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## RECONSIDERING SUPERVISORY POWER IN CRIMINAL CASES: CONSTITUTIONAL AND STATUTORY LIMITS ON THE AUTHORITY OF THE FEDERAL COURTS

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The Supreme Court has relied on its "supervisory authority over the administration of criminal justice in the federal courts"<sup>1</sup> as an independent basis for decision for more than forty years. Concluding in *McNabb v. United States*<sup>2</sup> that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence,"<sup>3</sup> the Court excluded the defendant's confession because it was the product of prolonged illegal detention. The *McNabb* opinion was expressly grounded on the Supreme Court's "limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases."<sup>4</sup> It was soon followed, however, by decisions in which the lower federal courts purported to apply their own supervisory powers;<sup>5</sup> and in the four decades since *McNabb* the lower federal courts have employed supervisory power in hundreds of cases.<sup>6</sup> In recent years the Supreme Court has employed its own supervisory authority sporadically,<sup>7</sup> and it has reviewed the lower

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1. *McNabb v. United States*, 318 U.S. 332, 341 (1943).

2. 318 U.S. 332 (1943).

3. *Id.* at 340.

4. *Id.* at 347.

5. The earliest decision expressly grounded on the appellate court's supervisory powers appears to be *Helwig v. United States*, 162 F.2d 837, 840 (6th Cir. 1947), which is described *infra* note 157.

6. Thirty cases are collected in *Burton v. United States*, 483 F.2d 1182, 1187 (9th Cir.), *aff'd* on rehearing, 483 F.2d 1190 (9th Cir. 1973), and more than 40 cases from a single circuit are identified in Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 Vill. L. Rev. 506, 509-11 (1982).

7. The Supreme Court most recently exercised its own supervisory powers in *United States v. Hale*, 422 U.S. 171, 181 (1975). The Court declined to exercise its supervisory powers in *United States v. Caceres*, 440 U.S. 741, 756 & n.22 (1979). *Cf. United States v. Payner*, 447 U.S. 727, 734-35 (1980) (characterizing *Caceres* as a supervisory power case).

courts' exercise of supervisory power.<sup>8</sup> But the Court has never fully explored the source of and the inherent limitations on either its own supervisory powers or those of the lower federal courts.<sup>9</sup> Although supervisory power has occasionally been employed in civil cases, its principal impact has been felt in federal criminal cases in which the federal courts have employed supervisory power to establish rules of evidence and judicial procedure and to devise sanctions for misconduct by prosecutors and government investigators.

Unencumbered by doctrinal limitations, the open-ended language of the phrase "supervisory power" has invited an expansive interpretation.<sup>10</sup> Courts employing supervisory power have generally felt relatively free to adopt rules intended to promote what the courts identify as the ends of justice and good public policy. Supervisory power has proven to be an attractive vehicle for rulings the federal courts might have been more hesitant to ground on a constitutional theory. Supervisory power rulings pose no risk of friction between the federal and state courts since by definition such rulings apply only in federal proceedings. Moreover, if a supervisory power ruling proves to be impractical or otherwise undesirable, it is far easier to alter than a constitutional decision. Supervisory power rulings may be freely revised by the courts themselves, and they are also subject to revision by legislation. As a result, supervisory power rulings have been employed to impose more rigorous standards in federal proceedings than the minimal standards imposed by the Constitution. In some cases, the availability of supervisory power permitted the courts to experiment in formulating standards that have subsequently been placed on a constitutional footing and made applicable to the states.

This Article argues that the supervisory power doctrine has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators. Part I of the Article examines the origins and development of the supervisory power doctrine. The remainder of the Article evaluates the possible sources for this authority. The Article concludes that there is no statutory or constitutional source of authority broad enough to encompass all of the supervisory power

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8. *United States v. Hasting*, 103 S. Ct. 174 (1983); *United States v. Payner*, 447 U.S. 727 (1980).

9. The supervisory power cases are analyzed in Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181 (1969); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1 (1958); Schwartz, *supra* note 6; Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963) [hereinafter cited as Harvard Note]; Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of the Federal Courts*, 72 Nw. U.L. Rev. 595 (1977); Note, *A Separation of Powers Approach to the Supervisory Power of Federal Courts*, 34 Stan. L. Rev. 427 (1982) [hereinafter cited as Stanford Note].

10. In the absence of any limitations, the phrase suggests what Ronald Dworkin calls discretion in the "strong sense," i.e., discretion that is not subject to standards established by others. R. Dworkin, *Taking Rights Seriously*, 31-33 (1977).

decisions. However, sources of authority do exist that justify some of the judicial power that has been called supervisory power. Part II examines the federal courts' constitutional and statutory authority to regulate judicial procedure, which is broad enough to encompass many supervisory power rulings, but is also subject to significant limitations. Part III considers the federal courts' power to fashion nonstatutory remedies as a source of authority for supervisory power rulings. Part IV considers the other possible sources of authority, particularly the federal courts' power to formulate federal common law.

Despite the identification of constitutional and statutory authority that provides support for some supervisory power rulings, the Article concludes that the concept of supervisory power should be abandoned in favor of identifying more specifically the constitutional or statutory power being employed. Such an approach would clarify the grounds upon which courts may oversee criminal adjudication, permitting them to act only where legitimate sources of authority exist.

#### I. THE ORIGINS AND DEVELOPMENT OF THE SUPERVISORY POWER DOCTRINE

*McNabb v. United States*,<sup>11</sup> decided in 1943, is generally regarded as the first supervisory power decision. *McNabb* marked a sharp break with the past, with the Court both taking on new power and justifying its action by referring to "considerations of justice."<sup>12</sup> Since *McNabb*, the Supreme Court and the lower federal courts have exercised supervisory power in a wide range of situations.

##### A. *Putting the Supervisory Power Cases Into Historical Perspective*

Understanding the supervisory power doctrine necessitates a review of judicial rulemaking prior to 1943 and the forces that led to the *McNabb* decision.

1. *The Development of the Supreme Court's Responsibility for the Formulation of Federal Rules of Evidence and Procedure.* — *McNabb* represented a substantial departure from the role played by the Supreme Court during the first 140 years of its existence. The Court's assertion of supervisory authority rested on the assumptions that the federal courts would follow federal procedure and that the Court was the appropriate body to exercise overall responsibility for developing and supervising the implementation of this procedure, particularly in criminal cases. Prior to 1930 neither of these assumptions was valid.

In the early years of the Republic, the Supreme Court's influence in criminal cases was extremely limited. Until 1889 there was no provision for

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11. 318 U.S. 332 (1943).

12. *Id.* at 341.

any appeal in federal criminal cases.<sup>13</sup> In 1889, Congress provided for appeal to the Supreme Court as of right in capital cases,<sup>14</sup> and in 1891 review was made available in noncapital cases.<sup>15</sup> Indeed, the trial of federal crimes was not always regarded as the exclusive province of the federal courts; a number of early statutes permitted federal criminal cases to be tried in the state courts.<sup>16</sup>

Moreover, during the first 140 years of the Supreme Court's existence there was no comprehensive federal procedure for civil or criminal cases, and Congress, rather than the Supreme Court, played the leading role in determining what procedural rules the federal courts would follow.<sup>17</sup> Beginning with the passage of the first Judiciary Act,<sup>18</sup> which contained several provisions regulating judicial procedure,<sup>19</sup> and continuing into the 1930s, Congress adopted a variety of provisions establishing the procedure to be followed in the federal courts in both civil and criminal cases.<sup>20</sup> Even

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13. See *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); B. Curtis, *Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States* 81-82 (1st ed. 1880). The unavailability of appeal in criminal cases has been cited as an important factor that contributed to the state courts' willingness to issue writs of habeas corpus for prisoners convicted in federal courts during the period prior to the Civil War. 2 C. Warren, *The Supreme Court in United States History* 332 n.1 (1932). In *Abelman v. Booth*, 62 U.S. (21 How.) 506, 523 (1859), and *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), the Supreme Court held that a state judge has no authority to issue a writ of habeas corpus for the discharge of a prisoner held in federal custody.

14. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

15. In fact, until an amendment adopted in 1897, this legislation had the unintended consequence of clogging the Supreme Court with relatively unimportant criminal cases. The Act of Mar. 3, 1891, ch. 517, §§ 2, 6, 26 Stat. 826, 828, established the federal courts of appeals, with jurisdiction over all final decisions in the federal trial courts, including those in criminal cases. Section 6 of that Act, 26 Stat. 828, provided for review of the decisions of the new appellate courts by certiorari, but § 5 of the 1891 Act permitted direct appeal from the trial court to the Supreme Court "[i]n cases of conviction of a capital or otherwise infamous crime," 26 Stat. 827. Congress was apparently unaware that the Supreme Court had given a broad interpretation to the phrase "infamous crimes." See F. Frankfurter & J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 109-11 (1928). In 1897 Congress corrected the problem by limiting direct appeals to capital cases. Act of Jan. 20, 1897, ch. 68, 29 Stat. 492. See F. Frankfurter & J. Landis, *supra*, at 111-13.

16. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 70-71 & nn.49-50 (1923).

17. Other scholars, most notably Professor Orfield, have concluded that there was relatively little legislative action on federal criminal procedure prior to the 1930s. Orfield, *Early Federal Criminal Procedure*, 7 *Wayne L. Rev.* 503, 504 (1961). Despite Professor Orfield's general comments, his article describes statutes dealing with almost all of the subjects ultimately covered by the Federal Rules of Criminal Procedure. Professor Orfield also argues that in many instances, the federal courts developed their own procedural rules. See *id.* at 510-11, 513.

18. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

19. *Id.* §§ 9(d), 29, 30, 33, 1 Stat. 77, 88, 91 (jury trial, venue in capital cases, jury selection, oral testimony, depositions, bail).

20. For example, the 1790 legislation defining the first federal crimes established several procedural rules for criminal cases. Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 118 (person accused of treason to receive copy of indictment and list of witnesses and jurors three days

in the aggregate, however, the federal statutes did not provide complete federal rules of civil or criminal procedure. Instead, Congress directed the federal courts to follow local procedure and practice on most matters not addressed by specific federal legislation.<sup>21</sup> Uniform federal rules of procedure existed only for cases in admiralty and equity, where conformity to state practice was not feasible.<sup>22</sup> Pursuant to express statutory authority the Supreme Court adopted rules of equity in 1822<sup>23</sup> and rules of admiralty in 1844.<sup>24</sup>

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before trial; in other capital cases, accused to receive indictment and list of jury two days before trial, and to have assistance of appointed counsel); *id.* § 30, 1 Stat. 119 (accused who stands mute will be treated as pleading not guilty); *id.* § 31, 1 Stat. 119 (statute of limitations). Legislation enacted between 1789 and 1923 regulating the organization and business of the lower federal courts is collected in Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1059 app. (1924).

21. In civil cases the federal courts followed a clear congressional directive. Beginning with the first Conformity Act, adopted in 1789, Congress provided that in civil suits at common law each federal court would conform to the state procedure in force in that geographic area. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93. As new states were admitted, Congress passed supplemental conformity legislation. The Federal Process Act of 1828, ch. 68, 4 Stat. 278, was applicable to states admitted before 1828. The history of the legislation is described in Warren, *Federal Process and State Legislation*, 16 Va. L. Rev. 421, 435-45 (1930). Another supplementary statute was passed to deal with states admitted between 1828 and 1842; thereafter, from 1842 to 1872 the same effect was achieved by a clause inserted in each new state's act of admission. *Id.* at 445 & nn.60-61. For treatment of equity and admiralty cases see *infra* note 22.

