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# The Securing of the Premises Exception: A Search for the Proper Balance

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# RECENT DEVELOPMENTS

## The Securing of the Premises Exception: A Search for the Proper Balance



### I. INTRODUCTION

The United States Supreme Court has long recognized that the fourth amendment warrant requirement[1] is first and foremost a protection against unauthorized entry into a person's home.[2] As

1. The fourth amendment provides:

> 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.

U.S. CONST. amend. IV.

2. In 1925 the Court first held that the fourth amendment requires a warrant for the search of a home. Agnello v. United States, 269 U.S. 20, 32 (1925). Before *Agnello*, most lower courts had assumed the same. *Id.* In *Agnello* the Supreme Court stressed the signifi-

the Court continually has repeated, the "physical entry of the home is the chief evil against which the wording of the fourth amendment is directed."[3] The Court, therefore, has held that search or seizure inside a home without a warrant is "presumptively unreasonable."[4] The Court has dileneated carefully a few exceptions to the warrant requirement, but places a heavy burden on the police to show exigent circumstances sufficient to fall within one of these exceptions:[5] "hot pursuit" of a fleeing felon,[6] the process of destruction of evidence,[7] or an ongoing fire.[8]

Prior to 1984 the Supreme Court construed these exceptions narrowly to preserve the sanctity of the home. In the recent case *Segura v. United States*,[9] however, two Justices endorsed a new exception to the warrant requirement. Justices Burger and O'Connor found that an eighteen to twenty hour warrantless occupation of a private dwelling to maintain the status quo in anticipa-

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cance of the warrant requirement: "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." *Id.* In Welsh v. Wisconsin, 104 S. Ct. 2091 (1984), the Court recently reiterated that the warrant requirement is the principal protection against government officials' unreasonable intrusions into the home. *Id.* at 2097. *But see* California v. Carney, 105 S. Ct. 2066 (1985) (stating that police do not need warrant to search a mobile home because mobile homes are regulated vehicles that may be moved and those characteristics reduce owners' expectations of privacy).

In Johnson v. United States, 333 U.S. 10 (1948), the Court set forth the reasons the warrant requirement is necessary to protect the privacy interest of individuals in the home:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

*Id.* at 13-14; *see also* Steagald v. United States, 451 U.S. 204, 212 (1981) ("The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.").

3. *See, e.g.*, Welsh v. Wisconsin, 104 S. Ct. 2091, 2097 (1984); Payton v. New York, 445 U.S. 573, 585-86 (1980); United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

4. Payton v. New York, 445 U.S. 573, 586 (1980); *see also* Coolidge v. New Hampsbire, 403 U.S. 443, 474 (1971).

5. Welsh v. Wisconsin, 104 S. Ct. 2091, 2097 (1984).

6. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42-43 (1976); Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

7. *See* Vale v. Louisiana, 399 U.S. 30, 35 (1970).

8. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978).

9. 104 S. Ct. 3380 (1984).

tion of a search warrant does not require exigent circumstances to constitute a reasonable fourth amendment seizure.[10]

This Recent Development argues that although an opinion endorsed by only two justices is not binding precedent, this portion of *Segura* represents an undesirable departure from the strict protections traditionally afforded a person's privacy interest in the home and leaves lower courts confused about the constitutional limitations on seizures in the home. Part II examines prior Supreme Court opinions that have defined the parameters of permissible warrantless searches and seizures. Part III explores the circuit court opinions that have developed a "securing of the premises" exception. Part IV describes Chief Justice Burger's analysis in *Segura*. Part V argues that the Chief Justice's holding is not supported by prior case law and unnecessarily erodes the privacy interest in the home. This Recent Development concludes by urging the Court to adopt an analytical framework, based on the circuit courts' "securing of the premises" exception, that more carefully balances the public need for law enforcement against the privacy interest in the home.

## II. Supreme Court Opinions Defining Reasonable Searches and Seizures

In 1969 the Supreme Court handed down the landmark decision *Chimel v. California*,[11] which significantly narrowed the scope of permissible warrantless searches and seizures incident to an arrest on the private premises. Prior to *Chimel* lower courts generally had interpreted two Supreme Court opinions, *Harris v. United States*[12] and *United States v. Rabinowitz*,[13] as allowing a thorough search of the private premises incident to a lawful arrest on the

10. *Id.* at 3386-90. This finding does not constitute the holding of the opinion. The holding appeared in Part V, in which the majority relied on an independent source analysis to admit the evidence found pursuant to the subsequently issued valid search warrant. The independent source doctrine allows the admission of evidence, notwithstanding a prior illegality, when the link between the illegality and that evidence is sufficiently attenuated to dissipate the taint. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The majority concluded that the illegal entry into petitioners' apartment did not contribute in any way to the discovery of the evidence seized under the warrant; therefore, the exclusionary rule did not demand the suppression of the postwarrant evidence. 104 S. Ct. at 3392.

11. 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969).

12. 331 U.S. 145 (1947), *overruled in* Chimel v. California, 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969).

13. 339 U.S. 56 (1950), *overruled in* Chimel v. California, 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969).

premises.[14] The lower court in *Chimel* had relied on the *Harris-Rabinowitz* rule to allow the search of the arrestee's entire three bedroom house, including the attic, the garage, and a small workshop.[15] The Supreme Court found that this extensive invasion of the arrestee's right to privacy in his home required the interposition of a neutral magistrate.[16] The Court thus explicitly overruled *Harris* and *Rabinowitz*[17] and held that police can search only the arrestee's person and the area "within his immediate control."[18] The Court offered two principal justifications for allowing this limited search: to prevent the arrestee from grabbing a nearby weapon, which would threaten the safety of the arresting officers, and to prevent the destruction of any evidence within the reach of the arrestee.[19] By narrowing the scope of permissible searches incident to arrest from a search of the entire premises to a search of the arrestee and the area within his control, *Chimel* recognized that certain exigencies—the threatened destruction of evidence and the danger of nearby weapons—justified limited intrusions on a person's privacy interest in the home. The obvious next question became whether any other exigencies would justify further intrusions. A year later, in *Vale v. Louisiana*,[20] the Court gave a partial answer by negative implication.

The *Vale* Court recognized that one exigency which would justify a warrantless search exists when evidence is in the process of

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14. In *Harris*, 331 U.S. 145 (1947), police had a warrant for defendant's arrest based upon his alleged involvement in the cashing and interstate transportation of a forged check. Police arrested defendant in the living room of his four bedroom apartment. Police conducted a warrantless search of his entire apartment looking for two cancelled checks. This search uncovered evidence of totally unrelated crimes, and police used this evidence to convict defendant. The *Harris* majority found the search permissible because it was "incident to arrest." *Id.* at 151.

In *Rabinowitz*, 339 U.S. 56 (1950), police obtained a warrant for defendant's arrest based on an allegation that he had been dealing in stamps bearing forged overprints. After arresting defendant at his one-room business office, police searched his desk, safe, and file cabinets. Police seized 573 stamps during the hour and a half search. *Id.* at 59. The Court upheld "[t]he right . . . to search the place where the arrest is made in order to find and seize things connected with the crime." *Id.* at 61 (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)).

For lower court cases relying on the *Harris-Rabinowitz* rule to justify a search of the entire premises incident to arrest, see Townsend v. United States, 253 F.2d 461 (5th Cir. 1958); Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958).

15. *Chimel*, 95 U.S. at 760.

16. *See id.* at 761-62.

17. *Id.* at 768.

18. *Id.* at 763.

19. *See id.*

20. 399 U.S. 30 (1970).

being destroyed. In *Vale* police observing defendant's house saw what they had probable cause to believe was a narcotics transaction. The police officers arrested defendant in his front yard, entered his house, and made a cursory sweep of the premises. A few minutes later, when defendant's mother and brother returned, police conducted a warrantless search of the entire premises, presumably because they believed that the mother and brother would destroy evidence before police could return with a search warrant.[21] The Supreme Court rejected the lower court's reasoning that the easy destructibility of narcotics justified the warrantless search and held that the search was impermissible.[22] The Court, however, noted that if the goods had been in the *process of destruction*, this exigency would have justified the search.[23] The *Vale* opinion thus implies that evidence in the *process of destruction* justifies the immediate search of a premises, whereas evidence merely threatened with the possibility of destruction cannot justify this significant intrusion. *Vale*, however, left undecided whether police may secure the premises to prevent the destruction of evidence while police obtain a search warrant.[24]

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21. *Id.* at 32-33.

22. *Id.* at 34.

23. *Id.* at 35 (emphasis added). The Court concluded with the unexplained suggestion that the officers should have obtained a search warrant prior to arresting defendant. *Id.* Justice Black, dissenting, strongly criticized the majority's reasoning. Justice Black first pointed out that police had probable cause to search defendant's house for drugs only upon observing the alleged drug transaction outside defendant's house. Police officers, therefore, could not have obtained a search warrant prior to their arrival at defendant's house. *Id.* at 40 (Black, J., dissenting). Black also contended that once defendant's mother and brother arrived, police officers had sufficient exigencies to search the premises based on the *threatened* destruction of evidence. *Id.* at 38-39 (Black, J., dissenting) (emphasis in original).

24. Several commentators have addressed this aspect of the *Vale* opinion. Professor LaFave criticized the Court for its failure to clarify this issue by delineating the reasons for not allowing the subsequent search. *See* 2 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 6.5, at 434-35 (1978). Two other commentators, Professor Kelder and Mr. Statman, would limit *Vale's* "process of destruction" standard to the issue of the validity of the warrantless search. They read *Vale* as allowing police to secure the premises, but not to conduct a search to prevent the destruction of evidence before a warrant could be obtained. *See* Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously with an Arrest on or near Private Premises*, 30 SYRACUSE L. REV. 973, 997-99 (1979). These two commentators rely in part on this analysis of *Vale* to support their proposition that the Court has delineated a constitutional preference for securing the premises to prevent the destruction of evidence. *See id.* at 999-1003; *see also* Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1468 (1971) (asserting that *Vale* apparently means that no exception to the warrant requirement justifies a warrantless search when evidence is merely threatened with destruction and not yet in the process of destruction).

