

April 1985

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Joshua Dressler

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Joshua Dressler, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftsmanship of Segura v. United States*, 26 Wm. & Mary L. Rev. 375 (1985), <https://scholarship.law.wm.edu/wmlr/vol26/iss3/2>

William and Mary Law Review

VOLUME 26

SPRING 1985

NUMBER 3

A LESSON IN INCAUTION, OVERWORK, AND FATIGUE: THE JUDICIAL MISCREANTSHIP OF *SEGURA V.* *UNITED STATES*

JOSHUA DRESSLER*

I. INTRODUCTION

Judicial opinions deserve to be taken seriously. Only when we do take them seriously, when the profession insists that their authors hold themselves to standards as high as those by which the great composers, writers, and painters [are judged] will it be possible . . . to consider judicial opinions as one of the fine arts without running the risk of being thought facetious.¹

The primary adjudicative responsibility of the United States Supreme Court is not to the immediate parties that appear before it, but to a larger audience—society generally, lawyers and courts more specifically.² The Court is the interpreter and practical en-

* Professor of Law, Wayne State University Law School. B.A. 1968, J.D. 1973, University of California at Los Angeles. Professor Joe Grano was very generous with his time, listening to the author's meanderings as well as reading and providing useful criticisms of an earlier draft of this article. I thank him. I dedicate this article to my former Criminal Law students, Class of 1986, at U.C.L.A. School of Law, who in a time of supposed student apathy and all-consuming concern about careers, expressed deep feelings about the trends in constitutional criminal law and about proper judicial craftsmanship. They made it fun to be a teacher.

1. Younger, *On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture*, 51 U. COLO. L. REV. 341, 352-53 (1980).

2. Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62; Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV.

forcer of our constitutional rights. It uses its decision-making authority to establish and defend legal principles of broad, rather than sectarian, value. To be effective, the Court must write opinions which are clear in their reasoning and straightforward in their handling of precedent.³ If we do not always like the principles enunciated or the results reached by the high court, we are at least entitled to understand what those principles are, and to know how they were reached.

No court can fulfill its institutional responsibility, however, if it is overworked. An overworked court is one unlikely to have the time, or its justices to have the energy, to fully research the law, and then to properly consider that law. The product of such imperfect deliberations—the published opinion—is more likely to be the victim of haste and fatigue than it is to be the beneficiary of calm, collegial input. The opinion probably will resemble graffiti more than it will resemble a work of fine art.⁴ Too often, the message of the opinion of an overworked court is obscured by imperfect organization, weighty verbiage, and the presence of separate opinions, containing language divisive in content and temperamental in tone.⁵

To properly fulfill its role as arbiter of constitutional rights and to avoid the damage that results from an overloaded docket, Supreme Court justices must choose carefully the vehicles through which they invoke broad and fundamental principles. They must choose neither too few nor too many cases; and the cases they do choose should be peculiarly suited, procedurally and substantively, both for adjudication and, ultimately, for the enunciation of the constitutional principles.

Unfortunately, the current Court largely is failing in its adjudicative responsibilities. Heavily worked,⁶ the Court is straining its

1127, 1128 (1981).

3. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2-3 (1979).

4. See generally Younger, *supra* note 1.

5. See generally Davis & Reynolds, *supra* note 2, at 77; Gewin, *Opinions-Dissents, Special Concurrences, Policy, Techniques*, 63 F.R.D. 594 (1974); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307 (1983) [hereinafter cited as Note, *High Designs*]. But see Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980) [hereinafter cited as Note, *Precedential Value*].

6. See *infra* notes 10-20 and accompanying text.

institutional and personal resources. As a result of an apparent mission to limit the scope of constitutional rights as defined by the Warren Court, the Burger Court has adopted an activist approach to adjudication, diving headlong rather than wading into the sea of constitutional controversies. It agrees to hear too many cases, and frequently the cases that it does hear are the wrong ones. The results are uneven: at times the Court has succeeded in narrowing the scope of the law; at times, however, it has had to back down and wait for a more propitious vehicle.⁷ Worst of all, justices frequently write opinions so unsatisfactory that even ideological comrades are disappointed. Its opinions often lack the clarity or cogency that we expect from our highest court.

This Article is the tale of *Segura v. United States*,⁸ a Supreme Court opinion that should not have been, a disaster in judicial decisionmaking, and the probable victim of the fatigue that comes from overwork.⁹ The tale has a moral—the Court, rather than concentrating on changing the direction of constitutional law, should focus its energy on the cautious selection of cases and the preparation of well-crafted opinions. Ultimately, *Segura* may tell us more about the need for such caution and care by the Court than it tells about correct application of fourth amendment jurisprudence.

II. THE COURT'S WORKLOAD

A. *The Extent of the Workload*

To put *Segura* in context, one first must focus on the extent of the Court's workload. If not overworked, the Supreme Court is, at least, heavily worked.

In its first fourteen years, the Burger Court¹⁰ docketed an average of 4752 cases per term, of which it disposed of an average of 3867 cases.¹¹ This workload has increased, not decreased. In the

7. See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983).

8. 104 S. Ct. 3380 (1984).

9. See generally *infra* text accompanying notes 76-127 & 175-239.

10. For purposes of clarity, I use the term "Burger Court" to identify the Supreme Court, beginning with the 1969 term, when Mr. Chief Justice Warren Burger began serving as the Court's leader. I use the term "Warren Court" to identify the prior Supreme Court, for which Earl Warren served as Chief Justice.

11. All statistics regarding the number of cases docketed during the 1969 through 1982 (but not the 1983) terms, the number of written opinions of the Court, as well as their

past three years, 15,534 cases reached the Court, an average of 5178 per term, eleven percent higher than the norm for the preceding eleven years.

Most cases did not require full review. Nonetheless, the Court has published an average of 144 majority opinions or an average total of 348 opinions including concurrences and dissents, each year. These figures disguise particularly substantial increases in the number of opinions over the most recent court terms.¹²

Whatever the cause, the recent increase in Court opinions¹³—majority, plurality, concurring, and dissenting—has resulted in a remarkable number of published words.¹⁴ Through the first fourteen years of the Burger Court, for example, West Publishing Company¹⁵ published 42,225 pages, or 3016 pages per year, of Court opinions, orders, and in-chamber opinions. As with the docket, verbiage has recently risen dramatically. The 1980 through 1982 terms saw the publication of 10,259 pages (or nearly twenty-five percent of the number amassed in the past fourteen years) at an average of 3419 pages per year, thirteen percent higher than in the earlier Burger years.¹⁶ Dividing the fourteen years into two

identification as "criminal" cases, are based on the figures provided by the *Harvard Law Review* in their annual reviews of the Supreme Court terms. The *Review* also provides five-year tables of the Court terms; these tables may be found at 87 HARV. L. REV. 310-14 (1973) (1968-1972 period); 92 HARV. L. REV. 336-39 (1978) (1973-1977 period); and 97 HARV. L. REV. 303-06 (1983) (1978-1982 period). For an excellent analysis of the Court's workload, see G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976).

12. During the 1979 through 1982 Court terms, the Court averaged 375 opinions, a figure eight percent higher than the average during the entire fourteen-year period.

13. Of particular interest is the recent Court penchant for concurring opinions, which has resulted in the Court's frequent inability to muster majority rationales for its judgments. Until 1956, there were only 35 cases with no clear-cut majority. Comment, *Supreme Court No-Clear-Majority Decision: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956). Since then, the plethora of separate opinions that frequently have resulted in plurality opinions, has caused many commentators to discuss the danger of such opinions. Davis & Reynolds, *supra* note 2, at 63-75.

14. Many of those words are strident. For a discussion of vituperation expressed in *Segura*, see *infra* notes 230-39 and accompanying text.

15. Because of the delay in publication of the official advance sheets of the *United States Reports*, I have instead compiled figures using the published pages of the *Supreme Court Reporter*.

16. The actual increase in published pages is partially obscured by the fact that West apparently published only four "memorandum decisions" per page, regardless of available space, until 1974 when it seems to have generally begun to place up to six such decisions on each page.

seven-year periods, the work of the Court in the earlier period required an average of 2810 pages; the more recent period resulted in 3222 pages per term.¹⁷

A large share of the Court's work involves issues largely "criminal" in nature.¹⁸ In its first fourteen years, the Burger Court wrote 530 full opinions, or 38 opinions per term, in this field.¹⁹ Assuming that all opinions generally take the same time to produce,²⁰ approximately one-quarter of the Court's time for deliberation and opinion writing has gone to cases involving criminal law or procedure.

B. "Workload" as "Overload"

By any numerical standard,²¹ the Burger Court must, and does, work very hard. Numbers cannot tell everything, however. They cannot prove that the Court works *too* hard. Ultimately, that judg-

17. The number of cases docketed, the number of court opinions, and the number of published pages in those opinions represent only three, relatively objective, ways to measure the workload of a court. Some cases by their nature are more difficult to decide and more physically draining than others.

One probably can assume that cases raising constitutional, rather than statutory, issues are more difficult to decide. These cases frequently raise a myriad of subissues, and are more apt to implicate broad, controversial issues of policy and moral principle. See Note, *supra* note 2, at 1138. Justices are less likely, as a result, to sign opinions that conflict with their deeply held views. Compromise is less likely; more opinions and more energy will be required. See *infra* note 28. One also can assume that the deliberative process—and the ultimate opinions—will be more highly charged. See, e.g., B. SCHWARTZ, *SUPREMACY* 410-30 (1983) (discussion of strident deliberative process in the reapportionment case, *Baker v. Carr*, 369 U.S. 186 (1962)); W. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 39 (1980) (describing the "Japanese internment" case, *Korematsu v. United States*, 323 U.S. 214 (1944), as the product of fear; and the case of *Rosenberg v. United States*, 345 U.S. 1003 (1953), as the product of the cold war possessing a "highly explosive atmosphere," to which he apparently believes the justices fell victim). Because most of the Court's work involves constitutional issues, many of which are highly emotive, the Court's workload probably is greater than the statistics themselves might imply.

18. See *supra* note 11.

19. During the 1980 through 1982 terms, however, the number of criminal cases decreased. The court wrote 27, 30, and 33 full opinions in those years, respectively. This recent trend has ended, however. For the figures during the 1983 term, see *infra* notes 30-38 and accompanying text.

20. All constitutional cases are difficult. See *supra* note 17. Cases pertaining to criminal justice, however, are apt to be among the most value-laden and divisive. After all, human lives and liberty are at stake, as is the right of citizens to be reasonably free from crime. Criminal cases are likely to generate great tension among the justices.

21. For subjective evidence of the Court's heavy workload, see *supra* note 17.

ment is subjective. Those of us with a "mission" are tempted to characterize a sympathetic court as one that is functioning well, and one at odds with our "mission" as too involved.

More than 3000 pages of court opinions per term are a lot of pages,²² but are they too many? Observers of the Court,²³ including many of the justices themselves,²⁴ think so. They maintain that the Court is impaired by the justices' substantial responsibilities. Calls for structural and procedural reforms, therefore, increasingly are in vogue.²⁵

Certainly many cases must be heard; and the number of days in the court term, as well as the energy level of the justices themselves, are limited. The Court's increasing workload, therefore, only increases the likelihood that time and energy will run out, and that poor decisionmaking will result.

Even if the characterization "poor decisionmaking" is largely a subjective one, one can nonetheless agree with Mr. Justice Frankfurter's conclusion that the judicial process is at its best when opinions flow from comprehensive briefing, powerful argumentation by both sides, and lengthy deliberations.²⁶ Justice Frankfurter also would, no doubt, caution a Court to be exceedingly careful when exercising its discretion to hear cases. It must do so for two reasons. First, only if it is slow to grant hearings will the Court's

22. See *supra* notes 13-17 and accompanying text.

23. See Davis & Reynolds, *supra* note 2, at 77; Note, *Precedential Value*, *supra* note 5, at 759; Note, *High Designs*, *supra* note 5, at 307.

24. Eight justices have called for reexamination of the Court's workload and procedures. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1982); Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); Marshall, Remarks at the Second Circuit Judiciary Conference (Sept. 9, 1982) (available on request from the Public Information Office of the United States Supreme Court); O'Connor, Comments on the Supreme Court's Caseload (delivered in New Orleans, La., on February 6, 1983) (available from the Public Information Office); Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370 (1982); Rehnquist, *Are the True Old Times Dead?*, MacSwainford Lecture at the University of Kentucky (September 23, 1982) (available from the Public Information Office); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982); White, *Challenges for the Supreme Court and the Bar: Contemporary Reflection*, 51 ANTITRUST L. J. 275 (1980).

25. See Note, *High Designs*, *supra* note 5 (containing a summary of such proposals).

26. *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring); see also Freund, *A National Court of Appeals*, 25 HASTINGS L. J. 1301, 1301 (1974) (calling for opinions "as invulnerable and persuasive as they can be made by research, reflection, collaboration, mutual criticism, and accommodation").

workload remain manageable. Only then can it afford the time for long deliberations and for the drafting and redrafting of proposed opinions. Second, only if the Court chooses cases with great care will it reasonably ensure that the cases it does hear reach it in a fashion conducive to the comprehensive briefing and full argumentation so important to the adversary process.

The judicial process also requires good opinion writing. The Court must develop its thesis in a manner both coherent and persuasive. Good opinions result in part from good briefing, argumentation, and deliberation. But the success of the process is primarily a function of serious concern for the importance of the written word,²⁷ and for the proper organization of one's arguments. Both take time and patience. Neither can exist unless the justices limit their decision-making role.

The best evidence of the Court's overload, then, if it exists, is its own opinions. They represent the tangible results of the Court's decision to grant certiorari, of the parties' briefing and argumentation, and of the Court's deliberative process.