The legislative directive regarding procedure in criminal cases was less clear than the directive for civil cases. The Judiciary Act of 1789 expressly directed the federal courts to follow state law on the method of jury selection and the process for arrests, bail, and preliminary hearings. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 88 (jury selection); *id.* § 33, 1 Stat. 91 (arrest, bail, preliminary hearings); see 1 Op. Att'y Gen. 85, 86 (1798); Orfield, *supra* note 17, at 505-08. There was, however, no general provision regarding procedural matters not specifically addressed by this legislation. Subsequent legislation was equally varied. Some provisions expressly required conformity to state law. For example, in 1840 federal courts were directed to follow state law "now in force" regarding the qualifications of jurors and procedures for selecting and challenging jurors, with the proviso that the courts also had the power by rule of court to conform to subsequent changes in state practice. The Act of July 20, 1840, ch. 47, 5 Stat. 394. Other provisions established specific federal procedural rules. For example, federal statutes provided for joinder of offenses, Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 162, the number of grand jurors required, Act of Mar. 3, 1865, ch. 86, 13 Stat. 500, and the defendant's competency to testify. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30. On many other matters Congress was silent. For a complete catalogue of statutes and decisions on every topic ultimately covered by the Federal Rules of Criminal Procedure see Orfield, *supra* note 17.

22. Conformity to state practice was not feasible in equity cases because some states had no substantial equity jurisprudence for many years. See 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1002, at 34 (1981). The states had no admiralty jurisdiction.

23. Section 2 of the Process Act of 1792 authorized the Supreme Court to promulgate rules of equity, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276. The rules promulgated in 1822 are reprinted at 20 U.S. (7 Wheat.) xvii-xxi.

24. Section 6 of the Act of Aug. 23, 1842, ch. 188, 5 Stat. 518, authorized the Supreme Court to promulgate rules for admiralty cases as well as cases in equity and at law. The admiralty rules promulgated in 1844 are reprinted at 44 U.S. (3 How.) ix-xix.

Prior to 1930 the Supreme Court showed no desire to enlarge its own role. The Court held that the necessary and proper clause of the Constitution empowered Congress to regulate procedure in the federal courts.<sup>25</sup> In addition, the Court held that the provision in article III authorizing Congress to create lower federal courts carried with it the authority to provide the procedures to be followed in these courts.<sup>26</sup> Although some federal common law rules of procedure developed,<sup>27</sup> in the absence of any statute on point, the Supreme Court tended to construe the federal courts' authority narrowly, concluding that Congress must have intended the federal courts to follow the local procedural rules when it had not provided otherwise.<sup>28</sup> The Court reached this conclusion despite the fact that the Judiciary Act authorized the federal courts to establish "all necessary rules for the orderly conducting [of] business."<sup>29</sup>

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25. The first major decision upholding the power of Congress to regulate procedure was *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). Because *Wayman* involved a challenge to a procedural rule promulgated by the district court pursuant to statutory authorization, the Court's discussion illuminates its attitudes about the powers of both Congress and the judiciary. The Supreme Court upheld the district court's action on the ground that Congress itself could regulate procedure or it could delegate at least limited rulemaking authority to the federal courts. *Id.* at 42-43. The Court made no effort to justify the district court's action by reference to article III's grant of judicial power.

26. *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

27. See Orfield, *supra* note 17, at 510-11, 513.

28. The line of cases dealing with evidentiary issues provides a good example of the Court's rationale. In *United States v. Reid*, 53 U.S. (12 How.) 361 (1851), the Supreme Court concluded that in the absence of a specific federal statute Congress intended federal courts hearing criminal cases to follow state law as it existed when the federal courts were established in 1789. The Court reasoned that in passing the Judiciary Act of 1789 "it must have been the intention of Congress to refer [the new federal courts] to some known and established rule" to govern procedure in criminal trials. *Id.* at 365. The Court concluded that "the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts." *Id.* *Reid* required the federal courts located in the original 13 states to follow state law as it existed in 1789, even if the state law in question had subsequently been amended or rejected by the state. Accordingly, in *Reid* the Court applied the Virginia rule in effect in 1789 and held that a defendant was incompetent to testify at his codefendant's separate trial, even though Virginia no longer followed that restrictive rule. *Accord* *United States v. Williams*, 28 F. Cas. 636, 641 (C.C.D. Me. 1858) (Clifford, Circuit Justice) (No. 16,707).

The *Reid* holding was not directly applicable to federal courts located in areas that were not yet states in 1789. The Court addressed that question in *Logan v. United States*, 144 U.S. 263 (1892). *Logan* held that Congress intended federal courts outside the original 13 states to follow the local law—usually territorial law—in force when the area was admitted to statehood. *Id.* at 298-303. Like *Reid*, *Logan* required the federal courts to conform to past, not present, state law.

29. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. The Supreme Court might well have concluded that in the absence of any statute on point, the lower federal courts were to develop their own procedural rules for criminal cases, subject to the Supreme Court's supervision. At least one case decided in 1931 seemed to follow that analysis. In *United States v. Murdock*, 284 U.S. 141, 150 (1931), the Court stated that "[f]ederal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts." The precedential value of this statement is questionable. The holding in *Murdock* was that the

The major exception to this general pattern of acquiescence to the dominant role of Congress was the Court's conclusion that statutes requiring the federal courts to follow state law on procedural matters were not intended to apply to "the personal conduct and administration of the judge in the discharge of his separate functions . . . ."<sup>30</sup> Under this rationale the Supreme Court held, for example, that federal judges were not bound by state laws that restricted the judges' authority to comment on evidence,<sup>31</sup> or required the judges to submit special verdicts.<sup>32</sup> This narrow construction of the conformity legislation made it unnecessary for the court to decide "[h]ow far the legislative department of the government can impair" the "powers inherent in judicial office" or regulate "the manner of their exercise."<sup>33</sup>

The coincidence of several major developments during the early part of the twentieth century set the stage for the Supreme Court's decision in *McNabb*. During this period, pressure for modernized federal rules of judicial procedure and evidence was growing, and eventually the Supreme Court was propelled into a new and more active role in formulating federal rules. Long after many states had adopted simplified procedural codes, the federal common law rules of pleading remained a confusing and unpredictable amalgam including many outmoded state rules.<sup>34</sup> Legislation adopted in 1872 failed to remedy the situation,<sup>35</sup> and in 1934 Congress took a fresh approach to the problem, authorizing the promulgation of rules of civil pro-

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use of a special plea was error, but the opinion does not even state whether such a special plea was permitted by state law. The summaries of the parties' arguments do not refer to the choice of law issue.

30. *Nudd v. Burrows*, 91 U.S. 426, 442 (1875).

31. *St. Louis, I.M. & S. Ry. v. Vickers*, 122 U.S. 360, 363 (1887); *Vicksburg & M.R.R. v. Putnam*, 118 U.S. 545, 553 (1886); *Nudd v. Burrows*, 91 U.S. 426, 441-42 (1875).

32. *United States Mut. Accident Ass'n v. Barry*, 131 U.S. 100, 119-20 (1889); *Indianapolis & St. L. R.R. v. Horst*, 93 U.S. 291, 299-301 (1876).

33. *Nudd v. Burrows*, 91 U.S. 426, 442 (1875); see *Indianapolis & St. L. R.R. v. Horst*, 93 U.S. 291, 299-301 (1876).

34. The Supreme Court generally construed the legislation requiring the federal courts to conform to local law as requiring conformity with state or territorial law as it existed at the time of the passage of the legislation or at the time of the state's admission to the union. Although the conformity legislation worked reasonably well as long as the states followed the same general common law rules of pleading, support for changes in federal procedures grew as state after state adopted simplified code pleading procedures modeled on New York's Field Code of 1848, see Warren, *supra* note 21, at 558, and the disparity increased between simplified state procedures and the antiquated rules of common law pleading retained in the federal courts. See Clark & Moore, *A New Federal Procedure: I. The Background*, 44 *Yale L.J.* 387, 401 (1935).

35. This action was the passage of the Conformity Act of 1872, ch. 255, § 5, 17 Stat. 197, which sought to preserve the principle of conformity while allowing the federal courts flexibility to adopt improved state procedures. Section 5 of the Act provided that the "forms and modes of proceeding" in federal civil cases, except those in equity and admiralty, were to "conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State . . . ." (emphasis added). See generally Warren, *supra* note 21, at 560-61.

cedure under the aegis of the Supreme Court.<sup>36</sup> The Federal Rules of Civil Procedure were adopted in 1938.<sup>37</sup> Satisfaction with the Rules of Civil Procedure led to support for the promulgation of the Federal Rules of Criminal Procedure,<sup>38</sup> and legislation authorizing the Supreme Court to promulgate rules for criminal cases was enacted in 1940,<sup>39</sup> three years before the Supreme Court's decision in *McNabb*.

During roughly this same period the Court also took responsibility for the development of the federal rules of evidence. By the end of the nineteenth century the traditional evidentiary rules, particularly the restrictive rules regarding the competency of witnesses, came increasingly under fire.<sup>40</sup> Nevertheless, Congress took no action to modernize the federal common law rules of evidence, which were based on outmoded state precedents.<sup>41</sup> In *Funk v. United States*,<sup>42</sup> which was decided in 1933, the Supreme Court for

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36. Act of June 19, 1934, ch. 651, 48 Stat. 1064.

37. See 4 C. Wright & A. Miller, *supra* note 22, § 1004, at 49-51.

38. See Dession, *The New Federal Rules of Criminal Procedure*, 55 Yale L.J. 694, 698 (1946).

39. 54 Stat. 688 (codified as amended at 18 U.S.C. § 3771 (1982)). The original Federal Rules of Criminal Procedure were promulgated in 1944.

40. As the Supreme Court recognized, state courts and legislatures were making substantial changes in their evidentiary rules. In *Benson v. United States*, 146 U.S. 325, 336 (1892), the Court stated:

[T]he theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion.

Twenty-five years later, in *Rosen v. United States*, 245 U.S. 467 (1918), the Court observed that this trend had continued, until there was almost universal acceptance of the view that

the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent . . .

*Id.* at 471.

*Rosen*, which was openly critical of the Court's earlier opinions, stated that "the dead hand of the common-law rule of 1789 should no longer be applied . . ." *Id.* at 471. Nevertheless, in *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920), the Court continued to follow the earlier opinions it had criticized. Writing in 1930, Professor Leach observed that the "patent inconsistency" of the Supreme Court's decisions in *Rosen* and *Jin Fuey Moy* had left the lower courts justifiably confused. Leach, *State Law of Evidence in the Federal Courts*, 43 Harv. L. Rev. 554, 565 (1930).

41. For example, in *Logan v. United States*, 144 U.S. 263, 298-303 (1892), the Court held that the competency of witnesses who had prior felony convictions was governed by the English common law which was in force in the Republic of Texas, not by a statute subsequently adopted by the state of Texas. In *Olmstead v. United States*, 277 U.S. 438, 466-69 (1928), the Court applied the English common law rule which had prevailed in the territory of Washington before its admission as a state.

