
INTRODUCTION

On July 5, 1984, the Supreme Court announced its opinion in Segura v. United States.¹ This decision affects two major criminal procedure doctrines—the exclusionary rule and the fourth amendment warrant requirement. The Court declined to apply the exclusionary rule, thus opening the door for another exception to the fourth amendment warrant requirement.

This Note contends that the Segura decision unnecessarily narrowed the scope of the exclusionary rule and was a poor vehicle by which to adopt an impoundment exception to the fourth amendment warrant requirement. After a brief overview of Segura’s facts and holding, this Note discusses the origins of and justifications for the exclusionary rule and examines the rule’s applications and exceptions.

Next, this Note explores the differing interests affected by searches as opposed to seizures and demonstrates that in some cases, the Court has preferred a warrantless seizure over a warrantless search. However, affording less fourth amendment protection against warrantless seizures should not extend to seizures of a home. Recognizing that while many lower court decisions have adopted “impoundment” or seizure of a home from within as a preferred alternative to a warrantless search, the facts of Segura do not support adoption of this alternative.

This Note further criticizes the Court’s use of the independent source doctrine, an exception to the exclusionary rule. By applying this exception on the facts of Segura, the Supreme Court has undermined a primary justification for the exclusionary rule: deterrence. Finally, this Note discusses possible implications of the Segura decision.

FACTS AND HOLDING

Petitioners Andres Segura and Luz Marina Colon had been under constant surveillance by the New York City Drug Enforcement Task Force for over two weeks in late January and early Feb-

ruary of 1981. Petitioners were suspected of using their apartment to conduct cocaine sales. On February 12, 1981, the agents observed what appeared to be a drug transaction between Segura and two others, Rivudalla-Vidal and Esther Parra. The agents followed Rivudalla and Parra, stopped them for questioning, and arrested them for possession of cocaine. After his arrest, Rivudalla agreed to cooperate with the authorities and informed them that Segura was to call him later that evening to see if he needed any additional cocaine.

Around 6:30 p.m. that evening, an Assistant United States Attorney directed the Task Force head, Agent Palumbo, to arrest Segura and Colon. The United States attorney informed Palumbo that as a search warrant could not be obtained until the next day, the agents were to secure the premises from the outside. The United States attorney apparently feared that the evidence would be destroyed before the agents could obtain a search warrant. Agent Palumbo informed his men that they were not to enter Segura's apartment. At 7:30 p.m., Task Force agents began external surveillance of Segura's apartment. The agents listened at the door but heard no indications that anyone was in the apartment. The agents continued their surveillance for over three hours, seeing no one enter or leave the apartment. Segura entered the apartment building lobby around 11:30 p.m., where Task Force agents arrested him. Ignoring Segura's protest that he did not live in the building, the agents forcibly took him up to his apartment. Colon answered the door, and the agents entered the apartment without asking for or receiving permission.

Upon entering the apartment, the agents conducted a "security check" to determine whether anyone else was present. The security check disclosed a triple beam scale and several jars of lactose,
items used in preparing cocaine for street sale. Luz Colon was then arrested, along with three others who were present. Segura, Colon, and the other three occupants were removed to Drug Enforcement Administration (DEA) headquarters. Two agents remained behind to secure the premises from the inside while other agents processed the arrestees. Due to administrative delays and a lack of secretarial services, the warrant application was not presented to a magistrate until 5:00 p.m. on the following day. The magistrate issued the search warrant at 6:00 p.m., nineteen hours after the agents first entered the apartment. The agents then searched the apartment, uncovering over 1,250 grams of cocaine, eighteen rounds of ammunition, over $50,000 in cash, and records of narcotics transactions.

Following a hearing, the district court granted petitioners' motion to suppress both the evidence discovered during the security check and the evidence seized pursuant to the warrant. The district court found that none of the exceptions to the warrant requirement applied to justify the warrantless entry or the security check. Therefore, the items seized during the security check, even though in plain view, were suppressible. The unreasonable delay in obtaining the search warrant, combined with the illegal entry, were the bases for suppression of the evidence seized pursuant to the warrant. The district court concluded that had there been no illegal entry, Colon might have destroyed the evidence before a search warrant was issued; therefore, the evidence seized pursuant to the warrant was "fruit" of the illegal entry.

The Second Circuit affirmed in part and reversed in part. The court held that the initial entry into the apartment was illegal, and therefore those items discovered before issuance of the warrant were suppressible. However, the Second Circuit also stated that the evidence seized pursuant to the warrant was admissible because the agents relied on information from a source independent of the initial

20. Id. at 4-5.
21. Id. at 5.
23. Brief for Petitioners at 5, Segura v. United States, 104 S. Ct. 3380 (1984). The affidavit submitted in support of the warrant application omitted the agents' earlier illegal entry into the apartment. Id.
24. Id.
25. Segura, 104 S. Ct. at 3384.
26. Id.
27. Id.
28. Id.
29. Id. at 3384-85.
31. Id. at 415.
illegality. Segura and Colon were then tried and convicted, and the
Second Circuit upheld the convictions.

The Supreme Court affirmed the Second Circuit's resolution of
the suppression issue. The Court had no quarrel with the determi-
nation that the initial entry was illegal for lack of exigent circum-
stances. Writing for the majority, Chief Justice Burger first noted
that the fourth amendment prohibits only unreasonable searches and
seizures. While reluctant to call it a seizure, Burger concluded that
the impoundment of the apartment was reasonable.

Relying on Chambers v. Maroney, United States v. Chadwick, and
Arkansas v. Sanders, the Chief Justice stated that the Court
had previously sanctioned seizures of personal property, on the basis
of probable cause, while law enforcement officers sought a search
warrant. He reasoned that these cases demonstrate the difference
between searches and seizures in that seizures are of a less intrusive
nature because they involve only possessory interests while searches
affect privacy interests.

The Chief Justice acknowledged that the Court had never con-
sidered whether a seizure of a home from the inside to prevent de-
struction of evidence violated the fourth amendment. He stated,
however, that the Court had suggested the constitutionality of this
procedure in Mincey v. Arizona and Rawlings v. Kentucky. The
Court further reasoned that because a seizure affects only possessory
interests and because the home has been held sacred only because of
the privacy interests affected, the impoundment of Segura's apart-

32. Id. at 416.
34. Segura, 104 S. Ct. at 3392.
35. Id. at 3385. This issue was not before the Court as the government had not
raised it in the Second Circuit. Id.
36. Id. at 3386.
40. Segura, 104 S. Ct. at 3387. The majority also cited two cases for the proposi-
tion that the Court had permitted temporary seizures even without probable cause. Id.
at n.6. United States v. Van Leeuwen, 397 U.S. 249 (1970) (seizure and detention of
packages deposited in the mail); United States v. Place, 103 S. Ct. 2637 (1983). How-
ever, it should be noted that Place only authorized a temporary detainment of luggage
to subject it to trained narcotics dogs. 103 S. Ct. at 2644-45. The Court did not sanction
the 90 minute detention of luggage without probable cause, noting that a seizure may
become unreasonable because of its duration. Id. at 2646.
41. Segura, 104 S. Ct. at 3387.
42. Id. at 3388.
43. 437 U.S. 385 (1978) (police guard stationed outside the apartment).
44. 448 U.S. 98 (1980) (police detained occupants of home of person for whom they
had an arrest warrant while other officers sought a search warrant).
ment was reasonable. The majority further observed that any interference with Colon's possessory interest was negligible, as he was in custody, and therefore, the nineteen hour delay in obtaining the warrant was reasonable.