The numbers suggest a heavy workload; the commentators' fear is that the load is too great. If it is, opinions generated in the most recent term should reflect that overload. Indeed, the 1983 term pressed the Court beyond reasonable limits.²⁸ For better or for worse, the justices granted hearing and rendered decisions in some of the most important and value-laden areas of constitutional and statutory law.²⁹ Specifically, in reversing the recent trend away

27. See generally *Younger*, *supra* note 1.

28. Justice Blackmun has been quoted as having described the 1983 value-laden term as "exciting, but not very enjoyable," and that he was "never so tired" as he was at the end of it. Barbash & Kamen, *Supreme Court: 'A Rotten Way to Earn a Living'*, Wash. Post Nat'l Weekly Ed., Oct. 1, 1984, at 33, col. 1.

29. Besides the criminal cases, see *infra* note 31 and accompanying text, the Court considered cases pertaining to discrimination against women, see *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984); *Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984); racial discrimination, see *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984); affirmative action, see *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984); freedom of speech, see *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984); freedom of press, see *Keeton v. Hustler Magazine*, 104 S. Ct. 1473 (1984); freedom of religion, see *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984); and draft registration, see *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 104 S. Ct. 3348 (1984). The value-laden issues can make adjudication difficult. See *supra* note 17.

from deciding "criminal" cases,³⁰ the Court wrote opinions in approximately³¹ forty-nine cases with criminal law overtones. Most of

30. See *supra* note 19.

31. This figure is based on my own compilation of cases that primarily raise issues of criminal law or procedure in the following areas (which are, of course, applicable to the cases that began in state court through the fourteenth amendment due process clause):

FOURTH AMENDMENT CASES: *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984) (exclusionary rule in deportation proceedings); *Segura v. United States*, 104 S. Ct. 3380 (1984) (dissipation of taint); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) ("good faith" exception to exclusionary rule); *United States v. Leon*, 104 S. Ct. 3405 (1984) (same); *United States v. Karo*, 104 S. Ct. 3296 (1984) (electronic beeper case); *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (prison cell search); *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984) (house arrest); *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758 (1984) (factory immigration surveys); *Oliver v. United States*, 104 S. Ct. 1735 (1984) (open fields); *United States v. Jacobsen*, 104 S. Ct. 1652 (1984) (meaning of "search" and "seizure"); *Donovan v. Lone Steer, Inc.*, 104 S. Ct. 769 (1983) (interpretation of Fair Labor Standards Act); *Michigan v. Clifford*, 104 S. Ct. 641 (1984) (fire investigation).

FIFTH AMENDMENT CASES: *Block v. Rutherford*, 104 S. Ct. 3227 (1984) (due process, contact visitation for pretrial detainees); *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984) (*Miranda* "custody" during traffic stops); *Hobby v. United States*, 104 S. Ct. 3093 (1984) (grand juries, discrimination in selection of foreman); *Wasman v. United States*, 104 S. Ct. 3217 (1984) (due process, judicial vindictiveness); *Richardson v. United States*, 104 S. Ct. 3081 (1984) (double jeopardy); *Thigpen v. Roberts*, 104 S. Ct. 2916 (1984) (due process, prosecutorial vindictiveness); *New York v. Quarles*, 104 S. Ct. 2626 (1984) (*Miranda* public safety exception); *Ohio v. Johnson*, 104 S. Ct. 2536 (1984) (double jeopardy, guilty plea); *Schall v. Martin*, 104 S. Ct. 2403 (1984) (due process [Fourteenth Amendment] juvenile preventive detention); *Mabry v. Johnson*, 104 S. Ct. 2543 (1984) (due process, guilty plea bargain broken); *California v. Trombetta*, 104 S. Ct. 2528 (1984) (due process, discovery of results of breath analysis test); *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984) (double jeopardy, capital sentencing); *James v. Kentucky*, 104 S. Ct. 1830 (1984) (jury instruction on defendant's silence); *Justices of Boston Municipal Ct. v. Lydon*, 104 S. Ct. 1805 (1984) (double jeopardy, two-tiered trial system); *United States v. Doe*, 104 S. Ct. 1237 (1984) (privilege against self-incrimination generally); *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) (privilege against self-incrimination and *Miranda*); *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984) (double jeopardy, collateral estoppel and civil proceedings).

SIXTH AMENDMENT CASES: *Patton v. Yount*, 104 S. Ct. 2885 (1984) (right to impartial jury); *Nix v. Williams*, 104 S. Ct. 2501 (1984) (inevitable discovery); *United States v. Gouveia*, 104 S. Ct. 2292 (1984) (right to counsel in solitary confinement); *Waller v. Georgia*, 104 S. Ct. 2210 (1984) (defendant's right to exclude public from pretrial suppression hearing); *United States v. Cronin*, 104 S. Ct. 2039 (1984) (adequacy of counsel); *Strickland v. Washington*, 104 S. Ct. 2052 (1984) (same); *Solem v. Stumes*, 104 S. Ct. 1338 (1984) (right to counsel, retroactivity of *Edwards v. Arizona*, 451 U.S. 477 (1981)); *Flanagan v. United States*, 104 S. Ct. 1051 (1984) (right to counsel, conflict of interest); *McKaskle v. Wiggins*, 104 S. Ct. 944 (1984) (right to counsel, self-representation); *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984) (juries, exclusion of public); *Rushen v. Spain*, 104 S. Ct. 453 (1983) (juries, judicial ex parte communication with juror).

EIGHTH AMENDMENT CASES: *Spaziano v. Florida*, 104 S. Ct. 3154 (1984) (capital sentencing, judicial overriding of jury); *Pulley v. Harris*, 104 S. Ct. 871 (1984) (capital sen-

these involved major, controversial issues. During the term, the Court substantially curtailed substantive protections of the fourth amendment,³² narrowed the amendment's exclusionary rule,³³ carved out the most significant exception to its *Miranda* rule,³⁴ permitted some forms of preventive detention,³⁵ provided the greatest guidance to date regarding the nature of the right to counsel at trial,³⁶ and further clarified the complicated law regarding capital punishment.³⁷ The published opinions of the 1983 term required 3593 printed pages in the *Supreme Court Reporter*, the most ever.³⁸

If jurisprudence as enunciated in the opinions of the Court suffers as a result of overwork, it should follow that the problem would be exacerbated at the end of the court term. Cases argued and deliberated and opinions written during the last few months of the term should suffer more than the rest, as time for debate and

tencing, proportionality review).

MISCELLANEOUS CASES: *Reed v. Ross*, 104 S. Ct. 2901 (1984) (habeas, meaning of "cause"); *United States v. Yermian*, 104 S. Ct. 2936 (1984) (statutory construction, making false statements); *Tower v. Glover*, 104 S. Ct. 2820 (1984) (Civil Rights Act, immunity of public defender); *Dixon v. United States*, 104 S. Ct. 1172 (1984) (statutory construction of bribery statute); *Flanagan v. United States*, 104 S. Ct. 1051 (1984) (statutory construction of appealability statute); *Wainwright v. Goode*, 104 S. Ct. 378 (1983) (habeas, capital sentencing); *Russello v. United States*, 104 S. Ct. 296 (1983) (statutory construction, RICO statute).

32. See, e.g., *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (prisoners have no reasonable expectation of privacy in a cell search); *Oliver v. United States*, 104 S. Ct. 1735 (1984) (open fields not protected by fourth amendment); *United States v. Jacobsen*, 104 S. Ct. 1652 (1984) (reopening damaged package not "search"); *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758 (1984) ("factory survey" not a "seizure"). But see *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984) (warrant required to arrest individual in home for violation of a noncriminal traffic offense).

33. See, e.g., *Segura v. United States*, 104 S. Ct. 3380 (1984) (valid independent search warrant renders search untainted despite illegal entry); *United States v. Leon*, 104 S. Ct. 3405 (1984) ("good faith" exception to exclusionary rule added); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (same); *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984) (exclusionary rule inapplicable in deportation proceedings); *Nix v. Williams*, 104 S. Ct. 2501 (1984) ("inevitable discovery" exception to fourth amendment and sixth amendment exclusionary rule is permitted).

34. *New York v. Quarles*, 104 S. Ct. 2626 (1984) ("public safety" exception).

35. *Schall v. Martin*, 104 S. Ct. 2403 (1984).

36. *United States v. Cronin*, 104 S. Ct. 2039 (1984); *Strickland v. Washington*, 104 S. Ct. 2052 (1984); *McKaskle v. Wiggins*, 104 S. Ct. 944 (1984).

37. *Spaziano v. Florida*, 104 S. Ct. 3154 (1984) (judicial overriding of jury recommendation of life imprisonment); *Pulley v. Harris*, 104 S. Ct. 871 (1984) (proportionality review).

38. The previous high was in the 1982 term, in which 3574 pages were required.

conciliation runs out, as energy reaches its lowest ebb, as the feelings of justices are most tender, and as the chasms between them are the greatest.

Ultimately, the subjectivity of the question and the comparative "Iron Curtain" around the deliberative processes of the Court³⁹ require that the claim of poor decisionmaking be framed cautiously as one of opinion, not of fact, and that the thesis that such decisionmaking is the result of overload be considered speculative. Nonetheless, within these confines, I make such a claim.

It is beyond the scope of this Article to canvass all opinions in this or any recent year. Even an analysis of all the opinions decided at the conclusion of the 1983 Court year is impractical.⁴⁰ In-

39. Some authors have pierced the curtain. *See, e.g.*, R. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979); B. SCHWARTZ, *supra* note 17.

40. Such a canvass would be worthwhile. Even a quick glance at the concluding cases of the 1983 term boggles the mind. In ways perhaps unprecedented, the justices wrote opinions near the end of the term that make counting justices' votes in the opinions seem nearly impossible without a computer. For some particularly divided opinions, see *Tower v. Glover*, 104 S. Ct. 2820 (1984) (O'Connor, J. delivered the opinion of the Court in which Burger, C. J., and White, Powell, and Rehnquist, JJ., joined, and in all but the first paragraph of Part IV of which Brennan, Marshall, Blackmun, and Stevens, JJ., joined. Brennan, J., filed an opinion concurring in part and concurring in the judgment, in which Marshall, Blackmun, and Stevens, JJ., joined); *Spaziano v. Florida*, 104 S. Ct. 3154 (1984) (Blackmun, J., delivered the opinion of the Court, in which Burger, C.J., and Powell and O'Connor, JJ., joined; in all but a portion of page 8 in Part II of White and Rehnquist, JJ., joined; and in Part II of which Brennan, Marshall and Stevens, JJ., joined. White, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, J. joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined); *Wasman v. United States*, 104 S. Ct. 3217 (1984) (Burger, C.J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, III-A, III-C, and IV, in which White, Blackmun, Powell, Rehnquist, and O'Connor, JJ., joined, and an opinion with respect to Parts II-B and III-B, in which White, Rehnquist, and O'Connor, JJ., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Blackmun, J., joined. Brennan, J., filed an opinion concurring in the judgment in which Marshall, J., joined. Stevens, J., filed an opinion concurring in the judgment); *United States v. Karo*, 104 S. Ct. 3296 (1984) (White, J., delivered the opinion of the Court, in which Burger, C.J., and Blackmun and Powell, JJ., joined, in Parts I, II, and IV of which Rehnquist and O'Connor, JJ., joined, and in Part III of which Brennan, Marshall, and Stevens, JJ., joined. O'Connor, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, J., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined); *Regan v. Time, Inc.*, 104 S. Ct. 3262 (1984) (White, J., announced the judgment of the court and delivered the opinion of the Court with respect to Part II-A, in which Burger, C.J., and Brennan, Marshall, Rehnquist, and O'Connor, JJ., joined, and an opinion with respect to Parts II-B, II-C, and II-D in which Burger, C.J., and Rehnquist and O'Connor, JJ., joined. Brennan, J., filed an opinion

stead, this Article focuses on one of the cases decided in the difficult 1983 term, a case announced on the last day of that term. That case is *Segura v. United States*.⁴¹ That case illustrates, as well as any case can, a Court too incautious in its work, and a Court working beyond its peak, or even moderate, level of efficiency.

III. THE FACTS OF *Segura*

On February 12, 1981, United States Drug Enforcement Agency officials apparently violated the constitutional rights of Luz Colon⁴² and three others⁴³ when the government agents entered Colon's and Andres Segura's third-floor apartment at 11:15 p.m. without a necessary⁴⁴ search warrant, and arrested the four occupants without arrest warrants.⁴⁵ The officers entered after they arrested

concurring in part and dissenting in part, in which Marshall, J., joined. Powell, J., filed an opinion concurring in part and dissenting in part, in which Blackmun, J., joined. Stevens, J., filed an opinion concurring in the judgment in part and dissenting in part).

The problems of haste at the end of the Court term may explain, too, why *Robbins v. California*, 453 U.S. 420 (1981), decided on July 1, 1981, was overruled eleven months later in *United States v. Ross*, 456 U.S. 798 (1982). Justice Powell had concurred in the judgment of *Robbins*, despite reservations, noting that a crucial issue was not pressed by the parties, "and it is late in the term for us to undertake *sua sponte* reconsideration of basic doctrines." 453 U.S. at 435.

41. 104 S. Ct. 3380 (1984).

42. The United States District Court for the Eastern District of New York found no exigency to enter the premises. See *Segura v. United States*, No. 81-CR-80(5), memorandum of decision and order at 11-12 (E.D.N.Y. May 15, 1981) (available in Joint Appendix to the Petition on Writ of Certiorari at 11, *United States v. Segura*, Nos. 82-1062, 82-1064 (2d Cir. June 29, 1982)) [hereinafter cited as *Segura*, District Court Memorandum]. The United States Court of Appeals for the Second Circuit agreed. See *United States v. Segura*, 663 F.2d 411, 415 (2d Cir. 1981). Consequently, absent any exception to the warrant requirement, the police needed a warrant to enter. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Although the police did have probable cause to arrest Colon, they did not know Colon when they saw her. Joint Appendix on Writ of Certiorari to the United States Court of Appeals for the Second Circuit, 82-5298 at 11 [hereinafter cited as Joint App.]. In any case, they needed an arrest warrant. See *Payton v. New York*, 445 U.S. 573 (1980) (the fourth amendment prohibits warrantless entries absent exigent circumstances).

