106 S.Ct. 1819
Supreme Court of the United States

DOW CHEMICAL COMPANY, Petitioner
v.
UNITED STATES etc.

No. 84–1259.
|
Argued Dec. 10, 1985.
|
Decided May 19, 1986.

Synopsis
Chemical company brought action for declaratory and injunctive relief against aerial surveillance and photography of its industrial complex by Environmental Protection Agency. The United States District Court for the Eastern District of Michigan, James Harvey, J., 536 F.Supp. 1355, entered partial summary judgment in favor of chemical company, but the United States Court of Appeals for the Sixth Circuit, Merritt, Circuit Judge, 749 F.2d 307,reversed. On certiorari, the Supreme Court, Chief Justice Burger, held that: (1) EPA had statutory authority to use aerial photography to perform "site inspection" under Clean Air Act, and (2) aerial photography of chemical company's industrial complex was not a "search" for Fourth Amendment purposes.

Affirmed.

Justice Powell concurred in part, dissented in part, and filed opinion in which Justices Brennan, Marshall, and Blackmun joined.

West Headnotes (6)

[1] **Searches and Seizures** Fourth Amendment and reasonableness in general

State tort law governing unfair competition does not define limits of Fourth Amendment. U.S.C.A. Const.Amend. 4.
8 Cases that cite this headnote

[2] **Antitrust and Trade Regulation** Particular cases, in general
Environmental Law Enforcement in general

State trade secret law could not protect chemical company from aerial photography of its industrial complex by Environmental Protection Agency; even assuming that such photography might be barred by state law with regard to competitors, EPA was seeking photographs to regulate, not to compete with, chemical company. U.S.C.A. Const. Amend. 4.
16 Cases that cite this headnote

[3] **Administrative Law and Procedure** Power and duty of agency; discretion

Regulatory or enforcement authority generally carries with it all modes of inquiry and investigation traditionally employed or useful to execute authority granted.

8 Cases that cite this headnote

[4] **Environmental Law** Enforcement in general

Environmental Protection Agency had statutory authority to use aerial photography of chemical company's industrial complex to implement its right of "site inspection" under Clean Air Act. Clean Air Act, § 114(a), 42 U.S.C.A. § 7414(a).
13 Cases that cite this headnote

[5] **Searches and Seizures** Persons, Places and Things Protected

Business establishments and industrial or commercial facilities enjoy certain protections under Fourth Amendment. U.S.C.A. Const.Amend. 4.
64 Cases that cite this headnote

[6] **Searches and Seizures** Aerial surveillance
Searches and Seizures Curtilage or open fields; yards and outbuildings

Environmental Protection Agency's aerial photography of chemical company's 2,000–acre outdoor industrial complex, while EPA was lawfully within navigable air space, was not "search" for Fourth Amendment purposes; open areas of complex were more comparable to open field than to "curtilage" of dwelling for purposes of aerial surveillance. U.S.C.A. Const.Amend. 4.
161 Cases that cite this headnote

Opinion

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to review the holding of the Court of Appeals (a) that the Environmental Protection Agency's aerial observation of petitioner's plant complex did not exceed EPA's statutory investigatory authority, and (b) that EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the Fourth Amendment.

I

Petitioner Dow Chemical Co. operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two powerplants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. See 49 U.S.C.App. § 1304; 14 CFR § 91.79 (1985).

EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the Fourth Amendment and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the ground that EPA had no authority to take aerial photographs and that doing so was a search violating the Fourth Amendment. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. 536 F.Supp. 1355 (ED Mich.1982)….

II

[S]econd, Dow claims EPA's use of aerial photography ***233** was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field," and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment….

IV

We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights under the Fourth Amendment. In making this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem.

In *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), decided today, we hold that naked-eye aerial observation from an altitude of 1,000 feet of a backyard within the curtilage of a home does not constitute a search under the Fourth Amendment.

[5] In the instant case, two additional Fourth Amendment claims are presented: whether the common-law "curtilage" doctrine encompasses a large industrial complex such as Dow's, and whether photography employing an aerial mapping camera is permissible in this context. Dow argues that an industrial plant, even one occupying 2,000 acres, does not fall within the "open fields" doctrine of *Oliver v. United States* but rather is an "industrial curtilage" having constitutional protection equivalent to that of the curtilage of a private home. Dow further contends that any aerial photography of this "industrial curtilage" intrudes upon its reasonable expectations of privacy. Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment. See *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

Two lines of cases are relevant to the inquiry: the curtilage doctrine and the "open fields" doctrine. The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *Ciraolo, supra.*

As the curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure, the contrasting "open fields" doctrine evolved as well. From *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), to *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), the Court has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling: "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance." *Oliver,* 466 U.S., at 179, 104 S.Ct., at 1741. In *Oliver,* we held that "an individual may not legitimately demand privacy for activities out of doors in fields, except

in the area ***236** immediately surrounding the home." *Id.,* at 178, 104 S.Ct., at 1741. To fall within the "open fields" doctrine the area "need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.,* at 180, n. 11, 104 S.Ct., at 1742, n. 11.

Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe. *E.g., See v. City of Seattle, supra.* Moreover, it could hardly be expected that Dow would erect a huge cover over a 2,000-acre tract. In contending that its entire enclosed plant complex is an "industrial curtilage," Dow argues that its exposed manufacturing facilities are analogous to the curtilage surrounding a home because it has taken every possible step to bar access from ground level.

The Court of Appeals held that whatever the limits of an "industrial curtilage" barring *ground* -level intrusions into Dow's private areas, the open areas exposed here were more analogous to "open fields" than to a curtilage for purposes of aerial observation. 749 F.2d, at 312–314. In *Oliver,* the Court described the curtilage of a dwelling as "the area to which extends the ****1826** intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " 466 U.S., at 180, 104 S.Ct., at 1742 (quoting *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). See *California v. Ciraolo, supra.* The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Admittedly, Dow's enclosed plant complex, like the area in *Oliver,* does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both.[3] Dow's inner ***237** manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle, supra,* 387 U.S., at 543, 87 S.Ct., at 1739. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility *without* physical entry.[4]

We pointed out in *Donovan v. Dewey,* 452 U.S. 594, 598–599, 101 S.Ct. 2534, 2537–2538, 69 L.Ed.2d 262 (1981), that the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly ***238** from the sanctity accorded an individual's home." We emphasized that unlike a homeowner's interest in his dwelling, "[t]he interest of the owner of commercial property is not one in being free from any inspections." *Id.,* at 599, 101 S.Ct., at 2538. And with regard to regulatory inspections, we have held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall v. Barlow's, Inc.,* 436 U.S., at 315, 98 S.Ct., at 1822 (footnote omitted).

Oliver recognized that in the open field context, "the public and police lawfully may survey lands from the air." 466 U.S., at 179, 104 S.Ct., at 1741 (footnote omitted). Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly ****1827** used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as ½-inch in diameter.

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.[5] ***239** An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.[6]

[6] We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance;[7] such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.

Affirmed.