The majority then addressed petitioners' second argument that the evidence seized pursuant to the search warrant was suppressible as "fruit" of the illegal entry. The Court gave short shrift to this contention, stating that the evidence seized pursuant to the search warrant was not fruit of the illegal entry because the information used to obtain the warrant came from an independent source and thus was not a product of an illegal entry. The majority also rejected petitioners' argument that had the agents not entered the apartment illegally, the evidence might have been destroyed. The Chief Justice stated that the possibility of destruction was too speculative and declined to extend the exclusionary rule to "further protect criminal activity."

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented. The dissent stated that the apartment's occupation constituted an unreasonable search and an unreasonable seizure. Justice Stevens reasoned that a search occurs any time a person's reasonable expectation of privacy is invaded, which certainly was the case in entering and remaining in petitioners' home. The dissent maintained that a seizure occurred because there was a meaningful interference with petitioners' possessory interests. Citing Mincey and Chimel, Justice Stevens stated that this was not altered by the fact that Segura and Colon were in custody. He concluded that the seizure was unreasonable because of its unjustified duration.

Justice Stevens also disagreed with the majority's resolution of

45. Segura, 104 S. Ct. at 3389.
46. Id. at 3390.
47. Id. Justice O'Connor was the only Justice joining the Chief Justice in this section of the majority opinion. Id. at 3382, 3392.
48. Id. at 3391.
49. Id. Though the majority does not explicitly identify this "independent source," it is clear that the agents used information obtained through Rivudalla's cooperation in applying for the search warrant.
50. Id. at 3392.
51. Id.
52. Id.
53. Id. at 3394 (Stevens, J., dissenting).
54. Id. at 3395.
55. Id. at 3394.
56. Id. at 3395.
57. Id. at 3397.
58. Id. at 3396-97.
the "taint" issue.\textsuperscript{59} He stated that the district court specifically had found the question of whether the evidence would have been removed to be non-speculative\textsuperscript{60} and that the majority had ignored a major component of the exclusionary rule by failing to consider whether suppression would remove police incentive to engage in this type of conduct.\textsuperscript{61}

The dissent also criticized the Court for failing to address the question actually raised by petitioners.\textsuperscript{62} Justice Stevens stated that the petitioners were not contending that the evidence seized pursuant to the warrant did not come from an independent source; instead, the petitioners were arguing that the agents' access to the evidence was a direct result of illegal conduct.\textsuperscript{63} In other words, had the agents not illegally seized the apartment, a strong possibility existed that no drugs would have been discovered when agents arrived with the search warrant, nineteen hours later. The dissent concluded that the case should be remanded for a further evidentiary hearing to determine whether the evidence would have in fact remained in the apartment absent the initial illegal entry.\textsuperscript{64}

OVERVIEW OF THE EXCLUSIONARY RULE

Almost since its inception, the exclusionary rule has existed in a state of chaos.\textsuperscript{65} This is regrettable, particularly since the fourth amendment suppression motion is the most frequently utilized procedure in criminal trials.\textsuperscript{66} Some commentators place the blame for this state of affairs at the Supreme Court's door,\textsuperscript{67} while others argue

\textsuperscript{59.} Id. at 3399. See notes 48-51 and accompanying text supra (majority holding that the evidence seized was not tainted as fruit of the illegal entry).

\textsuperscript{60.} Id. at 3402. The dissent noted that the Court must abide by the district court's finding, unless it was clearly erroneous. Id.

\textsuperscript{61.} Id. at 3399-3400.

\textsuperscript{62.} Id. at 3400.

\textsuperscript{63.} Id. Justice Stevens reads the "fruit of the poisonous tree" cases as meaning that the officer's access to the evidence was unlawful. Id. at 3401 n.27.

\textsuperscript{64.} Id. at 3403. The dissent also discussed the impact of the majority's holding, stating that it would encourage undisciplined police procedure and erode the sanctity of the home. Id. at 3404.


\textsuperscript{67.} See, e.g., Saltzburg, Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo. L.J. 151, 173 (1980) ("[B]oth the Warren Court and Burger Court have created a nightmare of complex rules and sub-rules that make it difficult to predict what is expected of law enforcement officers.").
that the fault lies with the exclusionary rule itself. The rule's critics claim that it prevents the use of probative evidence in court and that while the rule may protect fourth amendment rights, it does so at a staggering cost to society.

Constitutionally Mandated or Judicial Remedy?

Fourth amendment commentators disagree as to whether the exclusionary rule is implicit in the fourth amendment itself or is merely a judicial remedy. Those writers who take the first position apparently believe that this characterization is necessary to preserve fourth amendment values. Therefore, if the rule is characterized as a judicial remedy, it will be easier for courts to chip away at the rule's foundations. However, at least one author who refers to the rule as a judicial remedy implies that this position analytically is not that far removed from the view that the exclusionary rule is implicit in the fourth amendment itself. Initially, the Supreme Court

See also Weisberger, The Exclusionary Rule: Nine Authors in Search of a Principle, 34 S.C.L. Rev. 253 (1982) (no coherent principle may be derived from Supreme Court exclusionary rule cases).

68. See Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1392-93 (1983) (arguing that the courts do not place these constitutional restraints on police officers, the fourth amendment does); Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 Amer. Crim. L. Rev. 603, 603 (1982) (the chaotic state of the exclusionary rule has existed for so long that no single court can be blamed).

69. See Crump, The "Tainted Evidence" Rationale: Does it Really Support the Exclusionary Rule?, 23 S. Tex. L.J. 687, 688 (1982). Cf. Wilkey, supra note 66, at 534 ("It is the type of legal technicality which would cause Dickens' Mr. Bumble to say the law is a ass, a idiot.").

70. Stewart, supra note 68, at 1393.


73. See, e.g., Ervin, supra note 71, at 291-302 (characterizing the exclusionary rule as a personal constitutional right created by the fourth amendment); White, supra note 71, at 1274 (exclusionary rule as "an essential part of the fourth amendment's protection").

74. Cf. 1 LaFave, Search and Seizure, A Treatise on the Fourth Amendment 18 (1978) (extension [or retraction] of exclusionary rule depends on how it is characterized).