42. 290 U.S. 371 (1933).



the first time asserted its authority as a common law court to reevaluate some of the traditional rules of evidence in order to promote the search for the truth.<sup>43</sup> The Court conceded that Congress had the power to adopt evidentiary rules.<sup>44</sup> But in the absence of congressional action, *Funk* held that the federal courts should decide evidentiary questions "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past."<sup>45</sup>

2. *The Influence of Prohibition, Entrapment, Wiretaps, and the Third Degree.*

— During the same decade in which the Supreme Court acknowledged its authority to formulate common law rules of evidence and formal rules of civil and criminal procedure, the Court was confronted with an unprecedented number of federal criminal cases and unmistakable evidence of the prevalence of a number of disturbing investigative practices. Although it is not possible conclusively to establish a causal relationship,<sup>46</sup> it seems likely that the Supreme Court's exertion of its authority was heavily influenced by its increasing awareness of abusive practices.

Shortly after the expansion of the Supreme Court's appellate jurisdiction to include federal criminal cases,<sup>47</sup> the scope of federal criminal jurisdiction and the kind of cases being prosecuted underwent dramatic changes. Between 1901 and 1932 the number of federal criminal prosecutions increased more than fivefold.<sup>48</sup> This increase was due principally to Prohibition, but the Mann Act<sup>49</sup> and the Harrison Narcotics Act<sup>50</sup> were also enacted during this period. In 1932 there were more than 92,000 federal prosecutions, including more than 65,000 involving prohibition

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43. The Court explicitly rejected the view "that the [federal] courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions." 290 U.S. at 379. As the Court explained:

The fundamental basis upon which all rules of evidence must rest . . . is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

Id. at 381.

44. Id. at 382.

45. Id.

46. Cf. Allen, *The Supreme Court and State Criminal Justice*, 4 Wayne L. Rev. 191 (1958) (exploring reasons for Supreme Court's reevaluation of the concept of due process to place limitations on state administration of criminal justice).

47. See *supra* notes 13-16 and accompanying text.

48. In 1901 there were 16,734 federal criminal prosecutions; in 1932 there were 92,174. Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 Law & Contemp. Probs. 494, 497 (1934).

49. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended, 18 U.S.C. §§ 2421-2424 (1982)).

50. Act of Dec. 17, 1914, ch. 1, 38 Stat. 785 (superseded by § 2567 of the Internal Revenue Code of 1939, 53 Stat. 278).

offenses.<sup>51</sup>

The enforcement of federal laws criminalizing consensual conduct, especially Prohibition offenses, promoted increased reliance on investigative techniques such as electronic surveillance and the use of undercover agents and informants.<sup>52</sup> The use of electronic surveillance threatened privacy interests, and the use of undercover agents and informants raised fairness issues. Ultimately the use of these investigative techniques led to the development of a number of new legal doctrines.<sup>53</sup> The entrapment defense was developed almost exclusively in prohibition and narcotics cases.<sup>54</sup> The first federal cases challenging the use of evidence gained by electronic surveillance also arose during this period.<sup>55</sup>

Other kinds of investigative misconduct also became a matter of public concern at this time. In 1931 the National Commission on Law Observance and Enforcement, chaired by former Attorney General George Wickersham, published a report documenting the widespread use of "the third degree," which it defined as "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime."<sup>56</sup> The Wickersham report found that protracted questioning of prisoners, physical brutality, illegal detention, and refusal to allow the prisoner access to counsel were common, although they were less prevalent in federal than in state prosecutions.<sup>57</sup> The report exposed the "ugly naked facts" of conduct "violative of the fundamental principles of constitutional liberty."<sup>58</sup>

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51. Rubin, *supra* note 48, at 497.

52. "The increasing frequency of the assertion that the defendant was entrapped is doubtless due to the creation by statute of many new crimes (e.g., sale and transportation of liquor and narcotics) and the correlative establishment of special enforcement bodies . . ." Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring in the result). Assuming that the cases in his district were typical, one judge estimated that at least 30,000 of the 44,000 federal liquor prosecutions during 1926 would have been based on sales made to undercover prohibition agents. United States v. Washington, 20 F.2d 160, 161 (D. Neb. 1927).

53. There is also evidence that the Court's shifting attitude toward Prohibition played an important role in shaping fourth amendment doctrine. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. Crim. L. & Criminology 471 (1982).

54. Between 1920 and the end of Prohibition there were 80 federal cases discussing entrapment, and 74 of those involved either drugs or alcohol. Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 Miss. L.J. 211, 216, 220 (1976).

55. See, e.g., Olmstead v. United States, 277 U.S. 438 (1928).

56. National Comm'n on Law Observance & Enforcement, *Report on Lawlessness in Law Enforcement* 3 (1931). The Commission's report incorporated a 250 page report on "the third degree" written by consultants Zechariah Chafee, Walter Pollack, and Carl Stern.

57. *Id.* at 4.

58. *Id.* at 6. The Supreme Court's growing awareness of the problems exposed in the Wickersham report may help account for another dramatic change which occurred in the 1930s. As Professor Allen has noted, it was during the 1930s—the decade in which totalitarian regimes came to power in Western Europe—that the Supreme Court for the first time imposed constitutional limitations on state criminal proceedings. Allen, *The Judicial Quest*

Cases involving electronic surveillance and entrapment began reaching the Supreme Court during the 1920's,<sup>59</sup> and during that decade Justice Brandeis wrote a series of dissenting opinions that articulated many of the themes later adopted by a majority of the Court in its supervisory power decisions.<sup>60</sup> Justice Brandeis emphasized the importance of public respect for the law and predicted that this respect would be forfeited if the government employed "means which shock the common man's sense of decency and fair play."<sup>61</sup> He later characterized the government as "the potent, the omnipresent teacher," and warned that lawless government behavior "breeds contempt for the law" and "invites every man to become a law unto himself."<sup>62</sup> In Justice Brandeis' view, if the government used illegally obtained evidence, it ratified the illegal acts of its officers and itself became a "lawbreaker."<sup>63</sup> The courts, he argued, must deny their aid to such illegality in order "to maintain respect for law" and "preserve the judicial process from contamination."<sup>64</sup> Justice Brandeis' primary concern was not the parties' rights, but rather the protection of the government, particularly "the purity of its courts."<sup>65</sup>

This view was not accepted by a majority of the Court until the decision in *McNabb*. Prior to *McNabb*, the Supreme Court followed the common law rule that the illegality of the means by which evidence is obtained ordinarily has no bearing on its admissibility.<sup>66</sup> Although the Court recognized

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for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L.F. 518, 522. Professor Allen notes that the seminal case, *Powell v. Alabama*, 287 U.S. 45 (1932), was decided within a few months of Hitler's rise to power. This was one year after the publication of the Wickersham report. Although not all of the early state cases fit this pattern, one of the earliest decisions involved the admission of confessions made as a result of beatings and other torture. *Brown v. Mississippi*, 297 U.S. 278 (1936).

59. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping); *Casey v. United States*, 276 U.S. 413 (1928) (entrapment). *Olmstead* was overruled in *Katz v. United States*, 389 U.S. 347, 353 (1967), in which wiretapping was held subject to fourth amendment scrutiny.

60. See *infra* notes 132-35 and accompanying text.

61. *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

62. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

63. *Id.* at 483; see *Casey v. United States*, 276 U.S. 413, 423-24 (1928) (Brandeis, J., dissenting). Justice Holmes argued that "no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such a dirty business it does not permit the judge to allow such iniquities to succeed." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (citation omitted).

64. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

65. *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting); see *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (the objection cannot be waived by the parties, and will be raised by the court "despite the wish to the contrary of all the parties to the litigation").

66. However, the federal courts did follow the English common law, which excluded involuntary confessions as untrustworthy. See, e.g., *Wilson v. United States*, 162 U.S. 613 (1896). In 1936 the Supreme Court identified another basis for excluding an involuntary confession, holding in a state case that the admission of an involuntary confession would violate fundamental fairness and due process of law by infringing on the accused's right to a

an exception for evidence seized in violation of the fourth amendment, the opinion in the first exclusionary rule case, *Weeks v. United States*,<sup>67</sup> seemed to indicate that the exclusionary rule was constitutionally mandated.<sup>68</sup> But in *Olmstead v. United States*,<sup>69</sup> which was decided in 1928, the Court found that there had been no constitutional violation, and accordingly it refused to suppress evidence gathered by "unethical" telephone taps that constituted misdemeanors under state law. Applying the common law rules of evidence that were in force in the state of Washington (where the trial was held) at the time of Washington's admission to the United States in 1889,<sup>70</sup> the Court concluded that the evidence was admissible. "[W]ithout the sanction of congressional enactment," the majority concluded, the federal courts had no "discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured."<sup>71</sup> The Court regarded the desirability of excluding evidence because of the means used to secure it as an issue of policy that should be resolved by the legislature.<sup>72</sup>

#### B. *McNabb and the Supreme Court's Supervisory Power*

*McNabb* was decided in 1943, ten years after the Court's decision in *Funk*, which recognized the Court's authority to formulate rules of evidence,<sup>73</sup> three years after the adoption of legislation which authorized the

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fair trial. See Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 414-17 (1954). Occasionally, the Court also referred to the fifth amendment privilege against self-incrimination as a source of this rule. See, e.g., *Bram v. United States*, 168 U.S. 532, 542-43 (1897). But until the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the prevailing view was that the privilege did not apply to station house interrogations. See Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. Chi. L. Rev. 657, 667 (1966).

67. 232 U.S. 383 (1914); see also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (exclusionary rule applied to the fruit of the poisonous tree, i.e., evidence obtained by exploiting information gained in an unlawful search).

68. "[T]here was involved in the order refusing the application [for the return of the evidence] a denial of the constitutional rights of the accused . . ." 232 U.S. at 398 (emphasis added); see *infra* note 72.

69. 277 U.S. 438, 466-69 (1928).

70. The Court followed *United States v. Reid*, 53 U.S. (12 How.) 361 (1853). See *supra* note 28. The Court noted that the state statute prohibiting the interception of telephone conversations was enacted 20 years after Washington's admission as a state. 277 U.S. at 469.

71. 277 U.S. at 468.

72. The majority expressly recognized the social costs of a broader exclusionary rule: A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that *the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.*

277 U.S. at 468 (emphasis added). The italicized language reflects the view, stated in *Weeks*, that the admission of unconstitutionally seized evidence would itself violate the Constitution. See *supra* note 68.

73. See *supra* notes 42-45 and accompanying text.

Supreme Court to promulgate rules of criminal procedure,<sup>74</sup> and two years after the Court's first decision upholding one of the Federal Rules of Civil Procedure.<sup>75</sup> These developments set the stage for the Court's assertion in *McNabb* that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."<sup>76</sup> In exercising what the Supreme Court called, for the first time, "its supervisory authority over the administration of criminal justice in the federal courts,"<sup>77</sup> the *McNabb* Court sought to dissociate the federal courts from the unlawful investigative techniques that had been employed in that case and many others. The opinion in *McNabb* also clearly reflects the influence of the arguments advanced in Justice Brandeis' dissenting opinions.<sup>78</sup>

*McNabb* was not the first case in which the Supreme Court excluded evidence obtained in violation of a federal statute. But unlike the opinions in earlier cases,<sup>79</sup> which purported to do no more than enforce congressional intent,<sup>80</sup> the opinion in *McNabb* asserted the Supreme Court's general au-

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74. See supra notes 38-39 and accompanying text.

75. See infra note 225-26 and accompanying text.

76. 318 U.S. at 340.

