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STYLISTIC AND MINOR SUBSTANTIVE CHANGES THROUGHOUT. MAJOR CHANGES AS MARKED.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

From: **Justice Brennan**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 87-764

FLORIDA, PETITIONER *v.* MICHAEL A. RILEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[January ——, 1989]

JUSTICE BRENNAN, dissenting.

The Court holds today that police officers need not obtain a warrant based on probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the Fourth Amendment to the Constitution, which safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," tolerates such an intrusion on privacy and personal security.

I

The opinion for a plurality of the Court reads almost as if *Katz* v. *United States*, 389 U. S. 347 (1967), had never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. *Katz* teaches, however, that the relevant inquiry is whether the police surveillance "violated the privacy upon which [the defendant] justifiably relied," *id.*, at 353—or, as Justice Harlan put it, whether the police violated an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" *Id.*, at 361 (concurring opinion). The result of that inquiry in any given case depends ultimately on the judgment "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." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974); see also 1 W. LaFave, Search and Seizure § 2.1(d), pp. 310–314 (2d ed. 1987).

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." *Ante*, at 4–5. This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly.

I agree, of course, that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, *supra*, at 351. But I cannot agree that one "knowingly exposes [an area] to the public" solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of *Katz*. The reason why there is no reasonable expectation of privacy in an area that is exposed to the public is that little diminution in "the amount of privacy and freedom remaining to citizens" will result from police surveillance

of something that any passerby readily sees. To pretend, as the plurality opinion does, that the same is true when the police use a helicopter to peer over high fences is, at best, disingenuous. Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determining whether Riley suffered a serious loss of privacy and personal security through the police action?

In *California* v. *Ciraolo*, 476 U. S. 207 (1986), we held that whatever might be observed from the window of an airplane flying at 1000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could inure in anything on the ground observable with the naked eye from so high. Indeed, we compared those airways to "public thoroughfares," and made the obvious point that police officers passing by a home on such thoroughfares were not required by the Fourth Amendment to "shield their eyes." *Id.*, at 213. Seizing on a reference in *Ciraolo* to the fact that the police officer was in a position "where he ha[d] a right to be," *ibid.*, today's plurality professes to find this case indistinguishable because FAA regulations do not impose a minimum altitude requirement on helicopter traffic; thus, the officer in this case too made his observations from a vantage point where he had a right to be.[1]

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[1] What the plurality now states as a firm rule of Fourth Amendment jurisprudence appeared in *Ciraolo*, *supra*, at 213, as a passing comment: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities

It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety.[2] It is more curious still that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment.[3] But the plurality's willingness to end its in-

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clearly visible. *E. g., United States* v. *Knotts*, 460 U. S. 276, 282 (1983)." This rule for determining the constitutionality of aerial surveillance thus derives ultimately from *Knotts*, a case in which the police officers' feet were firmly planted on the ground. What is remarkable is not that one case builds on another, of course, but rather that a principle based on terrestrial observation was applied to airborne surveillance without any consideration of whether that made a difference.

[2] The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet (1000 feet over congested areas), while helicopters may be operated below those levels. See *ante*, at 4, n. 3. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

[3] In *Oliver* v. *United States*, 466 U. S. 170 (1984), for example, we held that police officers who trespassed upon posted and fenced private land did not violate the Fourth Amendment, despite the fact that their action was subject to criminal sanctions. We noted that the interests vindicated by the Fourth Amendment were not identical with those served by the common law of trespass. See *id.*, at 183–184, and n. 15; see also *Hester* v. *United States*, 265 U. S. 57 (1924) (trespass in "open fields" does not violate the Fourth Amendment). In *Olmstead* v. *United States*, 277 U. S. 438, 466–469 (1928), the illegality under state law of a wiretap that yielded the disputed evidence was deemed irrelevant to its admissibility. And of course *Katz* v. *United States*, 389 U. S. 347 (1967), which overruled *Olmstead*, made plain that the question of whether or not the disputed evidence had been procured by means of a trespass was irrelevant. Recently, in *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 239, n. 6 (1986), we declined to consider trade-secret laws indicative of a reasonable expectation of privacy. Our precedent thus points not toward the position adopted by the plurality opinion, but rather toward the view on this matter expressed some years ago by the Oregon Court of Appeals: "We . . . find little attraction in the idea of using FAA regulations because they were not

quiry when it finds that the officer was in a position he had a right to be in is misguided for an even more fundamental reason. Finding determinative the fact that the officer was where he had a right to be is, at bottom, an attempt to analogize surveillance from a helicopter to surveillance by a police officer standing on a public road and viewing evidence of crime through an open window or a gap in a fence. In such a situation, the occupant of the home may be said to lack any reasonable expectation of privacy in what can be seen from that road—even if, in fact, people rarely pass that way.