75. Stewart, supra note 68, at 1384.

76. Id. at 1384-85. Former Supreme Court Justice Potter Stewart has stated that while the exclusionary rule itself is not mandated by the fourth amendment, it is a constitutionally mandated remedy. Id. at 1384. In other words, while the Bill of Rights may be silent as to how the fourth amendment is to be enforced, the amendment's language nevertheless requires that courts fashion some remedy. Id. at 1384-85.
adopted the view that the Constitution mandates the exclusionary rule but has since abandoned this argument and now characterizes the rule as a judicially created remedy.\textsuperscript{77} In \textit{Mapp v. Ohio},\textsuperscript{78} the Court declared that the exclusionary rule was implicit in the fourth amendment.\textsuperscript{79} Yet the Court did an about-face in \textit{United States v. Calandra},\textsuperscript{80} rejecting \textit{Mapp}'s theory that the exclusionary rule itself was constitutionally compelled, holding that it was a judicially-created remedy.\textsuperscript{81}

The way in which the Court characterizes the rule affects whether the Court will extend or limit it.\textsuperscript{82} If the rule's underlying

\textsuperscript{77} Comment, supra note 65, at 735. The present exclusionary rule evolved from three cases: \textit{Boyd v. United States}, 116 U.S. 616 (1886); \textit{Adams v. New York}, 192 U.S. 585 (1904); and \textit{Weeks v. United States}, 232 U.S. 383 (1914). Stewart, supra note 64, at 1372 n.36. In \textit{Boyd}, the government instituted forfeiture proceedings against goods allegedly illegally imported. Boyd, 116 U.S. at 617. The district court ordered the Boyds to produce an invoice for these goods. \textit{Id.} at 618. The petitioners complied, and the goods were declared forfeited to the government. \textit{Id.} Relying on fifth amendment grounds, the Supreme Court reversed, stating that the order to produce the invoice violated petitioners' right to be free from self-incrimination. \textit{Id.} at 633-34. The Court stated: "[w]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." \textit{Id.} at 633.

In \textit{Adams}, officers had a warrant to seize the defendant's policy slips, but also seized other papers which were used to identify the defendant's handwriting on the policy slips. \textit{Adams}, 192 U.S. at 588. The Court concluded that as long as the evidence was relevant to the question of the defendant's guilt, it should not matter how the government obtained the evidence. \textit{Id.} at 595. Finally, in \textit{Weeks}, the Court reversed a conviction relying on the fourth rather than the fifth amendment as the sole ground.

\textsuperscript{78} 367 U.S. 643 (1961).

\textsuperscript{79} \textit{Id.} at 655-56. However, at least one commentator has argued that the Court has never held that the rule is constitutionally required, because \textit{Mapp} was a plurality opinion. Wilkey, supra note 66, at 551-52.

\textsuperscript{80} 414 U.S. 338 (1974).

\textsuperscript{81} \textit{Id.} at 348. See also Comment, supra note 65, at 742. (\textit{Calandra} Court held that rule was a judicial remedy, contrary to its \textit{Mapp} decision).

\textsuperscript{82} See notes 73-74 and accompanying text supra.
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premise is that the fourth amendment prescribes the exclusionary rule itself, then arguably it should be more difficult for a court to whittle away at the rule without violating the Constitution. However, if, as the Supreme Court has stated, the rule is merely one remedy among many, then it is possible that a court may choose not to apply the exclusionary rule at all, as long as there is another viable way to preserve fourth amendment rights. 83

Justifications for the Exclusionary Rule

Just as the Court has altered its stance on the constitutionally mandated/judicial remedy issue,84 so too has it shifted its position as to the justification for the exclusionary rule.85 Initially, the Court cited the need to preserve judicial integrity as justifying the exclusionary rule.86 In Weeks v. United States, the Court stated:

The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.87

One writer has suggested that there is ample basis in Supreme Court case law for adherence to the judicial integrity rationale.88 Despite this suggestion, it is fairly clear that the Court has shifted to adopt the deterrence theory as the main justification for the exclusionary rule.89 This shift can perhaps best be explained by the Court's recognition of both the criticism the rule has received regarding its high cost to society90 and the widespread drug problem.91 If

83. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (Bur- ger, C.J., dissenting) (stating that "[i]f an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule.").
84. See notes 78-81 and accompanying text supra...
85. Comment, supra note 65, at 736.
86. Weeks, 232 U.S. at 392.
87. Id.
88. Ervin, supra note 71, at 295 n.36. This commentator maintains that the exclusion of unconstitutionally procured evidence is not to protect the innocent from conviction, but is designed to protect the integrity of the judicial process, and quotes language from five Supreme Court cases in support of this view. Id. However, another view is that the exclusionary rule itself undermines the integrity of the judiciary: "It is the needless and counterproductive exclusion of evidence seized reasonably and in good faith that really taints a court." Crump, supra note 69, at 688.
89. See, e.g., Elkins v. United States, 364 U.S. 206, 217 (1960) (the rule's purpose is to deter).
90. Comment, supra note 65, at 739.
the Court is going to exclude probative evidence, especially when a serious crime is involved, a better justification than "protecting the judge's conscience" is required.92 Deterring law enforcement officials—those who are directly responsible for fourth amendment violations—is a justification that is easier to swallow than preservation of judicial integrity.93

Utilizing a deterrence theory has allowed the Court to refuse to apply the rule when its application would not further a deterrent purpose.94 For example, in Alderman v. United States,95 the Court declined to require exclusion of evidence obtained by illegal wiretapping which was used to convict co-conspirators.96 Since the petitioners had no protected privacy interests in the premises,97 excluding the conversations for their benefit would not deter police from violating fourth amendment rights of the premise's owner.98 The majority was concerned with extending the rule in this fashion because it would allow those defendants whose rights were not infringed to obtain the benefits of the rule without any deterrent impact.99 Thus, the Court now engages in a type of balancing process, i.e., will the educative benefits to police officers of the rule's application in a particular situation justify the cost to society from a potentially unjustified acquittal?100

In addition to the balancing process, the deterrence rationale has undergone even more fine tuning in recent years. The Supreme

