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Reasonable Expectation of Privacy Cases Revive Traditional Investigative Techniques

". . . for an expectation of privacy to be reasonable, it must be an expectation that society as a whole is willing to recognize and protect."

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The fourth amendment of the U.S. Constitution guarantees the right of the people to be secure from unreasonable searches and seizures.[1] Over the years, the U.S. Supreme Court has expended considerable time and energy in an effort to interpret the fourth amendment and to define its terms.[2] Specifically, the Court's efforts have often focused on the task of defining the term "search" as it is used in the amendment.[3] Whether an action is a search under the fourth amendment is of particular importance to the Court and law enforcement officers, because only those actions which amount to a search fall within the parameters of the fourth amendment, and consequently, only those actions need be reasonable.

Prior to 1967, the Supreme Court defined the term "search" as a governmental trespass into a constitutionally protected area.[4] Although this interpretation, when applied to fourth amendment cases, did little to protect individual privacy,[5] it did lead to very effective and confident use of traditional investigative techniques. Law enforcement officers could use electronic surveillance,[6] physical surveillance,[7] or any other investigative technique they chose without concern for the proscriptions of the fourth amendment as long as they steadfastly avoided any trespass into constitutionally protected areas such as homes and offices.

In 1967, however, the constitutionality of these investigative techniques was questioned when, in the case of *Katz* v. *United States*,[8] the Supreme Court redefined the term "search." In *Katz*, the Court recognized that the fourth amendment was designed to protect people, not places,[9] and concluded that the then current interpretation of the amendment did not accomplish this purpose. Therefore, the Court revised its definition of the term "search" in order to make the protections of the amendment more responsive to the needs of individual privacy. No longer would the application of the fourth amendment depend upon physical trespasses into certain protected areas.[10] Rather, the Court in *Katz* held that the purpose of the amendment would be better satisfied if all governmental intrusions into areas where individuals legitimately expected privacy were required to be reasonable. The Court achieved this goal by redefining

Special Agent Kingston

the term "search" to include any governmental action which intrudes into an area where there is a reasonable expectation of privacy.[11]

The concept of "reasonable expectation of privacy" was both new and confusing to law enforcement officers and lower courts alike. The clear distinction between those areas which were protected by the fourth amendment and those which were not no longer existed. Consequently, law enforcement officers never quite knew when their use of traditional investigative techniques would intrude into an area reasonably expected to be private, and thus, be considered a search. This confusion resulted in a loss of confidence in formerly acceptable investigative practices, such as warrantless entries into open fields and the inspection of discarded trash.

During the last few years, the Supreme Court has decided a number of cases which have eliminated some of the confusion that surrounds the concept of "reasonable expectation of privacy."[12] These cases have concluded that there is no reasonable expectation of privacy in certain areas, and therefore, these areas are not protected by the fourth amendment. The remainder of this article will focus on a few of these cases and illustrate how they have renewed confidence in certain law enforcement practices. In particular, law enforcement's use of warrantless entries into open fields, fly overs, dog sniffs, field tests, and inspections of discarded trash will be discussed.

Warrantless Entries Into Open Fields

A good example of the confusion that resulted from the decision in *Katz* is demonstrated by the lower courts' conflicting interpretations of the open fields doctrine in the case of *Oliver* v. *United States*.[13] In *Oliver*, two police officers, acting on a tip that marijuana was being grown on defendant's farm, went to the farm to investigate. While there, the officers drove onto defendant's property, and ignoring a "No Trespassing" sign and a locked gate, located a marijuana field approximately 1 mile from defendant's house. The marijuana was seized and defendant was arrested and indicted for manufacturing a controlled substance.

Prior to trial, defendant moved to suppress the marijuana seized from his property on the grounds that it was discovered as a result of an unreasonable, warrantless search. Applying its interpretation of *Katz*, the district court found that the entry into defendant's field was indeed a search.[14] Because the search was conducted without a warrant, it was deemed unreasonable and the evidence was suppressed. The district court's conclusion that a search of defendant's property had occurred was based on its belief that defendant "had a reasonable expectation that the field would remain private because [defendant] 'had done all that could be expected of him to assert his privacy in the area of the farm that was searched.' "[15]

On review, the Sixth Circuit Court of Appeals[16] applied its own interpretation of *Katz*, concluded that no search of defendant's property had occurred, and reversed the district court order suppressing the evidence. In reaching this conclusion, the court of appeals reasoned that the "human relations that create the need for privacy do not ordinarily take place"[17] in open fields. Because there normally was no need for privacy in an open field, the court found

". . . the subjective intent of an individual is not conclusive when determining the existence of a reasonable expectation of privacy."

that it would be unreasonable to expect such privacy, and thus, open fields do not come within the protection of the fourth amendment.