Other than *Vale*, the Supreme Court has left only a scattering of dicta to guide the police and lower courts in determining whether the process or threat of destroying evidence justifies searches or seizures in the home beyond the area of "control" defined in *Chimel*. In three older cases, *Johnson v. United States*,[25] *United States v. Jeffers*,[26] and *Chapman v. United States*,[27] the Supreme Court held entries into and searches of private premises without a warrant unconstitutional.[28] The Court found no exigencies justifying the warrantless searches in these cases, specifically noting that evidence was not threatened with removal or destruction.[29] Some lower courts have relied upon this dicta to hold that the threatened destruction of evidence is one exigency justifying an immediate search of the premises.[30]

More recently, in *Mincey v. Arizona*,[31] the Supreme Court again provided some dicta defining the limits of warrantless

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25. 333 U.S. 10 (1948).

26. 342 U.S. 48 (1951).

27. 365 U.S. 610 (1961).

28. In Johnson v. United States, 333 U.S. 10 (1948), a confidential informer told police officers that unidentified people were smoking opium at a certain hotel. Police investigating the tip at the hotel smelled narcotics in the hallway. After locating the source of the smell, police knocked on the door, entered the room, and arrested defendant. They then conducted a warrantless search of the room and found opium.

In United States v. Jeffers, 342 U.S. 48 (1951), a narcotics agent and a hotel detective, knowing defendant was absent, used a hotel passkey to enter defendant's room. Police then conducted a detailed, warrantless search of the room and seized narcotics found inside a pasteboard box.

In Chapman v. United States, 365 U.S. 610 (1961), defendant's landlord summoned police to defendant's residence after the landlord detected the odor of whiskey mash. Police entered the premises without a warrant in defendant's absence and arrested him when he returned. Federal officials then arrived and, without a warrant, took custody of defendant, seized samples of the mash, and destroyed the still.

29. *Chapman*, 365 U.S. at 615 ("No evidence or contraband was threatened with removal or destruction . . . .") (quoting Johnson v. United States, 333 U.S. 10, 15 (1948)); *Jeffers*, 342 U.S. at 52 ("There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized.").

30. *See, e.g.*, United States v. Curran, 498 F.2d 30 (9th Cir. 1974); United States v. Rubin, 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973). These courts, however, probably interpret the Supreme Court's dicta too broadly. Each of these cases concerned both an illegal entry and an illegal search. The Supreme Court did not clearly indicate that the threatened destruction of evidence would justify the warrantless search. Indeed, commentators have argued that the Court meant only that the threatened destruction of evidence justifies a warrantless entry but not a warrantless search. *See* Kelder & Statman, *supra* note 24, at 993-96. *See generally* Comment, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards*, 70 J. CRIM L. & CRIMINOLOGY 255 (1979).

31. 437 U.S. 385 (1978).

searches and seizures of private premises. *Mincey* concerned the constitutionality of a four day warrantless search of defendant's apartment after a shoot-out that resulted in the death of one police officer. In refusing to find this search reasonable, the Supreme Court rejected the government's argument that defendant had a lessened right to privacy in his home because he shot an officer on the premises or because he was under arrest and was not present during the search.[32] The Court, however, noted that a limited warrantless search of the area to check for victims or to find the killer would have been permissible.[33] The *Mincey* opinion concluded that a complete search would have been justified only upon proof that "evidence would be lost, destroyed, or removed during the time required to obtain a search warrant."[34] The Court added that the presence of a police guard at the apartment minimized any danger that evidence would be lost before police could obtain a search warrant.[35] *Mincey* thus suggests that the proper procedure for preventing the destruction of evidence is not to search the premises but to secure the premises while police obtain a search warrant.[36]

Prior to *Segura v. United States* the Supreme Court did not decide any additional cases that clarify what exigencies justify the securing of the premises. The Court has, however, addressed the issue of permissible seizures in the contexts of cars,[37] footlockers,[38]

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32. *Id.* at 391.

33. *Id.* at 392.

34. *Id.* at 394.

35. *Id.*

36. *See* Kelder & Statman, *supra* note 24, at 1002. The New York Court of Appeals has interpreted *Mincey* as allowing the securing of the premises from the inside to protect the scene of a crime even absent a showing that evidence was threatened with destruction. People v. Arnau, 58 N.Y.2d 27, 36-37, 444 N.E.2d 13, 18-19, 457 N.Y.S.2d 763, 768-69 (1982); *see* Note, *A Novel Approach To Warrantless Seizures of the Home: Inspirational or Aberrational Law?*, 41 WASH. & LEE L. REV. 231, 246-48 (1984).

In another search and seizure case, Rawlings v. Kentucky, 448 U.S. 98 (1980), police officers entered the private premises with an arrest warrant, but found arrestee was not present. The officers then smelled marijuana and saw marijuana seeds on the table. The police secured the premises and told the occupants that they could not leave unless they consented to a bodily search. The Supreme Court did not hold that this detention was illegal, but assumed it was illegal for the purpose of determining whether a subsequent oral confession was fruit of the illegal detention. Because the Court held the admission admissible, the Court did not address the legitimacy of the seizure. Apparently, the lower court had not squarely addressed the issue of whether the seizure was legal. *Id.* at 106.

37. *See* Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

38. *See* United States v. Chadwick, 433 U.S. 1 (1977).

and luggage.[39] In *Carroll v. United States*[40] the Supreme Court held that the inherent mobility of a car provides sufficient exigencies to conduct an immediate warrantless search if police have probable cause.[41] In *Chambers v. Maroney*[42] the Court further asserted that the probable cause and inherent mobility of a car which would justify a warrantless search at a roadside stop continue to justify a warrantless search of a car at the stationhouse after its impoundment. The *Chambers* case raised the issue of whether a search or a seizure constitutes a greater intrusion of privacy.[43] The Court, however, could not determine which intrusion was greater in the case of a car and allowed the search at the stationhouse because the search was no more intrusive than the impoundment that had already occurred.[44] The Court, however, noted that the same analysis "may not follow where there is unforeseeable cause to search a house."[45]

In *United States v. Chadwick*[46] the Court again faced the issue of whether a warrantless search or a warrantless seizure constitutes the greater intrusion. In this case the Court allowed the seizure of a footlocker,[47] but held the immediate warrantless search unconstitutional. The Court distinguished the case from *Chambers* by noting that the principal privacy interest in a footlocker is not in its exterior, but in its contents. Thus, although the impoundment constituted a "substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legiti-

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39. *See* United States v. Place, 462 U.S. 696 (1983); Arkansas v. Sanders, 442 U.S. 753 (1979). *See generally* Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982).

40. 267 U.S. 132 (1925).

41. *Id.* The Supreme Court recently held that the mobility of a mobile home, combined with the owner's lower expectation of privacy because of the regulation of mobile homes, justified a warrantless search when the police had probable cause to believe the mobile home contained contraband. *See* California v. Carney, 105 S. Ct. 2066 (1985).

42. 399 U.S. 42 (1970).

43. *Id.* at 51-52 (stating that whether the search or seizure is the greater intrusion is a debatable question whose answer depends on a variety of circumstances).

44. *Id.* at 52 ("We see no 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.").

45. *Id.*

46. 433 U.S. 1 (1977).

47. In *Chadwick* federal officials using a trained dog detected the presence of a controlled substance in a footlocker while it was being unloaded at a train station. The agents did not seize the property immediately but waited until defendant picked up the footlocker and placed it in the trunk of his car. The officers then arrested defendant and his companions, removed the footlocker from the car, and searched the footlocker. *Id.* at 4.

mate expectation that the footlocker's contents would remain private."[48] This dicta illustrates the distinction drawn between searches and seizures of effects: Except in the context of cars,[49] seizures constitute a lesser intrusion on an individual's privacy interest than do searches. Therefore, when a seizure can effectively prevent the removal or loss of evidence until police can obtain a search warrant,[50] police cannot commit the more significant intrusion of searching the effect seized.[51]

Having begun to articulate a distinction between searches and seizures, the Court attempted to refine its standard for the permissible scope of the seizure of a personal effect in *United States v. Place*.[52] In *Place* defendant had relinquished his luggage to drug enforcement agents in an airport after they told him they were going to seek a warrant to search his luggage.[53] The police did not have probable cause to search the luggage, however, until ninety minutes later when a trained canine detected the presence of narcotics in the luggage. The Court held that this ninety minute seizure based on less than probable cause was unreasonable under the fourth amendment.[54] The Court asserted that the duration of

48. *Id.* at 13 n.8; *see also* Arkansas v. Sanders, 442 U.S. 753, 766 (1979) (applying the *Chadwick* analysis to a suitcase located in an automobile and stating: "Where . . . the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained.").

49. In United States v. Ross, 456 U.S. 798 (1982), the Supreme Court extended the automobile exception to the search warrant requirement to include containers found when searching the car. Thus, if police have probable cause to search a car for contraband, and they find a container that they have probable cause to believe contains contraband, then *Ross* allows police to search that container. *Chadwick* and *Sanders*, *supra* note 48, also involved containers in automobiles, but the *Ross* court distinguished these two cases by noting that in *Chadwick* and *Sanders* police had probable cause to search only those specific containers and not the entire car. *Id.* at 809-14.