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92. Comment, supra note 65, at 739.
93. Id.
96. Id. at 174-75 (recognizing that the rule's deterrent justification applies to those whose privacy rights are directly violated, but declining to extend the rule to those who have no ownership interest, and thus no expectations of privacy, in the premises searched). See also notes 101-105 and accompanying text infra.
97. 394 U.S. at 174.
98. Id. at 174-75. The Court held that only those whose fourth amendment rights were violated by the illegal conduct could reap the benefits of the exclusionary rule. Id. The majority rejected the petitioners' contention that though they had no privacy interests in the wiretapped business, the conversations should nevertheless be excluded because the evidence was damaging. Id.
99. Id.
100. Stewart, supra note 68, at 1390. See also Stone v. Powell, 428 U.S. 465 (1976). In Stone, the Court refused to allow federal habeus corpus relief to state prisoners who had a full opportunity to litigate fourth amendment claims at the state level. Id. at 494. The Court balanced the deterrent function against the costs of the proposed extension and concluded: "There is no reason to believe . . . that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeus corpus review of state convictions." Id. at 493 (footnote omitted).
Court in *United States v. Janis*\(^{101}\) spoke of the rule’s purpose as deterring *individual* law enforcement officers.\(^{102}\) *Janis* held that evidence unlawfully seized by a state law enforcement officer was admissible in a federal civil proceeding.\(^{103}\) The Court reiterated the deterrence rationale, stating that the individual officer was the focus of the exclusionary rule’s sanction.\(^{104}\) The majority concluded that, therefore, suppression in a federal setting would have, at best, only a marginal deterrent effect on the state officer.\(^{105}\)

As previously discussed, the Court’s characterization of the rule affects future applications and modifications.\(^{106}\) This is also true for the justification embraced by the Court. Deterrence rationale critics argue that the exclusionary rule does not produce any perceivable deterrent effect.\(^{107}\) Perhaps an even greater concern with the deterrence justification is that since the rule’s deterrent effect is questionable, courts will continue to reduce the rule’s scope unless they can send a *clear* message to the law enforcement sector as to exactly what conduct is prohibited by the fourth amendment.\(^{108}\)

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102. *Id.* at 448.
103. *Id.* at 459-60.
104. *Id.* at 448. The Court explained that since the evidence was being offered in a federal civil trial, “[i]t falls outside the offending [state] officer’s zone of primary interest,” and therefore its exclusion would have little deterrent effect. *Id.* at 458.
105. *Id.* at 453.
106. See notes 73-74, 82-83 and accompanying text *supra*.
108. White, *supra* note 71, at 1281. White proposes that due process should be the guiding force behind the rule, not deterrence. *Id.* at 1280-81. He fears that when deterrence rather than due process is used as a justification, courts are more likely to refuse to apply the rule when it would allow the defendant to go free, without providing a strong deterrent to the police. *Id.* at 1281-82.

This dissatisfaction with deterrence is the likely basis for suggestion of alternatives to the rule. 1 LaFave, *supra* note 74, at 30. Among such alternatives are disciplinary boards for law enforcement officers, Wilkey, *supra* note 66, at 537-38, and actions for damages, Stewart, *supra* note 68, at 1387. There are several advantages to the damage remedy alternative. *Id.* It allows the innocent as well as the guilty to obtain compensation for violations of their fourth amendment rights. *Id.* The remedy can be tailored to fit the seriousness of the violation and would specifically deter those individual officers who demonstrate a propensity for violating the fourth amendment. *Id.* However, since juries accord great weight to police testimony and since officers would rarely have adequate resources to fully satisfy a large money judgment, the advantages of this alternative are largely illusory. *Id.* at 1387-88.

Another suggestion is a “mini-trial” of the offending officer. Wilkey, *supra* note 66, at 538-39. This author proposes that the officer’s trial would be held after the trial of the individual defendant. *Id.* at 538. If the officer was found guilty, and the law enforcement agency failed to take sufficient disciplinary steps to deter the officer from such conduct in the future, the defendant’s conviction would be reversed. *Id.* at 539. However, given the already burdened court system, this alternative might be too cumbersome and time-consuming to have any practical effect. However, it is unlikely that
Application and Limits of the Exclusionary Rule

The fourth amendment provides that:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^9\)

In response to this mandate in the Bill of Rights, courts have adopted the exclusionary rule with its deterrence basis as a means of preserving fourth amendment guarantees.\(^10\) However, the rule is not without exceptions. There are three separate categories of exceptions to, or limits on, the exclusionary rule. The first line of cases may be more properly characterized as creating limits on the applicability of the rule because it concerns exceptions to the fourth amendment warrant requirement.\(^11\) The amendment generally requires the authority of a warrant before law enforcement officers search or seize.\(^12\) Therefore, a warrantless search is presumptively unreasonable unless an exception to the warrant requirement is available.\(^13\) It logically follows that if an exception applies, then the exclusionary rule does not because there is no fourth amendment violation.\(^14\)

The Supreme Court has adopted seven exceptions to the warrant requirement. In Coolidge v. New Hampshire,\(^15\) the Court stated that a police officer need not apply for a warrant to seize objects which are in plain view when the officer has a right to be where he is.\(^16\) Chimel v. California\(^17\) stands for the rule that officers do not need a warrant to search pursuant to a valid arrest, provided that the search is restricted to the area within the arrestee's immediate control.\(^18\)

\(^9\) U.S. Const. amend. IV.
\(^10\) See notes 89-105 and accompanying text supra.
\(^12\) Terry v. Ohio, 392 U.S. 1, 20 (1968).
\(^14\) Cf. SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218, 249 n.38 (1973) (applicability of consent exception precluded further inquiry into exclusionary rule issues).
\(^15\) 403 U.S. 443 (1971).
\(^16\) Id. at 465-66.
\(^18\) Id. at 763.
In *Warden v. Hayden*, the Supreme Court stated that a police officer who begins pursuit of a fleeing criminal in a public place need not apply for a warrant before following the suspect onto private premises. Another exception is found in *Schneckloth v. Bustamonte* where the Court reasoned that a warrant is not required if police obtain valid consent to a search. In *Schmerber v. California*, the court stated that a warrant is not required before entering premises when there is a threat of imminent destruction, of evidence. In *Michigan v. Tyler*, the Court held that officials need not obtain a warrant to remain on premises for a reasonable time to investigate the cause of a fire, once the fire is extinguished. Finally, in *Chambers v. Maroney*, the Court adopted the automobile exception, holding that given probable cause, officers may search an automobile.

In addition to the above exceptions, lower courts have developed an impoundment exception to the warrant requirement. This line of case law holds that if there is a danger of destruction of evidence, officers may remain in and impound a home from within after a suspect is arrested while awaiting a search warrant.

