

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1259

TITLE DOW CHEMICAL COMPANY, Petitioner V. UNITED STATES, ETC.

PLACE Washington, D. C.

DATE December 10, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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DOW CHEMICAL COMPANY, :
Petitioner :
v. : No. 84-1259
UNITED STATES, ETC. :
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Washington, D.C.
Tuesday, December 10, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:45 o'clock a.m.

APPEARANCES:
MISS JANE M. GOOTEE, ESQ., Midland, Michigan; on behalf
of the Petitioner.
ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington,
D.C.; on behalf of the Respondent.

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1 human aerial eye or mind could ever see.

2 In September of 1977, EPA conducted a
3 three-hour on-site inspection of the two powerhouses at
4 Dow's Midland facility. That was done in continuing
5 preparation for Clean Air Act enforcement action and to
6 confirm the EPA's suspicion that the two powerhouses did
7 in fact violate the Clean Air Act.

8 QUESTION: Now, that was an on the ground
9 inspection?

10 MS. GOOTEE: Yes, it was, Justice Brennan, and
11 during that inspection the EPA people received full
12 cooperation from Dow personnel. They saw everything
13 they wanted to see. They were denied nothing.

14 In fact, after the inspection, at EPA's
15 request Dow submitted drawings and schematics to EPA
16 depicting the powerhouses, the equipment in the
17 powerhouses, and the areas surrounding the powerhouses.
18 The EPA enforcement engineer testified that after that
19 September inspection he needed no further information
20 from or about Dow to confirm his suspicions that the
21 powerhouses were in violation of the Act.

22 Three months later, in early December of 1977,
23 Dow received a phone call from the EPA requesting a
24 repetitive on-site inspection with a camera. Dow
25 refused that request, told the EPA it would not allow

1 non-Dow cameras inside the fence line, and the
2 possibility of EPA's getting a warrant was discussed.

3 In fact, after the phone call a Dow attorney
4 called the U.S. attorney's office in Bay City, Michigan
5 and told that office that if the EPA approached the
6 office and was going to try to seek a warrant, that Dow
7 would appreciate the opportunity to be there and be
8 heard.

9 Two months after that refusal of the second
10 on-site inspection, knowing that Dow refused consent for
11 a second on-site inspection, knowing that Dow objected
12 to aerial photographs, or the photographs of its plant,
13 and knowing of its duty to resort to the court, the EPA
14 ignored Dow's constitutional and statutory rights and
15 ignored its duty to seek judicial oversight and acquired
16 surreptitiously --

17 QUESTION: But isn't the question in the case,
18 whether it had such a duty? You said it ignored this
19 duty, but isn't that the issue?

20 MS. GOOTEE: Yes, Justice Stevens. The issue
21 is whether there was a search. The EPA had tried to
22 come on to that property to conduct a search and had
23 been turned away after there had been one consensual,
24 voluntary inspection.

25 The district court found that there was a

1 search. In fact, the Government admitted in both the
2 oral argument and the brief that it had conducted a
3 search in conducting the fly-over. The district court
4 also found that EPA's actions exceeded its statutory
5 inspection authority under Section 114.

6 On appeal by the Government the Sixth Circuit
7 -- the Sixth Circuit agreed with the district court that
8 Section 114 of the Clean Air Act does not explicitly
9 authorize aerial photography as a site inspection
10 technique, but the district court, ignoring the plain
11 language of the statute, ignoring the obvious
12 congressional intent of providing the owners notice,
13 without citation to any authority, held that the Act did
14 not impliedly forbid aerial photography.

15 Dow thinks that --

16 QUESTION: Ms. Gootee, what if the EPA
17 inspector here had been able to go to a nearby hilltop
18 and just look over the fence? Do you think the statute
19 prohibits that?

20 MS. GOOTEE: No, we do not, Justice O'Connor.

21 QUESTION: Why is it any different if they fly
22 over the premises?

23 MS. GOOTEE: Dow has absolutely no objection
24 to a naked-eye viewing of its plant from anywhere that
25 the government or the public may have a right to be.

1 Our objection in this case is that -- it's similar to
2 the Karo case. The EPA used intrusive technology, used
3 technology --

4 QUESTION: Okay, so you have no objection to
5 the flying over and taking a look, but to the -- your
6 sole objection is to the taking of the photographs?

7 MS. GOOTEE: Yes, it is, and that -- that's
8 both constitutional and statutory. Under the statute
9 the taking of pictures, the capturing of the extreme
10 intrusive detail to the size of a half-inch in diameter,
11 deprives Dow of the notice that an inspection has
12 occurred and deprives Dow of the opportunity to claim
13 confidential business information.

14 QUESTION: Well, would you object to standing
15 on the hillside with a camera?

16 MS. GCOTEE: Justice Brennan, that's an
17 interesting hypothetical. Midland, Michigan is very
18 flat. But if there were a hillside and the EPA could
19 have apparently legal access to it and could look at the
20 plant, we do not object to that.

21 We don't object to them --

22 QUESTION: Or taking pictures from that spot?

23 MS. GOOTEE: Not necessarily. I think the
24 real question is the degree of intrusion.

25 QUESTION: And it would be more with a camera

1 from a hillside as well as on a fly-over?

2 MS. GOOTEE: I think it depends on the
3 camera. There was a recent case in California --

4 QUESTION: Let's take it that they have one of
5 these -- I don't own one, but one of these very -- that
6 pick up everything?

7 MS. GCOTEE: Generally a lateral view from the
8 ground is the view that Dow has chosen to give. We know
9 that people can drive by and look at our plant. Now --

10 QUESTION: Go ahead.

11 MS. GCOTEE: As we go into the sky at varying
12 levels, it's going to depend more and more on the degree
13 of intrusion. I think it's the distinction --

14 QUESTION: Forgive me. I don't quite
15 understand your answer.

16 If one is equipped with a camera and there is
17 a hilltop and they can photograph from that spot the
18 things that were photographed by the fly-over, would
19 that be objectionable?

20 MS. GOOTEE: I have to come back to degree of
21 intrusion. We're on level ground, not even with a
22 hilltop, and the police or the inspection officials take
23 a picture through my living room window, which they can
24 see just standing on the street, and use a telephoto
25 lens and get detail as they did in the Kim case to see

1 what I'm doing in my living room, that's an
2 unconstitutional search.

3 QUESTION: Well, what about an airplane, as we
4 read in here, whether they're accurate or not, stories
5 about the phenomenal accuracy of photography now from
6 three, four miles up. Suppose not directly above the
7 Dow plant but without trespassing on the air space of
8 the Dow plant, pictures are taken from an angle at
9 12,000, 15,000, 18,000 feet and disclosed everything
10 that was disclosed here. Is that bad?