50. *See Chadwick*, 433 U.S. at 13 (noting that placing the footlocker under police control eliminated any danger of losing evidence before a warrant could be obtained).

51. At least two commentators have relied upon the Supreme Court's *Chadwick* analysis to conclude that the search of a house is never justified when an impoundment will prevent the loss of evidence. *See* Kelder & Statman, *supra* note 24, at 1003.

52. 462 U.S. 696 (1983).

53. The police told defendant that he was free to accompany them. He declined, but obtained from the agents telephone numbers at which he could reach them. *Id.* at 699.

54. *Id.* at 710. The Court reasoned that the seizure must fit within either the exceptions for seizures of property based on probable cause or the exceptions for *Terry*-type seizures based on less than probable cause. *See* Terry v. Ohio, 392 U.S. 1 (1968). *Terry* concerned the forcible stop and frisk of an individual on a public street. The *Terry* majority implicitly adopted the standard that an officer's forcible stop of a suspect is reasonable if the officer has a reasonable suspicion that the person is engaged in criminal activity. *See id.* at 32-33 (Harlan, J., concurring); *see also* Michigan v. Summers, 452 U.S. 692 (1981) (hold-

the interference can transform a seizure that is reasonable at its inception into one that is unreasonable. In arriving at the holding the Court again noted that a seizure is distinct from a search: a seizure interferes only with a person's possessory interest as opposed to his privacy interest.[55] Prior to *Segura* the Supreme Court did not attempt to analyze the permissible scope of a seizure, as distinct from a search, in the context of the home.

## III. The Circuit Courts and the Development of the Securing of the Premises Exception

Although the Supreme Court has had only limited opportunity to consider when police may "seize" the premises without unreasonably intruding upon fourth amendment protections, many of the circuits have discussed the constitutional implications of this impoundment process. Thus, aided by little Supreme Court dicta, the circuit courts have developed the constitutional parameters of the "securing of the premises" exception. In developing the securing of the premises exception, courts have addressed two distinct issues. First, when does the fourth amendment permit a warrantless entry? Second, once the police have entered the premises, what steps may the police take to secure the premises?

### *A. The Warrantless Entry*

The most significant constitutional barrier to invoking the securing of the premises exception is the warrantless entry into the premises. In *United States v. McLaughlin*[56] the United States Court of Appeals for the Ninth Circuit held that if officers have probable cause to believe evidence is on the premises, and if delaying entry involves a substantial risk that evidence will be removed or destroyed, then the fourth amendment permits a warrantless

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ing that *Terry* allowed the limited detention of persons while authorities searched premises pursuant to a valid search warrant); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (brief investigative stop near border justified by reasonable suspicion that car contained aliens); Adams v. Williams, 407 U.S. 143 (1972) (allowing officer making a reasonable investigatory stop to conduct a limited protective search for weapons when he had reason to believe the suspect was armed and dangerous).

The *Place* court relied on *Terry* and its progeny to conclude that an officer who has a reasonable suspicion that a traveller is carrying luggage containing narcotics may detain the luggage *briefly* to investigate the circumstances that aroused his suspicions. 462 U.S. at 709 (emphasis added). *See generally* Note, *Seizures of Personal Property Supported by Reasonable Suspicion*: United States v. Place, 44 La. L. Rev. 1149 (1984).

55. 462 U.S. at 708.

56. 525 F.2d 517 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976).

entry and securing of the premises.[57] Most circuit courts considering the issue presented in *McLaughlin* have accepted a standard for legitimate entry that is similar to this standard articulated by the Ninth Circuit.[58] These courts have upheld warrantless entries only in situations involving a substantial risk of evidence being destroyed or removed. At least one circuit, however, has demonstrated a rather deferential approach to reviewing a district court's approval of a warrantless entry and securing of the premises.[59] In *United States v. Korman*[60] the United States Court of Appeals for the Sixth Circuit approved a lower court's finding of exigent circumstances based on the totality of the circumstances surrounding the entry.

In *Korman* an FBI agent saw defendant pick up a suitcase from a smuggler who was cooperating with the government.[61] The agents tracked defendant and the suitcase to his residence. A few minutes after the agents arrived, they saw defendant hurriedly leave his house and drive away. The agents arrested defendant almost a quarter of a mile from the residence. When the officers discovered that the suitcase was not in the car, they entered and secured defendant's house in which only his wife and children were

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57. 525 F.2d at 520. In *McLaughlin* police officers had the premises under surveillance. After arresting one person outside, the officers entered the premises for the purpose of arresting the occupants and preventing the destruction of evidence. The Ninth Circuit considered the argument that officers should continue their surveillance, interceptions, and arrests of suspects outside the premises until a search warrant arrives. The *McLaughlin* court rejected this argument, however, reasoning that such a seige would have risked the destruction of evidence and endangered innocent people in the neighhorhood. *See id.* at 521; *see also* United States v. Grummel, 542 F.2d 789, 791 (9th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977) (following *McLaughlin* and holding that agents who had observed the arrival of a package they knew contained heroin were justified in entering and securing the premises "to the extent necessary to prevent the destruction of the evidence until a warrant could be obtained").

58. *See, e.g.*, United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983); United States v. Agapito, 620 F.2d 324, 336 n.18 (2d Cir. 1980); United States v. Edwards, 602 F.2d 458, 468-69 (1st Cir. 1979); United States v. Gardner, 553 F.2d 946, 948 (5th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

59. *See* United States v. Korman, 614 F.2d 541 (6th Cir. 1980).

> The Sixth Circuit's deferential attitude is illustrated by its quotation of the lower court:
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> It is also to be noted in this regard that the case law is clear that the agents, in reaching a decision of the nature that they did here, need only have sufficient information to justify the warrantless entry to reasonably conclude that evidence would be destroyed or removed. A hindsight, Monday-morning quarterback position, which might show that in fact that was not about to happen, is not the standard by which their conduct is to be judged, but rather the situation as it appeared to them at the time.

*Id.* at 545.

60. *Id.* at 541.

61. *Id.* at 548 (Merritt, J., dissenting).

present.[62] The Sixth Circuit held the entry and securing of the premises reasonable.[63] The dissent[64] argued that the exigency standard requires a high probability rather than a mere possibility that evidence will be destroyed.[65] The dissent feared that the majority's deferential approach to examining the constitutionality of a warrantless entry implies that when police face the mere possibility that occupants threaten evidence with destruction, police may enter and secure the premises.[66]

Another factor in determining the reasonableness of a warrantless entry may be the reasonableness of the delay prior to entry. For example, danger to the public posed by undiscovered dynamite created sufficient exigent circumstances to justify the warrantless entry and securing of defendant's apartment in *United States v. Picariello*.[67] In reaching this holding, however, the United

62. *Id.* The agents testified that the presence of another car which they had earlier observed following defendant justified their fear that the evidence was threatened with destruction. The agents thought that the other car was engaged in "counter-surveillance." They also testified that the presence of three cars in the driveway indicated that other people were present. The agents argued that this inference coupled with the counter-surveillence, the hurried departure by defendant, and the lateness of the hour justified their conclusion that sufficient exigent circumstances existed to enter and secure the premises. *Id.* at 549-50 (Merritt, J., dissenting).

63. *Id.* at 547. This holding, however, did not restrain the court from examining other alleged constitutional violations "irrespective of the legality of the initial entry." This examination suggests that the Sixth Circuit had doubts about the legitimacy of the search.

64. *Id.* (Merritt, J., dissenting).

65. In reflecting on the legality of the warrantless entry, the dissent first noted that the Supreme Court has never recognized a "securing-the-premises-in-anticipation-of-a-search-warrant" exception to the warrant requirement because such "an exception would swallow the rule" and destroy the protection the search warrant requirement seeks to provide. *Id.* at 549 (Merritt, J., dissenting). The dissent argned that the exigent circumstances exception to the warrant requirement applies only to a true emergency, such as when evidence is "in the process of destruction." *Id.* at 550 (Merritt, J., dissenting) (quoting Vale v. Louisiana, 399 U.S. 30, 35 (1970)). The dissent found that no such emergency existed in this case. The agents had no reason to believe that the occupants were aware of defendant's arrest. Thus, only a possibility existed that the evidence would be destroyed. *Id.* at 550-52 (Merritt, J., dissenting).

66. *Id.* at 550 (Merritt, J., dissenting).

67. 568 F.2d 222 (1st Cir. 1978). The securing of the premises took place as part of an investigation of stolen dynamite and bombings. In the early morning before the entry, the police, after engaging in a high speed chase, had lost defendants tailing them from Maine to Massachusetts. The police later found defendants' car unattended and wired with dynamite. The agents involved in this chase notified other agents in Portland, Maine—the site of defendants' apartment. Agents in Portland began assembling information at 7:00 a.m. in preparation for seeking a search warrant. At 11:00 a.m. the agents decided to secure the apartment pending issuance of the search warrant, which the agents ultimately obtained at 2:40 p.m. *Id.* at 224-25. The *Picariello* court found that the unrecovered dynamite and the unknown whereabouts of defendant created a "volatile" situation that posed a real threat to the public and thus justified the entry and securing of the premises. *Id.* at 226.