43. Even assuming the police had probable cause to arrest the three persons caught up in the sweep, arrest warrants would have been required. *Payton v. New York*, 445 U.S. 573 (1980). To further protect Colon's interest, the police would also have needed a search warrant. See *Steagald v. United States*, 451 U.S. 204 (1981) (absent exigent circumstances or consent, police may not search a home without a warrant).

44. See *Segura*, District Court Memorandum, *supra* note 42, at 11.

45. *Id.*

Segura in the first-floor apartment lobby.⁴⁶ Although the officers had no reason to believe anyone was in the apartment,⁴⁷ they forcibly took a handcuffed and resistant Segura to the apartment, knocked on the door, and then forcibly entered after a surprised Colon opened the door.⁴⁸

The agents had probable cause to search the apartment. In fact, five hours earlier they had notified the United States Attorney of their evidence for such a search. He dissuaded them from immediately seeking a search warrant, informing them that the "lateness of the hour"—6:30 p.m.—made issuance of a warrant unlikely until the next morning.⁴⁹ Instead, he advised them to go to the apartment, arrest Segura and Colon, for whom they had probable cause, and then "secure the premises" awaiting issuance of the search warrant.⁵⁰ With that advice, the police entered the Segura-Colon apartment.⁵¹ After arresting the four persons they found immediately, the police searched for any additional persons. During that process, the agents observed, but did not confiscate, drug paraphernalia on a bathroom table and in a bedroom closet.⁵² They found no one else. While some agents took the arrested parties to DEA offices, two agents remained in the unoccupied apartment, awaiting issuance of the search warrant.⁵³

In what was described by the United States Court of Appeals for the Second Circuit as "administrative delays,"⁵⁴ but which the district court had not so characterized,⁵⁵ no warrant was issued until 6:00 p.m. the following day. Apparently the delay resulted from the failure of the United States Attorney to apply in timely fashion for

46. *United States v. Segura*, 663 F.2d 411, 413 (2d Cir. 1981).

47. *Id.*

48. *Segura*, District Court Memorandum, *supra* note 42, at 10.

49. *Id.*

50. *Id.*

51. Petitioners claim the United States Attorney instructed the officers to secure the premises from *outside*. Joint Petition on Writ of Certiorari at 4, *United States v. Segura*, Nos. 82-1062, 82-1064 (2d Cir. June 29, 1982) [hereinafter cited as Joint Petition]. None of the courts, however, make note of any such specificity in their orders.

52. *United States v. Segura*, 663 F.2d 411, 413 (2d Cir. 1981).

53. *Id.*

54. *Id.*

55. The district court provided no explanation for the "lapse" of time. *Segura*, District Court Memorandum, *supra* note 42, at 11.

the warrant.⁵⁶ The agents remained in the apartment for about nineteen hours before the warranted search occurred. The application for the warrant was based solely on information obtained by the police *prior* to the entry in the apartment. Indeed, apparently no one informed the magistrate of the officers' entry into the living quarters of Colon and Segura, nor of their ongoing day-long occupation therein.⁵⁷ The agents did not seize the contraband and fruits and instrumentalities of crime until the evening following the unlawful entry into and occupation of the apartment.

Pursuant to Federal Rule 12(b)(3),⁵⁸ Segura and Colon made a pretrial motion to suppress all of the items seized in the apartment. The government opposed the motion, arguing that the agents' initial entry into, and subsequent occupation of, the apartment were constitutional.⁵⁹ The United States District Court for the Eastern District of New York disagreed. The officers had had no reason to believe the house was occupied, nor did they have any basis to believe that, if anyone was present, such persons would have been aware of Segura's arrest, which occurred three floors below.⁶⁰ In short, no evidence existed supporting the agents' apparent belief that destruction of the evidence in the apartment was

56. The government later conceded that "[i]t is not clear why a greater effort was not made to obtain a search warrant when the officers first sought one. . . ." Respondent's Brief on Petition for a Writ of Certiorari at 40 n.23, *United States v. Segura*, Nos. 82-1062, 82-1064 (2d Cir. June 29, 1982) [hereinafter cited as Respondent's Brief]. It assured the Supreme Court that the "failure" would not be repeated in future cases, and that the United States Attorney, subsequent to the present failure, circulated an internal memorandum "reemphasizing" the importance of seeking warrants when possible. *Id.* The warrant application was not presented to a magistrate until 5:00 p.m. on February 13, nearly 23 hours after the initial contact with the United States Attorney. *Segura v. United States*, 104 S. Ct. 3380, 3397 n.17 (1984) (citing testimony at the suppression hearing in the district court at Tr. 162-63). The agents claimed "it's very hard to get secretarial services today." 104 S. Ct. at 3397.

57. Joint Petition, *supra* note 51, at 17.

58. Federal Rule of Criminal Procedure 12(b) reads in pertinent part:

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial:

. . .

(3) Motions to suppress evidence

F. R. CRIM. P. 12(b)(3).

59. *Segura*, District Court Memorandum, *supra* note 42, at 11.

60. *Id.* at 12.

imminent. The court also found unreasonable the nearly twenty-hour delay in obtaining the search warrant. The delay "deprived the lawful occupant of the apartment, Luz Colon, of her right freely to occupy and control the same."⁶¹ That the officers eventually acquired a valid search warrant did not matter. But for the unlawful government conduct, the evidence would not inevitably have been discovered because "Colon might well have destroyed the evidence had she not been illegally excluded."⁶² The district court, therefore, excluded all of the items seized pursuant to the warrant.

The Second Circuit affirmed in part the district court's judgment, but reversed significant portions of it.⁶³ It agreed with the district court, and rejected the government's continued claim to the contrary, that the warrantless entry was unconstitutional.⁶⁴ It affirmed the suppression of the paraphernalia discovered in the initial entry.⁶⁵ It rejected perfunctorily⁶⁶ the government's argument that the items were not "seized" until after the search warrant was obtained. Given the "potential for abuse"⁶⁷—that officers would create their own emergency circumstances to justify the initial entry—the court concluded that suppression was appropriate.

The Second Circuit reversed the district court's judgment, however, regarding the exclusion of the remainder of the evidence.⁶⁸ Despite the illegal entry, it rejected as speculative the district court's argument that the evidence might have been destroyed had the unlawful entry not occurred.⁶⁹ It also described such analysis as "prudentially unsound"⁷⁰ since it would result in penalizing officers for what the court, perhaps inaccurately,⁷¹ described as

61. *Id.* at 15.

62. *Id.*

63. *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981).

64. *Id.* at 414-15.

65. *Id.* at 417.

66. "Finally we reject the government's argument that the evidence . . . should not be suppressed because it was not actually 'seized' until after the search warrant was obtained."
Id.

67. *Id.*

68. *Id.* at 416-17.

69. *Id.* at 416.

70. *Id.* at 417.

71. The apartment had been under direct surveillance for three hours. The agents heard nothing when one officer pressed his ear to the apartment door, no lights were visible, and

"their happenstance accuracy"⁷² in believing that someone on the premises wished to destroy the criminal evidence. It would be an "ironic twist,"⁷³ the court intoned, if the fourth amendment required exclusion of evidence when criminals are on the scene, but permitted admission when they are not.⁷⁴ Although it did not use such terms, the Second Circuit apparently was unwilling to consider the items first discovered during the warranted search as tainted by the initial illegality.

With most of the incriminating evidence rendered admissible, Segura and Colon were convicted. Both defendants appealed their convictions.⁷⁵ From the affirmance of their convictions, Segura and Colon jointly petitioned the United States Supreme Court for a writ of certiorari.

IV. PETITION FOR WRIT OF CERTIORARI

A. Segura as an Improper Court Vehicle

The Supreme Court can most effectively develop its constitutional jurisprudence when it is exceedingly cautious in using its discretion to grant petitions for writs of certiorari. The high court

no car known to belong to Segura or Colon was in the vicinity. Consequently, the officers left the area and set up the surveillance outside the apartment building. *Id.* at 413. It seems, therefore, that the officers subjectively believed that the apartment was unoccupied. One officer testified a bit more ambiguously that he did not know whether anyone was in the home. *Segura*, District Court Memorandum, *supra* note 42, at 12 (citing testimony at the suppression hearing in the district court at Tr. 394-96). The Second Circuit reasoned that "the agents had no reason to believe anyone was inside the apartment." 663 F.2d at 413. Nonetheless, that court inconsistently seems to indicate the officers believed, albeit unreasonably, that the room was occupied. *Id.* at 417. The officers' departure from the third floor, however, seems to belie this.

72. *Id.* at 417.

73. *Id.*

74. In a previous case, the Second Circuit permitted admission of evidence although the agents illegally entered the living quarters because the room was unoccupied. *United States v. Agapito*, 620 F.2d 324, 335-38 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980).

75. For the first time, on such appeal, the petitioners claimed that the search warrant was invalid, due to misrepresentations made in the application, apparently including the failure of the government to inform the magistrate of the illegal entry. *Segura v. United States*, Nos. 82-1062 & 82-1064, at 30-31 (2d Cir. June 29, 1982) (available in Joint App., *supra* note 42). This claim was rejected because of petitioners' failure to raise it earlier. *Id.* at 31.

Petitioners attempted to raise the issue in their joint petition to the Supreme Court. Joint Petition, *supra* note 51, at 2. The Supreme Court, however, did not agree to consider this question. *Segura v. United States*, 103 S. Ct. 1182 (1983).

should only grant hearings where "there are special and important reasons."⁷⁶ Especially at a time when the Court is so heavily burdened,⁷⁷ the justices should only hear cases which raise substantial constitutional questions of social importance, or involve substantial conflict among the lower courts,⁷⁸ and then only if such cases reach the Court in a procedural and adversarial context which permits the justices to tackle the questions in a relatively straightforward fashion.

In the realm of criminal procedure, and most particularly in the area of fourth amendment jurisprudence, however, the Burger Court appears remarkably inclined to take an activist, rather than a cautious, approach.⁷⁹ It proceeds in much the same manner as the Warren Court, albeit with different, even opposite, motives. The justices' voracious appetite for constitutional adjudication of criminal cases has resulted not only in exceedingly intricate fourth amendment case law,⁸⁰ but also has enticed the Court to invite the

76. SUP. CT. R. 17.1.

77. See *supra* notes 10-20 and accompanying text.

78. Supreme Court Rule 17.1 speaks to the considerations governing review on certiorari. Certiorari is appropriate when a "conflict" exists among the federal circuits or among state courts on a federal question, or when the lower court "has decided an important question of federal law which has not been but should be settled by this Court." SUP. CT. R. 17.1(c). Given their workload, however, I conclude that the justices should be even more cautious than the rule requires. If lower court "conflict" is at issue, such conflict should be substantial. An isolated disagreement does not merit hearing.

79. For the statistics on the opinions delivered by the Court in the field of criminal law or procedure, see *supra* notes 18-20, 29-37 and accompanying text. Justice Stevens has commented more than once on this matter. He criticizes the Court for "peering" over the shoulders of state-court judges when fourth amendment matters are at issue. *Florida v. Meyers*, 104 S. Ct. 1852, 1855 (1984). He is especially upset that the Court seems more inclined to vindicate the will of the majority than to protect individual rights and that it has done so summarily in a number of cases. *Id.* For Justice Stevens' comments, see *Florida v. Meyers*, 104 S. Ct. 1852, 1855 (1984) (Stevens, J., dissenting). See also *United States v. Leon*, 104 S. Ct. 3430, 3450-57 (1984) (Stevens, J., concurring in the judgment in No. 182-963 and dissenting in No. 82-1771); N.Y. Times, Aug. 5, 1984, at 1, col. 1 (speech before the American Bar Association) ("my present colleagues' enthusiastic attempts to codify the law . . . deciding the cases that come before them" involves "casting judicial restraint aside in an effort to move the law to the right"). Justice Blackmun, too, has been quoted as having criticized the Court for going "where it wants to go . . . by hook or by crook" and for "deciding more than the case requires." Barbash & Kamen, *supra* note 28, at 33, col. 1.

80. Professor LaFave expends 2253 pages, excluding the quickly enlarging three pocket parts, to summarize the law of the fourth amendment in his monumental treatise, W. LAFAVE, SEARCH AND SEIZURE (1978). Much of this law is highly intricate. Thus, in *United States v. Jacobsen*, 104 S. Ct. 1652 (1984), a fairly simple factual event—the opening of a

parties to litigate issues not originally raised in their petitions.⁸¹

Segura is a classic example of the problem. It is a disaster that need not have occurred. Although some minor division among the circuits existed regarding questions of the dissipation of taint in circumstances such as those present here,⁸² *Segura* came to the Court in both factually and legally undesirable condition for useful review. Even an activist court should have denied certiorari in this case.

Most disturbingly, the problems with the case were, or should have been, evident to the justices from the parties' briefs on the joint petition for certiorari.⁸³ The most important issues and sub-issues were never before the Court, or they reached the Court without adequate, hardly "comprehensive," briefing. Powerful argumentation was not in the cards. Little new law was possible; what new law the Court could make was likely to be undermined by the factual context of the case. A busy court decided to render a decision likely, by its very nature, to be flawed. The seeds were sown for poor development of fourth amendment jurisprudence.

damaged package by a private party, and then its reopening and chemical testing of the contents by a government agent—requires careful analysis of whether the reopening was a "search" and whether the *additional* movement of the contents, and the chemical testing of a small quantity of the contents, was a "search," a "seizure," or both. The final question, of course, was whether warrants were required for any of these events.