The U.S. Supreme Court resolved the apparent conflict which existed in the lower courts when it reviewed the facts of *Oliver* and, agreeing with the court of appeals, determined that no search had occurred. The Supreme Court's determination resulted from a two-part analysis. First, the Court recognized that the fourth "[a]mendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as reasonable.' "[18] In other words, for an expectation of privacy to be reasonable, it must be an expectation that society as a whole is willing to recognize and protect. The purely subjective intent of the individual is not controlling.[19] In the second step of its analysis, the Court, speaking for society in general, stated that it was not willing to either recognize or protect an expectation of privacy in an open field. In reaching this conclusion, the Court first looked at the traditional "overriding respect for the sanctity of the home"[20] and compared it with the open fields as follows:

> "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be."[21]

On balance, the Supreme Court found open fields unworthy of protection under the fourth amendment.

In practice, the Supreme Court's determination that there is no reasonable expectation of privacy in open fields has effectively removed all physical entries into such areas from fourth amendment scrutiny. Law enforcement officers can now, when the situation dictates, confidently resume the practice[22] of making warrantless entries into open fields without fear of contravening fourth amendment proscriptions. What must be remembered, however, is that the home and the curtilage, that is the area immediately surrounding and associated with the home,[23] remain under the protection of the fourth amendment. Consequently, any governmental entry into the home or curtilage must comply with fourth amendment standards by being conducted under the authority of a valid warrant or by falling into one of the recognized exceptions to the warrant requirement.

Fly Overs

Once the Supreme Court resolved the conflict over open fields, the next issue to arise involved the use of fly overs. If a law enforcement officer could physically intrude into an open field without concern for the proscriptions of the fourth amendment, it was obvious that he could fly over the same open field with a similar lack of concern. However, because the curtilage area that immediately surrounds the home is afforded protection under the amendment, the question of whether a law enforcement officer could make observations while flying over a curtilage remained unresolved until the Supreme Court decided the case of *California* v. *Ciraolo*.[24]

In *Ciraolo*, police officers, responding to an anonymous tip that marijuana was being grown in defendant's backyard, drove to defendant's house where their attempt to see into the backyard was thwarted by a 6-foot outer fence and a 10-foot inner fence. Undaunted, the police officers hired a private plane and flew over defendant's house. From an altitude of 1,000 feet, the officers were able to identify,[25] with unaided vision, a large number of marijuana plants growing in defendant's yard. The plants were photographed with a standard 35mm camera.[26] Later, the anonymous tip, the officers' observations, and the photographs were used to secure a search warrant for defendant's property. During the execution of the warrant, 73 marijuana plants were seized.

Defendant pleaded guilty to a charge of cultivation of marijuana after the trial court denied his motion to suppress the evidence seized pursuant to the warrant. The California Court of Appeals,[27] however, reversed the trial court's denial of defendant's motion on the grounds that the "warrantless aerial *observation* of [defendant's] yard which led to the issuance of the warrant violated the Fourth Amendment."[28]

After the California Supreme Court denied prosecution's petition for review, the U.S. Supreme Court granted certiorari and reversed. The Supreme Court recognized that the defendant had clearly manifested a "subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits."[29] However, as the Court pointed out in *Oliver*, the subjective intent of an individual is not conclusive when determining the existence of a reasonable

expectation of privacy. Rather, it is equally important to consider whether the individual's subjective expectation is one that society is willing to protect. More precisely, the Court in *Ciraolo* was faced with the question of whether the "naked-eye observation of the curtilage by the police from an aircraft lawfully operating at an altitude of 1,000 feet"[30] infringed upon "the personal and societal values protected by the Fourth Amendment."[31]

Although accepting defendant's initial argument that the area observed was intimately linked to the home where, traditionally, "privacy expectations are most heightened,"[32] the Court noted that the simple fact that an area is within the curtilage does not itself bar all police observation. On the contrary, the Court pointed out that the fourth amendment does not "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[33] It would be unreasonable to expect absolute privacy, even in a curtilage area, if the area is partially open to view from a public vantage point. Because the observations in question were made in a physically nonintrusive manner by officers flying in navigable airspace which is available to the general public, the Court readily concluded that defendant's "expectation that his garden was protected from such observations [was] unreasonable and [was] not an expectation of privacy that society is prepared to honor."[34] Accordingly, the Court held that because there was no interference with a reasonable expectation of privacy, there was no "search" under the fourth amendment, and hence, no need for a warrant.