States Court of Appeals for the First Circuit considered difficult questions concerning the delay prior to entry. Defendant argued that the seven hour delay between the time officers had probable cause to search and the time of the warrantless entry eliminated the exigent circumstances exception; the delay suggested that the officers had reasonable time to seek a warrant.[68] The First Circuit held that, given the facts of *Picariello*,[69] the seven hour delay was not unreasonable and thus the exigent circumstances exception justified the warrantless entry and securing of the premises.[70]

The availability of "telephone search warrants"[71] has added a new dimension to the determination of reasonable delay. Recently, in *United States v. Cuaron*,[72] the United States Court of Appeals for the Tenth Circuit considered a claim by defendant that exigent circumstances did not justify the warrantless entry and securing of his private residence because police had time to obtain a federal telephone search warrant.[73] The district court had found that exigencies supported the warrantless entry, but had failed to consider the telephone search warrant option.[74] The Tenth Circuit held that

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68. *Id.*

69. On the morning of the July 4 holiday, agents were called at their homes and told to come down to the station to help prepare affidavits. The other agents involved in the investigation had not yet had time to return from chasing defendant into Massachusetts. *See supra* note 67. Agents preparing affidavits had to compile, sift, and put data in satisfactory order. *Picariello*, 568 F.2d at 226.

70. In reaching the conclusion that the delay was not unreasonable, the First Circuit considered the Supreme Court opinion in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). In *G.M. Leasing* the Court held that the agents' delay, for two days following a warrantless entry into defendant's office and for one day following the observation that material was being removed from the office, eliminated any exigent circumstance exception. *Id.* at 226.

71. The Federal Rules of Criminal Procedure authorize magistrates to issue search warrants based on sworn testimony over the telephone. FED. R. CRIM. P. 41(c)(2). As of 1985 12 states have enacted provisions authorizing oral search warrants. *See* ALASKA STAT. § 12.35.015 (1984); ARIZ. REV. STAT. ANN. § 13-3914(c) (1978); CAL. PENAL CODE § 1526(b) (West 1982); MONT. CODE ANN. § 46-5-202 (1983); NEV. REV. STAT. § 179.045 (1981); N.Y. CRIM. PROC. LAW § 690.36 (McKinney 1984); N.D. R. CRIM. P. 41(c)(92); OKLA. STAT. ANN. tit. 22, §§ 1223.1, 1225(B) (West Supp. 1984); OR. REV. STAT. §§ 133.545(4), 133.555(3) (1973); UTAH CODE ANN. § 77-23-4 (1982); WIS. STAT. § 968.12(3) (1985); *see also* V.I. CODE ANN. tit. 5, § 3901 (1967) (incorporating Rule 41 of the Federal Rules of Criminal Procedure).

72. 700 F.2d 582 (10th Cir. 1983).

73. *Id.* at 586. *Cuaron* concerned an undercover drug operation in which federal agents had followed a drug dealer to defendant's house. Agents arrested the dealer after he left defendant's home. The agents feared that within thirty minutes after the dealer's arrest, defendant would become suspicious. The agents knew that defendant expected the dealer to pick up more cocaine. The agents, therefore, decided to enter and secure the premises. *Id.* at 586-87.

74. *Id.* at 588.

trial courts must consider the availability of a telephone warrant in determining the existence of exigent circumstances.[75] Exigent circumstances, therefore, exist only when the critical nature of the circumstances prevents the use of any warrant procedure.[76]

### *B. Securing the Premises*

After police have made a warrantless entry, the question becomes what steps police may take to secure the premises.[77] In *United States v. Cuaron*[78] police officers entering defendant's house saw an upstairs bedroom door close. Suspecting that someone was attempting to destroy evidence, an officer went into the closed bedroom and stopped defendant from flushing drugs down the toilet.[79] The *Cuaron* court found the officer's action "reasonably necessary to prevent the destruction of evidence"[80] and held

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75. *Id.* at 589. The Tenth Circuit noted that the legislative history of Rule 41(c)(2) suggests that Congress intended "to encourage police to procure telephone warrants where 'the existence of exigent circumstances is a close question and the police might otherwise conduct a warrantless search.'" *Id.* at 588 (quoting United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1981)); *see also* FED. R. CRIM. P. 41(c)(2), Notes of Advisory Committee on Rules—1977 Amendment, *reprinted in* 18 U.S.C. app. 640, 640 (1982).

76. *Cuaron*, 700 F.2d at 589. The *Cuaron* court examined a district court opinion, United States v. Baker, 520 F. Supp. 1080 (S.D. Iowa 1981), in which the court found that agents had an hour and fifteen minutes between the time they had probable cause and the time the occupants might have begun to destroy evidence. 700 F.2d at 589. The *Baker* court held that an hour and fifteen minutes was "abundant time" in which to seek a federal telephone warrant. 520 F. Supp. at 1083-84. After examining the facts of *Cuaron*, however, the Tenth Circuit concluded that the agents did not have even thirty minutes to obtain a warrant before the occupants of the house might have become suspicious and begun to destroy evidence. The court thus found that exigent circumstances justified the warrantless entry into defendant's house. 700 F.2d at 590; *see also* United States v. Hackett, 638 F.2d 1179 (9th Cir. 1980) (holding the 20 to 30 minutes between the time agents tailing defendant suspected his destination to be his home and the time defendant might reasonably be expected to begin destroying evidence insufficient time to procure a telephone warrant). *See generally* Marek, *Telephonic Search Warrants: A New Equation for Exigent Circumstances*, 27 CLEV. ST. L. REV. 35 (1978).

77. "Securing the premises" may be either a search or a seizure, depending on the circumstances.

78. 700 F.2d at 582.

79. *Id.* at 591.

80. *Id.* The court emphasized that the officers limited their actions inside the house to steps necessary to maintain the status quo. *Id.* For additional cases in which courts have noted that warrantless searches will be upheld when they are narrowly tailored to fit the existing exigencies, see Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1968)); United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975) ("[E]xigent circumstances justify an entry to arrest and to secure the premises to the extent necessary to prevent the destruction or removal of the evidence. They, however, carry the officers no further.").

permissible the seizure of items in plain view.[81]

In *United States v. Agapito*[82] the United States Court of Appeals for the Second Circuit considered the issue whether police may make a protective sweep of the premises to check for people. The Second Circuit found that once police are lawfully on the premises, the security check constitutes only a slight additional intrusion because the search is cursory in nature and designed to detect people not things.[83] After weighing the public interest in protecting police officers and preserving evidence against the modest intrusion on individual privacy, the court concluded that a security check meets the reasonableness requirement of the fourth amendment.[84] The Second Circuit, however, noted that once police have secured the premises, no further search is permissible until the warrant arrives.[85]

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81. 700 F.2d at 591. The Supreme Court has enunciated a "plain view" doctrine that allows an officer who is lawfully present within the premises to seize items that he discovers inadvertently. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 326 (1980).

82. 620 F.2d 324 (2d Cir. 1980).

83. *Id.* at 336 (citing United States v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977), which held a security check proper when police made arrest outside and reasonably believed people were inside).

84. *Id.* The *Agapito* court discussed an earlier Second Circuit decision, United States v. Dien, 615 F.2d 10 (2d Cir. 1980), *on reh'g from* 609 F.2d 1038 (2d Cir. 1979), in which the court had held a security check unreasonable absent any belief that other people were in defendant's one room studio apartment. *Dien*, 609 F.2d at 1047. The *Agapito* court stated that the *Dien* court held the security check unreasonable because the court found the security check was a mere pretext to justify a warrantless search. The officers in *Dien* conducted the security check not to protect themselves upon entry, but after detecting the odor of marijuana. *Agapito*, 620 F.2d at 335 n.15. Nonetheless, the *Agapito* court clearly allows a security check, even absent any reasonable belief that other people are present, provided that police conduct the security check as part of the securing of the premises process. *Id.* at 335-36.

Commentators have argued that whenever the police have probable cause to search a premises and are going to impound the premises in anticipation of a search warrant, the danger posed to police officers remaining on or near the premises justifies a protective sweep regardless of whether the police officers reasonably believe that other persons are present. *See* Kelder & Statman, *supra* note 24, at 1023; *see also* Payton v. New York, 445 U.S. 573, 589 (1980) (noting in dicta that in executing an arrest warrant "the police may need to check the entire premises for safety reasons"); United States v. Christophe, 470 F.2d 865, 869 (2d Cir. 1972) (holding that in securing the premises officers are entitled to make a cursory examination of the premises for the presence of anyone who might threaten officers' safety or destroy evidence). *But see* United States v. Grummel, 542 F.2d 789 (9th Cir.) (stating that police probably should not have made a protective sweep of the premises incident to arrest of defendant and as part of securing the premises), *cert. denied*, 429 U.S. 1051 (1976); United States v. Bravo, 403 F. Supp. 297 (S.D.N.Y. 1975) (holding unconstitutional a protective sweep of the premises absent any reasonable belief that others who posed a threat to police officer safety were present).

85. 620 F.2d at 337.

Difficult questions remain concerning what steps police may take to prevent the destruction of evidence after they have entered the premises and made a security check. In *United States v. DiGregorio*[86] the First Circuit held that when police officers legitimately on the premises have probable cause to believe that evidence is located on the premises, the likelihood that occupants will remove or destroy evidence before a search warrant arrives justifies police presence to watch the occupants.[87] FBI agents in *DiGregorio* secured the premises by informing the occupants that they were free to leave but that they could not remove any evidence pending the issuance of a search warrant.[88] Similarly, in *United States v. Diaz*[89] the Second Circuit held that police officers legitimately on the premises were not required to leave immediately because of the serious risk that an occupant would remove or destroy evidence before a search warrant arrived.[90] In *Diaz* the court specifically noted that because police had no probable cause to arrest defendant's wife or children, the only practical means of preserving the evidence was for police to watch the remaining occupants.[91]

In cases in which police have probable cause to search the premises, but have no reasonable belief that anyone who might destroy evidence is present, the Sixth Circuit suggested in *United*

86. 605 F.2d 1184 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979).

87. *Id.* at 1188. In *DiGregorio* an FBI investigation of a shooting and other acts of extortion resulted in the conviction of defendant for conspiracy to obstruct interstate commerce. The securing of the premises occurred after FBI agents entered defendant's premises with the consent of his wife and discovered the four defendants sitting around a kitchen table with a shotgun in plain view. Presumably, police had probable cause to search the premise only after seeing the gun. *Id.* at 1186-87.