81. *E.g.*, *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985) (Stevens, J., dissenting from grant of certiorari). In this case, Justice Stevens criticized the Court's request that the parties brief and argue a question they did not bring before the Court as follows:

Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ . . . as improvidently granted, orders reargument directed to the questions that [petitioners] decided not to bring here. . . . Thus, in this nonadversarial context, the Court has decided to plunge into the merits of the fourth amendment issues despite the fact that no litigant . . . wants the Court's guidance on these questions.

Id.; see also *Illinois v. Gates*, 462 U.S. 213 (1983).

82. The Second Circuit decision in *Segura* conflicted with the taint analysis in *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980), and to some extent with the analysis in *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974). *Segura* also conflicted with three state decisions: *State v. Dorson*, 62 Hawaii 377, 615 P.2d 740 (1980); *State v. Bean*, 89 Wash. 2d 467, 572 P.2d 1102 (1978); and *People v. Shuey*, 13 Cal. 3d 835, 533 P.2d 211, 120 Cal. Rptr. 83 (1975).

83. If the problems were not evident to the justices at this time, the government's subsequent brief on the writ certainly would have put them on notice that the writ was improvidently granted.

B. Finding Issues

In August 1982, Segura and Colon raised the following issue in their joint petition for certiorari:

Whether the introduction into evidence of contraband seized after a 19-hour hiatus between the illegal entry into and seizure of petitioners' dwelling and the obtaining of a search warrant violates the Constitutional requirement that a magistrate find probable cause and issue a warrant before the police violate the privacy of the home?⁸⁴

Noting that the decision below conflicted with holdings of other courts,⁸⁵ the petitioners called upon the high court to develop an opinion that would deter "this kind of [egregious] activity."⁸⁶

Surely a civil libertarian could be deeply troubled by the government officials' conduct in this case. They dragged Segura from the site of his arrest to his apartment, apparently unconstitutionally invaded his home and arrested the occupants, improperly searched the building, and then occupied it for more than nineteen hours. The Warren Court might well have accepted the petitioners' invitation to condemn this behavior. Obviously, the Court should strongly condemn egregious, unconstitutional government conduct. But, was this case the proper vehicle for expressing such condemnation? And, perhaps more pragmatically, if the majority of justices who voted to grant hearing in this case did *not* intend to condemn the government, was this a suitable vehicle for creating new law to protect such government activities?

Why would the Court grant hearing in this case? Putting aside the peculiar facts of the case, the fact pattern fairly raised two questions. First, under what circumstances may police secure premises pending issuance of a search warrant? This unresolved question is of no small importance to the police, and has perplexed and troubled courts,⁸⁷ including the high court,⁸⁸ in the past. This

84. Joint Petition, *supra* note 51, at 1-2. A second issue was also raised. See *supra* note 75.

85. See *supra* note 82 and accompanying text.

86. Joint Petition, *supra* note 51, at 10, 17.

87. Some courts assumed that *external* securing of premises, and exclusion of persons from the premises, was valid, but these cases involved only the hypothetical presence of persons already under arrest, or subject to immediate arrest. See 2 W. LAFAYE, *supra* note

issue can, however, arise in a number of factual contexts. Police may secure premises from within a home, or from without. The premises secured may be occupied. If they are, police may wish or need to evict, detain, or keep under scrutiny the occupants. If the premises are unoccupied, persons with a lawful possessory interest in the home may never arrive, or they might come and demand free access. What does the police officer do in each of these situations? Each of these questions ultimately requires Supreme Court consideration. The precise legal questions that the Court would have to confront, include: (a) whether the act of securing is a "search" or "seizure"; (b) if it is either or both, whether it requires "probable cause" or some lesser degree of certainty; (c) whether a warrant is a prerequisite to such securing; (d) whether the answers to (a) through (c) differ when the police occupy the premises from

80, § 6.5, at 451-52. Consequently, Professor LaFave considers a number of issues unresolved. Cases permitting *internal* securing, as here, exist, but LaFave notes that "convincing analogies [to established fourth amendment doctrine] are hard to come by." *Id.* at 453. Professor LaFave considers the issues of securing premises important and largely unresolved. *Id.*

88. The facts in *Segura* are similar in many respects to *Vale v. Louisiana*, 399 U.S. 30 (1970). Police officers arrested Vale on a drug charge, on the front steps outside his house, then took him into the house, and looked around it for possible occupants. When Vale's relatives subsequently returned home, the officers conducted a full search of the house, and seized evidence found in a rear bedroom. The Supreme Court of Louisiana justified the search as one incident to Vale's lawful arrest, but the Supreme Court rejected that theory. The Court considered the government's claim that the search was valid on the ground that the officers needed to enter in order to reduce the risk that anyone on the premises might dispose of contraband before a search warrant could be obtained. The Court responded ambiguously to this argument. It rejected the entry because no exigent circumstances existed to justify a warrantless entry, observing both that the government failed to demonstrate that contraband was in the process of destruction, and that in any event the arresting officers had checked the house and found nobody inside. The opinion could be interpreted implicitly to permit securing of premises. 2 W. LAFAVE, *supra* note 80, § 6.5(a), at 435. Justice Black's dissent in *Vale* expressed concern, however, that the Court's decision would require police to leave the premises to obtain a search warrant. 399 U.S. 30, 40-41 (1970) (Black, J., dissenting).

The result in *Vale*, however, was correctly described by LaFave as "baffling" and "curious," and hopefully not "the last word from the Court on this important issue." 2 W. LAFAVE, *supra* note 80, § 6.5(a), at 435-36. This case might, at first glance, have served as the Court's next word on this issue.

The similarity of *Vale* to *Segura* was not lost on the *Segura* parties. Petitioners argued in the principal case that "misapplication of the 'independent source' exception to the exclusionary rule would result in an overruling of *Vale*." Brief of Petitioners on the Writ of Certiorari at 21 n.5, *United States v. Segura*, Nos. 82-1062, 82-1064 (2d Cir. June 29, 1982) [hereinafter cited as Petitioners' Brief].

within, rather than secure them from without; and (e) what authority the government possesses, when it secures premises, regarding the lawful occupants or would-be occupants.⁸⁹

Second, the general facts implicate a *Wong Sun*⁹⁰ issue—what effect, if any, does a valid search warrant have on evidence tainted by a previous illegal search? The scope—even the legitimacy—of the fourth amendment exclusionary rule is surely one of great significance, and is a matter about which this Court has expressed frequent recent concern.⁹¹ The effect of the *Wong Sun* doctrine is to expand, not to restrict, the rule's scope. Recently, the Court has considered whether, and how, acts of free will by witnesses to crime,⁹² and by suspects,⁹³ can untaint subsequently obtained evidence causally tied to earlier illegalities. The Court could use a case like *Segura* to consider the effect of a hypothetical free will decision by a suspect to destroy seizable evidence. The Court could decide whether the existence of a constitutionally valid search warrant always, never, or sometimes, renders untainted evidence which the police originally legally found and subsequently seized.

C. The Issue of Securing the Premises

Despite the social importance of the issues, there are four reasons why the justices should have realized in advance that they could not properly use this case as a vehicle for considering the "securing" question.

89. This latter question, in turn, requires analysis of the nature of the government conduct vis a vis the person: is it a "seizure" of the person to evict or to detain or to keep under surveillance such person; and if it is, what level of suspicion is required? For a discussion of the securing issue, see generally 2 W. LAFAVE, *supra* note 80, § 6.5(a)-(c), at 432-55.

90. *Wong Sun v. United States*, 371 U.S. 471 (1963), is the leading case regarding the effect of an unconstitutional search or seizure upon subsequently seized evidence. I use the case named as shorthand for this general issue.

91. See, e.g., *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (exclusionary rule inapplicable in good-faith, warranted searches); *United States v. Leon*, 104 S. Ct. 3405 (1984) (same exception in federal context); *Nix v. Williams*, 104 S. Ct. 2501 (1984) ("inevitable discovery" exception to fourth amendment permitted); *United States v. Ceccolini*, 435 U.S. 268 (1978) (scope of taint limited).

92. See *United States v. Ceccolini*, 435 U.S. 268 (1978).

93. See *Brown v. Illinois*, 422 U.S. 590 (1975).

1. Strategy

It takes little prescience to realize that if *Segura* was intended as a vehicle to consider this question, it was because four or more justices wanted to justify such police conduct. If so, the obvious question is, why would they choose this case? It is hard to imagine a case less factually attractive. First, this case does not deal with the securing of unoccupied premises from without, but rather deals with the securing of occupied premises from within. Second, this is not a case, like *Chimel*,⁹⁴ where the police were, at least apparently, lawfully within the premises. Rather, *Segura* is more like *Vale*,⁹⁵ but perhaps worse.⁹⁶ Third, *Segura* involves more than a mere momentary occupation of the home. Nineteen hours passed. Finally, the extended occupation was not easily or attractively explained. At best, there was a significant, largely unexplained, delay in the judicial system. Worse, government laziness in applying for the warrant might have been involved. At worst, disinterest by the United States Attorney in the warrant requirement of the fourth amendment to the Constitution could explain the delay. Making matters even worse for the justices who wished to justify the conduct here, the government implicitly admitted after the Court granted certiorari that the delay was due to laziness or disinterest.⁹⁷

2. Was the Issue Before the Court?

It is not clear that the question of securing the premises as a fourth amendment issue was properly before the Court. In the courts below, the government argued that the initial entry was lawful. Both courts disagreed. At no time did either court justify—or, for that matter, even reject—“securing” as such. At the Supreme Court, however, the government apparently changed its position, although it did so in less than straightforward fashion. The Solicitor General’s brief on the petition for certiorari generally treated the entry as illegal, framing its position instead solely as a *Wong*

94. *Chimel v. California*, 395 U.S. 752 (1969).

95. *Vale v. Louisiana*, 399 U.S. 30 (1970). For a discussion of *Vale*, see *supra* note 88.

96. Here, the entry into the house was at night, forcible, and involved the unlawful arrest of four occupants of the premises.

97. See *supra* note 56 and accompanying text.

Sun claim.⁹⁸ "Securing," as an issue, was not raised. Yet, the Solicitor General dropped a footnote contending that "the court of appeals' conclusion [that the entry was unlawful] . . . is open to serious question. . . ."⁹⁹ It recommended that the Court grant hearing in another specified case then docketed with the Court,¹⁰⁰ and in which the government had petitioned for certiorari, because "it is possible that the Court will not find occasion to resolve the [*Wong Sun* issue] if it grants review in this case."¹⁰¹

Implicit in the government's position was that the justices might want to reach the entry question, even though the government no longer contested it. The only way, however, the Court could reach the "securing" issue would be to attack both lower courts' conclusion that the entry was unlawful, and, furthermore, to do so despite the apparent unwillingness of the Solicitor General to make such a claim;¹⁰² otherwise it would have to separate the unlawful entry from the subsequent occupation. Yet, again, the government brief made no such claim; it did not even hint at such an argument.¹⁰³

98. Brief for the United States in Opposition to Petition for Writ of Certiorari at 5, *United States v. Segura*, Nos. 82-1062, 82-1064 (2d Cir. June 29, 1982) (the "illegal entry did not cause the later discovery of the evidence . . . ; hence, that evidence was not a 'fruit'. . . . See, e.g., *Wong sun* . . .") [hereinafter cited as Brief in Opposition].

99. *Id.* at 6 n.3.

100. *United States v. Crozier*, 104 S. Ct. 3575 (1984). The Court did not follow the Solicitor General's recommendation. Rather, after *Segura* was decided, the Court granted certiorari in *Crozier*, vacated the judgment, and remanded the case to the Ninth Circuit for "further consideration in light of *Segura*" and two other cases. *Id.*

101. Brief in Opposition, *supra* note 98, at 6 n.3.

102. Willingness to reach issues in such circumstances would not be unique, however. See *supra* note 81, and accompanying text.

103. Subsequently, the government's brief on the writ did raise the securing issue and the government did defend such actions. Respondent's Brief, *supra* note 56, at 7. It was done in the context of assuming both that the entry was unlawful, *id.* at 12 n.6, and that securing is a seizure, *id.* at 7. See generally *infra* notes 104-11 and accompanying text. To follow this new strategy, the government had to separate the entry from the occupation, and the government seems only to argue that an external securing is appropriate. Respondent's Brief, *supra* note 56, at 21 ("That does not mean that the officers were entitled to enter the apartment . . . , but it does mean that they were permitted to station themselves in a place where they had a right to be and prevent persons from entering the apartment"); *id.* at 22 n.14 (distinguishing external from internal securing). Despite this argument, the government still claimed that the "question presented is not one of substantive Fourth Amendment law, but rather simply one of remedy" *Id.* at 12 (emphasis in original). Thus, the government apparently still viewed the only real issue to be one of taint.

3. What Subissues Were Before the Court?

Even if the "securing" question was somehow properly before the Court, consider the context in which it was raised. First, the government assumed *arguendo* the unlawfulness of the entry.¹⁰⁴ Second, the Court had to decide whether such occupation was a "seizure." This matter was of paramount legal significance, because, if the occupation of the premises was not a "seizure," it falls entirely outside the proscription of the fourth amendment. This reasoning may be a disturbing way for the Court to decide matters of such great concern,¹⁰⁵ but it is now the correct mode of analy-

104. Respondent's Brief, *supra* note 56, at 12 n.6.

105. By concluding that an occupation was not a seizure, the Court can preempt the important process of weighing the government action against the citizen's interests in privacy in his person and control of his property, in order to decide if the conduct is a "reasonable search or seizure."