Some questions remained unanswered in the wake of *Ciraolo*. The observations at issue in *Ciraolo* were made by the naked eyes of law enforcement officers flying a fixed-wing aircraft in navigable airspace. If any of these factors were changed, would the reasoning in *Ciraolo* still control?

The question was partially resolved by the Supreme Court in the case of *Dow Chemical Company* v. *United States*.[35] In *Dow*, the Court approved the use of a sophisticated mapping camera[36] to improve observations made while flying over an industrial complex. Acknowledging that the camera was available to the general public, the Court held that "the mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."[37]

Although some issues still remain unresolved,[38] it is quite apparent that as a result of *Ciraolo* and *Dow Chemical*, the warrantless fly over continues to be a viable law enforcement investigative technique.

Dog Sniffs

The use of specially trained dogs to detect the odors of explosives and narcotics is another example of a law enforcement practice that has caused some concern in the courts over the years since *Katz*. This concern was at least partially alleviated by the Supreme Court when it gratuitously addressed the issue of using specially trained dogs in the case of *United States* v. *Place*.[39]

In *Place*, law enforcement officers at New York's LaGuardia Airport lawfully detained defendant on a reasonable suspicion that he was carrying a controlled substance.[40] When defendant refused to consent to a search of his luggage, he was given the opportunity to accompany his luggage to the office of a Federal judge where a search warrant would be sought. Defendant declined the offer but requested and received a telephone number where the officers could be reached. After defendant left the premises, his luggage was taken to Kennedy Airport where it was subjected to a "sniff test" by a trained narcotics detection dog.[41] In response to the dog's positive reaction to one of the bags, a warrant was secured. The subsequent search of the bag revealed a substantial quantity of cocaine. The defendant was later arrested and indicted for possession of cocaine with intent to deliver.

After the district court denied defendant's motion to suppress the evidence seized from his luggage,[42] defendant entered a plea of guilty but reserved his right to appeal the denial of his suppression motion. On review, the U.S. Court of Appeals for the Second Circuit reversed on the grounds that the lengthy detention of defendant's luggage exceeded permissible limits and consequently amounted to a seizure in violation of the fourth amendment.[43] The U.S. Supreme Court affirmed.

Although resolution of the dispute in *Place* did not require the Court to address the use of "dog sniffs,"[44] a majority of the Court took the opportunity to clarify the issue.[45] The analysis used by the Court in *Place* was similar to the analysis discussed in previous cases. First, the Court looked and found that defendant had a subjective expectation of privacy in his luggage. Next, the Court considered whether the use of a specially trained dog to detect the odors

". . . there is no reasonable expectation of privacy in certain areas, and therefore, these areas are not protected by the fourth amendment."

emanating from the luggage violated any expectation of privacy that society was willing to protect. Of particular significance to the Court was the fact that the "dog sniff" did not require the opening of defendant's luggage.[46] Furthermore, the Court made the following observations:

> "[The 'dog sniff'] does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[47]

Obviously, what impressed the Court the most about the "dog sniff" was its limited intrusiveness. The sniff can tell law enforcement officers only one thing—whether there is contraband in the item tested. According to the Court, this single fact is something society is not willing to protect. Consequently, under the circumstances present in *Place*, the use of a trained detection dog did not violate any reasonable expectation of privacy, and therefore, was not a search under the fourth amendment.

In *Place*, the Court did not go so far as to say that no dog sniff would ever be considered a search. There remains some room for doubt. For instance, some courts have held that the reasoning in *Place* is not controlling when a detection dog is used to sniff a person[48] or an individual's home.[49] It is clear, however, that when an item of personal property, such as luggage, is brought into a public place[50] and thereafter subjected to the special talents of a detection dog, no fourth amendment concerns arise. Accordingly, the "dog sniff" continues to be a widely used, effective law enforcement investigative technique.