11 MS. GOOTEE: Yes, it is. It's very bad.

12 QUESTION: I mean, it's the taking of the
13 picture, not the invasion of your air space?

14 MS. GOOTEE: Exactly. We have no problem with
15 the public or the government making use of the air
16 space. I think the fact that they used an airplane is
17 like the fact that they can use a car. We have no
18 problem with people driving by the plants. But if they
19 use a car to ram through our gate and get in, we have a
20 problem with that.

21 It's the use.

22 QUESTION: Do you object to any enhancement of
23 the person's normal senses in making an inspection?

24 MS. GOOTEE: No, Your Honor. I think there's
25 some parts to inspections that society has deemed

1 reasonable. For instance, in sampling emissions,
2 obviously something has to be used to capture the
3 effluent or the smoke or something and then test that.

4 That is a use of technology, but it is a use
5 of technology with Dow's notice and we can split
6 samples, we can run the same test, we can give them
7 things to look at, and --

8 QUESTION: What about a case of the following
9 of an automobile by the use of a beeper, which this
10 Court has said was all right under the Fourth Amendment,
11 and yet the police with their natural senses might have
12 lost track of the vehicle they were trying to follow?

13 MS. GOOTEE: Except that I think the
14 distinguishing factor, as this Court has held, that the
15 police could have followed it with their visual sense.
16 It's only when that technology intruded into the home in
17 the Carroll case and the visual senses could not have
18 intruded the way the technology did, they couldn't have
19 depicted the critical information without a warrant or
20 without consent.

21 I think the existing holdings of this Court --
22 Western Alfalfa is probably the best case in Dow's
23 defense --

24 QUESTION: Before you go on, may I put another
25 hypothetical that I suspect you will say is difficult.

1 One reads in the media that a satellite flying 100
2 miles, not 20,000 feet but 100 miles above the Earth can
3 identify a tennis ball on a tennis court.

4 These satellites are up there every day, the
5 Soviet and the American, and if these pictures had been
6 taken by an unfriendly -- at 100 miles up, would that
7 make any difference?

8 MS. GOOTEE: Justice Powell, again an
9 excellent hypothetical and one we've obviously thought
10 about. The distinction that I think this Court should
11 stay away from is the spatial relationship.

12 I don't think it matters whether it's 1,000
13 feet up or 100 miles up.

14 QUESTION: It's really a matter of privilege?

15 MS. GCOTEE: It's purpose, and in this case --
16 it's mostly military satellites that have that
17 capability. That's usually top secret information. I
18 think the civilian satellites have a resolution of about
19 ten meters. With the new French system, the spot system
20 coming in, it may be four meters.

21 The problem here, though, is that we have a
22 governmental administrative agency with specific
23 statutory authority and who are bound by the
24 Constitution.

25 QUESTION: May I interrupt, just to follow up

1 on Justice Powell's question. You said it doesn't
2 matter if it's 1,000 feet or 100 miles. What if it's
3 100 feet? What if it's a helicopter?

4 MS. GCOTEE: Then we get into problems with
5 the FAA regulations.

6 QUESTION: No, the helicopters are not bound
7 by the 1,000 foot regulation. That doesn't apply. It
8 applies to fixed wing aircraft.

9 MS. GOOTEE: I think that the question there,
10 even though it's not binding on this Court, has been
11 answered in the case of People versus Sneed in
12 California where a helicopter did descend 20 feet above
13 a residential back yard and that was clearly held to be
14 an intrusion into the --

15 QUESTION: Is it your view that even if you
16 descend low enough so that you see with the naked eye
17 and see the same half-inch pipes? Would that be a
18 violation? And if so, why?

19 MS. GCOTEE: I think it would be an
20 unreasonable violation. We would still have the same
21 statutory problems.

22 QUESTION: I'm just directing it at the Fourth
23 Amendment.

24 MS. GOOTEE: On the Fourth Amendment issue, I
25 think it would be obviously an unreasonable intrusion

1 into --

2 QUESTION: Well, what makes it so obvious?

3 MS. GCOTEE: The Western Alfalfa case, and
4 somehow in Karo, they are using technology to get --

5 QUESTION: No, no. I am suggesting no
6 technology, the naked eye.

7 MS. GCOTEE: Well, the helicopter itself is
8 technology.

9 QUESTION: Oh, oh. So is an automobile. I
10 thought you said planes were like automobiles?

11 MS. GCOTEE: Right, we have no problem if they
12 are used in the normal events that society accepts, but
13 if they are used as a battering ram or as an invading
14 tool, then we have a problem.

15 QUESTION: I really have some difficulty. You
16 cannot look from helicopters at a low altitude?

17 MS. GCOTEE: You obviously can look.

18 QUESTION: But cannot constitutionally? The
19 police are constitutionally disabled from flying around
20 in helicopters at low altitude?

21 MS. GCOTEE: I think that they would have --
22 it would be an invasion of privacy, just as in NORML
23 versus Mullen, that the use of helicopters to go down
24 and look at people's windows and in their back yards was
25 an invasion of privacy.

1 I don't think that Americans --

2 QUESTION: And that's because a helicopter is
3 a sophisticated device, is that it, just as though it
4 were a high-powered telescope?

5 MS. GOOTEE: Well, again, I think I would draw
6 back from the exact technology utilized and focus in on
7 the fact that it's an unreasonable intrusion into a
8 reasonable expectation of privacy.

9 We don't expect our government and this
10 country to operate this way. It offends, you know, the
11 notions of justice and fair play.

12 QUESTION: What about catching speeders by
13 following them with a helicopter?

14 MS. GOOTEE: Well, they have a moving car from
15 whatever height is, I think, plainly visible with the
16 naked eye.

17 THE CHIEF JUSTICE: We will resume there at
18 1:00 o'clock.

19 MS. GOOTEE: Thank you.

20 (Whereupon, at 12:00 o'clock noon, the case in
21 the above entitled matter was recessed, to reconvene at
22 1:00 o'clock p.m. this same day.)

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1 facility. The Dow facility, the 2,000 acre fenced,
2 secured, including security that watches for suspicious
3 aircraft --

4 QUESTION: What did you say photo 3 was?

5 MS. GOOTEE: Photograph 3, Justice Brennan, is
6 a Dow photograph. It's the type of photograph that
7 after our management has a chance to take a look at it,
8 that we in fact take, our management looks at it, says,
9 no problem, that's the same as a naked eye view. It's
10 the type of photograph that we release to the press.

11 Now, in contrast to that, photographs 1 and 2
12 in the sealed Jcint Appendix are two of the actual EPA
13 photographs. These are the pictures that our plant
14 manager looked at with a hand-held magnification and
15 said that he could see items and equipment one-half inch
16 in diameter.

17 Now, photograph 2, our photograph 1, the upper
18 part of the photograph, it is easy to see electrical
19 wires and their shadows, which is the size of a small
20 finger, and that is the degree of intrusive detail that
21 EPA captured in these pictures.