The Court does not always appear to be sensitive to the distinction between concluding that conduct is not a seizure and finding that the conduct constitutes a seizure but is a reasonable one. In *United States v. Karo*, 104 S. Ct. 3296 (1984), police placed an electronic surveillance device in an ether can. The Court said, "[o]f course, if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment." *Id.* at 3302. A fourth amendment violation does not necessarily follow, however. To conclude that the beeper's, or any other object's, presence on or in a person's property is a "seizure," would only mean that a constitutional issue is raised. It does not mean that all or any such seizures are unreasonable, and therefore constitutionally violative. Even if all installations of all devices are to be treated alike, it would be preferable to analyze explicitly the competing interests, and forthrightly conclude that all such seizures are either reasonable or unreasonable, rather than to define away the issue by pretending it is not a "seizure."

At times the Court conducts the balancing process at the initial stage of deciding whether the governmental activity implicates the fourth amendment. At least in the realm of "searches," the Court recently balanced interests to conclude that prison cell searches are *not* "searches" in the constitutional sense. *Hudson v. Palmer*, 104 S. Ct. 3194 (1984). (At times it is linguistically difficult to describe the activity in any way other than as a "search," even if it is not one in fourth amendment terms.) The problem with the Court's approach, however, is evident from the facts of the case. The inmate claimed prison officials invaded his cell merely to harass him. Because the case reached the Court on summary judgment, this claim must be accepted as true. When the Supreme Court concluded that prison searches are not "searches"—because ordinarily the interests of society in prison security supersede those of the inmate—the harassment loses fourth amendment constitutional significance. It would seem far better to conclude that when prison guards walk into an inmate's cell, and look in and under all of its contents, that this is a "search," that usually the legitimate interests of the prison officials renders such searches reasonable, but that this "search," if based on harassment, was unreasonable. Collapsing the second issue—the reasonableness of the search—into the first—whether the activity was a search in the constitutional sense—does not permit this approach.

sis.¹⁰⁶ The government did argue below that no seizure occurred until the search warrant was executed. The court of appeals made short shrift of this point.¹⁰⁷ By the time the case reached the Supreme Court, however, the Solicitor General again backed down. Without conceding the point—indeed it made a half-hearted argument in a footnote¹⁰⁸—the government assumed *arguendo* that the occupation was a “seizure” of all of the contents of the apartment.¹⁰⁹ In short, the “occupation” issue, not apparently before the court,¹¹⁰ and present in a highly unattractive factual context,¹¹¹ was also in a legally undesirable context. The two initial issues—the possible illegitimacy of the entry, and the nature of securing as a “seizure”—were not before the Court. They both were assumed *arguendo*.

Third, the Second Circuit’s affirmance of the district court’s suppression of the evidence observed in plain view in the home further complicated matters. This issue, too, was not before the Court. Again, the Solicitor General changed his legal position, and did not object in the Supreme Court to the exclusion of the evidence.¹¹² Neither lower court opinion explains how the items, especially those in the closet, came into “plain view.” The district court said they were “turned up,”¹¹³ perhaps implying that the items might not have been so evidently in view. The court of appeals merely said that during the “limited inspection,” the police “discovered them.”¹¹⁴ The problem is, however, that once the government accepted the legitimacy of the exclusion of this evidence, which followed from its assumption that the entry was unlawful, and from its further assumption that the occupation was a seizure of all of the contents in the apartment, they left themselves without a compelling principled argument for distinguishing between the two

106. 3 W. LAFAYE, *supra* note 80 § 9.2(g), at 46.

107. See *supra* notes 66-67 and accompanying text.

108. Respondent’s Brief, *supra* note 56, at 16 n.9.

109. *Id.* at 14-16.

110. See *supra* notes 98-103 and accompanying text.

111. See *supra* notes 94-97 and accompanying text.

112. Respondent’s Brief, *supra* note 56, at 6 (identifying the issue as dealing with “evidence discovered pursuant to a valid search warrant”) (emphasis added). See generally Brief in Opposition, *supra* note 98.

113. *Segura*, District Court Memorandum, *supra* note 42, at 11.

114. *United States v. Segura*, 663 F.2d 411, 413 (2d Cir. 1981).

categories of seized evidence. Both seizures were probably reasonable, or both were unreasonable.¹¹⁵

Thus, the "non-issue" issue reached the Court as follows: it was "asked" whether, assuming that the entry was unlawful, and further assuming that the premises and all of the items therein were seized, and, still further assuming the inadmissibility of the items observed after the illegal entry of the apartment and seizure of the contents therein, were the remaining items of evidence similarly seized, nonetheless admissible? If the context in which the issue reached the Court is confounding, surely its principled resolution promised to command little intellectual support.

4. Decision in the Shadow of the "Taint" Issue.

Finally, considerable danger existed that any discussion by the Court of the securing issue would end up as dictum. After all, if despite all the problems noted above, the Court chose to hold the occupation lawful, the assumed illegality of the entry remained. Thus, a problem of taint necessarily would exist. Even if the Court declared the occupation unlawful, it nevertheless might admit the evidence on *Wong Sun* principles, on the ground that their subsequent seizure was not causally tied to the initial illegalities.¹¹⁶

D. The Issue of Taint

Segura was an entirely inappropriate vehicle for considering the very important question of securing of premises. If this case deserved the attention of an overly burdened Court, only the *Wong Sun*¹¹⁷ matter warranted their attention. Taint surely was a problem. Indeed, that issue occupied most of the lower courts' opinions and the government's initial brief. Perhaps certiorari could properly have been granted because at least a minor conflict did exist among lower courts regarding this matter of constitu-

115. For further discussion of this problem as it relates to the issue of securing, see *infra* notes 213-16 and accompanying text; for discussion of this problem as it relates to the ultimate taint issue, see *infra* note 229 and accompanying text.

116. Regarding the pertinent law on this matter, see *infra* notes 120-21, 141, and accompanying text.

117. See *supra* note 90.

tional significance.¹¹⁸ The question here, however, is not one of power but of propriety. Why would a busy court take this case to consider the *Wong Sun* issue? Let us put the matter in perspective.

First, granting the general importance of the taint doctrine to the administration of criminal justice, one may question how often this particular type of fact pattern occurs. That is, how often do the police illegally enter a home they apparently believe is unoccupied, solely so they can secure it, unexpectedly find lawful occupants, illegally arrest these occupants, remain on the premises while waiting for a search warrant, and then obtain a completely untainted search warrant? It happens, but one may wonder how often?¹¹⁹

Second, basic *Wong Sun* law is rather straightforward. Tainted evidence must be suppressed; when the taint is dissipated, it may be introduced into evidence.¹²⁰ No matter how unlawful the government conduct, or how many times the government violates the law, taint is absent if there is an independent source for the discovery, i.e. no causal connection between the illegality and the subsequent evidence seized.¹²¹ This law is basic and ancient, and neither disputed nor presently controversial. Certainly it did not require the Court's time to repeat.

Third, the district court concluded that there was a causal connection, suggesting that had the police acted constitutionally, Colon might well have destroyed the evidence. The Second Circuit rejected this finding as speculative. Once a court proceeds to consider the question of causation, however, it becomes one of fact. The relevant law is clear, and the application of that law to the facts is hardly one that merited the Court's attention.

One cannot say for sure why the Court felt *Segura* merited its

118. See *supra* note 82 and accompanying text.

119. All of these factual circumstances are important. The police in situations such as *Segura* are now apt to come armed with arrest warrants. See *Payton v. New York*, 445 U.S. 573 (1980). They thus would have a basis to enter the home lawfully. Or, if they have a reasonable basis to believe the accused narcotics violators and the contraband are in the house, they will have a much stronger case for entry. But see *supra* note 88. Once the police are lawfully in the house, the taint issue is gone.

120. *Wong Sun v. United States*, 371 U.S. 471, 477-88 (1963).

121. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

attention on the matter of taint. But, unless the Court intended to spend its time on a merely factual disagreement between the courts below, there seems only one possible basis for the Court's review—to create new law, beyond the causation issue.¹²² Namely, the Court may have wished to reach the allegedly “prudentially unsound” analysis of the district court. That is, even if we assume a causal connection, the Court could decide whether the execution of a valid search warrant always, never, or sometimes, serves to untaint the evidence originally come upon in the previous illegality.¹²³

Putting aside the merits of any rule which would flow from this litigation, however, *Segura* still was not an ideal avenue for making any such law. As with the issue of securing, the accepted exclusion of the “plain view” evidence presents conceptual difficulties.¹²⁴ The government argued, in essence, that there was an illegal entry, and that there were *two* seizures of all of the contents, once when the home was entered, and then again when the warrant was executed. Why, then, would one set of seizures after an illegal entry be distinguished from another set?¹²⁵ Unless the justices were prepared with a principled distinction, the Court should have waited for a case in which no plain view sighting occurred,¹²⁶ where *all* items

122. These facts arguably triggered one legally unsolved issue regarding the scope of the exclusionary rule: the applicability of the “inevitable discovery” doctrine, i.e. whether taint may be dissipated upon evidence that the government would have developed an independent source, even though, in fact, it did come upon the evidence as a result of the primary illegality. The court apparently did not consider this case the vehicle by which to resolve that question, however. It granted certiorari in another case, already docketed, which more directly, explicitly, and attractively raised that issue. See *Nix v. Williams*, 104 S. Ct. 2501 (1984). The Court's decision in *Nix*, upholding the doctrine, was announced less than a month before its decision in *Segura*. *Id.* at 2501.

123. A comparable issue, previously resolved by the Court, concerned the significance of *Miranda* warnings in untainting a subsequent confession obtained shortly after an illegal arrest. The Court concluded that such warnings were a factor, but no more than a factor, in dissipation of the taint. See *Brown v. Illinois*, 422 U.S. 590 (1975).

124. Moreover, the Solicitor General warned the Court, in its response to the petition, that the *Wong Sun* issue might be mooted because the illegality here—the entry—was a “close issue.” Brief in Opposition, *supra* note 98, at 6 n.3; see *supra* notes 98-101 and accompanying text.

125. For discussion of the possibility of any such principled distinction, see *infra* note 229 and accompanying text.

126. For example, such a situation would be where external securing of premises occurred.

ultimately seized were first sighted in plain view,¹²⁷ where plain view sighting occurred but the lower courts treated alike all the ultimately seized evidence, or where the evidence was treated differently, but the parties argued against such a distinction.

E. Summary

In short, this case came to the Court in an unenviable procedural context. The important issue of securing premises was not in an appropriate environment for resolution. Although the case did raise a *Wong Sun* issue, the legal issue came to the Court in inconsistent fashion. One cannot say that the Court had no authority to hear *Segura*, for it surely did. One can say, however, that in light of the state of the record and the Court's heavy schedule, the Court probably should have denied certiorari. The Court could have averted a nearly certain disaster.

V. SUPREME COURT OPINION

The Supreme Court granted *Segura* and Colon's petition for writ of certiorari on February 22, 1983.¹²⁸ Oral arguments were held on November 9, 1983. The opinion of the Court was not announced, however, until July 5, 1984, the final day of the 1983 Court term, in the awe-inspiring flurry¹²⁹ of decisions announced near the end of the term.

Chief Justice Warren Burger delivered the opinion of the Court. Justices White, Powell, Rehnquist, and O'Connor joined all but Part IV of the opinion. Chief Justice Burger explained in the first sentence of the opinion why the Court chose to hear the case: "We granted certiorari to decide whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police

127. It appears that *United States v. Crozier*, 104 S. Ct. 3575 (1984), docketed with the Court at the same time as *Segura*, was such a case. The government, in its brief on the petition in *Segura*, recommended to the Court that it grant hearing in *Crozier*, rather than in *Segura*. See *supra* note 100 and accompanying text.

128. *Segura*, 459 U.S. 1200 (1983).

129. During the period of June 4 through July 5, 1984, 61 decisions were announced. 52 U.S.L.W. 4681-5198 (1984). Of this number, nineteen were announced in the last three days of the Court term. *Id.* at 5051-98.

before the entry into the residence."¹³⁰

Part I of *Segura* is apparently¹³¹ three paragraphs long. Noting that the opinion purposely is limited, the justices identified two separate questions which they believed required resolution: first, whether entry and internal securing of premises constitutes an impermissible seizure of all the contents of the apartment, "seen and unseen"; and second, whether evidence first discovered during the later, warranted search should be suppressed as the fruit of the initial illegal entry.¹³²

In light of the poor context in which this case reached the Court, Chief Justice Burger identified what was "not before us, and [for which] we have no reason to question."¹³³ namely, that the entry without exigent circumstances was unlawful; and that the ensuing search and observation of items in plain view was illegal.¹³⁴ Additionally, perhaps because of the lack of significant briefing of the issue, the Court avoided deciding specifically whether the securing of the premises constituted a seizure. It assumed *arguendo* that it did.¹³⁵ Having put aside these three issues, the Court then presented its dual holdings:

Assuming that there was seizure of all the contents of the petitioners' apartment when agents secured the premises from within, that seizure did not violate the Fourth Amendment. Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscrip-

130. *Segura*, 104 S. Ct. 3380, 3382 (1984).

131. In the slip opinion, perhaps due to a printing error, the third paragraph is ambiguously broken up, so that the first and second sentences thereto are separated by spacing that could imply that the latter sentence was intended as a fourth paragraph (though it is not indented). *Segura*, No. 82-5298 slip op., at 2; see also 104 S. Ct. 3380, 3383 (1984).

132. 104 S. Ct. at 3382.

133. *Id.*

134. *Id.* at 3383. The Court reiterated these "non-issues" elsewhere. See *infra* notes 138-39 and accompanying text.