Field Tests

Shortly after announcing its decision in *Place*, the Supreme Court, in *United States* v. *Jacobsen*,[51] used the same rationale[52] to sanction the law enforcement practice of conducting warrantless field tests of suspected controlled substances. In *Jacobsen*, a package that was being shipped by Federal Express was damaged in transit. In accord with company policies, an employee opened the box to inspect for further damage. Inside the box, the employee found a 10-inch tube of duct tape containing a number of plastic bags. One of the plastic bags held a quantity of a white powder. Suspicious of the powdered substance, the employee contacted agents of the Drug Enforcement Administration (DEA) who responded quickly when advised of what had been found. However, before agents arrived at the Federal Express office, the employee replaced all the items he had taken from the box.

When agents arrived on the scene, the items were once again taken from the box. The plastic bags were opened, and a knife was used to remove a small amount of the white powder. A field test identified the powder as cocaine. Armed with the results of the field test, agents obtained a warrant to search the place corresponding to the address on the package. The warrant was executed and defendant was arrested.

After being indicted on charges of possession with intent to distribute, defendant moved to suppress the evidence on the grounds that the warrant was the product of an illegal search of the damaged package. Defendant's motion was denied, and he was subsequently tried and convicted. On appeal, the Eighth Circuit Court of Appeals reversed defendant's conviction on the basis that the field test of the white powder was a search under the fourth amendment and a warrant was required.[53] Because "field tests play an important role in the enforcement of the narcotics laws," [54] the Supreme Court agreed to review the case, and ultimately, reversed the decision of the court of appeals.

In reaching its conclusion, the Court noted first that the opening of the package by the Federal Express employee was not a "search" governed by the fourth amendment, inasmuch as it was not performed by a government actor.[55] Next, the Court found that the subsequent opening of the package by DEA agents was not, in and of itself, a "search" because defendant's reasonable expectation of privacy in the package had already been frustrated to some extent by the Federal Express employee.[56] What concerned the Court was whether the DEA agents made any significant invasion of defendant's privacy when they exceeded the scope of the Federal Express employee's ac-

tions by field testing the controlled substance.[57] More precisely, did the field test itself intrude into an area where defendant had a reasonable expectation of privacy remaining, thereby making the warrantless test an unreasonable search under the fourth amendment?

There was no doubt that the defendant expected privacy, not only in the package itself but also in the nature of the white powdered substance contained therein. Nevertheless, the Court was quick to point out that "the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" [58] is critically different than the "concept of an interest in privacy that society is prepared to recognize as reasonable." [59] The question thus became whether the field test at issue violated an expectation of privacy that society is willing to protect. Answering this question in the negative, the Court relied on its knowledge that "the field test could disclose only one fact previously unknown to the Agent—whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder." [60] Because the test could reveal only this one fact, the Court concluded that it did not compromise any legitimate interest in privacy.

By refusing to characterize the field test as a "search," the Supreme Court added this investigative technique to the list of law enforcement practices that have been removed from fourth amendment scrutiny.

Trash Inspections

The law enforcement investigative technique that has undergone the most recent judicial review is the warrantless inspection of discarded trash. In *California v. Greenwood*,[61] the Supreme Court upheld such inspections when the trash was left for collection outside the curtilage of the home.

In *Greenwood*, law enforcement officers received information indicating that defendant was involved in drug trafficking. Surveillance of defendant's home added to the officers' suspicions. In an effort to develop probable cause to search defendant's premises, officers arranged to have the local trash collector segregate defendant's trash bags during the regular scheduled pickup so that the bags could be inspected for evidence. The warrantless inspection resulted in discoveries which, when recited in an affidavit, supported the issuance of a search warrant. The subsequent search of defendant's home resulted in the seizure of cocaine and hashish. Defendant was thereafter arrested on felony narcotics charges.

While defendant was out on bail, law enforcement officers continued to receive reports of suspicious activities at defendant's home. Consequently, a trash pickup identical to the previous one was conducted and again evidence of narcotics trafficking was found. A second search warrant was executed and additional evidence was seized from defendant's residence. Once more, defendant was arrested on narcotics charges.