22 QUESTION: What caused the difference in
23 degree between 1 and 2 on the one hand and 3 on the
24 other? Is it the level of flight of the airplane, the
25 type of camera, or --

1 MS. GOOTEE: No, Justice Rehnquist, it is not
2 the level of the flight. They were taken at
3 approximately the same level, about 1,200 feet. It is
4 the angle.

5 The Dow picture is an oblique angle, which
6 means that you're looking at it from the side. The EPA
7 picture is a vertical angle, straight down, as would an
8 engineering drawing be, a straight down shot.

9 QUESTION: Well, now does that have Fourth
10 Amendment implications, whether it's an oblique angle or
11 a straight down --

12 MS. GOOTEE: Not directly in the Fourth
13 Amendment. It buttresses Dow's position that the
14 pictures are intrusive, that they don't serve a law
15 enforcement purpose, and that society would not
16 recognize them as reasonable because they depict our
17 trade secrets.

18 And if the Dow facility, which happens to be
19 an open field --

20 QUESTION: If you're just talking about
21 whether or not they serve a law enforcement purpose, I
22 would think that photographs 1 and 2 would serve that
23 purpose better than photograph 3.

24 MS. GOOTEE: Well, Your Honor, photographs 1
25 and 2, the EPA was specifically looking for emissions

1 from the powerhouse.

2 QUESTION: You are saying that isn't a law
3 enforcement purpose?

4 MS. GOOTEE: It's a law enforcement intent,
5 but the photographs showed no plumes from the
6 powerhouse. As stated on page 31 of the Joint Appendix,
7 the photographs showed no plume and they were worthless
8 to the Agency in the enforcement action..

9 QUESTION: So that, the test then is what
10 they're going to be looking for in the way of emissions
11 that are happening that day or not?

12 MS. GCOTEE: That's not the Fourth Amendment
13 test. That is one of the factors that shows that they
14 were in fact engaged in a search. They intended to get
15 evidence for use in an enforcement action.

16 Now, what I started talking about a minute
17 ago, about the detail, is the reasonable expectation of
18 privacy that society accepts as reasonable. The Agency
19 thought they had a need but they didn't get any good
20 evidence.

21 Dow has a need to protect its assets, its
22 confidential business information. If the Dow facility
23 was held to be an open field, number one, there is
24 little land in the United States that isn't, in that
25 case. Number two, as this Court recognized in the

1 Kewanee Oil case, to even make an allegation that there
2 is a trade secret an owner has to show that they have
3 taken steps to preserve the secrecy.

4 QUESTION: Ms. Gootee, may I ask you in that
5 connection, what would Dow Chemical Company do if one of
6 its competitors, using a private aircraft, took the same
7 pictures? Would you bring a trespass action against it,
8 or charge the competitor with criminal intrusion,
9 entering or breaking of a private residence, or what?

10 MS. GOOTEE: Justice Powell, under Michigan
11 state law, we have a -- well, we would swear, you know,
12 make out an indictment under the criminal laws of
13 Michigan for the taking of trade secrets by improper
14 means.

15 We also have a civil action under the
16 restatement of torts as recognized in the DuPont versus
17 Christopher case and as recognized by this Court in the
18 Kewanee Oil case. Aerial photography is a recognized
19 way of taking trade secrets.

20 Now, for that to happen, you know, for the
21 Court to say, yes, that's the way to do it, obviously
22 they have to be somehow exposed to the sky. Otherwise
23 it's nonsense. And that's what we have in this case.

24 QUESTION: Well, the government didn't make
25 use of the photos in anyway that constitutes a violation

1 of laws concerning trade secrets, did it?

2 MS. GOOTEE: No, Justice O'Connor, not that we
3 know of. The photographs were displayed on walls in
4 EPA's Chicago offices for roughly a month, but the use
5 of a trade secret or confidential business information
6 is not required for Fourth Amendment violation.

7 QUESTION: Has there been any use made of the
8 photos by the government at all, to your knowledge?

9 MS. GOOTEE: Other than the fact that we don't
10 know what happened to them that one month in Chicago,
11 no, we do not. They have been under seal since April
12 the 7th of 1978.

13 QUESTION: Ms. Gootee, do I understand you
14 that if you can see into the plant that's okay, but if
15 you take a picture of what you see, that's wrong?

16 MS. GOOTEE: Yes, Justice Marshall. From the
17 road -- from ground level, the view that is shown of the
18 plant is the view that Dow has chosen to show to the
19 public. From an aerial perspective --

20 QUESTION: You are talking -- if the exact
21 same spot where that person was standing, and legally,
22 according to your view of it, he couldn't take a
23 picture, or not?

24 MS. GOOTEE: He could probably take a picture
25 on the facts. It would be hard to get -- we're talking

1 open air plants. The plant is like a small city. We go
2 from --

3 QUESTION: I don't see how you -- I'm standing
4 and I can see, and I point a camera and do the exact
5 same thing, that's wrong?

6 MS. GOOTEE: If you get the exact same thing,
7 that's okay. That's our photograph 3. That's our naked
8 eye -- that's a picture of what you would see with the
9 naked eye.

10 QUESTION: So, the harm is the camera?

11 MS. GOOTEE: No, the harm is the degree of
12 intrusion. It's using technology to depict critical
13 details that you couldn't get --

14 QUESTION: Well, is that done by the camera?

15 MS. GOOTEE: In effect, but cameras only
16 operate through people.

17 QUESTION: What is the technology that you are
18 complaining about?

19 MS. GOOTEE: We're not complaining about
20 technology. We're complaining about the government's
21 intrusion.

22 QUESTION: Well, then what are you complaining
23 about?

24 MS. GOOTEE: That the government exploited
25 technology, as it did in the Karo case.

1 QUESTION: And you're objecting to the
2 technology?

3 MS. GCOTEE: Well, this certainly isn't a case
4 against aerial photography, just like a murder case
5 isn't against the gun.

6 QUESTION: A camera is not a gun.

7 MS. GCOTEE: Exactly. What we're complaining
8 about, Justice Marshall --

9 QUESTION: That's exactly why I don't
10 understand you.

11 MS. GCOTEE: Let me try to make myself more
12 clear, then. What we are -- Dow's problem in this case
13 is that after we had cooperated with the EPA, after we
14 had taken every step --

15 QUESTION: I don't know how far you
16 cooperated. When they asked to come in, you told them
17 no.

18 MS. GCOTEE: Well, that was their second
19 repetitive inspection.

20 QUESTION: I don't call that cooperating.

21 MS. GCOTEE: Well, I guess we take a different
22 point of view because we had cooperated with them. They
23 had a three hour on-site inspection. This was in fact
24 part of a long interaction with the Agency on the power
25 plant emissions, and maybe to cut this line of

1 questioning a little bit short, I refer the Court to the
2 Dow versus EPA decision by the Sixth Circuit on the
3 enforcement action at 635 Fed. 2d 559, and I think the
4 Sixth Circuit explains more the interaction between Dow
5 and the Agency, and there is quite a bit of cooperation.