135. *Id.* at 3382.

tion against unreasonable seizure.¹³⁶

On the matter of taint, the Court concluded that the illegal entry had no ultimate bearing on the second question:

[W]e hold that the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information of which it was based were unrelated to the entry and therefore constituted an independent source for the evidence. . . .¹³⁷

Part II of the opinion merely summarizes the facts and describes the lower courts' analysis of the issues. The Court repeated its earlier assertion that the lawfulness of the entry and the admissibility of the items sighted in plain view were not before it because the government, "although it does not concede the correctness of [the lower courts'] holding, does not [now] contest it. . . ."¹³⁸

Part III commences with the Court's third disclaimer regarding the "narrow and precise question now before us."¹³⁹ With the entry and plain view sighting put aside, the only issue was "whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed."¹⁴⁰ The remainder of Part III is a short, uncontroversial statement of the pertinent law regarding tainted evidence, and of the fact that "it is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence "from an independent source." ' "¹⁴¹

Part IV of the opinion for the first time turns to an explanation of the reasoning behind the Court's first holding described in Part I. Only Chief Justice Burger and Justice O'Connor signed this por-

136. *Id.* at 3382-83.

137. *Id.* at 3383 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

138. *Id.* at 3385 n.4.

139. *Id.* at 3385.

140. *Id.*

141. *Id.* at 3386.

tion of the opinion, however. In the slip opinion, Part IV has a Part A, but no Part B.¹⁴² Later, the "A" was deleted from the West Publishing Company's published version.¹⁴³

The two justices noted that Segura and Colon argued that the government's entry and act of securing the premises constituted a "seizure" of the contents of the apartment. The two justices observed that this argument was "plainly"¹⁴⁴ intended to avoid the "independent source" exception.¹⁴⁵ Chief Justice Burger and Justice O'Connor concluded, however, that such an argument was irrelevant; even if the occupation was a seizure, the seizure was not an unreasonable one given the totality of the circumstances.¹⁴⁶

The two justices conceded that no precedent for this ruling existed, although they found implied support from two previous cases—*Rawlings v. Kentucky*¹⁴⁷ and *Mincey v. Arizona*¹⁴⁸—from the words of "a distinguished constitutional scholar"¹⁴⁹ in a 1969 article,¹⁵⁰ and from language in Justice Black's dissent in *Vale v. Louisiana*.¹⁵¹

Chief Justice Burger also conceded that "arguably, the wiser course"¹⁵² would have been for the police to secure the premises externally. Although this wiser course existed, he deemed it constitutionally irrelevant that they instead entered the apartment. He stressed the difference between "searches," which protect privacy, and "seizures," which implicate possessory interests in property. Although the entry here may have constituted an illegal search,

142. *Segura*, Slip Op. at 9, 52 U.S.L.W. 5130-33 (1984).

143. 104 S. Ct. at 3386. One can assume, therefore, that the official version of the opinion, published in the *United States Reports*, will be in corrected form.

144. *Id.*

145. *Id.* The theory would be that the evidence seized in the occupation must be suppressed as primary, not tainted secondary evidence, seized directly as the result of the illegality. *Id.* The second seizure would be irrelevant. The Court conceded that the direct results of unconstitutional searches or seizures must be suppressed. *Id.* This conclusion derives from the reasoning that such evidence must be poisoned since it is actually part of the tree, not part of the fruit that falls from it.

146. *Id.* at 3386-87.

147. 448 U.S. 98 (1980), cited in 104 S. Ct. at 3388.

148. 437 U.S. 385 (1978), cited in 104 S. Ct. at 3388.

149. 104 S. Ct. at 3388 n.7.

150. Griswold, *Criminal Procedure, 1969—Is it a Means Or An End?*, 29 Md. L. Rev. 307 (1969), cited in 104 S. Ct. at 3388 n.7.

151. 399 U.S. 30, 36-41 (1970), cited in 104 S. Ct. at 3389 n.7.

152. 104 S. Ct. at 3389.

requiring suppression of the evidence observed in plain view, the act of securing the premises was at most a "seizure," of which the possessory interests of Segura and Colon were equally invaded whether the seizure was conducted from without or from within.¹⁵³

The seizure was a reasonable one, the two justices reasoned, because seizures generally are less intrusive than searches, and because the governmental interest in discovering and preventing destruction of incriminating evidence is great.¹⁵⁴ Citing three cases, with emphasis on *Chambers v. Maroney*,¹⁵⁵ the justices concluded that warrantless seizures of property based on probable cause frequently are permitted for the time necessary to secure a warrant in order to conduct the more intrusive search. Chief Justice Burger and Justice O'Connor defended their rule from the claim that it would increase the likelihood of illegal entries such as this one, noting inter alia that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed,"¹⁵⁶ as it was here.

The two justices conceded that a reasonable seizure could become unreasonable as a result of the duration of the seizure "or [for] other reasons."¹⁵⁷ They found no problem here: the agents acted in good faith because the delay "in a large metropolitan center unfortunately is not uncommon";¹⁵⁸ the officers spent time giving priority to processing Segura, Colon, and the others arrested; there was no evidence that the agents in the house exploited their presence; and finally, Segura and Colon were under arrest and in custody, so the "possessory interests in the apartment and its contents was virtually non-existent."¹⁵⁹ Chief Justice Burger and Justice O'Connor distinguished *United States v. Place*,¹⁶⁰ in which a ninety-minute detention of luggage was deemed unreasonable because that case involved a seizure upon mere reasonable suspicion,

153. *Id.*

154. *Id.* at 3387.

155. 399 U.S. 42 (1970), cited in 104 S. Ct. at 3387. The other cases cited on the point were *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979).

156. 104 S. Ct. at 3390 (emphasis added).

157. *Id.*

158. *Id.*

159. *Id.*

160. 103 S. Ct. 2637 (1983).

not upon probable cause. Once the probable cause in *Place* was established, the luggage was not opened for three days, although it "was not suggested that this delay presented an independent basis for suppression of the evidence eventually discovered."¹⁶¹

Part V of the opinion returns to the "fruit" issue. The five justices repeated their holding of Part I, based on the law described in Part III, concluding that an independent source "for the discovery of the evidence" existed—the valid search warrant. The justices noted that the "vast majority of federal court [sic] of appeals have held that evidence obtained pursuant to a valid warrant search need not be excluded because of a prior illegal entry."¹⁶² Had the police merely followed the "wiser course" of securing from the outside, the same evidence ultimately would have been seized. Thus, the illegality of the initial entry was causally irrelevant. The "but for" connection, a necessary precondition to taint, was absent.

Would not Colon, or others, have destroyed the evidence but for the illegal entry? The Supreme Court first observed that the petitioners now made no such claim, and then it accepted in full the Second Circuit's reasoning that the possibility of destruction was speculative and, more importantly, that the district court's ruling was "prudentially unsound."¹⁶³ The Court declined "to extend the exclusionary rule, which already exacts an enormous price . . . to further 'protect' criminal activity."¹⁶⁴ The Court was reminded "of Justice Jackson's warning that 'sophisticated argument may prove a causal connection' . . . and his admonition that the courts should consider whether 'as a matter of good sense . . . such connection may become too attenuated as to dissipate the taint.'"¹⁶⁵ This language from the Slip Opinion was later revised to give proper credit for the quote to Justice Frankfurter.¹⁶⁶ The Court concluded that the "essence of the dissent is that there is some 'constitutional

161. 104 S. Ct. at 3390 n.8.

162. *Id.* at 3391 n.9.

163. *Id.* at 3392. This is another reason why the Court should not have heard this case: without this claim the remainder of their discussion was irrelevant.

164. *Id.*

165. *United States v. Segura*, 52 U.S.L.W. 5127, 5133 (U.S. July 5, 1984).

166. The revision is found in 104 S. Ct. at 3392. Presumably, the official version of the opinion will be corrected, too. The dissent made the same error, and even incorrectly identified the "Jackson" opinion as a dissent. *United States v. Segura*, 52 U.S.L.W. 5140 n.31 (U.S. July 5, 1984). This error, too, was corrected. 104 S. Ct. at 3404 n.31.

right' to destroy evidence. This concept defies both logic and common sense."¹⁶⁷ Apparently, although the Court does not say so directly, the taint is dissipated as a matter of law, even if a causal tie could arguably be made, if the only claim of causation is predicated on a theory of destruction of evidence by the defendants or, perhaps, by their cohorts.

Part VI is two sentences long, merely affirming the judgment and agreeing with the court of appeals regarding the admission of the evidence in question.¹⁶⁸

Justice Stevens dissented for himself and three others. He concluded that the act of securing was clearly both a "search"¹⁶⁹ and a "seizure,"¹⁷⁰ and that the act was unreasonable because of its duration.¹⁷¹ He maintained that the search warrant did not "untaint" the evidence seized. Not only was destruction of evidence plausible, but Stevens rejected the majority justices' view that suppression was prudentially unsound.¹⁷² In his view, the government agents' conduct was "blatantly" unconstitutional,¹⁷³ and the "Court's rhetoric cannot disguise the fact that . . . it not only tolerates, but provides an affirmative incentive for warrantless and plainly unreasonable and unnecessary intrusions into the home. . . ."¹⁷⁴

VI. *Segura* AS A JUDICIAL OPINION

One can criticize the *Segura* opinion from a number of perspectives. First, one can criticize the results on the merits from any one of a number of policy or analytical perspectives.¹⁷⁵ Second, one can

167. 104 S. Ct. at 3392.

168. *Id.*

169. *Id.* at 3394 (Stevens, J., dissenting).

170. *Id.* at 3395.

171. *Id.* at 3394-97.

172. *Id.* at 3400-03.

173. *Id.* at 3404.

174. *Id.* The dissenters believed the record was inadequate to factually resolve the "destruction" question. It would have remanded the case for further proceedings on this question. *Id.* at 3403.

175. For example, the policy implications of *Segura*, if it were binding law on the matter of securing the premises, which it is not, see *infra* notes 208-12 and accompanying text, would be staggering to civil libertarians. The message to the police is "Thou shall not enter homes without a warrant," but that "Thou may occupy it without a warrant." The permissibility of the latter virtually extinguishes the former prohibition.

criticize the Court for its lack of candor in its description of the facts. Chief Justice Burger initially wrote that the occupants of the apartment "were taken to [DEA] headquarters,"¹⁷⁶ rather than forthrightly indicating that they were arrested. More significantly, Chief Justice Burger chose to accept the Second Circuit's characterization of the nearly twenty-hour occupation as the result of "administrative delay."¹⁷⁷ Yet, the Solicitor General conceded that the United States Attorney's office was to blame.¹⁷⁸ Perhaps the justices felt a need to obscure the particularly unattractive factual context with which they were working.

My objection here, however, is more basic. For the reasons

Also troubling is the place of "inevitability" in all of this. If the government can prove by a preponderance of the evidence that the agents would inevitably have discovered the evidence, then the item seized is untainted. *Nix v. Williams*, 104 S. Ct. 2501 (1984). A hypothetical independent source is enough. Yet, what is good for the goose is not acceptable for the gander. When the gander—the person charged with a crime—may be expected to destroy evidence, then this inevitability must be ignored. The difference between the goose and the gander surely is not logical. The explanation is that the former, but not the latter, is clothed in a police uniform. Yet, the issue is "causation," a matter ordinarily of fact, not of law. What happens if a defendant argues that her husband, not suspected of "criminal activity," might have destroyed evidence? Is this a case of goose, or of gander? Does it matter why the husband would destroy it—because he is cleaning house, or because he is trying to "save" his wife? When does he become clothed in a "criminal's uniform"? The claim that there is no "constitutional right" to destroy evidence is a strawman. Nobody made such a claim. Colon and the others in the apartment did have a constitutional right not to be arrested, and Colon had the right not to have the home entered. The real issue is what should be the evidentiary implication of these violations.

I also am troubled by the increasing analytical separation of the "search" from the "seizure." Sometimes, such a distinction is plausible and even desirable. For example, in a *Terry* stop and pat-down one must decide if the stop—i.e. seizure—was valid, and then whether the pat-down—i.e. search—was correct. Often, such a distinction is undesirable, however. You cannot easily—or, more importantly, commonsensically—divide up the *entry* from the continued *presence* in the Segura-Colon apartment. The *res gestae* of the event includes both. If the "entry" is a "search," the occupation is a continuing one. It is hard to defend the "entry" as a possible search, but the "occupation" as only a seizure. At what point does the entry become an occupation, so that a "search" becomes a "seizure"? Suppose a blind police officer enters an unoccupied home and stays for 20 hours. Now there can be no inadvertent search of the contents of the house. Must we now conclude that the constitutional implications of this occupation is precisely the same as that on an external securing? My guess is that the average person would find such a result counterintuitive. *See also infra* note 201 and accompanying text.

176. 104 S. Ct. at 3384.

177. *Id.*

178. *See supra* note 56 and accompanying text.

stated earlier, the case never should have been heard.¹⁷⁹ Once it was heard, however, the legal community was entitled to a far better judicial product than it received. The result of *Segura* was an opinion not only inherently flawed but also unnecessarily weak. Although one can only speculate as to the reasons for this result, the most likely explanations flow from the Court's inappropriate rush to reach issues not suitably before them, their fatigue, and the time pressures caused by their heavy workload.

A. Structure of the Opinion

The *Segura* opinion provides ample evidence of a fatigued Court, of a group of justices trying to finish its work in a hurry, and, perhaps, of a Court putting more time into other, more "significant" cases. The opinion surely demonstrates little concern for structure.

The main opinion is structured oddly. There are six parts. Frequently a court divides its opinion into severable sections in order to make clearer to the reader the differences among justices, particularly when concurring opinions are drafted. Here, however, there were no concurring opinions.