A second category of cases concerns situations in which the Court deems the exclusionary rule inapplicable because the deterrence rationale supporting the rule would not be served. *United States v. Calandra* held that the exclusionary rule does not apply to exclude illegally obtained evidence from consideration in grand jury proceedings. In *Stone v. Powell*, the Court refused to extend federal habeas corpus jurisdiction to search and seizure claims if a defendant had adequate opportunity to litigate these claims in state

119. 387 U.S. 294 (1967). This exception to the warrant requirement is more commonly referred to as the "hot pursuit" rule. See 2 LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 388 (1978).
120. Id. at 298-99.
121. Id. at 242-43.
122. Id. at 769.
123. Id. at 510.
126. Id. at 52.
128. Id. at 351-52 (stating: "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." Id. at 351.).
The Court has also stated that the exclusionary rule does not apply to use of evidence illegally seized in one sovereign and used in a civil proceeding in another sovereign.\(^\text{135}\)

Yet a third line of case law delineates an exclusionary rule exception on the premise that the illegal conduct did not materially assist officers in discovering the evidence sought to be excluded.\(^\text{136}\) The Supreme Court has thus far recognized three exceptions under this rationale: independent source,\(^\text{137}\) attenuation,\(^\text{138}\) and inevitable discovery.\(^\text{139}\)

_Silverthorne Lumber Co. v. United States_\(^\text{140}\) involved a contempt charge directed at the petitioners for failure to turn over original documents.\(^\text{141}\) Petitioners were arrested pursuant to a valid indictment, and officials conducted a warrantless search of the company’s office, seizing documents which were later used to frame a new indictment.\(^\text{142}\) The government made copies and returned the original documents but then served subpoenas requesting the originals after issuance of the second indictment.\(^\text{143}\) The petitioners refused to comply, and the government sought and obtained a contempt sanction requiring compliance with the subpoena.\(^\text{144}\) The Supreme Court reversed, holding that the government could not use the knowledge gained from the illegal search and seizure in this manner.\(^\text{145}\) In dictum, the Court laid the foundation for the independent source exception,\(^\text{146}\) maintaining that if knowledge of these facts was gained from a source independent of the prior illegality, the exclusionary rule would not apply.\(^\text{147}\) There is yet a broader way of looking at the independent source exception. Even though independent information is used to secure the search warrant, the evidence seized should

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134. _Id._ at 494. See also note 113 supra.
136. Cf. 3 _Lafave, Search and Seizure: A Treatise on the Fourth Amendment_ 612 (1978) (primary question in this scenario is whether evidence is “tainted” by the illegal conduct so that exclusion is called for).
137. Silverthorne Lumber Co. _v._ United States, 251 U.S. 385, 392 (1919).
140. 251 U.S. 385 (1919).
141. _Id._ at 390.
142. _Id._ at 390-91.
143. _Id._ at 391.
144. _Id._
145. _Id._ at 392.
146. _Id._ After holding that the evidence was illegally obtained and thus should not have been used in this case, the Court stated: “Of course, this does not mean that the _facts_ thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others.” _Id._ (emphasis added).
147. _Id._
nonetheless be excluded if law enforcement officers illegally obtain physical access to the evidence before the warrant is executed.\textsuperscript{148}

In \textit{Nardone v. United States},\textsuperscript{149} the government sought to prevent inquiry into the connection between its proof at trial and information obtained from illegal wiretaps.\textsuperscript{150} The majority remanded the case and directed the district court to allow the government to demonstrate that its proof had an origin independent of the illegally seized evidence.\textsuperscript{151} In so doing, the Court announced the attenuation doctrine.\textsuperscript{152} The majority reasoned that there could be situations in which one could argue that there was \textit{some} type of connection between the illegally obtained evidence and the government's proof.\textsuperscript{153} The majority concluded, however, that if this connection was so tenuous, i.e., if the connection between the proof and the illegally acquired evidence was so attenuated as to remove the taint, then exclusion was unwarranted.\textsuperscript{154}

In \textit{Nix v. Williams},\textsuperscript{155} the Supreme Court validated the inevitable discovery rule.\textsuperscript{156} In that case, the Court held that the exclusionary rule does not apply if the illegally acquired evidence would have been inevitably discovered by legal police work, even in the absence of a fourth amendment violation.\textsuperscript{157}

These three doctrines—\textit{independent source}, \textit{attenuation}, and \textit{inevitable discovery}—are justified under the deterrence rationale, the Court reasoning that law enforcement officials should not be sanctioned by application of the exclusionary rule when the rule would not serve the deterrent purpose of putting police in the same position they would have been in but for the misconduct.\textsuperscript{158} Excluding the "fruits" of illegal conduct meets this objective, but when the evidence would have been discovered inevitably or through an independent source, exclusion would instead put the police in a \textit{worse} position.

\footnotesize
\begin{itemize}
\item \textsuperscript{148} One author states that "[t]he 'independent source' exception was initiated only to protect the government where its source is developed through honest police efforts and not where its evidence is developed through a mixture of good and bad police work. . . . If the police know that their initial illegality can be covered up later by legal police work, what is there to stop them from committing the initial illegality?" Comment, \textit{supra} note 65, at 625. Therefore, even if police have an independent source to support a search warrant, that should not matter if they have had illegal physical access to the evidence during the warrant application.
\item \textsuperscript{149} 308 U.S. 338 (1939).
\item \textsuperscript{150} \textit{Id.} at 339.
\item \textsuperscript{151} \textit{Id.} at 341.
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} 104 S. Ct. 2501 (1984).
\item \textsuperscript{156} \textit{Id.} at 2507, 2511.
\item \textsuperscript{157} \textit{Id.} at 2509.
\item \textsuperscript{158} \textit{Nix v. Williams}, 104 S. Ct. 2501, 2509 (1984).
\end{itemize}
Thus, the rule should not be applied.\footnote{Id. at 2506-09.}

**Privacy and the Fourth Amendment**

Despite the fourth amendment's proscription against "unreasonable searches and seizures,"\footnote{U.S. Const. amend. IV.} relatively few Supreme Court decisions discuss the seizure aspect.\footnote{United States v. Jacobsen, 104 S. Ct. 1652, 1656 n.5 (1984).} When the Court has addressed this issue, it has held that searches and seizures involve different interests.\footnote{104 S. Ct. at 1656.} A search entails an invasion of a recognized expectation of privacy\footnote{Illinois v. Andreas, 103 S. Ct. 3319, 3323 (1983); Smith v. Maryland, 442 U.S. 735, 739-40 (1979); Terry v. Ohio, 392 U.S. 1, 9 (1968).} while a seizure constitutes a meaningful invasion of a person's possessory interests.\footnote{Jacobsen, 104 S. Ct. at 1656 n.5. The seizure concept is a logical extension of the concept of an arrest: "Meaningful interference, however brief, with an individual's freedom of movement." Id.}

The Court has never directly stated that the proscription against unreasonable seizures is entitled to less fourth amendment protection than the proscription against unreasonable searches. However, there is a line of case law which supports the contention that searches and seizures are not afforded equal constitutional protection. In this category of cases, the Court implicitly has preferred a temporary, warrantless seizure to a warrantless search.\footnote{See notes 170-193 and accompanying text infra.}

In *Taylor v. United States*,\footnote{286 U.S. 1 (1931).} prohibition agents noticed the odor of whiskey in Taylor's garage, broke in, and seized the liquor without a warrant.\footnote{Id. at 5.} The Supreme Court reversed Taylor's conviction, stating that the search and seizure were unreasonable.\footnote{Id. at 6.} The Court suggested that if the agents were concerned with the destruction of evidence, they could have kept watch over the garage.\footnote{Id.} However, even this proposed action could arguably be characterized as a seizure, especially if the agents would not allow the owners access to the garage.