77. Id. at 341.

78. See supra notes 61-65 and accompanying text.

79. The first and second opinions in *Nardone v. United States*, 302 U.S. 379 (1937); 308 U.S. 338 (1939), provided some precedent for *McNabb* and gave the first indication of the shift in the Supreme Court's views. The first opinion in *Nardone* held that telephone conversations intercepted in violation of § 605 of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1103 (codified as amended at 47 U.S.C. § 605 (1982)), could not be admitted into evidence in federal criminal cases. The Act provided that without the sender's approval, "no person" could intercept any communications and "divulge or publish" the contents of an intercepted communication "to any person."

80. The language of § 605 was originally part of the Radio Act of 1927, 44 Stat. 1162, which was in force at the time of the Court's decision in *Olmstead* but never discussed by the Court. Despite the lack of any clear evidence of legislative intent to reverse the result in *Olmstead*, the Court held in *Nardone* that § 605 barred federal agents from testifying regarding the contents of intercepted communications. In light of the public "controversy . . . with respect to the morality of the practice of wire-tapping by officers to obtain evidence," and "the view of many that the practice involves a grave wrong," the Court applied the principle that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong." 302 U.S. at 384 (footnote omitted).

On retrial, the government was permitted to introduce evidence derived from the intercepted conversations. 308 U.S. at 339. The Supreme Court again reversed, holding that allowing derivative use of the illegally intercepted conversations would thwart the policy that compelled the Court's first decision. 308 U.S. at 340. Despite the fact that it had found no direct evidence of congressional intent in its first opinion, the Court concluded in its second opinion that permitting indirect use would encourage the use of methods that Congress had "outlawed because [they were] 'inconsistent with ethical standards and destructive of personal liberty.'" 308 U.S. at 340 (quoting *Nardone v. United States*, 302 U.S. 379, 383). The complete passage from the first opinion stated:

*Congress may have thought* it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. *The same considerations may well have moved the Congress to adopt § 605* as evoked the guaranty against practices and proce-

thority to establish "civilized standards of procedure and evidence" for the federal courts.<sup>81</sup> The Court noted that its holding "respect[ed] the policy which underlies Congressional legislation,"<sup>82</sup> but its opinion rested on other grounds as well. In formulating evidentiary rules "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts" the Court stated that it was "guided by considerations of justice not limited to the strict canons of evidentiary relevance."<sup>83</sup> In *McNabb* and its companion case, *Anderson v. United States*,<sup>84</sup> the Court consciously seized upon its newly acknowledged authority over procedure and evidence to formulate a response to the third degree tactics employed in the cases before it.<sup>85</sup>

In both *McNabb* and *Anderson*, confessions had been obtained from a group of suspects by one of the classic third degree techniques: before the authorities had sufficient evidence to file formal charges, they arrested a group of suspects, held them incommunicado, and interrogated them until some individuals made incriminatory statements.<sup>86</sup> *McNabb* was a prosecution for the murder of an officer from the Alcohol Tax Unit of the Internal Revenue Service. The suspects were unsophisticated and poorly educated young men from an isolated area of Tennessee.<sup>87</sup> After two days of intense questioning, several of these young men made incriminating statements.<sup>88</sup>

Although the defendants did not raise and the lower courts did not

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dures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

302 U.S. at 383 (emphasis added). In the second decision in *Nardone*, the Court stated that it would not impute "a self-defeating, if not disingenuous purpose" to Congress. 308 U.S. at 341.

81. *McNabb*, 318 U.S. at 340.

82. *Id.* at 347.

83. *Id.* at 341.

84. 318 U.S. 350 (1943). *Anderson* involved a federal prosecution for conspiracy to damage property owned by the Tennessee Valley Authority. The local sheriff arrested a group of at least 21 striking coal miners after power lines leading to the mine were dynamited. *Id.* at 352-53.

85. For example, in *Chambers v. Florida*, 309 U.S. 227 (1940), the defendant confessed after custodial questioning that lasted six days, including questioning throughout the last night. The Court found the undisputed facts showed that the confession was not voluntary. *Id.* at 238-39. Citing the Wickersham report, the Court noted that "[t]he police practices here examined are to some degree widespread throughout our country." *Id.* at 240 n.15. The Court rejected the contention that these methods were necessary to uphold the law, and noted that use of such methods might have "lowered the esteem in which administration of justice is held by the public." *Id.*

86. In *Anderson*, the local sheriff held at least 21 suspects incommunicado in a company-owned building where they were questioned by agents from the Federal Bureau of Investigation for six days until incriminating statements were made. 318 U.S. at 352-55.

87. The McNabbs were "a clan of Tennessee mountaineers." 318 U.S. at 333. Four of the five defendants were 25 or younger; the eldest was 28. *Id.* at 334-35, 337. None had gone beyond the fourth grade in school. *Id.*

88. The defendants were not permitted to see the relatives or friends who came to visit them, and they had no attorney. 318 U.S. at 335. They were held in a barren detention cell for 14 hours and questioned "unremitting[ly]." *Id.* at 345. The defendants were questioned

consider whether this prolonged detention violated the statutory requirement that a person who has been taken into custody should be promptly brought before a judicial officer,<sup>89</sup> the Court raised the issue sua sponte in *McNabb*.<sup>90</sup> Although the Court cited no legislative history, it concluded that the federal statutes—and similar state provisions—requiring prompt presentment were intended to outlaw “the third degree” and “secret interrogations.”<sup>91</sup> Despite the absence of any findings on this point by the lower courts,<sup>92</sup> the Supreme Court concluded that the arraignment had been delayed until a confession was made, in “flagrant disregard” of the federal statutory requirements.<sup>93</sup> Accordingly, it held that allowing a conviction to rest on evidence secured in this manner would “stultify” the congressional policy expressed in the statutes.<sup>94</sup> The Court also accepted Justice Brandeis’ view that admission of the unlawfully secured evidence would make “the courts themselves accomplices in wilful disobedience of law.”<sup>95</sup> The

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singly and together; during most of the questioning there were at least six officers present. *Id.* at 336.

89. 18 U.S.C. § 595 (1940), which was superseded by Fed. R. Crim. P. 5, made it the duty of a federal officer making any arrest “to take the defendant before the nearest United States commissioner or the nearest judicial officer . . . for a hearing, commitment, or taking bail for trial . . . .” Cf. 18 U.S.C. § 593 (1940) (federal marshal arresting person in the act of operating an illicit still authorized to arrest suspect and take him “forthwith” before judicial officer) (superseded by Fed. R. Crim. P. 5(a)). Another provision authorized agents of the Federal Bureau of Investigation to make arrests and required that “the person arrested shall be immediately taken before a committing officer.” 5 U.S.C. § 300a (1940), repealed by Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862, 866. The Tennessee statute provided that no person could be “committed to prison for any criminal matter, until examination thereof be first had before some magistrate.” Tenn. Code Ann. § 11515 (Michie 1938) (current version at Tenn. Code Ann. § 40-5-103 (1982)).

90. Justice Reed, who dissented, noted that “[n]o point was made of the failure to commit by defendant or counsel. No opportunity was given to the officers to explain.” *McNabb*, 318 U.S. at 349. The majority’s willingness to raise the issue sua sponte was in accord with Justice Brandeis’ view that the exclusion of illegally seized evidence is required to protect the purity of the courts, even if it is opposed by the parties. The issue was raised to some degree in the briefs in the companion case, *Anderson v. United States*, 318 U.S. 350 (1943), principally in the briefs filed by amici. The government’s brief in *Anderson* reflects its recognition that the Supreme Court might consider formulating an evidentiary rule excluding the confessions even if they were deemed voluntary. Brief for Respondent at 49–56, *Anderson v. United States*, 318 U.S. 350 (1943) [hereinafter cited as Brief for the United States]. The brief appears to concede that the Court’s authority to formulate evidentiary rules includes the authority “to formulate stricter standards of admissibility than are required to exclude testimonially worthless confessions and to enforce constitutional provisions.” Brief for the United States, *supra*, at 49. The only authority cited in this portion of the brief is *Funk v. United States*, 290 U.S. 371, 382 (1933). The government contended, however, that Congress was the proper body to determine the desirability of nonconstitutional exclusionary rules or other procedural protections to prevent the third degree. Brief for United States, *supra*, at 55–56.

91. *McNabb*, 318 U.S. at 344.

92. See *infra* notes 97–98 and accompanying text.

93. *McNabb*, 318 U.S. at 345.

94. *Id.* at 345.

95. *Id.*

Court emphasized, however, that it was concerned with law enforcement practices only "in so far as courts themselves become instruments of law enforcement."<sup>96</sup>

But the proceedings on remand revealed that the Supreme Court had misinterpreted the facts in *McNabb*, and a persuasive case can be made that it misinterpreted congressional intent as well. On remand a new trial was held at which the government introduced evidence that the McNabbs were taken before a judicial officer shortly after their arrest and arraigned the following day on murder charges.<sup>97</sup> Accordingly, their confessions were admitted into evidence, they were convicted, and the convictions were affirmed on appeal.<sup>98</sup> Moreover, no evidence has been discovered to support the Supreme Court's conclusion that the statutes involved in *McNabb* were intended to prevent prolonged interrogation and other third degree tactics. To the contrary, as Professor Inbau has shown, the provisions requiring prompt arraignment before the nearest judicial officer were intended to prevent federal marshals from increasing their fees for transporting prisoners farther than necessary.<sup>99</sup> Thus, the *McNabb* doctrine was born of factual and legal misconceptions by the Court.

### C. *The Supreme Court's Post-McNabb Exercise of Its Supervisory Power*

In the four decades since its decision in *McNabb*, the Supreme Court has employed its supervisory power in a large number of cases.<sup>100</sup> Although a few of the Supreme Court's supervisory power decisions remedied possible injustices in individual cases without establishing any general principle,<sup>101</sup>

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96. *Id.* at 347.

97. *United States v. McNabb*, 142 F.2d 904 (6th Cir. 1944).

98. *Id.*

99. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 *Ill. L. Rev.* 442, 455-58 (1948). Professor Inbau quotes the sponsor of an amendment to the principal statute in *McNabb*, who explained that the purpose of the statute was to remedy an evil which exists in every State where marshals arrest persons in one portion of the State and possibly take them the whole length of the State, for the purpose of making mileage against the Government, to have a hearing before some particular United States Commissioner. In some states they take these persons thus arrested from their homes some 200 miles for the sole purpose of making mileage against the Government. . . .

*Id.* at 456, quoting 24 *Cong. Rec.* 1107 (1893).

100. The dividing line between supervisory power rulings and other cases is not always clear. Several opinions that do not expressly refer to supervisory authority have subsequently been identified by the Court as supervisory power decisions. See, e.g., *Jencks v. United States*, 353 U.S. 657 (1957), described in *Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., concurring) (*Jencks* "was not put on constitutional grounds"); *Roviaro v. United States*, 353 U.S. 53 (1957), described in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 883 n.3 (1982) (Brennan, J., dissenting); *Aldridge v. United States*, 283 U.S. 308 (1931), described in *Ristaino v. Ross*, 424 U.S. 589, 598 n.10 (1976).