6 QUESTION: May I ask you a couple of
7 questions. Supposing the problem were either emissions
8 from a stack or water or some chemical being discharged
9 eventually into water pollution, and if you couldn't see
10 it except by flying over the plant, but if you do fly
11 over the plant you could see a discoloration of water or
12 maybe some smoke coming out of a very tiny smokestack.

13 Would it be illegal and unconstitutional under
14 your view for the government to fly over and just look
15 and see if that was happening?

16 MS. GCOTEE: No, it would not, Justice Stevens.

17 QUESTION: Even your plant, with all --
18 suppose you had to fly at a very low altitude to do
19 that, that they get permission from the FAA or something
20 so that they can fly low enough to take a look. Would
21 it still be all right?

22 MS. GCOTEE: That is crossing the line that we
23 got to before lunch. It's -- in our perspective,
24 ordinary overflights are reasonable. Extraordinary
25 overflights are not reasonable.

1 QUESTION: Well, what do you mean by
2 "extraordinary"?

3 MS. GCOTEE: Extremely low level, or an
4 aircraft hovering low to the ground, something that's
5 outside the ordinary conduct of the police or citizens.
6 And that's -- you know, remembering that the Agency is
7 both bound and authorized --

8 QUESTION: Forget the statute for a minute.
9 I'm just talking about the constitutional question. But
10 supposing they can fly at 1,000 feet, then, and they
11 could not be sure with the naked eye but they could take
12 a picture just like you did and then magnify the picture
13 and look at it.

14 That's bad, you say?

15 MS. GOOTEE: They were flying at 1,000 feet?

16 QUESTION: At 1,000 feet, they look down with
17 the naked eye, they can't really detect the coloration
18 of the water very well but they take a picture thinking
19 they can study it, you know, have it enlarged and look
20 at it more closely and then they can figure out --
21 that's unconstitutional?

22 MS. GOOTEE: Yes, it is, because the aerial
23 photography -- well, that's presuming the picture shows
24 more detail than the human eye can detect.

25 QUESTION: It shows -- it enables them to make

1 darned sure that there's some discoloration of the
2 water. What about smoke coming out of the smokestack.
3 They couldn't quite see it with the naked eye, it was a
4 little foggy or something, but they take a picture and
5 they study it and they find out -- is that
6 unconstitutional?

7 MS. GCOTEE: It's unconstitutional because of
8 the degree of intrusion into areas that they're not
9 authorized to go. It's unreasonable.

10 QUESTION: But you don't have any control over
11 the air space?

12 MS. GCOTEE: No, we don't, but we have, under
13 the Fourth Amendment we have control of the privacies of
14 our corporate existence, and that's what we are trying
15 to establish today.

16 The photographs here, in the nature of aerial
17 photography, it's like a wiretap on a public phone. You
18 get -- whoever uses the phone. Here they flip the
19 switch on, the run begins. They got not only Dow
20 Chemical. They photographed Dow Corning, Consumers
21 Power, and the entire city of Midland, and that strikes
22 me as a search of the type that was carried out in
23 Ybarra versus Illinois where they saw a criminal run
24 into a bar. They thought the person was in there, so
25 they frisk everybody.

1 It's just massively intrusive and repugnant.

2 QUESTION: Do you think it's wrong to fly
3 around in airplanes looking for emissions that pollute
4 the air?

5 MS. GOOTEE: No, I don't, but I think there
6 are more reasonable ways of doing it, such as was
7 recognized in Western Alfalfa or by asking the Dow
8 Chemical Company, under Section 114-A. If we're
9 required to keep records and the EPA wants to see those
10 records, they can at any point in time, they can ask us
11 and we have no Fifth Amendment privilege.

12 QUESTION: Well, are you suggesting that you
13 would give the government everything that they got by
14 these pictures if they asked for it?

15 MS. GOOTEE: No, we are not, Your Honor,
16 because they went far beyond the scope of the statute.
17 Under Section 114 they are limited to three types of
18 investigations on-site. 114 is a notice statute, the
19 same as the Fourth Amendment, and we should probably
20 note that as a notice statute not only is Dow deprived
21 of notice of what the EPA did but the EPA employees
22 themselves who are criminally liable if they disseminate
23 trade secrets under 18 USC 1905.

24 Thank you.

25 THE CHIEF JUSTICE: Mr. Horowitz.

1 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. HOROWITZ: Thank you, Mr. Chief Justice,
4 and may it please the Court:

5 Referring to the issue that came up several
6 times in petitioner's argument as to whether EPA
7 conducted a search here, obviously the ultimate issue in
8 this case is whether there was a search within the
9 meaning of the Fourth Amendment. But, she has suggested
10 that we conceded in the court of appeals that there was
11 a search here, and of course that's true, there was a
12 search in the layman's normal use of the term, that is,
13 EPA was looking for something.

14 That is what law enforcement agencies do all
15 the time. They can look at cars on the street to see if
16 one matches a description of the car that fled a
17 robbery. That's a search, of course, but it is not a
18 search within the meaning of the Fourth Amendment.

19 A search that is regulated by the Fourth
20 Amendment is one that invades a reasonable expectation
21 of privacy, and that's what the ultimate issue in this
22 case is. It is our position that the overflight here
23 and the photography did not invade any reasonable
24 expectation of privacy.

25 Maybe the best way to frame the issue is to

1 look at the way that Dow has chosen to define its
2 facility. They have taken issue with the government's
3 characterization of it as an outdoor plant.

4 On page 4 of their reply brief they define it
5 this way. The plant here is a three-dimensional
6 commercial structure which encompasses production
7 equipment and know-how and which does not have a
8 traditional roof.

9 QUESTION: Mr. Horowitz, tell me if we can
10 sort of sharpen the focus of this case. My
11 understanding is that Dow is not arguing that the
12 Constitution necessarily would forbid an overflight just
13 to take a picture of a beautiful plant.

14 I understand its position is that it has trade
15 secrets that cannot be covered under a roof because of
16 the nature of the secret. I have no idea what that is.

17 So, if you would focus your attention on --

18 MR. HOROWITZ: If you would like me to --

19 QUESTION: On a company protecting a trade
20 secret, and what -- and when there is no other option
21 but an overflight, what is the government's answer to
22 that?

23 MR. HOROWITZ: I'd be happy to talk about
24 trade secrets now, if you'd like. I should have at the
25 outset mentioned -- I had understood, certainly when I

1 did the brief in this case, that the whole crux of their
2 claim was that there were trade secrets in the plant,
3 and we devoted quite a bit of attention to that in our
4 brief.