*Chambers v. Maroney*\footnote{399 U.S. 42 (1970).} involved the warrantless seizure of an automobile.\footnote{Id. at 43-44.} Police arrested the defendants for robbery, took their car to headquarters, and discovered two guns which were used as evi-
dence to convict the defendants. The majority stated that while it might be less intrusive to seize the car while obtaining a warrant, a search warrant was not even required in this situation. The rationale for this different treatment of automobiles is their inherent mobility and the fact that a lesser privacy interest is involved.

In United States v. Van Leeuwen, the Court upheld a twenty-nine hour seizure of packages containing illegal coins. After Van Leeuwen dropped the packages off at the post office, a clerk notified authorities who discovered that one of the addresses was under investigation for trafficking in illegal coins. The packages were held for twenty-nine hours while officers investigated the addressee of the second package to determine whether probable cause existed for the issuance of a search warrant. On the next day, suspicions concerning this second package were confirmed, and a warrant was obtained, pursuant to which the packages were searched and then re-mailed.

Writing for the majority, Justice Douglas concluded that the detention was reasonable. He stated that the alternative, allowing the packages to continue in the mail until initial suspicions were confirmed, would have unreasonably tied the authorities' hands.

In United States v. Chadwick, the Court invalidated a warrantless search of respondents' footlocker after their arrest. In dictum, the Court explained that because the footlocker was already in custody, a seizure was sufficient to prevent destruction of evidence. Therefore, since there was no threat of destruction, the warrantless search was illegal. The Court adopted the same analysis in Arkansas v. Sanders, where police seized luggage from the defendant's

172. Id. at 44-45.
173. Id. at 51-52. The Court concluded that there was "[n]o difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the fourth amendment." Id. at 52. Yet, the Court also advised that this reasoning might not apply to a home, which involves a greater expectation of privacy than a car. Id. at 50-52.
176. Id. at 250, 253.
177. Id. at 249-50.
178. Id. at 252-53.
179. Id. at 253.
180. Id. The Court was careful to specifically limit its holding to the facts of the case. Id.
181. Id.
183. Id. at 13.
184. Id.
185. Id.
car and subsequently searched it without a warrant.  

The Court again confronted the luggage detention issue in United States v. Place.  

Drug Enforcement Administration agents became suspicious of Place as he waited in a ticket line at the Miami airport.  

After investigation, the agents allowed Place to board but alerted agents at his destination.  

When Place arrived in New York, agents had trained narcotics dogs to sniff his bags, which were detained over the weekend until officials obtained a search warrant on Monday.  

The Court held that it was constitutional to detain luggage for a short period and subject it to a sniff test, provided there was reasonable suspicion to believe it contained contraband.  

However, the Court concluded that the length of this detention was unreasonable.

Read together, these cases indicate a preference for a warrantless seizure over a warrantless search because the former may be justified as merely preventing the destruction of evidence without violating other fourth amendment restraints. However, the above cases did not involve seizures of homes. Therefore, considering the Court's decisions in Vale v. Louisiana, Mincey v. Arizona, and Payton v. New York, it is doubtful that this preference should extend to seizures of homes. These cases emphasize the Court's concern with the privacy of the home. In Vale, officers arrived at defendant's residence, armed with arrest warrants. Vale emerged from his house and conducted what appeared to be a narcotics transaction with a person parked at the curb. The officers arrested Vale and searched his entire house without a warrant. The Court held that as there were no exigent circumstances, the fruits of the illegal search should be suppressed.

In Mincey, officers conducted a warrantless four-day search of petitioner's apartment. The Supreme Court disagreed with the
Arizona Supreme Court's recognition of the murder scene exception to the warrant requirement. The state argued that since the initial entry was illegal, the further illegality of the search was "constitutionally irrelevant." The Court rejected this argument, stating that while Mincey's arrest meant that he had a lower privacy right in his person, the fact that he was in custody did not mean he had a lessened privacy interest in his apartment.

In Payton, petitioner challenged a New York statute authorizing warrantless entries into private residences to make routine felony arrests. The Court's decision reiterated that unless exigent circumstances are present, warrantless entries into the home are unconstitutional.

In the seizure of property cases discussed previously, the Court's major concern appears to be the "mobility" of the item seized. Therefore, while the Court may prefer warrantless seizures of mobile property, this case law should not be extended to support a warrantless seizure of a home from the inside, in light of the Court's concern with the sanctity of the home.

**ANALYSIS**

The *Segura* decision indicated that the time has come for acceptance of an "impoundment exception" to the warrant requirement. Lower court decisions have recognized that officers may need to remain in a home to prevent the destruction of evidence when the arrestee or other occupants are present. However, *Segura* was a demonstrably poor vehicle by which to adopt such an exception. The Court has consistently maintained that absent exigent circumstances,

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202. Id. at 391.
203. Id.
204. Id.
205. Payton, 445 U.S. at 574.
206. 445 U.S. at 598 (stating: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").
207. See notes 170-193 and accompanying text supra.
208. See, e.g., United States v. Place, 103 S. Ct. 2637, 2643 (1983) (inherently transient nature of drug couriers may justify brief detention of luggage); Arkansas v. Sanders, 442 U.S. 753, 763 (1979) (closed suitcase in trunk of car "may be as mobile as the vehicle in which it rides."); United States v. Chadwick, 433 U.S. 1, 13 (1977) (mobility of footlocker justified its seizure and detention); Chambers v. Maroney, 399 U.S. 42, 48 (1970) (vehicle can be moved quickly from the locality) (citing United States v. Carroll, 267 U.S. 132, 153 (1925); United States v. Van Leeuwen, 397 U.S. 249, 253 (1970) (sanctioning detention of packages rather than allowing them to enter the mails and having to locate them en route).
209. See LAFAVE, supra note 136, at 450.
210. See note 227 infra.
The facts of Segura establish that there were no exigent circumstances.\textsuperscript{213} Also, in applying the independent source exception to the exclusionary rule,\textsuperscript{214} the Segura majority has confirmed the fears of those who argue that the exclusionary rule is constitutionally mandated.\textsuperscript{215} If the rule is viewed as a judicial remedy, it appears easier for the Court to restrict its application.\textsuperscript{216}

\textit{Segura Creates an Unwarranted Constitutional Difference Between Search and Seizure of a Home}

It is clear from prior Supreme Court holdings that a seizure did occur in Segura.\textsuperscript{217} However, the majority did everything but call it a seizure, characterizing the agents' conduct as "preserv[ing] the status quo."\textsuperscript{218} Perhaps this characterization is of little consequence, as the Court also stated that assuming that a seizure occurred, it was nevertheless reasonable.\textsuperscript{219}