101. For example, in *Calvaresi v. United States*, 348 U.S. 961 (1955) (*per curiam*), the defendants had sought unsuccessfully to have the district judge disqualify himself, and the record revealed friction throughout the trial between defense counsel and the court, which had denied every defense motion without exception. See *Calvaresi v. United States*, 216 F.2d



most of the Court's supervisory power decisions have announced general rules of procedure and evidence for federal criminal proceedings. For example, some opinions dealt with summary contempt,<sup>102</sup> while another series dealt with the trial jury, requiring federal jurors to be selected from a fair cross section of the community,<sup>103</sup> requiring a new trial when federal jurors were exposed to pretrial publicity,<sup>104</sup> and regulating the voir dire to ensure the selection of an unbiased jury.<sup>105</sup> Several other supervisory power decisions dealt with discovery and disclosure issues,<sup>106</sup> procedures for accepting a guilty plea,<sup>107</sup> and restrictions on impeachment.<sup>108</sup> Although supervisory power has been used much more frequently in criminal cases, the Supreme Court has occasionally employed supervisory power for similar purposes in civil cases.<sup>109</sup>

The opinions in these cases generally reflect the Court's concern with

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891, 899-900 (10th Cir. 1954). In a one paragraph per curiam opinion the Court reversed the convictions and ordered retrial before another judge "[i]n the interests of justice and in the exercise of the supervisory powers of this Court." 348 U.S. at 961. The opinion did not describe the facts of the case, and it stated no general principles. Similarly, in *Gaca v. United States*, 411 U.S. 618 (1973) (per curiam), the Court ordered an appeal reinstated in the Third Circuit, apparently accepting the claim of the petitioner that he had not realized he was required to pay a \$25 filing fee even though the appellate court had authorized him to file his appeal in forma pauperis. The Court stated that its order was intended "to avoid possible injustice and the possibility of collateral attack upon the conviction." See also *Saldana v. United States*, 365 U.S. 646 (1961) (per curiam) (giving effect to decision of first district judge to allow plea to one count with 5 year sentence, after subsequently assigned judge required all counts to go to trial and sentenced defendant to 20 years); *Yates v. United States*, 356 U.S. 363 (1958) (per curiam) (reducing criminal contempt sentence to time served).

102. Because the district court's summary contempt power could readily be abused, many members of the Court favored active oversight of summary contempt cases pursuant to the Court's supervisory authority. See *Piemonte v. United States*, 367 U.S. 556, 561-64 (1961) (Warren, C.J., dissenting); *id.* at 565-67 (Douglas, J., dissenting). The Court also employed its supervisory authority to hold that a district judge may not try a summary contempt case if he has become personally embroiled in conflict with the contemnor, *Offutt v. United States*, 348 U.S. 11, 13-17 (1954), and to require that a defendant who is subject to a contempt sentence of more than six months be tried before a jury. See *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

103. *Ballard v. United States*, 329 U.S. 187 (1946); see also *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (civil case).

104. *Marshall v. United States*, 360 U.S. 310, 312 (1959) (per curiam).

105. *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981) (plurality opinion); see *Ristaino v. Ross*, 424 U.S. 580, 597 n.9 (1976) (dicta); *Aldridge v. United States*, 283 U.S. 308 (1931) (decided prior to *McNabb*, and not expressly grounded on supervisory power, but described as a supervisory power case by a majority of the Court in *Ristaino v. Ross*, 424 U.S. at 598 n.10).

106. *United States v. Nobles*, 422 U.S. 225 (1975); *Jencks v. United States*, 353 U.S. 657 (1957); *Roviaro v. United States*, 353 U.S. 53 (1957).

107. *McCarthy v. United States*, 394 U.S. 459 (1969).

108. *United States v. Hale*, 422 U.S. 171 (1975), and *Grunewald v. United States*, 353 U.S. 391, 423-24 (1957), held that the government would not be permitted to impeach a defendant's exculpatory trial testimony by proving that the defendant had previously claimed the privilege against self-incrimination.

109. For example, *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), which held that the jury in a federal civil case must be selected from a fair cross section of the community, is

formulating rules to enhance the accuracy and fairness of federal criminal proceedings.<sup>110</sup> For example, the Court concluded that "fundamental requirements of fairness" justified employing supervisory power to limit the scope of the common law privilege not to disclose the identity of government informants, and requiring the privilege to give way if the informant's identity would be "relevant and helpful" to the defendant or "essential to the fair determination of a cause."<sup>111</sup> The Court also employed supervisory power to require the defendant to provide the prosecutor with a report previously prepared by a defense witness and referred to in the witness's testimony.<sup>112</sup> The Court observed that the ends of justice are defeated if judgments are founded on a speculative, partial version of the facts. "The very integrity of the judicial system and public confidence depend on full disclosure of all the facts, within the framework of the rules of evidence."<sup>113</sup>

The Court's concern for the integrity of the criminal process and the reliability of the evidence supporting the verdict was also evident in a case in which the government informed the Court that one of its chief witnesses at the defendant's trial had subsequently given untruthful testimony in other judicial proceedings.<sup>114</sup> Concluding that the witness' subsequent false

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generally recognized as a supervisory power case although the *Thiel* opinion does not use that terminology. See *Peters v. Kiff*, 407 U.S. 493, 500 n.9 (1972) (plurality opinion).

110. To some degree the cases discussed supra note 108 fit this pattern, although they were also concerned with the protection of the accused's fifth amendment privilege against self-incrimination. The Court noted in *Grunewald v. United States*, 351 U.S. 393 (1957), that it felt justified in exercising its supervisory power because of the "grave constitutional overtones." *Id.* at 423-24. The Court held that the defendant's earlier silence could not properly be said to be logically inconsistent with exculpatory testimony, and in any event the possible prejudicial effect on the jury would far outweigh any probative value. The Court concluded that allowing impeachment might distort the truth if the jurors did not understand that reliance on the privilege may be wholly consistent with innocence. *Id.* at 421-23. In *United States v. Hale*, 422 U.S. 171 (1975), the defendant claimed the privilege against self-incrimination at the time of his arrest. The Court concluded that here, as in *Grunewald*, the defendant's silence was so ambiguous that it had little probative value; it could as easily be taken to indicate only the defendant's intention to rely on his constitutional rights as to support an inference that his subsequent explanation was a later fabrication. *Hale*, 422 U.S. at 176-77.

111. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (footnote omitted). Similarly, in *Jencks v. United States*, 353 U.S. 657, 667-68 (1957), the Court concluded that restricting the defendant's right to examine reports previously prepared by government witnesses would be inconsistent with seeing that justice is done when the reports had been made contemporaneously by key government witnesses before their memories had dulled, and the credibility of those witnesses was vital to the prosecution's case. The informants in *Jencks* were the chief witnesses at the defendant's trial for making a false statement to the NLRB denying his membership in the Communist Party. They were party members who had been paid by the F.B.I. for their contemporaneous reports on the defendant's activities. The Court noted that on remand the government could elect to forego reprosecution if the costs of disclosure of confidential information in the reports outweighed the benefits of prosecuting the defendant. 353 U.S. at 672.

112. *United States v. Nobles*, 422 U.S. 225 (1975).

113. *Id.* at 231 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

114. *Mesarosh v. United States*, 352 U.S. 1 (1956).

testimony had discredited him and tainted the defendant's conviction,<sup>115</sup> the Supreme Court held that its duty "to see that the waters of justice are not polluted" required it to employ its supervisory authority to reverse the conviction and remand for a new trial.<sup>116</sup>

A number of the supervisory power decisions had constitutional overtones, and several of the decisions anticipated later constitutional rulings.<sup>117</sup> As subsequent decisions have acknowledged,<sup>118</sup> the sixth amendment rights to confrontation and cross-examination were implicated in the Court's supervisory power decisions dealing with discovery and disclosure. Supervisory power decisions anticipated the Court's rulings in state cases that due process was violated by the use of the defendant's prior silence to impeach his exculpatory trial testimony,<sup>119</sup> and that the fair cross section standard is an essential element of the sixth amendment right to trial by jury.<sup>120</sup>

The Court also employed its supervisory authority in cases where extrajudicial government conduct violated the Constitution, federal statutes, or procedural rules.<sup>121</sup> In *Mallory v. United States*<sup>122</sup> the Court followed the

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115. The government indicated its belief that the witness in question had testified truthfully at the defendant's trial, but it sought a remand to allow the district court to hold a hearing on the reliability of the witness' testimony in light of his subsequent untruthful testimony in other proceedings. *Id.* at 4.

116. *Id.* at 14. The Court stated that "[t]he dignity of the United States Government will not permit the conviction of any person on tainted testimony." *Id.* at 9. The Court reached a similar conclusion in a civil case, *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956), in which the Court reversed the administrative board's judgment because it was "taint[ed]" by the testimony of three perjurious witnesses. Despite the fact that there was sufficient untainted evidence to uphold the board's judgment, the Court concluded that the "fastidious regard for the honor of the administration of justice" required the Court to make "the doing of justice . . . manifest." *Id.* at 124.

117. The Court's holding that a defendant in federal contempt proceedings is entitled to a jury trial if his sentence may exceed six months, *supra* note 102, foreshadowed its holding in *Baldwin v. New York*, 399 U.S. 66 (1970), that the sixth amendment requires a jury trial if the sentence may exceed six months.

118. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982) (although *Roviaro v. United States*, 353 U.S. 53 (1957), was not decided on constitutional grounds, its affirmation in a later decision in which both due process and confrontation clause claims were considered "suggests that *Roviaro* would not have been decided differently if those claims had actually been called to the Court's attention"); *id.* at 883 n.3 (1982) (Brennan, J., dissenting) (due process and confrontation clause claims were implicit in *Roviaro*, although case was decided as an exercise of supervisory power); see also *Palermo v. United States*, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring in the result) ("it would be idle to say that the commands of the Constitution were not close to the surface" in *Jencks*).

119. *Doyle v. Ohio*, 426 U.S. 610 (1976).

120. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

121. *Rea v. United States*, 350 U.S. 214 (1956), involved both a seizure in violation of the fourth amendment and what the Court viewed as a deliberate attempt to circumvent federal law. In *Rea* the federal district court suppressed marijuana seized by federal agents, and the United States voluntarily dismissed the federal charges. *Id.* at 215. But the federal agent who seized the evidence then swore out a state criminal complaint and had the defendant arrested on state charges. *Id.* The Supreme Court enjoined the agent from circumventing the district court's suppression order by presenting the evidence in state court. *Id.* at 217. The Court observed that the policy of the federal rules would be defeated if federal

general reasoning of *McNabb* and excluded a confession obtained from a suspect during a period of extended detention which violated the requirement in Federal Rule of Criminal Procedure 5(a) that an arrestee be taken to the nearest committing officer "without unnecessary delay." Concluding that Rule 5(a) was intended to safeguard individual rights,<sup>123</sup> the Court held that it could not sanction the unnecessary delay that resulted in the defendant's confession without undermining the policy underlying Rule 5(a).<sup>124</sup> In *Elkins v. United States*,<sup>125</sup> the Court relied on its supervisory authority to overrule the "silver platter" doctrine, which had permitted the federal courts to receive evidence illegally seized by state officials if federal officials were not involved in the seizure. The opinion in *Elkins* accepts Justice Brandeis' view<sup>126</sup> that permitting the introduction of illegally seized evidence would make the federal courts accomplices in the violation of the Constitution.<sup>127</sup> The Court also emphasized the deterrent function of the exclusionary rule.<sup>128</sup>

Like other supervisory power decisions, *McNabb*, *Mallory*, and *Elkins* anticipated later constitutional rulings to some degree. *Miranda v. Arizona*<sup>129</sup> involved the constitutional ramifications of custodial interrogation and third degree tactics like those employed in *McNabb* and *Mallory*. Indeed the majority in *Miranda* recognized that the supervisory power rulings in *McNabb* and *Mallory* "were . . . responsive to the same considerations of Fifth Amendment policy" that dictated the result in *Miranda*.<sup>130</sup> *Elkins*, which employed the federal courts' supervisory power to exclude evidence seized illegally by state law enforcement officials, anticipated the ruling that grounded the exclusionary rule in the fourth amendment and held it applicable in state as well as federal proceedings.<sup>131</sup>

Several of the Supreme Court's supervisory power opinions reflect the influence of Justice Brandeis' claim that the courts have an interest in judicial integrity that is distinct from their duty to enforce the rights of the litigants.<sup>132</sup> The opinions in the Court's jury selection cases most clearly reflect this view. In a case in which it concluded that the jury clerk's exclusion of daily wage earners from jury service had been improper, the Court found it unnecessary "to determine whether the petitioner was in any way

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agents could use evidence seized in violation of federal laws to secure a state conviction. *Id.* at 218.