5 In the reply brief Dow says that our
6 discussion of trade secrets misses the point, that it is
7 the intrusive surveillance of detail beyond the purview
8 of the naked eye that constitutes the Fourth Amendment
9 violation. The Fourth Amendment violation exists
10 independently of the capturing of any Dow trade secrets.

11 So, they do seem to take the position that
12 whether or not there are trade secrets or not --

13 QUESTION: If they are trade secrets that
14 cannot be covered up --

15 MR. HOROWITZ: Well, let me assume that there
16 are some sort of, at least proprietary information
17 there. First of all, I think we would say that it's in
18 fact not a secret, and the fact is that it's exposed to
19 the view of anyone who can fly over, and there is -- I
20 don't know there is any real law on the question of
21 whether it's a trade secret under statutes, but I think
22 it probably would be found not to be a trade secret
23 under the statutes.

24 In any case, assuming it is found to be a
25 trade secret, even though it is open to the public, the

1 fact is that EPA has not taken any trade secret. The
2 trade secret that they are discussing in here is
3 something that is revealed through this extreme
4 magnification of these photographs that Dow themselves
5 did and that are shown to you in the sealed Joint
6 Appendix.

7 EPA didn't blow up these photographs. They
8 weren't even looking at the chemical plant that is the
9 focus of this trade secret claim. They were looking at
10 the power plants. The chemical plant happened to be
11 next door and it was captured in the photographs.

12 But, a trade secret has been revealed to the
13 government in this case only in the sense that there is
14 some potentiality for the government to actually
15 discover it by using examination. That's a little bit
16 like the issue in Knotts or in Karo where the Court
17 found that the mere installation of a beeper was not a
18 Fourth Amendment violation. It wasn't until you
19 actually monitored it that you had transformed the
20 potential to conduct some sort of a search into actually
21 doing it.

22 Third, I would say that all of the trade
23 secret legislation which is basically directed at unfair
24 competition, not at the things that the Fourth Amendment
25 is aimed at, all of that is directed at the unfair use

1 of the information.

2 If EPA was planning to build a chemical plant
3 and copy these type configurations that we are assuming
4 were secrets, then there might be some basis for a trade
5 secret claim here, but there is no suggestion that EPA
6 is going to do that. They are using these pictures for
7 the purpose of enhancing their investigation of Clean
8 Air Act violations, and the fact that there's a trade
9 secret there is basically, completely irrelevant.

10 It's the same as if somebody would throw a --
11 some sort of invention that he would call a trade secret
12 in the middle of his marijuana field and then claims
13 that the government can't fly over his field and take a
14 picture of it because they're capturing a trade secret
15 on the picture.

16 QUESTION: But what if the government -- I
17 know it's not true in this case, but what if there were
18 a secret that the government was interested in
19 acquiring, went over and took a picture and then went
20 ahead and developed its own plant to make whatever the
21 chemical might be or something.

22 Could you claim that was a seizure?

23 MR. HOROWITZ: Well, I think the claim is
24 probably -- I'm not sure I would agree with it, but I
25 think it's probably more of a taking claim than anything

1 else, and there was a Fifth Amendment claim in this case
2 that was dismissed without prejudice that they can
3 bring. If the government actually was going to use this
4 information, the court, I guess, was considering that
5 sort of an issue in Monsanto last year. But there is no
6 suggestion of that here.

7 I would say again, though, I doubt that it is
8 a trade secret. Now it's a question of tort law.

9 I think also, more generally, the reason why
10 this might arguably be a trade secret has nothing at all
11 to do with the Fourth Amendment. I mean, there is a
12 sense that corporations are entitled to maintain the
13 fruits of their research and development. They spend a
14 lot of money developing these sources of secrets, and it
15 is unfair competition in a sense for -- or maybe unfair
16 competition for a competitor to just take the fruits of
17 their labor and then use it without infusing the same
18 amount of funds.

19 Now, that principle is limited by what the
20 competitor or the -- excuse me, the inventor of the
21 trade secret is required to disclose to the public,
22 because it is a clear, recognized principle of trade
23 secret law that if you've developed something and put it
24 into a product and it's a secret at that time, that if a
25 competitor can figure out through what is called reverse

1 engineering, by dissecting a product that is found on
2 the market, figuring out how it was made and basically
3 acquire all the information that you've developed
4 through your research, that is not a violation of trade
5 secret statutes.

6 So, again, I am not sure there is really a
7 secret here. But the reasons for having these kinds of
8 unfair competition statutes don't have to do with the
9 Fourth Amendment. It's easy to see that conduct that
10 might be considered unfair competition under the trade
11 secret laws would clearly not be considered a Fourth
12 Amendment violation.

13 One example is the use of an informant, which
14 government law enforcement agencies do all the time, and
15 that's not considered to violate the Constitution. On
16 the other hand, most trade secret statutes suggest that
17 if you have a spy in another plant or can somehow
18 convince an employee of another plant to exchange
19 loyalties and give you trade secrets, that is considered
20 unfair competition.

21 I think another example is the Christopher
22 case that was cited, the Fifth Circuit case that was
23 cited by Dow Chemical in its brief. That's a case where
24 one company was building a plant and a competitor flew
25 over and took aerial photographs of it before the plant

1 was completed, before they had a chance to put the roof
2 on, basically, although they were putting a roof on it,
3 kind of snuck in there, and the Fifth Circuit said that
4 was dirty pool in the trade secret context and they
5 considered it unfair competition.

6 Even in that context, I can't believe if the
7 state had sent a plane over to check for building code
8 violations, if that was threatening the safety of the
9 employees who were going to be working in that plant,
10 that that would be considered to violate the Fourth
11 Amendment.

12 They're just not taking trade secrets.
13 They're looking for other information.

14 Finally, I would make one more point about the
15 trade secret claim, and that is that it doesn't really
16 address what the issue here is because what they're
17 claiming, I take it, is that the EPA overflight and
18 photography was some kind of a search that required EPA
19 to get a warrant. They are not suggesting that the
20 government, under no circumstances, could have conducted
21 this overflight.

22 But, if we did get a warrant to look for these
23 emissions, we would have exactly the same pictures of
24 Dow's plant and we would have exactly the same trade
25 secrets, and they would have exactly the same problem.

1 The relief that they are seeking here, forcing EPA to
2 get a warrant, doesn't at all address this sort of
3 complaint that they have.

4 So, that's sort of a long answer, Justice
5 Powell, but I think really, trade secrets have very
6 little to do with this case. It's really a red herring.

7 QUESTION: It wouldn't have been business of
8 the government to obtain an administrative warrant,
9 would it really?

10 MR. HOROWITZ: It wouldn't be much of a burden?

11 QUESTION: It wouldn't have been business of
12 them to have obtained, as you did in Barlow, an
13 administrative warrant?

14 MR. HOROWITZ: No, you're setting up a whole
15 new regime, basically, where you have to have
16 magistrates involved in this and you have to decide what
17 sort of showing has to be made by the government in
18 order to do it.