Prior to trial, the evidence seized pursuant to the warrants was suppressed on the theory that the warrantless trash searches violated the fourh amendment,[62] and all charges against the defendant were dismissed. Both the suppression of evidence and dismissal of charges were upheld by the California Court of Appeals.[63] After the California Supreme Court denied the prosecution's petition for review, the U.S. Supreme Court agreed to hear the case.[64]

On review, the Supreme Court simply applied the two-part analysis it had used in previous cases and came to the conclusion that although defendant may have had a subjective expectation that his trash was private, that expectation was not objectively reasonable because it was not an expectation of privacy that society was willing to recognize and protect. The Court's conclusion that society would not recognize defendant's expectation of privacy as reasonable was based in large part on the belief that defendant had "exposed [his] garbage to the public sufficiently to defeat [his] claim of Fourth Amendment protection." [65] The Court found it to be "common knowledge that plastic garbage bags left on or at the side of the public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." [66] Because the contents of the trash bags were so "readily accessible," the Court held, as a matter of law, defendant "could have had no reasonable expectation of privacy in the inculpatory items that [he] discarded." [67]

It is important to reiterate that the Court's holding in *Greenwood* is applicable only in situations where the trash bags in question have been left for collection outside the curtilage of the home.[68] The Court did not condone law enforcement intrusions into curtilage areas for the purpose of collecting the desired trash bags. Nevertheless, despite the dissenting Justice's opinion that "scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior," [69] the majority in

". . . the Court has approved the warrantless use of those investigative techniques which merely intrude into areas that society is not willing to protect."

Greenwood has preserved the warrantless inspection of discarded trash as an effective, if not particularly attractive, investigative technique.

Conclusion

The recent decisions of the Supreme Court were not, in any way, intended to diminish the protections of the fourth amendment. On the contrary, the Court has repeatedly stressed both the importance of complying with fourth amendment proscriptions and the desirability of obtaining warrants whenever possible.[70] However, in those instances where reliance on a warrant is an impossibility,[71] the Court has cleared the way for the use of certain less intrusive investigative techniques. Specifically, the Court has approved the warrantless use of those investigative techniques which merely intrude into areas that society is not willing to protect. As a result, law enforcement officers can return to traditional police practices such as those discussed herein with renewed confidence in the constitutionality of their actions. FBI

Footnotes

[1]U.S. Const. amend. IV reads: "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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[2]*See, e.g., Hale* v. *Henkel*, 201 U.S. 43 (1906) (defining seizure); *Brinegar* v. *United States*, 338 U.S. 160 (1949) (defining probable cause); *Illinois* v. *Gates*, 462 U.S. 213 (1983) (defining probable cause); *United States* v. *Jacobsen*, 466 U.S. 109 (1984) (defining search and seizure); *Maryland* v. *Macon*, 105 S.Ct. 2778 (1985) (defining seizure).

[3]*See, e.g., Hale* v. *Henkel*, 201 U.S. 43 (1906); *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Lee*, 274 U.S. 559 (1927).

[4]*Hester* v. *United States*, 265 U.S. 57 (1924).

[5]*See, e.g., Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 316 U.S. 129 (1942).

[6]*Id.*

[7]*Supra* note 4.

[8]389 U.S. 347 (1967) [hereinafter cited as *Katz*].

[9]*Katz, supra* note 8, at 351.

[10]*Katz, supra* note 8, at 353.

[11]The term "reasonable expectation of privacy" actually originated in Justice Harlan's concurring opinion in *Katz*. *Supra* note 8, at 361 (Harlan, J., concurring).

[12]*See, e.g., Oliver* v. *United States*, 104 S.Ct. 1735 (1984) [hereinafter cited as *Oliver*]; *Hudson* v. *Palmer*, 468 U.S. 517 (1984); *United States* v. *Dunn*, 107 S.Ct. 1134 (1987) [hereafter cited as *Dunn*].

[13]*Oliver supra* note 12.

[14]*Id.* at 1739.

[15]*Id.* at 1738-39.

[16]*United States* v. *Oliver*, 686 F.2d 356 (6th Cir. 1982). The Court of Appeals for the Sixth Circuit was sitting *en banc*. Previously, a panel for the sixth circuit had affirmed the suppression order. *United States* v. *Oliver*, 657 F.2d 85 (6th Cir. 1981).

[17]*United States* v. *Oliver*, 686 F.2d 356 at 360 (6th Cir. 1982).

[18]*Oliver, supra* note 12, at 1741 quoting *Katz, supra* note 8, at 360 (Harlan, J., concurring).

[19]The district court in *Oliver* focused exclusively on the defendant's subjective intent. Of particular importance to the district court were the facts that Oliver had posted "No Trespassing" signs at regular intervals and had a locked gate at the entrance of his property. Additionally, the district court noted that the field was very secluded because it was bounded on all sides by woods, fences, and embankments. *Oliver, supra* note 12, at 1739.

[20]*Oliver, supra* note 12, at 1741.

[21]*Id.*

[22]The open fields doctrine was first announced by the Supreme Court in *Hester* v. *United States*, *supra* note 4.