122. 354 U.S. 449 (1957).

123. *Id.* at 453-54.

124. *Id.* at 455.

125. 364 U.S. 206 (1960).

126. See *supra* text accompanying notes 61-65.

127. *Elkins*, 364 U.S. at 222-23.

128. *Id.* at 217. The Court also noted that the exclusion of the evidence regardless of its source would remove the incentive to "subterfuge and evasion with respect to federal-state cooperation" which the silver platter doctrine had fostered. *Id.* at 222.

129. 384 U.S. 436 (1966).

130. *Id.* at 463.

131. *Mapp v. Ohio*, 367 U.S. 643 (1961).

132. See *supra* text accompanying note 65.

prejudiced by the wrongful exclusion or whether he was one of the excluded class," and "immaterial" that the jury had actually included five members of the laboring class.<sup>133</sup> In another supervisory power case a majority of the Court was willing to consider the defendant's objection to the exclusion of women from service on grand and petit juries, even though the defendant had not raised that issue in the court of appeals.<sup>134</sup> The Court observed that the injury resulting from the exclusion of women "is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."<sup>135</sup>

The goals articulated by the Supreme Court in the supervisory power cases are not always reconcilable. The exclusion of evidence to preserve the integrity of the courts and to deter official misconduct may interfere with the accuracy and reliability of the courts' search for the truth.<sup>136</sup> Although the Court has often been divided on this issue, it has generally given precedence to the search for the truth unless the evidence in question was obtained in violation of a federal statute, rule, or constitutional provision. The first case that raised this issue, *United States v. Mitchell*,<sup>137</sup> was decided one year after *McNabb*. The accused in *Mitchell* had been held illegally for eight days before being taken before a magistrate.<sup>138</sup> The Court refused to suppress the confession made by the accused, finding the case "wholly different" from *McNabb* because the accused had confessed immediately, not because of and only after prolonged illegal detention.<sup>139</sup> The confession thus was not elicited in a manner that violated the defendant's constitutional rights. The Court stated that it would not use its supervisory control over the rules of evidence "as a punitive measure against *unrelated* wrongdoing by the police,"<sup>140</sup> or as "an indirect mode of disciplining misconduct."<sup>141</sup> *Mitchell* thus foreshadowed the Court's decision in *Payner v. United States*,<sup>142</sup> which held that even in an egregious case supervisory power should not be used to create an exception to the rule that only a defendant whose own fourth amendment rights have been violated may invoke the exclusionary rule.<sup>143</sup>

Similarly, in *Lopez v. United States*,<sup>144</sup> the Court refused to exclude a

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133. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946) (citations omitted).

134. *Ballard v. United States*, 329 U.S. 187, 197-98 (1946) (Frankfurter, J., dissenting).

135. *Id.* at 195 (opinion of the Court).

136. In the jury selection cases the concern for judicial integrity is not at odds with the concern for accuracy and reliability. Unlike the remedy of exclusion, the remedy in the jury selection cases—requiring retrial before a jury drawn from a cross section of the community—should promote the fairness and accuracy of the verdict.

137. 322 U.S. 65 (1944).

138. *Id.* at 70.

139. *Id.*

140. *Id.* (emphasis added).

141. *Id.* at 71.

142. 447 U.S. 727 (1980).

143. *Id.* at 731-33.

144. 373 U.S. 427 (1963).

recording, made surreptitiously by a government agent, of the defendant's offer of a bribe, explaining that it would be "wholly unwarranted" to exclude the evidence "where there has been no manifestly improper conduct by federal officials."<sup>145</sup> The majority cautioned that the Court's power to exclude material evidence "must be sparingly exercised" because it would interfere with the function of a criminal trial, which the Court described as the determination of the truth or falsity of the charges.<sup>146</sup> The Court explained: "Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court."<sup>147</sup>

Although Congress has generally acquiesced in the Supreme Court's supervisory power decisions, on two occasions it has enacted legislation intended to limit or overrule the Court's rulings. The first supervisory power decision that provoked legislation was *Jencks v. United States*,<sup>148</sup> which required the government to provide the defendant with memoranda prepared by government informants who had testified against him. Legislation popularly known as the Jencks Act<sup>149</sup> was enacted in 1957 to clarify and limit the reach of that decision.<sup>150</sup> In 1968, Congress overrode the rulings in *McNabb* and *Mallory* with legislation enacted as part of the Omnibus Crime Control and Safe Streets Act.<sup>151</sup> The legislative history indicates that section 3501 of the Act was intended to "assign proper weight to the *Mallory* rule" by making delay in bringing a suspect before a magistrate "a factor to [be] consider[ed] in determining the issue of voluntariness, but . . . not . . . the sole criterion . . . operating to . . . exclude an otherwise competent confession."<sup>152</sup> Although the Supreme Court has not had occasion

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145. Id. at 440 (footnote omitted).

146. Id.

147. Id. (citations omitted). Three members of the Court dissented, criticizing the majority's "suggestion that the supervisory power may never be invoked to create an exclusionary rule of evidence unless there has been a violation of a specific federal law or rule of procedure" as a "gratuitous attempt to cripple" the Court's supervisory power. Id. at 462 (Brennan, J., dissenting).

148. 353 U.S. 657 (1957).

149. Act of Sept. 2, 1957, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (1982)).

150. One purpose of the Jencks Act was to define the sorts of statements by government witnesses that would be subject to disclosure. See 18 U.S.C. § 3500(e) (1982). The Act also provided that disclosure was not to be made until the witness had testified on direct examination at trial. 18 U.S.C. § 3500(a) (1982).

151. Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501 (1982)). The legislative history and scope of § 3501 are described in 1 C. Wright, *Federal Practice and Procedure: Criminal* § 72 (2d ed. 1982). Section 3501 was intended to reverse not only the decisions in *McNabb* and *Mallory*, but also the decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964). See S. Rep. No. 1097, 90th Cong., 2d Sess. 40-52 (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2123-38.

152. Id. at 40-41, reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2123.

to consider the validity of section 3501, in *Palermo v. United States*<sup>153</sup> a majority of the Court concluded that the Jencks Act raised no serious constitutional difficulties. The majority recognized that "Congress has the power to prescribe rules of procedure for the federal courts," and accordingly that the Supreme Court's power to prescribe rules of evidence and procedure "exists only in the absence of a relevant Act of Congress."<sup>154</sup>

The Court itself has also employed its rulemaking authority to extend and even to reverse its supervisory power rulings. For example, Federal Rule of Criminal Procedure 11, which specifies the procedures to be followed when a guilty plea is accepted, was amended to include an express harmless error provision<sup>155</sup> in order to reverse a supervisory power decision holding that prejudice inhered in any violation of Rule 11.<sup>156</sup>

Thus the supervisory power doctrine has provided the Supreme Court with a flexible tool which it has employed for a number of purposes. The Court has used supervisory power to regulate procedure in the lower federal courts, in order to promote the search for the truth, to protect the integrity of the courts, to remedy violations of individual rights, and to impose sanctions against governmental misconduct. Although the Court has continued to employ its supervisory power sporadically, the Burger Court has employed supervisory authority less frequently than its predecessors.

#### D. *The Exercise of Supervisory Power by the Lower Federal Courts*

1. *The Scope of Decisions.* — Although the source of the lower federal courts' supervisory authority has not been identified, both the Supreme Court and the lower federal courts have generally assumed that these courts possess supervisory authority in their own circuits or districts like that wielded by the Supreme Court on a nationwide level.<sup>157</sup> Supervisory power

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153. 360 U.S. 343 (1959).

154. *Id.* at 353 n.11 (citations omitted). Four members of the Court concurred in the result only, disapproving of the broad generalizations in the majority's opinion and expressing doubt that Congress had in fact intended to strip the Court of all power to order production of a statement. *Id.* at 360-61 (Brennan, J., concurring in the result). Justice Brennan also noted that serious confrontation clause and compulsory process issues would be raised in some circumstances if the Jencks Act prohibited production of a witness' prior statement. *Id.* at 362-63.

155. Fed. R. Crim. P. 11(h).

156. Fed. R. Crim. P. 11(h) was intended to overrule *McCarthy v. United States*, 394 U.S. 459 (1969). In contrast, the principles announced in *United States v. Nobles*, 422 U.S. 225 (1975), and *Jencks v. United States*, 353 U.S. 657 (1957), were extended by the adoption of Fed. Rs. Crim. P. 26.2 and 12(i), respectively.

157. The first court of appeals decision explicitly reversing a conviction on the basis of supervisory power appears to have been *Helwig v. United States*, 162 F.2d 837 (6th Cir. 1947). In *Helwig* the court of appeals ordered a new trial to permit the introduction of exculpatory evidence even though the defendant knew of the evidence at the time of his first trial but failed to subpoena it. *Id.* at 839-40. The Sixth Circuit expressly recognized that the defendant was not entitled to a new trial on the ground of newly discovered evidence, but it ordered a new trial in any event on the basis of its supervisory power. *Id.* at 840. The court of appeals cited *McNabb* as authority for "the exercise of judicial supervision of the adminis-

decisions have now become commonplace in every circuit, and district courts as well as courts of appeals purport to exercise supervisory power.<sup>158</sup> The range of situations in which the lower courts have applied supervisory power illustrates the flexibility and breadth of the doctrine. Supervisory power has been used to ensure the integrity of federal judicial proceedings when false or potentially false evidence was presented to obtain a warrant<sup>159</sup> or before the grand jury.<sup>160</sup> The lower courts have employed supervisory power in some cases to reach just results on a case-by-case basis without the formulation of general rules,<sup>161</sup> and in other cases to establish rules of general application,<sup>162</sup> which may apply prospectively only.<sup>163</sup>

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tration of criminal justice." *Id.* at 840 & n.1. Similarly, the Supreme Court's first decision explicitly recognizing the lower courts' supervisory authority simply asserted that both the Supreme Court and the courts of appeals "have broad powers of supervision" over federal proceedings. *Bartone v. United States*, 375 U.S. 52, 54 (1963) (*per curiam*). The brief opinion in *Bartone* held that "in federal proceedings, over which both the Courts of Appeals and this Court . . . have broad powers of supervision," *id.* at 54, it was appropriate to correct plain errors on appeal rather than to require a collateral attack. Although the Court's earlier decision in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957), speaks of the court of appeals' "supervisory control," in context it refers to the appellate courts' authority under the All Writs Act, 28 U.S.C. § 1651(a), to issue a mandamus when the district court's order was beyond its authority. 352 U.S. 256; see *infra* text accompanying notes 286-90. The Supreme Court's most recent decisions refer simply to the supervisory authority of the federal courts in general. See, e.g., *United States v. Hastings*, 103 S. Ct. 1974, 1978-79 (1983); *id.* at 1982 n.1 (Stevens, J., concurring); *United States v. Payner*, 447 U.S. 727, 734-36 & n.7 (1980).