88. *Id.* at 1187. The police remained on the premises for eight hours. The court did not discuss the reasonableness of the duration of the detention.

89. 577 F.2d 821 (2d Cir. 1978).

90. *Id.* at 824. Police entered the premises with probable cause to arrest defendant, but without an arrest warrant. The court did not discuss on what grounds the entry was legal. The court noted that the police first attempted to gain peaceful access by giving notice of their authority and purpose, but after hearing the flushing of the toilet, broke the door down. *Id.* at 822-23. These facts suggest the lower court may have found that exigent circumstances justified the entry. This case, however, was decided before Payton v. New York, 445 U.S. 573 (1980), made it clear that the fourth amendment does not allow entry to arrest without an arrest warrant or exigent circumstances.

91. *Diaz*, 577 F.2d at 824 n.3; *see also* United States v. Christophe, 470 F.2d 865 (2d Cir. 1972) (allowing the securing of the premises when defendant's wife was present).

The Supreme Court in *Vale v. Louisiana*, *see supra* notes 20-24 and accompanying text, faced the dilemma of what steps police may take when occupants, whom the police cannot arrest, pose a significant threat to the interest in preserving evidence. *DiGregario* and *Diaz* may offer a solution to that problem by allowing seizures in fact situations similar to that in which the *Vale* Court was not willing to allow a search.

*States v. Hayes*[92] that the proper method of protecting evidence is to post a guard outside the premises until a search warrant arrives.[93] Similarly, the Second Circuit held in *Agapito* that if a security check reveals that no one is present, police should leave and station a policeman at the door.[94] The Ninth Circuit, however, held in *United States v. Lomas*[95] that even guarding the premises from the outside constitutes an illegal seizure absent exigent circumstances.[96] *Lomas* clearly indicates that when considering the sanc-

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92. 518 F.2d 675 (6th Cir. 1975). In *Hayes* agents had knowledge from surveillance and from informants' tips of the identity of persons involved in a drug transaction. After arresting these people outside their hotel rooms, the agents entered the rooms without any reason to suspect the presence of other co-conspiraters who might threaten the security of the evidence or the agents' safety. The *Hayes* court noted that the *mere possibility* that someone could have entered the hotel rooms and destroyed evidence was not enough to support a finding of exigent need to enter the hotel room. *Id.* at 678 (emphasis added).

93. *Id.* (citing United States v. Jeffers, 342 U.S. 48, 52 (1951)). For a discussion of *Jeffers*, see *supra* notes 28-29 and accompanying text.

94. *Agapito*, 620 F.2d at 337. The agents in *Agapito* remained on the empty premises for almost 24 hours. *See also* United States v. Vasquez, 638 F.2d 507 (2d Cir. 1980) (finding exigent circumstances sufficient to justify the warrantless entry, but affirming the district court's suppression of 13 items, which the court found to be the product of an impermissible 16 hour warrantless search of the premises).

95. 706 F.2d 886 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 720 (1984).

96. 706 F.2d at 893. The *Lomas* appeal resulted form a Drug Enforcement Administration investigation of a narcotics operation. An agent conducting surveillance at defendant's hotel entered the room, made a cursory 30-second search of the premises, and then secured the premises. The court found it legally insignificant that the officers waited outside rather than inside for the warrant to arrive. *Id.* at 893-94. The lower court did not decide whether exigent circumstances existed because the lower court found the agent's actions reasonable without proof of exigencies. On appeal, the Ninth Circuit admitted the evidence found in the room as cumulative without determining whether exigent circumstances justified the seizure. *Id.* at 894.

The court may have found the police officer's action reasonable if he had only gnarded the premises from the outside, rather than entering to make a quick search. The language of the opinion suggests, however, that the Ninth Circuit found the warrantless seizure as impermissible as the entry, absent exigent circumstances. The court stated: "The distinction between searches and seizures in this instance is more than mere semantics. Our holding in *Allard II* was not limited to warrantless entries, but directed also at police attempts to maintain the status quo by exercising control over a place while seeking a search warrant." 706 F.2d at 893-94.

United States v. Allard, 600 F.2d 1301 (9th Cir. 1979) (*Allard I*), *modified*, 634 F.2d 1182 (9th Cir. 1980) (*Allard II*), concerned appeals from a Drug Enforcement Administration investigation of a cocaine distribution operation. Two agents entered a hotel room and questioned its occupant. The agents then called for a search warrant and remained on the premises for two hours until the search warrant arrived. On the first appeal, the Ninth Circuit held that even though the officers had probable cause to search the premises, no exigent circumstances justified the illegal entry. The case was thus remanded to the district court to determine whether sufficient independent grounds existed for the subsequent search warrant to remove the taint of the illegal entry. *See* 600 F.2d at 1305 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)). The district court determined that the subsequent search warrant was not based on any unlawfully acquired evidence and denied defendant's

tity of the home, the Ninth Circuit draws no constitutional distinctions between searches and seizures—both demand either a search warrant or probable cause and exigent circumstances. Chief Justice Burger clearly rejected this premise in *Segura v. United States*.[97]

## IV. SECURING OF THE PREMISES FROM THE INSIDE FOUND PERMISSIBLE ABSENT A SHOWING OF EXIGENT CIRCUMSTANCES: *Segura v. United States*

The United States District Court for the Eastern District of New York held in *United States v. Segura* that no exigent circumstances existed to justify the warrantless entry into and occupation of defendants' apartment.[98] The district court suppressed all evidence found in defendants' apartment, including evidence found pursuant to a subsequently obtained, valid search warrant.[99] On

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motion to suppress the evidence found pursuant to the search warrant. On appeal to a different panel, *Allard II* held that the "independent source" rule did not afford adequate protection against illegal entries to secure the premises. *See infra* note 103 (defining the "independent source rule"). *Allard II* thus adopted a stricter test: The government must prove "that it would have both independently discovered and successfully obtained the proffered evidence notwithstanding the illegal seizure." 634 F.2d at 1187. *Allard II* found that the government failed to meet this stricter test and suppressed the evidence as fruit of the illegal entry. Prior to the Supreme Court's consideration of this issue in *Segura*, the Ninth Circuit was the only circuit to apply the stricter test. The other circuits simply applied an independent source analysis. *See* United States v. Segura, 663 F.2d 411 (2d Cir. 1981), *aff'd*, 104 S. Ct. 3380 (1984); United States v. Beck, 662 F.2d 527, 529-30 (8th Cir. 1981); United States v. Korman, 614 F.2d 541, 547 (6th Cir.), *cert. denied*, 446 U.S. 952 (1980); United States v. Annese, 631 F.2d 1041, 1042 (1st Cir. 1980).

97. 104 S. Ct. 3380, 3386 (1984) (Burger, C.J., writing for majority but joined in Part IV of the opinion only by O'Connor, J.).

98. 663 F.2d 411 (2d Cir. 1981). The events surrounding the instant appeal were the culmination of a two week investigation of defendants Segura and Colon by the New York Drug Enforcement Task Force. When the Task Force agents determined that they had probable cause to arrest defendants, the agents contacted the United States Attorney's Office and requested permission to arrest defendants and authorization to search their apartment. The Assistant United States Attorney authorized the arrests but stated that because it was already 6:30 p.m., a search warrant was unobtainable. He therefore advised them to arrest defendants and "secure the premises" pending the issuance of a warrant. The agents went to defendants' apartment and climbed the fire escape where they could see anyone entering or leaving the apartment. The agents neither saw nor heard anything that led them to believe anyone was home. After a few hours, the officers left the fire escape and went outside the building to await Segura's arrival. Segura arrived and the agents arrested him as he entered the building lobby. They forcibly took Segura to his third floor apartment and knocked on the door. Colon answered and the officers entered without permission. They found three other people with Colon and arrested all four occupants. When the agents made a protective sweep of the apartment, they found narcotics paraphernalia in plain view. The agents remained in the now empty apartment for 18 to 20 hours until a search warrant arrived. *Id.* at 413.

99. *Id.* at 412.

appeal, the Second Circuit affirmed the finding of no exigent circumstances and suppressed the evidence found in plain view.[100] The Second Circuit, however, admitted the evidence discovered after the issuance of the search warrant.[101] On remand, the district court convicted defendants on the basis of this evidence and the Second Circuit affirmed the conviction.[102] Defendants appealed the admission of the postwarrant evidence, asserting that the conduct of police officers in remaining inside the premises for eighteen to twenty hours until the search warrant arrived constituted an unreasonable seizure of all the items within the apartment.[103] Chief Justice Burger, in the portion of the majority opinion joined only by Justice O'Connor,[104] found that the seizure did not violate the

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100. *Id.* at 415, 417. The Second Circuit determined that the agents' surveillence did not give rise to any reasonable belief that anyone was present within defendants' apartment. Furthermore, the court reasoned that even if the police thought someone was inside, they had no reason to believe that the people inside knew of defendant's arrest. Therefore, the evidence was not threatened with immediate destruction or loss. The Second Circuit also declined to find that the knocking at the apartment door gave rise to exigent circumstances that justified the entry. The court stated that to allow such an exception would permit agents "to create their own exigencies." *Id.* at 415 (quoting United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980)). The Second Circuit thus concluded that the exclusionary rule demanded the suppression of the evidence found in plain view after the warrantless entry. The court stated: "Given the potential for abuse of the emergency security check exception by officers who would create their own emergencies, we believe it appropriate 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Id.* at 417 (quoting Brown v. Illinois, 422 U.S. 590, 599-600 (1975)).

101. 663 F.2d at 417.