19 This was not a routine regulatory inspection.
20 It was one that was made in connection with a specific
21 investigation of the plant. I think they probably could
22 have gotten a warrant from a magistrate.

23 QUESTION: This whole area is very puzzling in
24 light of the scientific development. Think about all
25 the buildings we now see that are made entirely of

1 glass. I'm glad I don't live in one of them, but I
2 suppose with the right sort of photography you could
3 take pictures of whatever you wanted inside those
4 buildings if they were anywhere near the windows, and I
5 wonder if that would involve -- implicate the Fourth
6 Amendment?

7 I'm not talking about a private home. I'm
8 talking about --

9 MR. HOROWITZ: I understand. I think you're
10 right. I mean, technology has changed the world we live
11 in to some extent.

12 I mean, aerial photography today is a fact of
13 life. There are affidavits in the record. We have
14 mentioned some of them in our brief. All sorts of
15 government agencies use aerial photography all the time,
16 for mapping, geological purposes. And it's not just
17 government agencies.

18 If you go to a real estate office you'll find
19 that they like to take aerial photographs of real estate
20 subdivisions so they can show people where houses are
21 located and what things look like. People are being
22 photographed all the time, and Dow knows that.

23 This is not a case where they really had an
24 expectation that they would not be photographed from the
25 air. They said several times in their brief that they

1 had this whole, elaborate system for looking for planes
2 flying overhead so they could try to figure out who was
3 photographing them, and I guess try to take some steps
4 to discourage them from doing it or to keep track of
5 whether photography was being used.

6 It can't seriously be contended that they had
7 a subjective expectation of privacy, that they weren't
8 going to be photographed from the air here. News
9 cameras are photographing them. In fact, there's this
10 Business Week article that's referenced in their brief
11 where they -- I think about six weeks ago, from October,
12 where they mention that that's a photograph that they
13 supplied to Business Week.

14 Actually, I spoke to the reporter from
15 Business Week because I was curious where she had gotten
16 the photograph and she told me that they didn't really
17 like the photograph that Dow had given them and they've
18 gone ahead and taken their own.

19 There's just nothing to keep people from doing
20 it. What Dow's position is --

21 QUESTION: Mr. Horowitz, do you think the
22 standard should be the same in flying over an industrial
23 complex of this type as it should for the police to fly
24 over someone's residential back yard and take
25 photographs? Is it really the same standard?

1 MR. HOROWITZ: If anything, I think it's a
2 lesser standard. There may be more of an expectation of
3 privacy in the back yard.

4 The companion case to this one will be coming
5 up next, where it's undisputed that that was within the
6 privilege of the home, where the overflight and the
7 photographing took place.

8 Here we had a footnote in our brief,
9 discussing whether this qualifies as privilege or not.
10 I think there's an argument that it's not privilege at
11 all here, but we've been willing to assume for purposes
12 of this case that it can be treated the same because we
13 feel there is no expectation of privacy in any of them.

14 Basically, what Dow's position is, is that
15 they have their property, they've built things on their
16 property and they don't want people to take pictures of
17 them. I understand that position from a layman's
18 perspective. I have some sympathy for it. I feel the
19 same way sometimes. I have a back yard and neighbors
20 can see into my back yard and occasionally things happen
21 in my back yard that I say to myself, gee, I hope the
22 neighbors aren't watching.

23 That's a hope, but I don't have any
24 expectation that they're not watching and I don't expect
25 the Fourth Amendment to keep them from watching. I

1 mean, what Dow has done here is, they have built a
2 facility and they have put a fence around it. We don't
3 dispute that, and it's very hard to get in on the
4 ground, and they haven't built a roof, and they want the
5 Fourth Amendment to build a roof for them.

6 They want a very special roof. They want one
7 that lets in the rain, lets in the snow, lets in news
8 photographers, apparently lets in people who are just
9 flying over and looking down, maybe lets in people who
10 are taking pictures from higher altitudes, but it
11 doesn't let EPA take photographs that are relevant to
12 its enforcement of the Clean Air Act.

13 And, there's no reason why the Fourth
14 Amendment should do that. They can't build a roof, they
15 say, and from that they draw the conclusion that the
16 Fourth Amendment should provide a roof for them.

17 From that, we draw the conclusion that what
18 they have in there is just not private and they can't
19 expect to keep it private, and they certainly can't
20 expect the Fourth Amendment to keep it private.

21 QUESTION: May I go back to Justice Powell's
22 example. Supposing it were a glass office building and
23 you could fly over and you had -- I don't know if
24 techniques are this sophisticated or not, but you could
25 take pictures through the glass walls or roof that were

1 sufficiently detailed to read documents on a desk.

2 Any objection to that ?

3 MR. HOROWITZ: Well, I think there are two
4 different aspects here that come out of Katz, and one is
5 whether there is an expectation of privacy in the sense
6 that you can expect that what you have in there can't be
7 seen from the outside, and then there's a second aspect,
8 which is whether what you're seeking to protect is
9 really something private.

10 That's at the core of what the Fourth
11 Amendment is trying to protect. In this case Dow flunks
12 on both counts, I think. I think there is no subjective
13 expectation of privacy. Anyone could take these
14 photographs. They concede that.

15 Secondly, there's really nothing in there that
16 was very private. I mean, this is just an outdoor
17 place, except for the trade secrets which I've talked
18 about at length already. There's no reason why one
19 would expect the Fourth Amendment to inhibit law
20 enforcement in this way because there's nothing to
21 protect.

22 Now, there are harder cases where these two
23 different prongs are somewhat in conflict, and you have
24 raised one. I think where you've got a glass building
25 it may be hard to argue that you've got a subjective

1 expectation of privacy. You may well know that someone
2 can fly over and take photographs through the glass, if
3 that's possible, I don't know, and that will reveal
4 things.

5 On the other hand, what you do have in an
6 office building, and even more so in a home, is
7 something that we have recognized as being more private,
8 and it may be that the rule should be more stringent
9 there when you're trying to protect something of that
10 privacy.

11 QUESTION: I'm a little puzzled on that, on
12 the Dow case. It seems to me you've agreed that they
13 have a privacy interest in keeping people out at ground
14 level, from seeing what goes on within, and surely there
15 could be things that happen in the plant that they would
16 like to have the same degree of privacy --

17 MR. MCROWITZ: No, what I have said is, they
18 have taken steps to keep people out. I'm not suggesting
19 that -- I don't know whether the Fourth Amendment would
20 keep people from going in there or not.

21 I mean, that's the question of whether this is
22 an open field or not, and we don't think it really
23 matters in this case so we haven't addressed it. I
24 don't know whether --

25 QUESTION: But if 99 and 99 one-hundredths of

1 the passengers in airplanes, and pilots who flew over
2 really couldn't see anything, it's only the one case out
3 of a million in which you take a sophisticated camera
4 and take a picture, would you say they have no
5 expectation that in general their privacy would be
6 respected?