Whenever law enforcement officers significantly interfere with a person's possessory interest in property, a seizure occurs.\textsuperscript{220} It is arguable, however, that because the petitioners in Segura were in custody, the seizure did not constitute a meaningful invasion of their possessory interests.\textsuperscript{221} However, Justice Stevens noted that Mincey \textit{v. Arizona}\textsuperscript{222} and Chimel \textit{v. California}\textsuperscript{223} preclude this result.\textsuperscript{224} These cases emphasize that regardless of whether a person is in cus-

\textsuperscript{211} See notes 194-204 and accompanying text \textit{supra}.
\textsuperscript{212} Segura, 103 S. Ct. at 3385.
\textsuperscript{213} See note 49 and accompanying text \textit{supra}.
\textsuperscript{214} See notes 71-74 and accompanying text \textit{supra}.
\textsuperscript{215} Id.
\textsuperscript{216} See note 164 and accompanying text \textit{supra}. The police action in Segura in impounding the apartment for 19 hours clearly fits within this definition.
\textsuperscript{217} Id. at 3382. See also id. at 3396 n.12 (Stevens, J., dissenting) (stating: "The Chief Justice's parsimonious approach to Fourth Amendment rights is vividly illustrated by the fact that, as though he were preparing an adversary's brief, he is unwilling even to acknowledge explicitly that the apartment and its contents were seized, but only 'assumes' that was the case.").
\textsuperscript{218} Id. at 3390.
\textsuperscript{219} See note 164 and accompanying text \textit{supra}.
\textsuperscript{220} Segura, 104 S. Ct. at 3390.
\textsuperscript{221} 437 U.S. 385 (1978). Here, the Court invalidated the Arizona Supreme Court's murder scene exception to the warrant requirement. \textit{Id.} at 395.
\textsuperscript{222} 395 U.S. 752 (1969). In this case, police arrested petitioner in his own home pursuant to a valid warrant and conducted a warrantless search of the entire house. \textit{Id.} at 753-54. The Supreme Court rejected the state's argument that the search was incident to the arrest. \textit{Id.} at 762-64.
\textsuperscript{223} Segura, 104 S. Ct. at 3397 (Stevens, J., dissenting). See also Mincey, \textit{supra} note 221, at 391, where the Court stated: "It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person . . . [i]t is quite another to argue that he also has a lessened right of privacy in his entire house." (citations omitted.)
today, he still retains a privacy interest in his home which may not be violated absent a warrant. The Court has viewed the home as the most "clearly defined" zone of privacy, and therefore, privacy interests are implicated when police enter and remain without a warrant regardless of whether the owner is present.

Chief Justice Burger emphasized in Segura that a seizure only affects a person's possessory interests, concluding that "the heightened protection we accord privacy interests is simply not implicated where a seizure of premises, not a search, is at issue." Yet, a recent Supreme Court decision reiterating the sanctity of the home demonstrates that the differing interests affected by searches and seizures of a home should be afforded equal constitutional protection. The home has always enjoyed a heightened privacy status, more so than a car, luggage, or package. When officials seize the latter items, they do not necessarily gain access to their contents. However, when a home is seized from the inside, the protective shell of the structure is broken and the contents of the home are laid bare. Therefore, even though the Court has traditionally held that seizures are entitled to less fourth amendment protection than searches, this bright line becomes blurred when police seize a home. This type of seizure involves an extensive invasion of privacy and should be afforded the same fourth amendment protection as a search.

225. Segura, 104 S. Ct. at 3389 (emphasis in original).
226. See Payton v. New York, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). See also Katz v. United States, 389 U.S. 347, 350 (1967) (fourth amendment protects property as well as privacy interests). Cf. Weisberger, supra note 67, at 269 (trend suggests that Court now affords more protection to homes and repositories of personal effects); Note, Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule, 68 CORNELL L. REV. 105, 141 (1982) (recent cases suggest Court feels real property is entitled to greater protection).
227. See note 226 supra. But cf. Grano, supra note 68, at 648. The author contends that the violation of the possessory interest implicated in a warrantless seizure can be remedied by returning the item seized. Id. However, once the privacy interest is invaded by an unlawful search, it cannot be restored. Id. As further support for the argument that seizures do not require as great a protection as searches, the author states that nothing indicates that the Framers viewed warrantless seizures themselves as evil. Id. at 647.
228. See notes 196-208 and accompanying text supra.
229. In Segura, the government conceded at oral argument that the agents' action in remaining in the home was a "continuing search" because their presence there allowed them to view personal items throughout the apartment. Segura, 104 S. Ct. at 3395 n.9 (Stevens, J., dissenting).
230. See notes 170-193 and accompanying text supra.
Segura and the Impoundment Exception

Many lower courts have held that warrantless impounding of a home from within is permissible. In each of these cases, however, either the arrestee himself was present or other occupants were present. Thus, an extremely high possibility existed that the evidence would be destroyed if the officers did not remain until a search warrant arrived.

The facts of Segura are markedly different from the above cases. In Segura, all of the occupants were removed to DEA headquarters so that no realistic threat of evidence destruction existed. It is plausible that one of them could have phoned confederates, instructing them to go to the apartment and remove or destroy the evidence. This contention fails, however, because the agents could monitor any calls petitioners made while in custody. If the agents truly were concerned, they could have placed a guard outside the door of the apartment or kept the hallway under surveillance. In Segura, the threat of evidence destruction was virtually non-existent.

Several commentators also have discussed the seizure of a home from within while police await a search warrant. These authors advance two justifications for impoundment: a threatened destruction of evidence coupled with the time involved in procuring a search warrant. The loss of evidence justification was not present
in *Segura*.239 Neither would the time involved in obtaining a search warrant have been so prohibitive as to justify the warrantless entry and impoundment.240

Segura and Colon had been under surveillance for more than two weeks.241 On the afternoon of the day of the seizure, Task Force Agents had enough information to apply for a search warrant.242 The government cited administrative delay in obtaining the search warrant as justification for the lengthy impoundment.243 However, there was no reason presented why the agents did not apply for a telephone warrant under the provisions of Federal Rule of Criminal Procedure 41(c)(2).244 Lack of a federal magistrate to hear the warrant application is an excuse without merit. According to Federal Rule of Criminal Procedure 41(a), a state judge within the district may issue a phone warrant.245 On the day of Segura's arrest, there were 447 state judges in the Eastern District of New York.246

Even those authors who argue the validity of the impoundment alternative247 would not condone securing a home from within when none of the dwelling's occupants were present.248 Finally, while lower court cases support impoundment,249 no case has involved a seizure of a home for nineteen hours, as in Segura. This may be because the Supreme Court has clearly stated that a seizure may be-