The poorest feature of the structure is the unnecessary and self-damaging division of the taint issue into two, nonconsecutive, parts. Parts III and V deal exclusively with the taint question. The former section provides the uncontroversial law; the latter section applies it to the case here. Part IV, dealing with the "securing" question, separates the two-part taint discussion. The opinion would be developed more logically by placing its "securing" discussion first,¹⁸⁰ and then integrating into one section the two parts which deal with "taint." The dissent expresses no criticism of the basic taint law, so the majority's segregation of this law is inexplicable. There was also no need for Part VI. It could easily have been included in Part V.

Finally, there is the intriguing presence of Part IVA of an opinion lacking any Part IVB. Its presence in the Slip Opinion implies an apparent last-moment reorganization of the opinion, or the deletion of a portion of the opinion. It also demonstrates the haste

179. See *supra* notes 76-127.

180. This assumes the inevitability of the discussion of this issue.

with which the opinion reached its audience.

B. Securing the Premises (Part IV)

Earlier, I argued that the Court could not properly view this case as a proper vehicle to reach the issue of the constitutionality of the securing of the premises.¹⁸¹ And yet, the Court purported to reach that issue. The result was predictably flawed; in addition, the result was worse than it had to be.

1. How not to Make an Issue of a Nonissue

The Court purports to declare new "hornbook" law regarding the securing of premises. It does so, however, while ignoring the essential point of departure in any analysis of a "seizure" question—namely, whether the securing was, in fact, a seizure. Describing an assumed seizure as reasonable makes as much sense as arguing that an assumed human is a male human, that "assuming *X* is a student, she is a good student." This is not a case like *Oliver v. United States*¹⁸² in which the Court, perhaps unnecessarily, provided two independent reasons to approve government conduct in open fields—first, that such conduct is not a "search," and, second, that open fields are not "persons, houses, papers, [or] effects." In *Segura*, a seizure cannot be reasonable—or unreasonable, for that matter—unless it is, first of all, a seizure.

More than logic is at issue. Unless government activity reaches the stature of a "search" or a "seizure," no fourth amendment issue is implicated. The issue, then, falls outside the confines of the Constitution, in which case the Supreme Court has no reason to rule on what is reasonable or unreasonable behavior, nor to tell states what they cannot do.

Beyond logic and "jurisdiction," there is another reason why the Court, inspired to make new law where none was requested by the parties, should have confronted the "seizure" issue. Discussion would have provided useful guidance to the legal community regarding the nature of the concept of "seizure" in the context of personalty. The Court recently has demonstrated particular inter-

181. See *supra* notes 94-116 and accompanying text.

182. 104 S. Ct. 1735 (1984).

est in the subject.¹⁸³ The police and the courts would have benefited from a coherent discussion of this relatively new issue. Instead, the justices provide no guidance. Worse yet, the opinion creates a new, perhaps unintended, cloud over "seizure" law. The dissenters claimed that prior cases "virtually compel"¹⁸⁴ a finding of "seizure." Are the dissenters wrong? Does the Court's grudging treatment of the issue imply that there is more than meets the eye? Or is Chief Justice Burger "simply" guilty of what the dissenters accuse him: reasoning so "parsimonious [that] . . . [it is as if] he were preparing an adversary's brief . . ."?¹⁸⁵

The justices would have been far less subject to criticism had they given a "wrong" answer to the right question, instead of answering the wrong question. Why did they do so? Probably the answer is a result of the factors emphasized earlier. The issue of the seizure was not properly framed. The lower courts never discussed the issue seriously. The Solicitor General never raised it in his first brief to the Court, and he relegated it to a mere footnote in his later brief. Pressured by time and dulled by fatigue, the Court seized the opportunity to avoid the problem and merely tracked the Solicitor General's brief. The Court found itself trapped between its activist desire to make law, and its fatigue that cried out for a simple, if not satisfactory, solution.

2. Questionable Use of Precedent¹⁸⁶

The Burger-O'Connor opinion misuses precedent and leaves false impressions. Whether this is the result of inadequate time for research, or something worse,¹⁸⁷ is unclear.

183. See, e.g., *United States v. Jacobsen*, 104 S. Ct. 1652 (1984); *United States v. Place*, 103 S. Ct. 2637 (1983). Previously, the meaning of the term "seizure" was relevant only with respect to the detention of persons, see, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968), or securing of intangible objects such as conversations, see, e.g., *Berger v. New York*, 388 U.S. 41 (1967). Until recently, Professor LaFave's observation was correct that "the word 'seizure' . . . has, in the main, not been a source of difficulty." 1 W. LaFAVE, *supra* note 80, § 2.1(a), at 221.

184. 104 S. Ct. at 3395 (1984) (Stevens, J., dissenting).

185. *Id.* at 3396 n.12.

186. Criticism of the justices' use of prior case law necessarily skirts arguments which go to the merits of the holding.

187. The Burger Court has been criticized before for "its unyielding determination to reach the desired result [such that] the Court has too often resorted to distortion of the record, disregard of the precedents, and an unwillingness honestly to explain or to justify its

First, the justices' use of *Chambers*¹⁸⁸ as the key precedent for the crucial general proposition that seizures are less invasive than searches is inexplicable. Rather than supporting their claim, *Chambers* refutes it. If seizures are less intrusive than searches, then it would follow that a warrantless seizure of a car, until a warrant can be obtained, followed by a warranted search, would be preferred to a warrantless immediate search. However, not only did the Court in *Chambers* view these issues as constitutionally indistinguishable,¹⁸⁹ but it even upheld a warrantless search after a warrantless seizure.¹⁹⁰ *Chambers*—a car case—simply did not stand for the proposition for which it was used.¹⁹¹

Second, the justices' use of various other cases was disingenuous.¹⁹² They observed that *Rawlings v. Kentucky*¹⁹³ "did not question the admissibility of evidence [internally secured]."¹⁹⁴ True, as

conclusions." Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 169. See Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); see also Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 SW. L. J. 1063, 1089-98 (1981).

188. *Chambers v. Maroney*, 399 U.S. 42 (1970).

189. *Id.* at 52. This position in *Chambers* was inconsistent with an earlier pronouncement of the Court. See *Chimel v. California*, 395 U.S. 752, 766 n.12 (1969) (rejecting the claim that a search after a seizure was "relatively minor," by saying that "we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed . . .").

190. *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *United States v. Chadwick*, 433 U.S. 1 (1977), also cited by the Court, do support their thesis. Both cases, however, went out of their way to distinguish *Chambers*, on the ground that the latter involved a piece of property—an automobile—subject to less privacy protection than the containers seized in the instant cases. See *United States v. Chadwick*, 433 U.S. at 13 n.8; *Arkansas v. Sanders*, 422 U.S. at 765 n.14.

191. Ironically, if one accepts certain other reasoning by the two justices in *Segura*, *Chambers* was improperly decided. Burger partially defends the Court's new rule by noting that since *Segura* and *Colon* were under arrest, their possessory interest in the home and its contents was "virtually non-existent." 104 S. Ct. 3380, 3390 (1984). Putting aside the fact Burger bootstraps the illegal seizure of *Colon* into a basis for justifying the seizure of *Colon*'s home and contents, the reasoning here, applied to *Chambers*, would result in an interesting conclusion. The occupants of the *Chambers* car were all under (proper) arrest. Their possessory (i.e. seizure) interest in their automobile was "virtually non-existent." Their interest in the automobile was a privacy (i.e. search) interest. Under these circumstances, it would seem that a warrant to search the automobile was required.

192. Others have made the same criticism regarding the Burger Court's use of case law. See *supra* note 187 and accompanying text; see also the Court's disingenuous description of the facts in *Segura*, at *supra* notes 176-78 and accompanying text.

193. 448 U.S. 98 (1980).

194. 104 S. Ct. 3380, 3388 (1984).

far as the statement goes. In fact, however, the reason the *Rawlings* court "did not question"—to use Chief Justice Burger's words—the admissibility of the evidence discovered pursuant to the warrant later issued was because, as the Court should have done in *Segura*, that court resolved the issue on alternative *Wong Sun* grounds. What the *Rawlings* Court did assert, in dictum, was that "the legality of temporarily detaining a person at the scene of suspected drug activity to secure a search warrant may be an open question" ¹⁹⁵

The Court read *Mincey*¹⁹⁶ as approving of the situation in which "to preserve evidence, a police guard had been stationed at the entrance to an apartment" ¹⁹⁷ The only issue before the Court there, however, was the search of the house, not its seizure. The propriety of the seizure of items in the house was an issue explicitly left open. ¹⁹⁸

The justices' use of *Place*¹⁹⁹ is similarly odd. With regard to the nearly twenty-hour delay, the Court distinguished *Place* on the grounds that it "was not suggested" by that Court that such a delay was unreasonable.²⁰⁰ It is not surprising that the Court did not make such a suggestion, however, because the *Place* court had already declared the seizure of the suitcase invalid on far more limited grounds,²⁰¹ thereby avoiding the need to reach the issue not

195. 448 U.S. 98, 110 (1980).

196. *Mincey v. Arizona*, 437 U.S. 385 (1978).

197. 104 S. Ct. at 3388.

198. *Mincey*, 437 U.S. at 395 n.9.

199. *United States v. Place*, 103 S. Ct. 2637 (1983).

200. 104 S. Ct. at 3390 n.8.

201. One reason why the seizure of personalty was unreasonable was because of its duration. *Place*, 103 S. Ct. at 2645. The Court was concerned in *Place* with the fact that, on the one hand, use of canines to sniff out drugs was a relatively unintrusive way to conduct an investigation, *id.* at 2644, but that the seizure of *Place*'s luggage was not done in as non-intrusive a fashion as it could have been, *id.* at 2645-46. The Court has indicated before that "investigative methods employed should be the least intrusive means reasonably available" *Florida v. Royer*, 103 S. Ct. 1319, 1325 (1983) (plurality opinion). Both *Place* and *Royer* were cases which involved investigations based on "reasonable suspicion," not "probable cause." Burger points this out. *Segura*, 104 S. Ct. at 3390 n.8 (1984). It is at least debatable, however, whether Burger's opinion in *Segura* is consistent with the underlying interests which *Place* and *Royer* affirm. The presence of "probable cause" justifies greater intrusion by police. The longer detention of property, which flows from probable cause, however, in turn implicates greater interests of the citizen. The fourth amendment, after all, prohibits "unreasonable" searches and seizures. It is troubling, therefore, that Chief Justice

before it.²⁰²

3. The Nature of the "Securing" Holding

Prior to hearing the case, it was not only apparent that the issue of securing did not reach the Court in a proper litigation context, but that any holding was likely to be dictum. And yet, the result of the Court's handling of the issue was even worse than it should have been, or needed to be. The nature of the holding is impaired in at least four ways.

First, Part I purports to state new law regarding the securing of premises. Part IV, however, presents the only explanation or defense of the rule, and it is signed by only two justices. Plurality rationales are, unfortunately, not unique.²⁰³ What is apparently unique²⁰⁴ is that three justices—who apparently like and want this

Burger considers it entirely irrelevant that the police did not follow the "arguably wiser course" of securing the premises from the outside. It may be true that the "seizure" is equally intrusive whether the impoundment is internal or external, but surely the net fourth amendment interests of Colon and Segura were impaired by the internal securing. *Id.* at 3389. To separate the "search" interest from the "seizure" one must, at some point, sever the Court's mode of analysis from the commonsense approach it frequently urges others to apply. *See, e.g.*, 104 S. Ct. at 3392; *Illinois v. Gates*, 462 U.S. 213 (1983). This criticism, of course, goes to the merits of the decision. *See supra* note 175 and accompanying text; *see also infra* note 202.

202. Chief Justice Burger's citation to a "distinguished constitutional scholar" *see supra* note 149 and accompanying text, also was questionable. Burger accurately points out that the scholar, Dean Griswold, "raised the question whether a seizure of premises might not be appropriate . . ." 104 S. Ct. at 3388 n.7. Chief Justice Burger implies, however, from the context in which the quotation is used, that Griswold not only raised the question, but answered it, and that he did so by approving internal securing of homes. As the dissent points out, 104 S. Ct. at 3396 n.14 (Stevens, J., dissenting), however, no such answer from the article was forthcoming, although it cannot be denied that one reasonable inference from the article is that Griswold favored some form of securing of premises.

It is also relevant to point out, however, that the author believed that there "is a clear difference between the search of a home . . . and the search of an automobile." Griswold, *supra* note 150, at 316. The former is clearly more intrusive. Although Dean Griswold was speaking about searches, not seizures, he also said that there is a need "to avoid a kind of intellectual game of chess," and that the law should not be "pushed to a dryly logical extreme." *Id.* at 319. The separation by Burger of the "search" from the "seizure," however, strikes me as just such a chess game. *See supra* note 201.

The Court's use of precedent on the matter of taint also was objectionable. *See infra* notes 224-28 and accompanying text.

203. Nonetheless, they were not common until recently. *See supra* note 13 and accompanying text.

204. The closest to such a case may be *United States v. Harris*, 403 U.S. 573 (1971).

new rule of law—failed to write a separate concurring opinion to defend the controversial rule, or to explain what they accept, if anything, of the Burger-O'Connor opinion.

The dissent is unstinting in its condemnation of Part IV.²⁰⁵ In light of its attack, why would three justices sign a portion of the opinion creating such a controversial rule and yet not provide the reader with their collective or individual reasoning? At the very least, a justice fails to meet his responsibility when he neglects to defend his conclusions with principled analysis.²⁰⁶

The most generous view of this issue is that the timing of the decision—and the workload—compelled this absence. Perhaps, with a reduced workload, the justices would not have allowed the opinion to be announced until the three silent justices spoke. Whatever the reason, the finished product does a disservice to the legal community. Putting aside the *Wong Sun* issue, Part IV is, in fact, a concurring opinion by two justices, and can be deleted without affecting the opinion. After all, the "rule" in Part I lacks a majority explanation. The Court could as well have stated the facts, its "holding," announced its judgment without rationale, and closed. The Court has created a new rule, and essentially has provided no support for the structure.