7 Isn't that the fact, that it's the unusual
8 case where somebody can look at the kind of stuff they
9 see here?

10 MR. HOROWITZ: Well, I don't know that
11 comparing it to commercial air flights is very
12 relevant. I mean, it's just a number of people who come
13 over and take photographs that's relevant, and we have
14 statistics that the FAA says more than a million
15 flight-hours a year are devoted to aerial photography.

16 I don't think, in this context, that they
17 really have an expectation that people won't fly over
18 and as I said, I think that's reflected in the fact that
19 they take such measures to stare at the sky and see
20 whether people are flying over.

21 What I understand your question to be, I think
22 it's just more hypothetical than actually applicable to
23 this case, is if you were really in a position where
24 there was not reason to think that you would ever be
25 observed unless somebody was deliberately trying to do

1 it, I think that presents more difficult questions of
2 expectation of privacy and I think that the resolution
3 of it might well depend on what sort of place it was,
4 how private.

5 If it was a home and the question was whether
6 somebody could see with binoculars from a quarter-mile
7 away, you might have a stronger case. If it's outside
8 activity, I'm not sure that the Fourth Amendment really
9 should be preventing government action in that way.
10 There just isn't anything important, really, to protect.

11 As the Court, I think, suggested in the
12 opening argument here, I have also had some difficulty
13 in figuring out exactly what the legal principle is that
14 DCW relies on. As I said, it seems to be pretty much
15 that they don't want the government to be able to
16 photograph what they don't want the government to be
17 able to photograph.

18 In their case, they don't mind oblique
19 photography so they don't consider that to be a Fourth
20 Amendment violation, standing on a nearby hillside. But
21 I think the Court needs to have more of a rule than that
22 because next week there may be someone here who doesn't
23 like oblique photography.

24 QUESTION: Would it be fair to say that they
25 are interesting in protecting a trade secret and they

1 think the trade secret would not be revealed from
2 someone taking a photograph from the hillside?

3 MR. HOROWITZ: I agree. I think that's what
4 they're saying, Justice Powell. What I'm trying to say
5 is that next week Union Carbide might be here and they
6 may say that their trade secrets are revealed by
7 photographs taken from a hillside.

8 So, I think the Court --

9 QUESTION: I appreciate the facts can vary
10 widely. My understanding was that this Dow facility was
11 built on what, a 2,000 acre plot -- a 2,000 acre tract
12 of land? I don't know what part of that was covered by
13 the plant, but the record indicates that it would not
14 have been feasible to protect it.

15 I'm not at all sure that you're wrong on the
16 Fourth Amendment. I just think we ought to stick to
17 what I understand the facts to be, and that is that this
18 company was trying to protect a trade secret that
19 couldn't be protected if sophisticated equipment was
20 used by airplanes flying over it for the purpose of
21 detecting the secret.

22 Now, you've got a pretty good answer, I think,
23 if I understand it, when you say all the EPA was
24 interested in was the emissions from a smokestack and
25 whatever else you took was incidental, is that correct?

1 MR. HOROWITZ: Well, that's certainly one of
2 our answers. I also dispute whether it's a trade
3 secret. But I'm a little bit unwilling to concede that
4 they're really interested in protecting trade secrets
5 because I think you have to look at the course of the
6 litigation here.

7 I mean, they found out that EPA had taken
8 these pictures and they ran in to court, they got an
9 injunction from the district court that prevents any use
10 of the pictures and any future overflights, I think
11 surveillance or photography by EPA, but I guess they
12 really conceded away in this Court part of what they won
13 in the district court.

14 If they were worried about trade secrets, all
15 they had to do was talk to the EPA and say, look, we're
16 really worried about these trade secrets. Here, you use
17 these pictures for your enforcement action but we want
18 you to keep them under seal and we only want you to give
19 them back to us when you're done with the enforcement
20 action and don't blow them up because that's going to
21 reveal trade secrets.

22 After all, there's no trade secrets, as I said
23 before, on anything that EPA has, other than just
24 potential to blow them up. So, I think they are at
25 least partly concerned about EPA flying over and finding

1 out what EPA wants to know, and not just about trade
2 secrets.

3 It seems to me --

4 QUESTION: We had a couple of cases a couple
5 of years ago. I can't think of the name of them now,
6 from Tennessee involving Stouffer where Stouffer was
7 complaining that they didn't want EPA to contract out an
8 inspection because they thought there was a danger of
9 losing some of their trade secrets.

10 So, you know, was there any case of
11 contracting out here on the part of EPA, or was it all
12 EPA employees who did the --

13 MR. HOROWITZ: The pictures were taken by a
14 local photography concern and they were immediately --
15 negatives were put into a parcel and air freighted to
16 EPA, and since that time I think it's been under control
17 of EPA. I don't think there's any issue like that here.

18 As I said, I found it hard to discern a rule
19 from the contentions that Dow is making. I think the
20 only line that can be drawn from what they are saying is
21 one, the Court was suggesting in the argument, which is
22 that naked eye observation is okay but once you pull out
23 a camera you're violating the Fourth Amendment.

24 I just don't think that rule can stand in
25 light of what the Court has said. The Court has always

1 recognized that technology can be used to enhance the
2 senses, said it recently in Knotts, and going all the
3 way back to the Lee case in the 1920's. That's two on
4 the ground, and there's no reason why it shouldn't be
5 equally true from the air.

6 The point is whether there is a legitimate
7 expectation of privacy that is being infringed. If the
8 government uses some sort of space age technology that's
9 only available to the Pentagon or the military, then a
10 person on the ground probably has a right to assume that
11 he's going to be free from that kind of surveillance,
12 and surveillance of that type probably does violate a
13 reasonable expectation of privacy.

14 If EPA is doing nothing more than taking the
15 same photographs that everyone else is taking, and here
16 again I'll repeat that all they did was hire this local
17 concern and told them to take a picture with their
18 equipment, and the idea that we used sophisticated
19 equipment -- it's certainly more sophisticated than a
20 Kodak Instamatic but it was basically just regular old
21 aerial photography.

22 There's just no expectation to be free from
23 the use of that sort of fairly minor technology. It's
24 just --

25 QUESTION: Mr. Horowitz, you seem to agree

1 that if there were space age technology used, it might
2 be so unusual that it would be unconstitutional. Does
3 that mean that as we get more accustomed to more
4 sophisticated technology, it would no longer be
5 objectionable so that the constitutional rule will
6 change as scientific developments increase?

7 MR. HOROWITZ: Well, I think a sort of answer
8 to that is that as long as you're going to have a
9 standard where it depends on people's expectations, it's
10 inevitable that those expectations may change with the
11 development of technology.