The police officer positioned 400 feet above Riley's backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley's fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access. In such circumstances it makes no more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in *Katz* by the legality of the officer's position outside the telephone booth. The simple inquiry whether the police officer had the legal right to be in the position from which he made his observations cannot suffice, for we cannot assume that Riley's curtilage was so open to the observations of passersby in the skies that he retained little privacy or personal security to be lost to police surveillance. The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To 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

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formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety." *State* v. *Davis*, 51 Ore. App. 827, 831, 627 P. 2d 492, 494 (1981).

recognize as 'reasonable.'" *Katz*, 389 U. S., at 361 (concurring opinion).[4] While, as we held in *Ciraolo*, air traffic at elevations of 1000 feet or more may be so common that whatever could be seen with the naked eye from that elevation is unprotected by the Fourth Amendment, it is a large step from there to say that the Amendment offers no protection against low-level helicopter surveillance of enclosed curtilage areas. To take this step is error enough. That the plurality does so with little analysis beyond its determination that the police complied with FAA regulations is particularly unfortunate.

II

Equally disconcerting is the lack of any meaningful limit to the plurality's holding. It is worth reiterating that the FAA regulations the plurality relies on as establishing that the officer was where he had a right to be set no minimum flight altitude for helicopters. It is difficult, therefore, to see what, if any, helicopter surveillance would run afoul of the plurality's rule that there exists no reasonable expectation of privacy as long as the helicopter is where it has a right to be.

Only in its final paragraph does the plurality opinion suggest that there might be some limits to police helicopter surveillance beyond those imposed by FAA regulations:

> "Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, no wind, dust, or threat of injury.

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[4] Cf. *California* v. *Greenwood*, 486 U. S. —— (1988) (BRENNAN, J., dissenting) ("The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in [their] contents . . .").

> In these circumstances, there was no violation of the Fourth Amendment." *Ante*, at 5.[5]

I will deal with the "intimate details" below. For the rest, one wonders what the plurality believes the purpose of the Fourth Amendment to be. If through noise, wind, dust, and threat of injury from helicopters the state "interfered with respondent's normal use of the greenhouse or of other parts of the curtilage," Riley might have a cause of action in inverse condemnation, but that is not what the Fourth Amendment is all about. Nowhere is this better stated than in JUSTICE WHITE'S opinion for the Court in *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967): "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." See also *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978) (same); *Schmerber* v. *California*, 384 U. S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment . . ."), overruled on other grounds, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Boyd* v. *United States*, 116 U. S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . .").

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[5] Without actually stating that it makes any difference, the plurality also notes that "there is nothing in the record or before us to suggest" that helicopter traffic at the 400-foot level is so rare as to justify Riley's expectation of privacy. *Ante*, at 5. The absence of anything "in the record or before us" to suggest the opposite, however, seems not to give the plurality pause. It appears, therefore, that it is the FAA regulation rather than any empirical inquiry that is determinative.

If indeed the purpose of the restraints imposed by the Fourth Amendment is to "safeguard the privacy and security of individuals," then it is puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed. Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would today's plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.

III

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." *Ante*, at 5. What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in

our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people," *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will forbid the Government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." Amsterdam, 58 Minn. L. Rev., at 403.[6]

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[6] See also *United States* v. *White*, 401 U. S. 745, 789–790 (1971) (Harlan, J., dissenting):

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. . . . The interest

IV

The Court's decision today opens the door to low-level helicopter surveillance. The plurality would go farther and remove virtually all constitutional barriers to police surveillance from the vantage point of helicopters—thus bringing us perilously close, in this respect, to the world of the 1980's described so graphically by George Orwell:

[protected by the Fourth Amendment] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously . . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

I find little to disagree with in the concurring opinion of JUSTICE O'CONNOR, apart from the sentence that expresses her resolution of this case. A majority of the Court agrees, it appears, that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet.

I cannot, however, agree with the concurrence's cryptic statement that "there is reason to believe" the public makes considerable use of the airspace at 400 feet. *Ante*, at 4. I think it must be obvious that—at least compared to the fixed-wing aircraft at issue in *Ciraolo*—there are relatively few helicopters in use in this country, few people ever fly in one, and few of them operate at altitudes of 400 feet. I should think the major exception to this generalization would be police surveillance helicopters, and the concurring opinion agrees that their use cannot become a bootstrap to show widespread public use. *Ibid.* Nor is Riley's failure to introduce any evidence on the issue significant. If ever there were a place for Professor Davis' distinction between "adjudicative" and "legislative" facts, this is surely it. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402–410 (1942). We may well place the burden on one side or another in a suppression hearing to prove the "facts concerning [the] immediate parties," *id.*, at 402, such as the altitude of the police helicopter or the precautions the defendant took to guard against observation of his curtilage. The extent of helicopter traffic at 400 feet is not, however, such an "adjudicative fact" which a litigant bears the burden of proving. The concurrence's view that Riley had no reasonable expectation of privacy is, like the plurality's, on shaky ground indeed.

> "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." G. Orwell, Nineteen Eighty-Four 4 (1949).

Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? The issue in this case is, ultimately, "how tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance." Amsterdam, *supra*, at 402. I decline to embrace the Court's view that police surveillance of the kind sanctioned today is compatible with the vision of a free and open society embodied in the Fourth Amendment to our Constitution.