A published concurrence by the three silent justices would have improved the quality of the adjudication in a number of ways. First, the "Silent Three" might have been in only limited disagree-

There, four justices, including Justice Stewart but not Justice White, signed Part I of the opinion. This portion generally summarized prior case law regarding how to measure the reliability of informants in applications for search warrants, and it summarized the lower court's reasoning in the principal case. Then, in the last three sentences of the section, the Court stated its conclusion in the principal case, and stated one of its rationales, which it indicated it would "develop" in Part III. Yet, when it did develop its reasoning in Part III, Part III was signed by four justices, including Justice White, but not including Justice Stewart. Thus, by one reading, the rationale developed in Part III carried four votes. If Stewart's signature to Part I was intended to include the brief, perfunctory allusion to the rationale later to be "developed," however, then the rationale in Part III carried five votes. But, if that was true, why did Stewart not sign Part III?

The confusion in *Harris* seems to be a function of sloppiness in the writing of the opinion (which, it may be relevant to point out, came at the end of the 1970 court term) and was not, as in *Segura*, the result of willful silence.

205. See *supra* notes 169-71 & 185; see *infra* notes 230-39 and accompanying text.

206. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 21 (1959) ("nine men of ten find it easier to reach agreement on result than upon reasons," but it is "essential that . . . the variations of position be disclosed").

ment. As a result, a majority view on much of Part IV might have been secured. The justices might have disagreed, for example, with the fact that the Burger-O'Connor opinion gratuitously reaffirmed the "search" holding in *Vale v. Louisiana*,²⁰⁷ yet have agreed entirely on the matter of the seizure. Second, the three justices might have provided different and better case law or scholarship to support this rule, rendering the rule more persuasive. Third, a opinion explaining their alternative reasoning would have provided police, lawyers and courts with more understanding of the general views of the Court on the issues of securing, seizures, and home entries. Finally, if nothing else, a concurring opinion would make less persuasive a claim that the entire opinion was riddled by disinterest, fatigue, or overload.

A second problem is that the Court not only provides us with an unsupported rule, but that rule is dictum. This result was predictable²⁰⁸ if not inevitable. If the Court was going to assume that the entry was unlawful, and assume that a seizure occurred, it should also have assumed that the seizure was unreasonable. It would not have affected the result. The Court indicated twice that the reason for granting a hearing was to decide if a seizure, upon a lawful warrant, untaints evidence originally seized as a result of an illegal entry.²⁰⁹ This was the *Wong Sun* question.²¹⁰ According to the Part V reasoning, no taint existed because no causal connection existed between the illegal entry and the later warranted seizure, and because the Court, as a matter of law, will apparently not countenance claims of causation based on hypothetical destruction of evidence by suspects. Such reasoning renders irrelevant not only the illegality of the entry (as it concedes),²¹¹ but also the lawfulness, or unlawfulness, of the occupation. The Court's new law, then, represents much ado about nothing. It is wasteful adjudication, and the

207. 104 S. Ct. at 3389. Regarding the relationship of *Vale* to *Segura*, see *supra* note 88.

208. See *supra* note 116 and accompanying text.

209. See *supra* notes 139-41 and accompanying text.

210. Inexplicably, and incorrectly, the Court indicated in Part I that resolution of this issue "required" it to consider whether the securing constituted an impermissible seizure of all the contents. See *supra* note 132 and accompanying text. Yet, the Court later conceded that resolution of that issue was not required. See *supra* notes 144-46 and accompanying text.

211. See *supra* note 137 and accompanying text.

Court will have to do it all over again in the future.²¹²

The third problem with the case is that the Court's dictum—even as an advisory opinion—fails to deal adequately with the plain view evidence. Again, the Court made matters worse for itself. The high court points out that the admissibility of these items was not before it,²¹³ yet simultaneously Chief Justice Burger and Justice O'Connor use the inadmissibility of the evidence as apparent²¹⁴ partial support for their claim that their "securing" rule will not undermine the deterrent value of the exclusionary rule.²¹⁵

The propriety of the plain view suppression order was not before the Court, which made discussion of it inappropriate. Once the Court began its discussion, however, it should have provided a principled justification for the distinction. None was forthcoming. As a matter of logic—and common sense—none seems apparent. Once the Court viewed the issue to be one of "seizure," not "search," and once it assumed that the securing of the home was a seizure of all of the contents of the apartment, the Court should have treated alike all such contents, including the plain view items.²¹⁶

The final problem with *Segura* is that one of the elements of the "rule" regarding securing is good faith by the officers. Bad faith would, presumably, render securing unreasonable. Yet the Court

212. The Arizona Supreme Court recently rejected the *Segura* dictum regarding securing of premises. *State v. Bolt*, 689 P.2d 519 (Ariz. 1984). The court was aware that the *Segura* holding was dictum, but it felt that "we must conclude that a majority of the Court may soon reach the view" that such securing is reasonable. To take no chances that the dictum will become binding on the state, the state court applied its own constitution to protect citizens from police conduct such as that involved in *Bolt* (and *Segura*).

213. See *supra* notes 133-34 & 138-40 and accompanying text.

214. "Apparent" is used because the justices ambiguously say that police will realize that an unlawful entry "may" result in suppression of plain view evidence. They did not say "will" or "should." 104 S. Ct. at 3390.

215. See *supra* note 156 and accompanying text.

216. It does not appear plausible to distinguish between the classes of evidence on the ground that the plain view items involved a *search*, while the rest of the items implicated a seizure. The unlawfulness of the "search" of the plain view items, and the consequent violation of privacy, might make a civil suit appropriate. Here, however, the issue was the exclusion of evidence in a criminal trial because of an allegedly unlawful seizure. As to that issue all of the evidence was arguably seized in the "reasonable" occupation, and seized, again, in the valid warranted search, so a distinction based on the seizure seems difficult to concoct. If there is one, and if the justices were going to defend the different treatment, the Court should have provided some rationale.

offers no precedent for this substantive distinction. Indeed, there is none. Although "good faith" is now an element factor of the exclusionary rule, at least where a warrant is issued,²¹⁷ not only was there no relevant warrant here, but the Court uses the concept of good faith in *Segura* to create a substantive, not exclusionary rule, doctrine. The Court seemingly requires good faith without serious discussion. Such sloppiness can be expected of tired justices, anxious to end the opinion—and the Court term.

C. *The Taint Holding (Part V)*

Segura is impaired by its treatment of the issue of the securing. Nonetheless, the Court did render a five-vote ruling with rationale, that is not dictum, regarding the question of taint. Merits aside, however, one can make three objections to the adjudicative process.

First, the only binding new rule that comes out of this case is that the Court is unwilling to "further 'protect' criminal activity, as the dissent would have us do,"²¹⁸ by using the possibility of the destruction of evidence as a basis to prove causation (and ultimately, taint).²¹⁹ The dissent argues,²²⁰ with some force, that destruction of evidence was precisely the basis for the finding of taint in other cases.²²¹ How then does the Court justify this new bright line rejection of taint? The answer is found in only three sentences, and a careful look at the three sentences raises doubt about the quality of the deliberative process.

The first sentence is a quote from the 1938 *Nardone* decision. All of the justices originally credited the wrong justice for the statement.²²² Perhaps this is a small point, especially since the Court later corrected it. Nevertheless, this sloppiness is a sign of a body worked beyond its limits. If the Court makes this basic error,

217. See *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).

218. 104 S. Ct. at 3392.

219. The precise scope of this rule is unclear because it is unclear whether such evidence is irrelevant where the claim is that a nondefendant might destroy the evidence.

220. 104 S. Ct. at 3400-03.

221. *Id.* at 3401 & n.28 (citing, for example, *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984); *United States v. Place*, 103 S. Ct. 2637 (1983)).

222. See *supra* notes 165-66 and accompanying text.

can we be confident about the rest?²²³

Indeed, what *is* the rest? The only additional support for the new law was the wholly conclusory statement that "the essence of the dissent is that there is some 'constitutional right' to destroy evidence. The concept defies both logic and common sense."²²⁴ The dissenters never implied any such "right," however. The only "right" the dissenters claim is the right of all citizens to be assured that once a tree is poisoned by the government, its fruits are not ingested without assurances that they, too, are not unwholesome. A new rule of law deserves more than a quote out of context from the dictum of a 1939 decision, originally credited to the wrong judge, followed by a conclusory statement that is hardly self-evident. More time could only have improved the opinion.

Second, the justices cite no precedent for the new rule, while the lower court opinions they do cite are of questionable value. As previously noted,²²⁵ the justices assert that their holding is consistent with the "vast majority" of circuit court opinions, which have held that evidence obtained pursuant to a valid warrant "need not be excluded" because of a prior illegal entry. The Court cited five cases,²²⁶ one of which it conceded was dictum. These cases, however, only hold that evidence "need not" be excluded; they do not stand for the Court's stronger proposition in *Segura* that such evidence always dissipates the taint.²²⁷ Moreover, three of the five cases cited are significantly distinguishable.²²⁸

223. The language quoted from *Nardone* was dictum, and was excised from the following language immediately preceding it, by Justice Frankfurter: "[t]o forbid the direct use of methods. . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destruction of personal liberty'." *Nardone v. United States*, 308 U.S. 338, 340 (1939).

224. 104 S. Ct. at 3392.

225. See *supra* note 162 and accompanying text.

226. See *infra* note 228 and accompanying text.

227. Indeed, if the "vast majority" of cases had said this, there would have been even less need to hear the case.

228. *United States v. Kinney*, 638 F.2d 941 (6th Cir. 1981), and *United States v. Fitzharris*, 633 F.2d 416 (5th Cir. 1980), both involved external securing. *United States v. Bosby*, 675 F.2d 1174 (11th Cir. 1982), involved the securing of a suitcase found in an automobile, not a home.

Another case cited, *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983) simply cited *United States v. Beck*, 662 F.2d 527 (1981) as support for the rule; *Beck*, however, reached the result perfunctorily, merely by citing other cases. *United States v. Agapito*, 620 F.2d 324 (2nd. Cir. 1980), also cited, was similarly devoid of rationale.

Third, *Segura's* facts regarding the items in plain view undermine the new rule. The Court implies that these items were properly excluded, but it fails to tell us why, on the issue of taint, these seized items are different from the others. The justices owe the reader this much. No reason of logic or policy explains this distinction.²²⁹

D. Vituperation

Justice Stevens frequently has expressed his displeasure with the recent direction of the Court's fourth amendment jurisprudence;²³⁰ this case probably represents his most strident condemnation. One cannot know whether the language he used here was, at least partially, the result of fatigue. Nonetheless, the dissent's language is noteworthy. Justice Stevens accuses the Chief Justice of "simply ignor[ing]"²³¹ important points, making an "untenable" assumption,²³² and writing an "adversary's brief";²³³ he condemns the Court's remarkable "misuse"²³⁴ of precedent, for reaching "astounding,"²³⁵ "absurd,"²³⁶ "strange"²³⁷ holdings, ones "as reasonable as was the agents' conduct,"²³⁸ which is described elsewhere as

229. I have already developed why such a distinction is unpersuasive regarding the matter of securing. See *supra* notes 213-16 and accompanying text. Here, the policy arguments for a distinction on the matter of taint are harder to fathom.

In light of the fact the occupation was reasonable, why should the inadvertent visual sighting of items while in the home result in suppression, just because the entry was unlawful? What reason of deterrence justifies its suppression, once one says, as does the Court, that internal securing is valid?

More relevantly, how do we know the two officers "discovered" nothing else in the twenty hours they camped out in the home? Simply, we do not. The Court is at the mercy of the memory and honesty of the two officers. A rule which puts a premium on perjury is not a good rule. Accidental, good-faith sighting of evidence in a home, while a warrant is secured, should not be suppressed—at least, if good faith delays by officers in securing the warrant are reasonable, and if the seizure of the premises is itself reasonable.

230. See *supra* notes 79 & 81 and accompanying text.

231. 104 S. Ct. at 3395.

232. *Id.*

233. *Id.* at 3396 n.12.

234. *Id.* n.14.

235. *Id.* at 3397.

236. *Id.* at 3404.

237. *Id.* at 3397.

238. *Id.* at 3398.

"blatantly unconstitutional."²³⁹

VII. CONCLUSION

Segura is a disaster as a written opinion. The Court should never have granted hearing, or, having done so, should have dismissed certiorari as improvidently granted. It wrote a sloppy and poorly organized opinion. It wasted its own time, going out of its way to render a holding on an issue not before it. The result was dictum, in which three of the five supporters of the rule fail even to explain their vote. The opinion of the other two justices for the rule is riddled with difficulties. Even the portion of the opinion not dictum is weakened by sloppiness, lack of substantial explanatory force, and poor use of case law.

A message emerges from this morass. The Court no longer can afford to continue to follow its activist approach. One can in principle favor activism, and even defend such involvement in order to "undo the damage"²⁴⁰ of the Warren Court's fourth amendment jurisprudence; but those principles must give way to a possibly unpleasant reality. The reality is, simply, that the Court cannot continue to decide so many cases, and at the same time fulfill its responsibility to do proper research, deliberate fully, and write coherent, well-drafted opinions. Perhaps court opinions will never be items of fine art. They should, however, be better products of adjudication than was *Segura v. United States*. Absent structural changes, the Court must limit itself or risk the loss of the respect of even those in the legal community who agree with the majority's philosophical predilection.

239. *Id.* at 3403.

240. I do not have such a view of the work of the Warren Court, but obviously many do.