12 I mean, if this case had come up in 1900, they
13 could have had an expectation that these pictures
14 couldn't have been taken and in fact they couldn't have
15 been taken. But, it doesn't -- I don't think it means
16 that as technology increases people will continue to
17 lose more and more of their privacy.

18 QUESTION: Perhaps if that's the rule, the
19 government could do a very good job of educating
20 everybody as to their great capacity for sophisticated
21 investigation and people would realize that they'd have
22 to just take those risks.

23 MR. HOROWITZ: I understand. That's why I
24 said earlier that there are these two prongs to Katz,
25 and I think just saying that if people have an

1 expectation that they may be subject to certain
2 intrusion does not necessarily -- is not a complete
3 answer because everybody is familiar with 1984 where the
4 government put cameras in everyone's house and that
5 would clearly violate the Fourth Amendment even if they
6 announced it on TV for weeks beforehand and everyone
7 knew about it.

8 So, the Fourth Amendment does go beyond what
9 people have -- it does give an additional protection
10 beyond what the government is willing to confer. But in
11 a context like this where there is, I still say, very
12 little private interest that's actually involved and
13 plus the aura that what Dow is seeking basically to do
14 is to prevent the government from doing what everyone
15 else can do.

16 This is information that is open to the
17 public, and to the extent that trade secret law is a
18 limitation on that, that's something that has to be
19 litigated in a separate trade secret action where the
20 issue would tend to focus on what sort of use is being
21 made of it.

22 QUESTION: Mr. Horowitz, what I'm now going to
23 ask you is immaterial to the case, really, but you were
24 talking about this garden variety type camera. There is
25 a footnote in the district court brief that says the

1 camera cost \$20,000. That's rather special, isn't it?

2 MR. HOROWITZ: It is special, but it is not
3 special for aerial photographers, I'm trying to say. In
4 fact, we have cited to an affidavit which stresses that
5 the same level of detail could have been taken with a 35
6 millimeter camera that most people have.

7 QUESTION: Could that identify a pipe one-half
8 an inch in diameter? I have a 35 millimeter camera and
9 I --

10 MR. HOROWITZ: The finding of the district
11 court, we have a footnote in our brief about the
12 dimensions here. The scale in the photographs that were
13 taken by EPA was on a scale of one inch equals one
14 forty-eight hundredth of an inch, I believe.

15 I mean, these pictures are not that detailed.
16 I mean, Dow seems to have access to some very
17 sophisticated magnification and enlargement equipment
18 and that's what they said, and they keep enlarging these
19 things and that's what the district court found, they
20 can see up to a half an inch diameter.

21 I'm not sure I believe that but if that's the
22 case I think the same thing could have been done with
23 the 35-millimeter camera. It's obviously not the sort
24 of camera that everybody has in their back yard but this
25 is a regular -- this is basically the commercially

1 available equipment, it's the routine aerial photography
2 equipment, the same thing that Business Week and the
3 real estate developers are using. There's no aura here
4 of the government bringing in its space age technology.

5 Let me just say something here very briefly
6 about the statute. I think the statutory argument
7 borders on the frivolous here. There's nothing in the
8 statute that suggests that EPA couldn't do this.

9 The argument seems to assume that the
10 photography here was constitutionally offensive. If it
11 was, of course, then you don't have to get to the
12 statutory argument but assuming that the photography --

13 QUESTION: Well, that's a little vice versa
14 from our usual ruling, is that if it doesn't violate the
15 constitution you don't have to get into statutory --

16 MR. HOROWITZ: I understand, but I mean -- I'm
17 saying that the statutory argument there is subsumed in
18 the constitutional argument. But I think the statutory
19 argument has to rest on the assumption that the
20 photography was in fact constitutional, which we believe
21 it was.

22 In their reply brief they suggest that perhaps
23 the statute doesn't authorize it because EPA is not a
24 law enforcement agency. I don't understand why EPA is
25 not a law enforcement agency. The Clean Air Act is a

1 law, I think, and the government is entitled to enforce
2 it, and they are entitled to use the same sort of
3 methods of investigation that private investigators are
4 entitled to use.

5 QUESTION: Let me ask you one last question.
6 What's the state of the record, either supporting or
7 contradicting Judge Merrit's statement that the plant is
8 located within the landing pattern of a nearby airport?

9 MR. HOROWITZ: I hate for the last question to
10 be one that I can't answer, Justice Stevens, but I don't
11 know.

12 Thank you.

13 THE CHIEF JUSTICE: Do you have anything
14 futher?

15 MS. GCOTEE: Yes, I do, Mr. Chief Justice.

16 ORAL ARGUMENT OF JANE M. GOOTEE, ESQ.

17 ON BEHALF OF PETITIONER -- REBUTTAL

18 MS. GCOTEE: To answer Justice Stevens'
19 question, there is absolutely no reference in the record
20 that the Dow facility is on any airport approach for the
21 local airport.

22 A few other points to bring out --

23 QUESTION: Do you think Judge Merritt just
24 made that up?

25 MS. GCOTEE: Your Honor --

1 QUESTION: He flies airplanes, I understand.

2 MS. GCOTEE: You Honor, in our motion for
3 summary judgment we did admit, being reasonable as we
4 think we are in this case, that obviously planes fly
5 over or near the plant, but that's a fair step from
6 saying it's on an airport takeoff and landing pattern.

7 It may have been mentioned during oral
8 argument by the Government. I don't know.

9 QUESTION: How far is it from an airport?

10 MS. GCOTEE: It's about ten miles, Justice
11 Rehnquist.

12 QUESTION: Thanks a lot.

13 MS. COOTEE: The one-half inch detail that was
14 mentioned is visible on the original EPA photographs.
15 It has nothing to do with the enlargements. You've
16 heard a lot from the Government about Dow's position,
17 Dow's feelings, Dow's property.

18 I would refer the Court to the Dow briefs for
19 those statements. We have heard nothing from the
20 Government about justification for what the EPA did, and
21 I would bring that to the Court's attention.

22 The Government states that it doesn't know
23 whether the Fourth Amendment would keep people out of
24 the Dow plant. Well, we'd like to remind the Government
25 that the Fourth Amendment was written to oblige the

1 government to control itself. It does not apply to
2 private parties.

3 In this case Dow is asking for the status
4 quo. Case law of this Court shows that commercial,
5 non-public areas are entitled to Fourth Amendment
6 protection. It is mutually exclusive from an open field.

7 Finally, it is the law of this Court that the
8 use of technology to intrude into the private details of
9 a protected place is an unreasonable search.

10 Thank you.

11 THE CHIEF JUSTICE: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 1:40 o'clock p.m., the case in
14 the above entitled matter was submitted.)

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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1259 - DOW CHEMICAL COMPANY, Petitioner V. UNITED STATES, ETC.

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BY

Paul A. Richardson

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