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239. See notes 227-230 and accompanying text *supra*.
242. Id. at 2-3. The agents arrested Rivudalla at 5:30 p.m. Id. at 2. Law enforcement officials illegally entered and seized Segura's apartment, five hours after obtaining the information they ultimately used to secure the search warrant. Id. at 42.
243. Segura, 103 S. Ct. at 3397 n.17 (Stevens, J., dissenting). There are two components to this "administrative delay" argument. First, an Assistant United States Attorney advised the members of the Task Force that they could go and arrest Segura, but that they would not be able to get a search warrant until the next morning, as the Magistrate "could not be found." Brief for Petitioners at 3, Segura v. United States, 103 S. Ct. 3380 (1984). Second, the government argued that even though a magistrate was available in the morning, the warrant was not procured until 6:00 p.m. because most of the day was spent processing the arrests. Brief for Respondent at 5 n.4, Segura v. United States, 103 S. Ct. 3380 (1984).
245. FED. R. CRIM. P. 41(a): Authority to Issue Warrant—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.
247. See note 231 *supra*.
248. See, e.g., LAFAVE, *supra* note 136, at 452. ("It does seem clear, however, that if the only risk is loss of evidence by someone thereafter entering the premises, then the police may not take the more intrusive step of making entry into the premises and guarding it from within while a search warrant is obtained.") (emphasis added).
249. See note 227 *supra*. 
come unreasonable because of its duration. The nonexistent threat of evidence loss and the relative ease with which a search warrant could have been obtained point to the conclusion that impounding Segura's apartment was unwarranted.

Application of the Independent Source Exception

The Segura Court applied the independent source exception to the exclusionary rule, concluding that the information used to obtain the search warrant came from a source which was independent of the illegal entry. However, since the impoundment of the apartment was an unreasonable seizure and since the fourth amendment protects against both unreasonable searches and seizures, there is a direct connection between the illegal entry, the seizure, and the evidence discovered during the search pursuant to the warrant. Thus it was irrelevant that the information used in applying for the search warrant was independent of the illegal entry and seizure because the agents' access to the evidence was the direct result of unconstitutional conduct. Any other result would mean that a search warrant could be used to "legalize" illegal police methods.

In applying the independent source exception, the Segura Court ignored the main justification underlying the exclusionary rule: deterrence of illegal police conduct. One commentator has criticized this exception, stating that it works contrary to deterrence: "If the police know that their initial illegality can be covered up later by legal police work, what is there to stop them from committing the initial illegality?" The holding in Segura may encourage police to "seize now, think later," in the hope that during the interim they will find an "independent source" to justify a warrant, especially if they are allowed to remain in the home for nineteen hours.

Another flaw in the majority's independent source reasoning is

251. See notes 241-248 and accompanying text supra (discussion of independent source exception).
252. Segura, 104 S. Ct. at 3391.
253. See notes 246-247 and accompanying text supra.
254. See United States v. Allard, 634 F.2d 1182 (9th Cir. 1980). In this case, agents illegally entered defendant's hotel room and remained there, awaiting issuance of a search warrant. Id. at 1184. The Allard court concluded that the independent source exception was inapplicable because the valid search warrant did not remove the taint created by the illegal entry and seizure. Id. at 1187.
255. Segura, 104 S. Ct. at 3400 (Stevens, J., dissenting).
256. See notes 89-93 and accompanying text supra.
258. Id.
259. United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980).
that it does not square with the Court’s stated justification for the impoundment. The district court concluded that the evidence seized pursuant to the warrant must be suppressed as “fruit” of the illegal entry and impoundment because were it not for the presence of the police, the evidence might have been destroyed and thus would not have been there to be seized. A majority of the Supreme Court disagreed with the above argument, stating that this would give defendants a “constitutional right to destroy evidence.” The majority reasoned that the possibility that Colon would have destroyed the evidence was “purely speculative” and that, therefore, the items seized pursuant to the valid search warrant were admissible.

Yet, this analysis is inconsistent with the Court’s conclusion that the seizure was reasonable. If the danger of the destruction of evidence was so “speculative” that the independent source exception would apply, then on what justification can the Court base its impoundment argument?

Since the justification for impoundment is the high likelihood that evidence will be destroyed, how can the Court reconcile this in its independent source exception analysis? Thus, not only did Segura contain a poor set of facts to justify impoundment, so to is the case inappropriate to apply the independent source exception, especially when coupled with the asserted justification for the seizure.

CONCLUSION

Segura’s Impact

While Segura was a poor vehicle for the Court for adopting an impoundment exception and in applying the independent source exception, the decision will nonetheless have a practical effect on several areas in criminal procedure. The Court has consistently stated that a warrantless entry into a home is invalid absent exigent circumstances. Yet in Segura, where there were no exigent circumstances, the Court adopted a rule allowing police to “seize” a home from the inside without a warrant as long as probable cause exists. However, in order to impound the home from the inside, the police

260. Segura, 104 S. Ct. at 3384-85. The district court specifically found that it was highly probable that had the agents not illegally entered and remained, Colon would have been alerted that something was amiss by Segura’s failure to return, and would have removed or destroyed the evidence. Id. at 3400-01 (Stevens, J., dissenting).
261. Segura, 104 S. Ct. at 3391 n.10.
262. Id. at 3392.
263. Id. at 3392.
264. Id. at 3388.
265. See notes 196-201 and accompanying text supra.
266. See notes 42-47 and accompanying text supra.
have to effectuate a warrantless entry first. This may result in more seizures without probable cause, thus frustrating the purpose of the warrant requirement.

Not only will Segura impact on the warrant requirement, it will also influence a law enforcement officer's decision to apply for a telephone warrant. Federal Rule of Criminal Procedure 41\textsuperscript{267} may well be rendered useless, for if warrantless seizures to preserve evidence are allowed, officers will be more likely to seize first and apply for a warrant later.\textsuperscript{268} However, the Segura opinion provides no guidance in the situation where the magistrate disagrees with the officer's probable cause determination and refuses to issue the search warrant.

In that case, a person's home will have been entered without a warrant and his privacy violated while the officers apply for the search warrant for no legally justifiable reason. Also, the majority's use of the independent source exception will allow officers to treat the warrant requirement as an ex post facto formality\textsuperscript{269} in permitting officers to seize a home and attempt to base a search warrant on an "independent" source they may not have had before the illegal seizure. Finally, there is no guarantee that officers will not actually search the home while awaiting the warrant, especially if they are allowed to remain in the dwelling for extended periods of time. Situations may arise in which law enforcement officers decide to "save time" and actually search the home awaiting judicial approval. At this point, the search warrant will have become a "rubber stamp" for illegal police conduct.

Mary C. Luxa—'85

\textsuperscript{267} See note 229 supra.
\textsuperscript{268} See notes 253-254 and accompanying text supra.
\textsuperscript{269} Note, supra note 236, at 1472.