102. *Segura*, 104 S. Ct. at 3380.

103. *Id.* at 3386. Defendants advanced this argument to avoid the independent source exception to the warrant requirement. Under the independent source exception, the court admits the evidence if the government can prove that the subsequent search pursuant to a valid search warrant was based on information sufficiently unrelated to the constitutional violation to dissipate the taint of illegality. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Thus, defendants contended that because all the apartment's contents were "seized" at the time of the illegal entry and occupation, the postwarrant evidence must be suppressed because it was a direct result of that primary illegality. 104 S. Ct. at 3386.

104. Justices White, Powell, O'Connor, and Rehnquist joined the Chief Justice in the majority opinion, but only Justice O'Connor joined Chief Justice Burger on Part IV of the opinion. Part IV concerns the reasonableness of the occupation. Presumably, the other Justices found deciding this issue inappropriate and unnecessary because the Government had expressly conceded the unreasonableness of the occupation, and the Court's subsequent independent source analysis held the evidence admissible regardless of whether the occupation was reasonable. *See* 104 S. Ct. at 3395 n.9. (stating that at oral argument the Government conceded that the agents' occupation of the apartment constituted a "continuing search"); *see also* New Jersey v. T.L.O., 104 S. Ct. 3583, 3584 (1984) (Stevens, J., dissenting) (mem.) (noting the astonishing judicial activism represented by Chief Justice Burger's finding in *Segura* that the occupation was reasonable in spite of the Government's expressed

fourth amendment.

The Chief Justice began by stating that the fourth amendment prohibits only "unreasonable" searches and seizures.[105] He then recognized the distinction between searches and seizures, noting that *Chadwick*[106] and *Sanders*[107] found warrantless seizures of property reasonable even though the warrantless searches were unreasonable.[108] After examining the facts of these two opinions, the Chief Justice stated that the Court's approval of the seizure was not based on a concern that the evidence was threatened with immediate loss or destruction.[109] He thus reasoned that underlying these decisions is a belief that society's interest in protecting incriminating evidence can outweigh, for a limited period of time, a person's possessory interest in the property seized, provided that police have probable cause to believe that the property is associated with criminal activity.[110]

The Chief Justice next found that *Mincey v. Arizona*[111] and *Rawlings v. Kentucky*[112] suggest Court approval for the police practice of securing the premises to maintain the status quo even

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concession that the occupation was unreasonable).

105. 104 S. Ct. at 3386.

106. 433 U.S. 1 (1977). For a discussion of *Chadwick*, see *supra* notes 46-51 and accompanying text.

107. 442 U.S. 753 (1979). For a discussion of *Sanders*, see *supra* note 48.

108. 104 S. Ct. at 3387.

109. *Id.* at 3388. Burger reasoned that in both *Chadwick* and *Sanders* officers could have prevented the evidence from being lost or destroyed by following the cars in which the property at issue was placed. *Id.*

110. *Id.*

111. 437 U.S. 385 (1978). For a discussion of *Mincey v. Arizona*, see *supra* notes 31-36 and accompanying text.

112. 448 U.S. 98 (1980). In *Rawlings*, *see supra* note 36, police entered a house with an arrest warrant for a resident of that house. While searching the house, the officers smelled marijuana. Two of the officers went to obtain a search warrant while other officers remained behind. The officers told the occupants of the house that they could leave only if they consented to a body search. After obtaining a search warrant for the house 45 minutes later, the officers searched an occupant's purse which contained drugs that were controlled substances under Kentucky law. The owner of the purse told defendant to take what was his from her purse. Defendant then admitted that he owned the drugs. The two primary issues facing the Court were: (1) whether defendant had standing to challenge the legality of the search of the third person's purse, and (2) whether the statements of ownership made by defendant were inadmissible as fruit of an illegal detention. The Court answered both issues in the negative and thus affirmed defendant's conviction. In *Segura* the Chief Justice noted that although officers secured the premises in *Rawlings*, the Court did not question the admissibility of the evidence discovered pursuant to the subsequently issued warrant. 104 S. Ct. at 3388. Although that contention may be true, the admissibility of that evidence was not an issue before the *Rawlings* Court. Thus, *Rawlings* does not provide support for the Chief Justice's seizure analysis in *Segura*.

when evidence is not threatened with immediate destruction. These opinions, along with the oft quoted line from *Katz v. United States*[113]—"the Fourth Amendment protects people, not places"—led the Chief Justice to conclude that the "home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within."[114] Chief Justice Burger thus concluded that a seizure does not invoke the higher constitutional protections afforded a search. Therefore, the securing of a dwelling on the basis of probable cause to prevent the destruction of evidence is not an unreasonable seizure.[115]

Examining the facts of *Segura*, the Chief Justice distinguished the warrantless entry from the warrantless seizure. He stated that the Second Circuit may have been correct in treating the warrantless entry, which was unsupported by exigent circumstances, as an unreasonable search requiring the suppression of evidence observed during entry.[116] The Chief Justice, nevertheless, found that once the initial entry was over, the internal seizure constituted no greater interference with defendants' possessory interests in the contents of the apartment than an external stakeout.[117] Finally, the Chief Justice noted that although a seizure that is reasonable at its inception may become unreasonable because of its duration, the eighteen to twenty hour delay in obtaining a search warrant was not unreasonable in this case.[118]

The dissent[119] found the eighteen to twenty hour occupation

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113. 389 U.S. 347 (1967).

114. 104 S. Ct. at 3389 (emphasis in original).

115. *Id.*

116. *Id.*

117. *Id.* The Chief Justice dismissed defendants' argument that holding the seizure reasonable would increase the possibility of illegal entries. *Id.* at 3390. The Chief Justice rejected that argument for four reasons. First, the Chief Justice does not believe officers will violate the law routinely and purposefully by engaging in warrantless entries unsupported by exigent circumstances. Second, officers who have probable cause have no reason to enter the premises prior to obtaining a warrant, absent exigent circumstances, which would allow the entry. Third, the suppression of all evidence found in plain view during a warrantless entry discourages officers from entering illegally. Last, officers entering a private premises without a warrant and without exigent circumstances expose themselves to unnecessary and unwanted civil liability. *Id.*

118. *Id.* In finding that the delay was not unreasonable the Chief Justice noted the following considerations: The lateness of the hour made it difficult to obtain a warrant; the officers were busy processing the five arrestees; and the actual interference with the defendants' possessory interest in their apartment was virtually nonexistent because the defendants were not there. *Id.*

119. Justice Stevens wrote the dissenting opinion in which Justices Brennan, Mar-

unreasonable for two distinct reasons. First, the occupation amounted to a warrantless "search" within the contemplation of the fourth amendment.[120] The dissent reasoned that the agents' occupancy inevitably involved the scrutiny of personal effects throughout the apartment.[121] The dissent thus found untenable the Chief Justice's assumption that no constitutional distinction exists between an external stakeout and an internal occupation.[122] Second, the dissent argued that the occupation was an unreasonable "seizure" within the contemplation of the fourth amendment. The dissent contended that precedent virtually compelled the conclusion that the agents "seized" the contents of the apartment.[123] The dissent concluded that this seizure was unreasonable from its inception because the agents acted without a warrant and in the absence of exigent circumstances.[124] The dissent further argued that even if the seizure had been reasonable at its inception, the eighteen to twenty hour delay in obtaining a warrant certainly was unreasonable.[125] The dissent thus concluded that the occupation of defendants' apartment constituted a second violation of the fourth amendment: "Not only was it the fruit of the initial illegal entry into that apartment, but it also constituted an unreasonable search

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shall, and Blackmun joined.

120. 104 S. Ct. at 3394 (Stevens, J., dissenting). The dissent noted that both Mincey v. Arizona, 437 U.S. 385 (1978), and Chimel v. California, 395 U.S. 752 (1969), *reh'g denied*, 396 U.S. 869 (1969), suggested that a person's expectations of privacy do not cease after the initial entry. For a discussion of *Mincey*, see *supra* notes 31-36 and accompanying text. For a discussion of *Chimel*, see *supra* notes 11-19 and accompanying text.

121. 104 S. Ct. at 3395 (Stevens, J., dissenting). The dissent also noted in a footnote the Government's admission that the agents' occupation of the apartment constituted a "continuing search." *Id.* at 3395 n.9 (Stevens, J., dissenting).

122. *Id.* at 3395 (Stevens, J., dissenting).

123. *Id.* The dissent analogized the seizure of the apartment to cases holding that when police take custody of an arrestee's person they concomitantly take custody of his personal effects, *see* Illinois v. LaFayette, 462 U.S. 640, 648 (1983); United States v. Edwards, 415 U.S. 800 (1974), and to cases holding that when police take custody of a car they also take custody of its contents, *see* South Dakota v. Opperman, 428 U.S. 364 (1976). 104 S. Ct. at 3395-96 (Stevens, J., dissenting).

124. *Id.* at 3396 (Stevens, J., dissenting). The dissent noted that since *Chimel* the Court has held that police may neither search nor seize the contents of a home without a warrant or exigent circumstances. *Id.* Justice Stevens, however, stated in a footnote that he assumed that an impoundment of the premises from the outside, pending the issuance of a warrant, would be permissible even absent exigent circumstances, provided police do not enter the premises. *Id.* at 3396 n.15 (Stevens, J., dissenting).

