong argument can be made that, under the *Katz* balancing formula, an individual's expectation of privacy for curtilage activities is one that society should be prepared to recognize as reasonable. In fact, in an aerial surveillance case decided the same day as *Ciraolo,* the Court appeared to agree when it stated that "[t]he curtilage area immediately surrounding a private house has long been given protection as a place where occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept."[73] Nevertheless, the Court reached the opposite result in *Ciraolo* by relying exclusively on the mechanical application of the open view doctrine. Such jurisprudence constitutes an unwise departure from the *Katz* balancing analysis because it fails to focus on the truly significant issues at stake.

V. CONCLUSION

The Supreme Court's decision in *Ciraolo* reflects the Court's con-

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[69] Oliver v. United States, 466 U.S. 170, 179 (1984).
[70] *Id.*
[71] *Id.*
[72] *Ciraolo,* 106 S. Ct. at 1812.
[73] Dow Chemical Co. v. United States, 106 S. Ct. 1819, 1825 (1986).

tinuing trend toward narrowing the scope of the fourth amendment.[74] Individuals will no longer be able to demand privacy from naked-eye aerial observations of their outdoor activities, when the observations are made from navigable airspace,[75] even though the observed activities occur within the curtilage of the home. As police departments increasingly resort to aerial observations as a means of law enforcement, the privacy previously enjoyed for outdoor activities within the curtilage will be greatly reduced. Such a result is at odds with the spirit of *Katz,* which sought to preserve fourth amendment protections against developments in governmental surveillance.

Despite recognizing that privacy expectations "are most heightened" for activities occurring within the curtilage, the Court failed to analyze why law enforcement interests outweigh the individual's privacy interest in those activities. As a result, the Court overlooked the central thrust of the second prong of the *Katz* test. Instead, it relied exclusively on the mechanical application of the open view doctrine to the area of aerial surveillance as support for its conclusion that Ciraolo's subjective expectation of privacy was not one that society is prepared to honor. This mechanical jurisprudence has reduced the scope of the fourth amendment and ignores the importance of the curtilage doctrine with respect to aerial observations from navigable airspace.[76] If the activity is outside the curtilage, the aerial surveillance is per se constitutional under the *Oliver* open fields doctrine, and if the outdoor activity is within the curtilage, the aerial surveillance is per se constitutional under the open view doctrine as applied in *Ciraolo.*

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[74] *See supra* note 5 and accompanying text.

[75] *But see* People v. Sabo, 185 Cal. App. 3d 626, 108 Cal. Rptr. 585 (1986) (naked-eye aerial observations made from other than navigable airspace held impermissible and the rule of *Ciraolo* is not applicable to such observations).

[76] The Courts decision in *Dow Chemical Co.,* reaffirming the curtilage doctrine, was issued the same day as *Ciraolo.* 106 S. Ct. 1819 (1986). *Dow Chemical Co.,* however, is factually distinguishable from *Ciraolo* because it involved a commercial facility and the Court analogized the 2,000 acre industrial complex to an open field, while distinguishing it from homes or offices. *Id.* at 1823, 1825-26. Neither case creates a rule of law applicable to aerial observations of activities conducted within a structure.