[23]There is considerable confusion in the courts on the issue of what constitutes a curtilage area. In *United States* v. *Dunn*, 107 S.Ct. 1134 (1987), the Supreme Court suggested that the "curtilage question be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 1139.

[24]106 S.Ct. 1809 (1986) [hereinafter cited as *Ciraolo*].

[25]Both officers in the airplane were trained in marijuana identification.

[26]Because the parties to the action framed the issue as concerning only the reasonableness of aerial observations generally, without raising any distinct issue as to the photographs, the Court's analysis was similarly circumscribed. *Ciraolo, supra* note 24, at 1812, fn. 1.

[27]*People* v. *Ciraolo*, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984).

[28]*Ciraolo, supra* note 24, at 1811 (emphasis in original). Of particular importance to the court of appeals was the method of surveillance used. The court of appeals found it " 'significant' that the flyover 'was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [the] curtilage.' " *Id.*

[29]*Id.*

[30]*Id.* at 1812.

[31]*Id.*

[32]*Id.*

[33]*Id.*

[34]*Id.* at 1813.

[35]106 S.Ct. 1819 (1986) [hereinafter cited as *Dow*].

[36]The camera in question cost in excess of $22,000 and was capable of taking several photographs in precise and rapid succession. Under magnification, powerlines as small as 1/2 inch in diameter could be observed. *Id.* at 1827, fn. 5 and 1829, fn. 4 (Powell, J., dissenting).

[37]*Id.* at 1827.

[38]In *Riley* v. *State*, 511 So.2d 282 (Fla. 1987), the Florida Supreme Court held that observations made from a helicopter hovering at 400 feet over a greenhouse in defendant's backyard constitute a search under the fourth amendment. The U.S. Supreme Court has agreed to review the case. *Florida* v. *Riley*, 108 S.Ct. 1011 (1988) (cert. granted).

[39]103 S.Ct. 2637 (1983) [hereinafter cited as *Place*].

[40]Reasonable suspicion had previously been established by law enforcement officers at Miami International Airport who had talked to Place before he boarded his plane for New York.

[41]The "dog sniff" occurred approximately 90 minutes after the luggage was originally seized.

[42]Defendant's suppression motion claimed that the warrantless seizure of his luggage violated his fourth amendment rights.

[43]*United States* v. *Place*, 660 F.2d 44 (2d Cir. 1981).

[44]Because a majority of the Supreme Court found that the 90-minute detention of defendant's luggage was too long, and therefore, an unreasonable seizure under the fourth amendment, there was no need for the Court to address the "dog sniff" question. See Justice Brennan's concurring opinion in *Place*. 103 S.Ct. 2637 at 2646 (Brennan, J., concurring).

[45]The concurring Justices chastised the majority for being "unable to 'resist the pull to decide the constitutional issues on a broader basis than the record before it imperatively requires.' " *Id.* quoting *Street* v. *New York*, 394 U.S. 576, 581 (1969).

[46]*Place, supra* note 39, at 2644.

[47]*Id.*

[48]*See, e.g., Horton* v. *Goose Creek School District*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

[49]*See, e.g., United States* v. *Thomas*, 757 F.2d 1359 (2d Cir. 1985).

[50]Recently, the Fourth Circuit Court of Appeals upheld the practice of bringing detection dogs into the private sleeping compartment of a train to sniff defendant's luggage. However, the court's decision was not based on a finding that no search had occurred. Instead, the court found the "search" to be reasonable because it was based on a reasonable suspicion. *United States* v. *Whitehead*, 849 F.2d 849 (4th Cir. 1988).

[51]104 S.Ct. 1652 (1984) [hereinafter cited as *Jacobsen*].

[52]In *Jacobsen*, the Court compared the field test to a dog sniff and found that the likelihood that either would "compromise any legitimate interest in privacy seems much too remote to characterize [them as searches] subject to the Fourth Amendment." Id., at 1662.

[53]*United States* v. *Jacobsen*, 683 F.2d 296 (8th Cir. 1982).

[54]*Jacobsen, supra* note 51, at 1656. Certiorari was also granted because there was a split in the circuits on this issue. Compare *United States* v. *Jacobsen*, 683 F.2d 296 (8th Cir. 1982) with *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982).

[55]The Supreme Court has consistently construed the proscriptions of the fourth amendment as being applicable only to governmental action. The fourth amendment proscriptions are wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter* v. *United States*, 100 S.Ct.