125. *Id.* at 3397 (Stevens, J., dissenting). The dissent noted that the Government's only excuse for the delay was the time necessary to process the arrestees. The dissent concluded that because the arrests were unconstitutional, the Chief Justice allowed the police to use one wrong to justify another. *Id.* at 3397 n.17 (Stevens, J., dissenting).

and seizure of the apartment."[126]

## V. Analysis

### A. *Criticisms of* Segura

*Segura* represents an effort by at least two members of the Court to recognize a "securing of the premises" exception to the warrant requirement of the fourth amendment. Given the conflict between the circuits on the permissibility of seizures,[127] the Chief Justice may have realized the need to articulate the fourth amendment implications of seizing the premises to maintain the status quo. Unfortunately, *Segura* did not present the proper facts for articulating such an exception. The Chief Justice's narrow reading of the fourth amendment to find the *Segura* occupation reasonable has two negative consequences: the Chief Justice's interpretation limits the meaning of fourth amendment privacy and expands the definition of reasonable time.

The facts of *Segura* constitute a clear violation of the principle enunciated in *Payton v. New York*: police must have an arrest warrant to enter a defendant's home and arrest him.[128] In *Segura* police arrested Colon and three other occupants inside a private dwelling without a warrant. Nonetheless, the Chief Justice's analysis relies, in part, on these arrests to find the seizure reasonable. Had the police not arrested Colon and the other occupants, then the police officers' occupation of the premises easily would have met the Chief Justice's new standard for an unreasonable intrusion into the home. The police presence would have interfered with the remaining occupants' "privacy interest in the activities that take place within."[129] Thus, absent exigent circumstances, this occupation would not have been reasonable. The Chief Justice might argue that the presence of occupants would present exigent circumstances. Under these facts, however, the presence of occupants presented exigent circumstances only when the police alerted the occupants to the need to destroy evidence. Such an argument, therefore, would impermissibly allow police officers to create their own exigencies.[130] Therefore, when occupants are present and no exigent circumstances exist, police can take advantage of this new

126. *Id.* at 3398 (Stevens, J., dissenting).
127. *See supra* notes 92-96 and accompanying text.
128. 445 U.S. 573, 590 (1980).
129. *See supra* text accompanying note 114.
130. *See supra* note 100.

constitutional mandate only by committing two constitutional violations: first, entering the premises illegally and second, arresting the occupants illegally. To find a fourth amendment exception that depends on fourth amendment violations is antithetical to the very protections guaranteed by the Constitution.

Not only do the facts in *Segura* fail to justify an exception to the warrant requirement, but the Chief Justice's reasoning is faulty. Relying on the assertion in *Katz v. United States*[131] that "the Fourth Amendment protects people not places,"[132] the Chief Justice concluded that the primary focus of the fourth amendment privacy interest is the occupants' activities in the home rather than the property in the home.[133] The Chief Justice's premise, however, is inaccurate; the fourth amendment protects people *and* places.[134] Moreover, the Chief Justice relied on *Katz*, which extended fourth amendment protection to places other than homes,[135] to restrict fourth amendment protection in the home. This distorted application of *Katz* is unwarranted and inappropriate. Furthermore, if the Chief Justice's definition is accurate, and if the fourth amendment primarily protects activities in the home, then the Court should not place such great importance on the intervention of a neutral magistrate in determining probable cause to search the home.[136]

More importantly, the logical implications of the Chief Justice's characterization of the fourth amendment privacy interest are untenable. Applied expansively, the Chief Justice's definition results in a complete emasculation of the search warrant requirement. For example, as long as the occupants of a home are known to be absent, the police would no longer be interfering with activities in the home and thus would be able to search the premises. Admittedly, the Chief Justice is not advocating such an extreme position. In fact, by articulating this "securing of the premises" ex-

131. 389 U.S. 347 (1967).

132. 104 S. Ct. at 3389 (quoting *Katz*, 389 U.S. at 351).

133. *See supra* text accompanying note 114.

134. Justice Harlan, concurring in *Katz*, noted that interpreting the protection afforded by the fourth amendment requires reference to a "place." Justice Harlan then set forth the two-prong test for determining when the fourth amendment protects a place. First, a person must have exhibited an actual (subjective) expectation of privacy. Second, the expectation must be one that society is prepared to recognize as "reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Supreme Court explicitly adopted Justice Harlan's two-step test for determining when a reasonable expectation of privacy exists in Smith v. Maryland, 442 U.S. 735, 740-41 (1979).

135. In *Katz* the Court extended fourth amendment protection to defendant's reasonable expectation of privacy in a telephone booth. 389 U.S. at 359.

136. *See supra* note 2 and accompanying text.

ception, the Chief Justice is providing police with the time to get a warrant before searching. Thus, under the Chief Justice's analysis a significant privacy interest attaches to some property within the defendant's home—that property which was not seen and thus not searched when the police illegally entered. Yet, even the Chief Justice recognized that prior to the illegal entry, a privacy interest existed in all those objects inside the defendants' home.[137] If a privacy interest existed in those objects before entry, the illegal entry should not dissipate that privacy interest. In *Mincey v. Arizona*[138] the Court recognized that a person maintained a legitimate expectation of privacy in the contents of his home even after killing a policeman on the premises.[139] The *Segura* dissent, therefore, must be correct in stating that the occupation amounted to an unreasonable continuing search of all those objects that the occupying police officers could see.[140]

The most distressing feature of *Segura* is that the Chief Justice has created an exception without identifying any corresponding need. All prior opinions recognizing as reasonable certain intrusions into the sanctity of the home carefully defined the needs that justified those intrusions. In *Chimel v. California*[141] the Court held permissible a search in the "grab area" incident to arrest because the Court recognized that police officers need to secure their own safety and prevent the destruction of nearby evidence.[142] In *Vale v. Louisiana*[143] the Court noted that a warrantless search would be permissible when evidence is in the *process of destruction* because the Court recognized that police officers must prevent evidence from being lost.[144] In *Mincey v. Arizona*[145] the Court noted that a limited search of the premises to find victims or dangerous accomplices would be permissible because the Court recognized that the

137. The Chief Justice explicitly recognized that if the initial entry was not supported by exigent circumstances, then it constituted an unreasonable search of those items in plain view. 104 S. Ct. at 3389.

138. 437 U.S. 385 (1978).

139. *Id.* at 394-95. For a discussion of *Mincey*, see *supra* notes 31-36 and accompanying text.

140. *See supra* notes 120-21 and accompanying text.

141. 395 U.S. 752, *reh'g denied*, 396 U.S. 869 (1969).

142. 395 U.S. at 763. For a discussion of *Chimel*, see *supra* notes 11-19 and accompanying text.

143. 399 U.S. 30 (1970).

144. *Id.* at 35 (emphasis added). For a discussion of *Vale*, see *supra* notes 20-24 and accompanying text.

145. 437 U.S. 385 (1978).

police need to protect themselves and innocent people.[146] In *Segura* the Chief Justice held permissible the occupation of the premises but he did not state any need to remain inside the premises. Clearly, no such need existed—the evidence inside the premises could be secured just as safely by a perimeter stakeout. Arresting all the occupants of the premises eliminated any reason for remaining inside the house. Because no law enforcement need remained to justify the police presence, any continued occupation must have been unreasonable.

Furthermore, even if the *Segura* seizure had been reasonable at its inception, the eighteen to twenty hour duration of the seizure cannot be considered reasonable. The Chief Justice recognized that the occupation constituted an interference with the defendants' possessory interest in their home,[147] but found this interference reasonable in part because the defendants were absent from the apartment.[148] Again, this holding impermissibly relies upon illegal arrests to find a subsequent intrusion reasonable. Furthermore, even if the defendants were absent by their own choice, this holding contravenes the Court's ruling in *United States v. Place*.[149] In *Place* the Court recognized that the owner of a suitcase retained a possessory interest in his suitcase even after he left it with the police and continued on his way.[150] *Place* thus suggests that the defendant's absence should not affect the determination of reasonableness. The interference with the defendants' possessory interest in their house must be circumscribed by the need for the seizure. Absent a showing of need,[151] the Chief Justice should be reluctant to label as reasonable sloppy police practices resulting in an eighteen to twenty hour, unnecessary occupation of a private dwelling.

Finally, *Segura* provides little useful guidance in defining the constitutional limits on the "securing of the premises" exception. The Arizona Supreme Court recently considered the Chief Jus-

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146. *Id.* at 392. For a discussion of *Mincey*, see *supra* notes 31-36 and accompanying text.

147. *See supra* notes 105-15 and accompanying text (discussing that part of the Chief Justice's opinion in which he implicitly recognizes a possessory interest in the home).

148. *See supra* note 118.

149. 462 U.S. 696 (1983).

150. *Id.* at 708-09. For a discussion of *Place*, see *supra* notes 52-55 and accompanying text.

151. In *Segura* the only explanation the Government provided for the delay was that processing the (illegal) arrests took a long time. The Government did not explain why it did not use a telephone warrant procedure. *See* 104 S. Ct. at 3397 n.17 (Stevens, J., dissenting).

tice's opinion,[152] because although the Arizona court realized that the portion of *Segura* concerning the "securing of the premises" exception was not binding precedent, the Arizona court feared that a majority of the Supreme Court might soon adopt the Chief Justice's analysis.[153] The Arizona court, however, declined to adopt the Chief Justice's reasoning and determined that the "sanctity of the home" demanded greater protections than those provided by *Segura*. The Arizona court, therefore, held the warrantless entry and occupation of a home illegal as a matter of Arizona state constitutional law absent proof of exigent circumstances.[154]

In another state court case, *State v. Riley*,[155] the Florida Supreme Court relied on the Chief Justice's seizure analysis in *Segura* to conclude that a police officer could enter and secure a house without a search warrant if a judicial officer already had issued the search warrant and the police officer was just waiting for another officer to deliver the warrant. The Florida court noted that if a twenty hour seizure in anticipation of an unissued search warrant was held constitutional in *Segura*, then a ten minute seizure in anticipation of an issued search warrant also should be constitutional. The Florida court, however, failed to distinguish carefully the Chief Justice's seizure analysis, which was endorsed by only two justices, from the rest of the majority opinion.[156] The Florida opinion thus demonstrates the confusion that *Segura* has created in the lower courts and the distressing consequences that may stem from this confusion. Both the Arizona and Florida opinions suggest the need for a majority of the Court to clarify the ambiguities created by the Chief Justice's *Segura* opinion.