Even the few decisions that discuss the nature and source of the federal courts' supervisory authority assume that the same principles govern this authority in the Supreme Court and in the lower federal courts. See, e.g., *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *In re Grand Jury Proceedings*, 507 F.2d 963, 970-71 (3d Cir.) (Schofield II) (Aldisert, J., dissenting), cert. denied, 421 U.S. 1015 (1975).

158. Despite the large number of supervisory power decisions in the lower federal courts, there are only two articles dealing specifically with the lower federal courts' supervisory authority, and neither treats the district courts' authority. See Schwartz, *supra* note 6; Note Supervisory Power in the United States Courts of Appeals, 63 Cornell L. Rev. 642 (1978).

159. *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980). But see *United States v. Gjijeli*, 717 F.2d 968, 977-79 (6th Cir. 1983) (dismissal not appropriate when prosecutor obtained "bogus writ" constituting a "fraud on the federal judicial system" because error was harmless, there were mitigating circumstances, and trial court accepted prosecutor's apology), cert. denied, 104 S. Ct. 1595 (1984).

160. *United States v. DiBernardo*, 552 F. Supp. 1315 (S.D. Fla. 1982) (grand jury proceeding considered tainted because government agent had propensity to lie).

161. See, e.g., *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1967); *United States v. Helwig*, 162 F.2d 837, 839-40 (6th Cir. 1947); see also *United States v. Singer*, 710 F.2d 431 (8th Cir. 1983) (*en banc*) (new trial ordered because trial judge injected himself into trial on government's side).

162. See, e.g., *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.), withdrawn, 697 F.2d 112 (4th Cir. 1982) (*en banc*); *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1302-05 (3d Cir. 1978); *United States v. Schofield*, 486 F.2d 85 (3d Cir. 1973), later appeal, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975). Two circuits employed their supervisory authority to require that the government prove the voluntariness of a confession beyond a reasonable doubt, not by a mere preponderance of the evidence. *Pea v. United States*, 397 F.2d 627, 637-38 (D.C. Cir. 1967) (*en banc*); *United States*



Many of the decisions address garden-variety questions of evidence<sup>164</sup> and judicial procedure in the district courts,<sup>165</sup> regulating matters such as the procedure for taking a guilty plea,<sup>166</sup> and various issues relating to the trial jury.<sup>167</sup>

The lower federal courts have also employed their supervisory authority to control the conduct of the prosecutor in order to enforce ethical and professional standards,<sup>168</sup> and to devise sanctions for misconduct by government investigators.<sup>169</sup> For example, supervisory power has been applied in multiple representation cases to disqualify defense counsel who have an actual or potential conflict of interest.<sup>170</sup> Supervisory power has been used to dismiss charges in order to control what the lower court identified as misuse

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v. Inman, 352 F.2d 954 (4th Cir. 1965), clarified in *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786, 793 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972). In *Lego v. Twomey*, 404 U.S. 477 (1972), the Supreme Court held that the Constitution required a showing of voluntariness only by a preponderance of the evidence, and it suggested in a brief footnote that there was no persuasive reason to impose a stricter standard by the exercise of supervisory authority. *Id.* at 488 n.16. In light of the views expressed by the Supreme Court in *Lego v. Twomey*, both circuits reconsidered their prior decisions and approved the standard of proof by a preponderance of the evidence. *United States v. Wiggins*, 509 F.2d 454, 461 (D.C. Cir. 1975); *United States v. Johnson*, 495 F.2d 378, 383 (4th Cir.), cert. denied, 419 U.S. 860 (1974).

163. See, e.g., *United States v. Udziela*, 671 F.2d 995 (7th Cir.), cert. denied, 457 U.S. 1135 (1982); *United States v. Florea*, 541 F.2d 568 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *Moody v. United States*, 497 F.2d 359, 362-65 (7th Cir. 1974).

164. See, e.g., *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (recognition of priest-penitent privilege); *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952) (special evidentiary rules for consensual sodomy prosecutions).

165. See, e.g., *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983) (five step procedure for sua sponte dismissal of prisoner's civil rights complaint).

166. *United States v. Zudick*, 523 F.2d 848 (3d Cir. 1975); *Moody v. United States*, 497 F.2d 359, 362-63 (7th Cir. 1974); *Burton v. United States*, 483 F.2d 1182, 1187 (9th Cir.), rev'd on other grounds, 483 F.2d 1190 (9th Cir. 1973).

167. *United States v. Schiavo*, 504 F.2d 1, 7-8 (3rd Cir.) (procedure for closing courtroom and restraining publication of potentially prejudicial material during pendency of trial), cert. denied, 419 U.S. 1096 (1974); *United States v. Florea*, 541 F.2d 568 (6th Cir. 1976) (per se rule that contact between an agent for one of the parties and jurors during deliberations is prejudicial), cert. denied, 430 U.S. 945 (1977).

168. *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974) (criminal charges dismissed with prejudice because of several incidents of prosecutorial misconduct and bad faith during discovery and trial), appeal dismissed sub nom. *United States v. Means*, 513 F.2d 1329 (8th Cir. 1975).

169. Recent decisions do, however, reflect a growing recognition that the courts' use of supervisory power to control prosecutorial and other executive activities must be limited by separation of powers principles. See, e.g., *United States v. Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir.) ("the federal judiciary's supervisory power[s] over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all"), cert. denied, 104 S. Ct. 359 (1983); *United States v. Kelly*, 707 F.2d 1460, 1475-76 (D.C. Cir.) (Ginsburg, J., concurring in the judgment), cert. denied, 104 S. Ct. 264 (1983); *United States v. Gervasi*, 562 F. Supp. 632, 645 (N.D. Ill. 1983).

170. *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978) (actual conflict of interest); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976) (possibility of conflict of interest).

of the prosecutor's charging discretion,<sup>171</sup> to exclude evidence obtained through a search warrant where false statements were made in the application for a warrant,<sup>172</sup> and to suppress statements obtained from a defendant who was interrogated when defense counsel was not present.<sup>173</sup> The Second Circuit cited supervisory power as the basis for its ruling that an indicted defendant's waiver of the right to have counsel present during an interview with a prosecutor would be ineffective unless a judicial officer had first given the defendant specific warnings and advice.<sup>174</sup> The same circuit approved the use of supervisory authority to dismiss all charges and order the release of a defendant if he could prove his allegations that jurisdiction over him was obtained by kidnapping him in a foreign country and torturing him before bringing him to the United States for trial.<sup>175</sup>

The lower courts have frequently employed their supervisory authority in connection with federal grand jury proceedings. For example, in cases known as *Schofield I* and *II*, the Third Circuit exercised its supervisory authority to require the government to make a three-part preliminary showing to get enforcement of grand jury subpoenas.<sup>176</sup> Many of the grand jury

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171. In *United States v. Ottley*, 439 F. Supp. 587, 591-92 (S.D.N.Y. 1977), the district court dismissed an indictment under its supervisory authority because of preindictment delay resulting from the government's failure to join related charges in an earlier indictment; the court made no effort to discover any prejudice to the defense, focusing solely upon its "review of prosecutorial discretion." The district court and court of appeals also approved use of supervisory power to control the prosecutor's charging discretion in *United States v. Gonsalves*, 691 F.2d 1310 (9th Cir. 1982). The Supreme Court reversed and remanded *Gonsalves* for reconsideration in light of *United States v. Hasting*, 103 S. Ct. 1974 (1983). *United States v. Gonsalves*, 104 S. Ct. 54 (1983) (mem.). *Gonsalves* is discussed further infra note 499.

172. *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980).

173. See, e.g., *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), cert. denied, 412 U.S. 932 (1973); *Ricks v. United States*, 334 F.2d 964, 970 (D.C. Cir. 1964).

174. *United States v. Mohabir*, 624 F.2d 1140, 1153 (2d Cir. 1980).

175. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). Compare *Toscanino* with *United States v. Romano*, 706 F.2d 370, 372-74 (2d Cir. 1983) (supervisory power not appropriate because means by which government induced defendant to enter United States did not violate due process), and *United States v. Reed*, 639 F.2d 896, 900-02 (2d Cir. 1981) (supervisory power not appropriate because use of deceit by federal agents to get defendant to board plane for United States and holding defendant at gunpoint during flight did not violate due process).

176. In re Grand Jury Proceedings, 507 F.2d 963 (3rd Cir.), cert. denied, 421 U.S. 1015 (1975) (*Schofield II*); In re Grand Jury Proceedings, 486 F.2d 85 (3rd Cir. 1973) (*Schofield I*). *Schofield I* required the government to make a preliminary showing that each subpoenaed item was "relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and [was] not sought primarily for another purpose." 486 F.2d at 93. This requirement was clarified and reaffirmed in *Schofield II*. 507 F.2d at 966-67.

Although its decision was subsequently withdrawn and the appeal dismissed as moot, a panel of the Fourth Circuit employed its supervisory power to require the government to make a showing similar to but more stringent than that required in *Schofield* when it issued a grand jury subpoena to an attorney who had been retained by the target of a grand jury investigation. In re Special Grand Jury No. 81-1 (*Harvey*), 676 F.2d 1005, 1010-12 (4th Cir.), withdrawn, 697 F.2d 112 (4th Cir. 1982) (en banc). The subsequent history of the *Harvey* case is described in In re Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571, 1575 (5th Cir. 1983). The Fourth Circuit granted the government's petition for rehearing en banc.

cases have involved allegations of prosecutorial abuse of the grand jury; and the Second,<sup>177</sup> Third, and Ninth<sup>178</sup> Circuits have all approved use of supervisory power to dismiss an indictment as a sanction for serious government misconduct in connection with grand jury proceedings. The Third Circuit has expressly approved the use of supervisory authority to dismiss an indictment as a prophylactic sanction for "entrenched and flagrant misconduct," even if no actual prejudice can be shown.<sup>179</sup> And in *United States v. Jacobs*,<sup>180</sup> in which the Supreme Court twice heard oral arguments before dismissing the writ of certiorari as improvidently granted,<sup>181</sup> the Second Circuit employed its supervisory power to dismiss a perjury indictment because a federal prosecutor had not followed the local United States Attorney's practice of giving targets of a grand jury investigation warnings before they testified. The court of appeals stated that its order was not intended to require that warnings be given, but rather to act "as an ad hoc sanction . . . to enforce 'consistent performance' one way or another."<sup>182</sup>

The lower courts have recognized, however, that grand jury proceedings are not equivalent in all respects to judicial proceedings. Cases involving the use of supervisory power to control grand jury proceedings present a potential for "conflict between the Executive and Judicial branches of the federal government over their respective relationships to the federal grand jury."<sup>183</sup> Moreover, the grand jury is an independent institution predating

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The en banc court vacated the panel's opinion and dismissed the appeal after oral argument because of Harvey's fugitive status.