### *B. A Proposal*

Given all of these problems with the Chief Justice's ruling in *Segura*, the Supreme Court should reformulate the "securing of the premises" exception. Because all past Supreme Court prece-

152. *See* State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984).

153. *Id.* at 264, 689 P.2d at 523.

154. *Id.* at 264-65, 689 P.2d at 523-24. This holding notwithstanding, the *Bolt* court admitted the evidence by relying on the Supreme Court's independent source analysis. For an explanation of the independent source rule, see *supra* note 103.

155. 462 So. 2d 800 (Fla. 1984).

156. The Florida court quoted a passage from the beginning of the *Segura* opinion in which the Chief Justice explained the points of law that would be covered by the opinion. *Id.* at 802. The point of law quoted, however, dealt with the Chief Justice's seizure analysis and this seizure analysis was not endorsed by the majority of the *Segura* Court. *See supra* note 104.

dent has erected a constitutional barrier at the door to the premises, the Supreme Court should clarify the exigencies that allow the police to enter and secure a home to preserve the status quo. A synthesis of the circuit court opinions provides a well-developed fourth amendment analysis for the Supreme Court to consider. The Court should adopt the following three-prong test, which at least one commentator has advocated in part[157] and the circuits have adopted: (1) police officers must have probable cause to believe evidence is on the premises, and delaying entry must create the substantial risk that evidence will be lost or destroyed;[158] (2) the critical nature of the circumstances must prevent the use of any warrant procedure, including the telephone warrant;[159] and (3) the police must not be responsible for creating their own exigencies.[160] This three-prong test weighs the law enforcement need to preserve evidence against the individual's privacy interest in maintaining the sanctity of the home. The Court should require careful review of police decisions to enter the premises.[161] The substantial infringement on privacy that may follow from a warrantless entry demands rigid enforcement of the three-prong test.

After entry, police officers should be allowed to conduct a limited security check to determine if anyone is present who might destroy evidence or pose a threat to police safety.[162] If police officers find occupants on the premises, but lack probable cause to arrest these people, the Court should recognize that the least significant intrusion is to detain[163] the people[164] until a warrant ar-

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157. *See* Note, *supra* note 24, at 1480 (proposing a statute that would allow the impoundment of a premises under certain conditions).

158. *See supra* notes 56-58 and accompanying text.

159. *See supra* notes 71-76 and accompanying text.

160. *See supra* note 100.

161. For an example of an inappropriately deferential approach to appellate review of exigent circumstances decisions, see *supra* notes 60-66 accompanying text.

162. *See supra* notes 82-85 and accompanying text.

163. "Detain" in the context of this proposal allows police to remain on the premises in order to watch occupants and to force them to stay in a central location. If an occupant were to insist on going to the bathroom, sufficient exigencies would exist for police to first search the occupant and the bathroom because evidence can be destroyed easily in bathrooms.

164. The term "people" includes any person who is present when police enter the premises as well as residents who arrive after police have secured the premises. A "resident" includes anyone who is staying at the premises more than 24 hours, including an out-of-town visitor. If a person who is not a resident seeks entry subsequent to the securing of the premises police should be able to deny this person the right to enter. This rule is justified because a nonresident, by definition, has someplace else to stay.

rives rather than searching the premises.[165] Of course, allowing police to detain the occupants raises constitutional questions. The Court, however, should recognize that the same exigent circumstances that justify the warrantless entry into the home also justify the limited detention or search of the occupants.[166] Police applying this procedure in previous cases have either detained all the occupants or told the occupants they could leave only if they consented to a search of their persons.[167] Nonetheless, this police presence constitutes a very significant intrusion of an occupant's right to privacy and should be narrowly circumscribed by police need. Because of these potential complications, the Supreme Court should require the use of the telephone warrant procedure, whenever possible, to keep the occupation as brief[168] and unintrusive as possible.[169]

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165. Given the significant nature of this intrusion, some courts and commentators have suggested that a search would entail a lesser intrusion. *See, e.g.*, Chimel v. California, 395 U.S. 752, 775 n.5 (White, J., dissenting), *reh'g denied*, 396 U.S. 869 (1969); W. LAFAVE, *supra* note 24, § 6.5(c), at 452-55. Commentators responding to this suggestion point out that if the detained occupant lives on the premises, then he can consent to a search and decide for himself which invasion constitutes the lesser intrusion. *See* Kelder & Statman, *supra* note 24, at 1004; Note, *supra* note 24, at 1482.

166. *Cf.* United States v. Hensley, 105 S. Ct. 675 (1985) (holding that a person may be stopped and detained because of a flyer circulated by another "police" department indicating that the person is wanted for the investigation of a felony, as long as that flyer is based upon a reasonable suspicion that the person was involved in a criminal activity); United States v. T.L.O., 105 S. Ct. 733 (1985) (holding that the significant interest school officials have in maintaining an environment conducive to learning justifies permitting a warrantless search of a student if that search is based upon a reasonable suspicion that the student has violated or is violating the law or school rules and if the scope of the search is reasonably related to the circumstances which justified the initial interference); Michigan v. Summers, 452 U.S. 692 (1981) (allowing the limited detention of persons while authorities search the premises pursuant to a valid search warrant).

167. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (securing the premises by informing occupants that they could leave only if they consented to a bodily search); United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983) (detaining all occupants of a house for four hours until the search warrant arrived); United States v. Edwards, 602 F.2d 458, 467 (1st Cir. 1979) (lower court noted that the agents "acknowledged that they would not have permitted anyone to leave the premises.") (quoting United States v. Edwards, 443 F. Supp. 192, 195 (D. Mass. 1977)); United States v. DiGregorio, 605 F.2d 1184 (1st Cir.) (securing the premises by informing occupants that they were free to go, but could not take any property with them), *cert. denied*, 444 U.S. 937 (1979).

168. "Brief" in the context of this proposal means the time it would take for officers to procure a telephone warrant. At least one court has held that an hour and fifteen minutes is adequate time to obtain a telephone search warrant. *See* United States v. Baker, 520 F. Supp. 1080, 1083 (S.D. Iowa 1981).

169. This proposal is applicable only in jurisdictions adopting a telephone search warrant procedure and suggests the need for more state jurisdictions to adopt such a procedure. For a list of the states that have adopted a telephone warrant procedure as of the time of this writing, see *supra* note 71.

If the security check subsequent to entry reveals that no occupants are present, or if police officers arrest all the occupants, then the Court should recognize that police have no legitimate reason to remain on the premises[170] and should require police to leave. The Court should hold that the proper procedure for maintaining the status quo when police have no reasonable belief that people are inside the premises, or have determined no one is on the premises, is to conduct an external stakeout. An external stakeout is, in effect, a seizure of the entire premises. The circuits are divided on this issue,[171] but the Chief Justice's seizure analysis[172] properly suggests that an external seizure constitutes a lesser intrusion than a search because an external seizure interferes only with occupants' possessory interest in their residence. Therefore, the public interest in preserving evidence inside the residence justifies allowing police to impound the premises from the outside. Such an impoundment would include preventing anyone from entering the residence until the search warrant arrives. This impoundment, however, is reasonable only for a short period of time.[173] Courts should not accept administrative delays such as those advanced in *Segura* as reasonable. Again, the Court should demand the use of the telephone warrant procedure when available.

When police suspect that occupants are inside the premises, but have no reason to believe that they will destroy evidence before a warrant arrives, allowing the impoundment of the premises is problematic. First, the impoundment process may alert the occupants to the need to destroy evidence. Sanctioning entry at this point, however, would impermissibly allow police to create their own exigencies. Second, even if the impoundment process does not directly alert the occupants, a third person may seek entry and be stopped. The police would have to detain this person or he could notify the occupants and they could destroy evidence. Under *Terry v. Ohio*[174] a brief detention is reasonable, but a brief period of time may be insufficient to obtain a warrant. Allowing detention of this person for an indefinite period of time would be the equivalent of arresting the person on less than probable cause,

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170. *See supra* text accompanying notes 141-46 (discussing cases in which the Court allowed an exception to the warrant requirement only after recognizing a legitimate law enforcement need).

171. *See supra* notes 92-96 and accompanying text.

172. *See supra* notes 105-15 and accompanying text.

173. *See supra* text accompanying and following note 54.

174. 392 U.S. 1 (1968). For a discussion of the *Terry* line of cases, see *supra* note 54.

because no independent exigencies[175] justify the detention. Therefore, when police know that people are on the premises, but do not reasonably believe that they will destroy evidence, the Court should require police to continue surveillance operations until a warrant arrives or exigent circumstances arise.

## VI. CONCLUSION

The fourth amendment provides protections against unreasonable intrusions into the home. In *Segura*, however, two Supreme Court Justices unnecessarily expanded an exception to this protection. The "securing of the premises" exception must be strictly circumscribed by law enforcement need. The Court should place more emphasis on the privacy interest in the home by redefining the "securing of the premises" exception to balance more carefully the government's interest in preserving evidence against the privacy interest in the home. At the very least, the Court should clarify the practical applications of the "securing of the premises" exception to prevent the confusion resulting from lower courts' attempts to apply *Segura* to police actions. Only by reaffirming the privacy interest in the home can the Court prevent lower courts and prosecutors from relying on *Segura* to dangerously erode fourth amendment protections.

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175. The term "independent exigencies" refers to exigencies not created by the police.

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