177. *United States v. Hogan*, 712 F.2d 757, 761-62 (2d Cir. 1983) (conviction reversed because prosecutor interfered with grand jury's independence by extensive use of hearsay, use of inflammatory language and speculative references, and introduction of false testimony); *United States v. Fields*, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972) (conviction reversed because prosecutor misled grand jury with hearsay evidence).

178. The Ninth Circuit has upheld the district courts' authority to dismiss criminal charges in flagrant cases where "the grand jury has been overreached or deceived in some significant way." *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979), quoting *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978).

179. *United States v. Serubo*, 604 F.2d 807, 817-18 (3d Cir. 1979) (dismissal appropriate remedy for misconduct, even in absence of prejudice, but case remanded to determine whether misconduct was limited to proceedings of earlier grand jury that did not indict this defendant).

180. 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978).

181. *United States v. Jacobs*, 436 U.S. 31 (1978) (dismissing writ of certiorari as improvidently granted).

182. *Jacobs*, 547 F.2d at 778.

183. *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977). In some contexts the federal grand jury has been characterized as an arm of the district court, subject to its general supervision and control, and dependent on the court to summon the grand jurors and the witnesses who will testify before it. See, e.g., *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981), cert. denied, 103 S. Ct. 1520 (1983); *United States v. Campanale*, 518 F.2d 352, 366 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972). Other cases have emphasized that federal grand juries perform an investigative and prosecutorial function subject to the supervision and control of the executive branch. See, e.g., *Chanen*, 549 F.2d

the Constitution, whose continued existence is guaranteed by the fifth amendment.<sup>184</sup> Unlike other institutions created by the Constitution, the grand jury is not assigned to any one of the three branches of government. Although the lower court decisions reflect increasing agreement that supervisory power should not be exercised in a way that encroaches upon the "constitutionally-based independence" of the grand jury itself or upon the prerogatives of the prosecutor,<sup>185</sup> no consensus has been reached regarding what constitutes improper encroachment.<sup>186</sup>

Although a number of the supervisory power cases in the lower federal courts have had constitutional or statutory underpinnings,<sup>187</sup> most of the lower court decisions employing supervisory authority have not involved the enforcement of the Constitution, statutes, or the Federal Rules of Criminal Procedure. In contrast to the supervisory power rulings of the Supreme Court, which frequently anticipated subsequent constitutional rulings, the lower courts have repeatedly employed their supervisory authority to reach results that the Supreme Court had already concluded were not required by the Constitution. For example, despite the Supreme Court's prior ruling that the fifth amendment is satisfied by an indictment based solely on hearsay evidence,<sup>188</sup> the Second Circuit employed its supervisory authority to

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at 1312-13; *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (Schofield I), later appeal, 507 F.2d 963 (3d Cir.) (Schofield II), cert. denied, 421 U.S. 1015 (1975).

184. See *United States v. Dionisio*, 410 U.S. 1, 16 (1973); *Stirone v. United States*, 361 U.S. 212, 218 (1960); *United States v. Pabian*, 704 F.2d 1533, 1535-36 (11th Cir. 1983).

185. *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977); accord *United States v. Pabian*, 704 F.2d 1533, 1536-37 (11th Cir. 1983); *United States v. Udziela*, 671 F.2d 995, 999 (7th Cir.), cert. denied, 457 U.S. 1135 (1982).

186. Compare *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (Schofield I) (preliminary showing of relevance required before government will enforce subpoena), later appeal, 507 F.2d 963 (3d Cir.) (Schofield II), cert. denied, 421 U.S. 1015 (1975), with *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977) (per curiam) (no right under supervisory power to affidavit from government that subpoenaed information is relevant to ongoing grand jury investigation).

187. Lower courts have relied upon supervisory power to formulate a remedy for a constitutional violation. See, e.g., *United States v. Cortina*, 630 F.2d 1207, 1213-14 (7th Cir. 1980); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); cf. *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976) (describing steps counsel must take on remand to assure effective assistance of counsel in the sentencing process). In other cases constitutional rights were clearly implicated, but the use of supervisory power made it unnecessary to rest decisions on constitutional grounds. *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976) (implicating immunized witness' fifth amendment privilege against self-incrimination), cert. denied, 429 U.S. 1066 (1977); *United States v. Schiavo*, 504 F.2d 1, 7-8 (3d Cir.) (implicating first amendment rights of the press), cert. denied, 419 U.S. 1096 (1974); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (implicating sixth amendment right to counsel), cert. denied, 412 U.S. 932 (1973). The lower courts have also employed their supervisory authority to enforce the Federal Rules of Criminal Procedure, *United States v. Dilg*, 700 F.2d 620 (11th Cir. 1983), and federal statutes, *United States v. Novak*, 715 F.2d 810, 820 (3d Cir. 1983) (to enforce requirements of Speedy Trial Act, district courts required to make specific contemporaneous findings on reasonableness of extended tolling of time period within which trial must be held), cert. denied, 104 S.Ct. 1293 (1984).

188. *Costello v. United States*, 350 U.S. 359 (1956).

invalidate an indictment when the prosecutor relied exclusively on hearsay evidence; the court emphasized that better evidence was available, and that the prosecutor failed to inform the grand jury that it was considering only hearsay.<sup>189</sup> In *Schofield I* and *II*<sup>190</sup> the Third Circuit required federal prosecutors to make a preliminary showing to get enforcement of a grand jury subpoena duces tecum, despite Supreme Court decisions establishing that the fourth amendment does not require a preliminary showing of probable cause before a grand jury subpoena for similar evidence will issue.<sup>191</sup> Although the Supreme Court reversed and remanded the first decision in *Jacobs* for reconsideration in light of the Court's ruling that target warnings were not constitutionally required,<sup>192</sup> the Second Circuit affirmed its ruling that the failure to issue target warnings required the exclusion of the target's testimony and the dismissal of the perjury indictment.<sup>193</sup>

The various circuits have split repeatedly on the appropriateness of particular exercises of supervisory authority.<sup>194</sup> For example, several circuits have refused to follow the Third Circuit's decision in *Schofield*,<sup>195</sup> and to date no circuit has followed the Second Circuit's decision in *Jacobs*.<sup>196</sup> In another illustrative case, the Fifth Circuit expressly disagreed with the

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189. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

190. *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973), later appeal, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

191. See *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplars); *United States v. Mara*, 410 U.S. 19, 22 (1973) (handwriting exemplars).

192. *United States v. Jacobs*, 531 F.2d 87 (2d Cir.), vacated and remanded for reconsideration in light of *United States v. Mandujano*, 425 U.S. 564 (1976), 429 U.S. 909 (1976).

193. *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976) (where United States attorney for district gives target warnings, federal task force for district must also do so), cert. dismissed as improvidently granted, 436 U.S. 31 (1978).

194. Compare *United States v. Zudick*, 523 F.2d 848, 852 (3d Cir. 1975) (approving use of conditional guilty pleas under court's supervisory power), with *United States v. Benson*, 579 F.2d 508, 510-11 (9th Cir. 1978) (no statutory basis for conditional guilty pleas, which are also precluded by Supreme Court precedent). The Sixth and Ninth Circuits have refused to follow the Second Circuit's decision in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972) (discussed supra note 189 and accompanying text). See *United States v. Markey*, 693 F.2d 594, 596 (6th Cir. 1982); *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

195. See, e.g., *In re Grand Jury Proceedings (Bowe)*, 694 F.2d 1256, 1258 (11th Cir. 1982); *In re Pantojas*, 628 F.2d 701, 704-05 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978); *In re Grand Jury Investigation (McLean)*, 565 F.2d 318, 320 (5th Cir. 1977); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977). There is also disagreement on the question of whether the preliminary showing required in *Schofield* should be required in cases in which the grand jury subpoenas the attorney for a target or witness. Compare *In re Grand Jury Proceedings (Bowe)*, 694 F.2d 1256, 1258 (11th Cir. 1982) (no preliminary showing required), with *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, 1010 (4th Cir.) (preliminary showing is required), withdrawn, 697 F.2d 112 (4th Cir. 1982) (en banc). The Ninth Circuit has expressly declined to follow the panel opinion in *Harvey*. *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983).

196. But see *United States v. Crocker*, 568 F.2d 1049, 1055 (3d Cir. 1977) (approving practice of a uniform warning and suggestion in dicta that court might follow *Jacobs* in some future case).

Third Circuit's ruling that supervisory authority may be used to dismiss an indictment for prosecutorial misconduct when the defendant was not prejudiced by the government's conduct, or when any prejudice to the defendant may be cured by a less drastic remedy.<sup>197</sup> The scope of the supervisory power of the lower federal courts remains uncertain. This uncertainty is at least in part a result of the lack of Supreme Court guidance on the issue. The Court's review of lower court supervisory power decisions is discussed in the next section.

2. *Supreme Court Review.* — The Supreme Court has reviewed two cases involving the use of supervisory power by the lower federal courts, *United States v. Payner*<sup>198</sup> and *United States v. Hasting*.<sup>199</sup> Although these decisions do not identify the source of the lower courts' supervisory power, they do emphasize one major limitation on the exercise of that power. When the lower courts employ supervisory power to fashion a remedy for a constitutional violation, they are not free to disregard the limitations the Supreme Court has deliberately placed on constitutional remedies. *Payner* and *Hasting* involved what the lower courts found to be deliberate or repeated constitutional violations, and the lower courts employed their supervisory authority to fashion remedies more extensive than those required by the Constitution. In reversing both cases, the Supreme Court disapproved the lower courts' use of supervisory power to avoid the carefully considered limits the Court itself had established for constitutional remedies.<sup>200</sup>

The Supreme Court has indicated, however, that there are circum-

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197. *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). The Eleventh Circuit, which has recognized the split between the Third and Fifth Circuits, has not expressed its own position. See *United States v. Pabian*, 704 F.2d 1533, 1540 (11th Cir. 1983).

198. 447 U.S. 727 (1980).

199. 103 S. Ct. 1974 (1983). In *Hasting* the court of appeals did not expressly refer to supervisory power, but the respondent argued in the Supreme Court that the decision below was an appropriate exercise of that power. See *id.* at 1986 (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated that this argument should be rejected because the court did not expressly invoke its supervisory authority. *Id.* Justice Stevens agreed that the case was not a proper vehicle for a discussion of "the limits on the supervisory power of other federal courts." *Id.* at 1982 n.1 (Stevens, J., concurring in the judgment).

200. *Payner* involved the admissibility of evidence obtained by a violation of the fourth amendment rights of a third party, not the defendant. The district court found that government agents deliberately violated the fourth amendment rights of a Bahamian bank official in order to get evidence to use in prosecutions of bank depositors who were evading federal taxes. *United States v. Payner*, 434 F. Supp. 113, 130 (N.D. Ohio 1977). Although the Supreme Court had consistently refused to permit a defendant to invoke the exclusionary rule unless his own fourth amendment rights were violated, the lower courts employed their supervisory power in *Payner* to exclude the evidence tainted by the government's bad faith hostility to the fourth amendment. See *United States v. Payner*, 447 U.S. 727, 730-31 (1980). The Supreme Court reversed, holding that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment." *Id.* at 736. Since the Supreme Court had already weighed the competing values and concluded that "the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of

stances in which the lower courts may properly exercise their supervisory power to establish procedural rules that the Supreme Court has concluded are not constitutionally mandated.<sup>201</sup> In contrast to *Payner* and *Hasting*, which involved the lower courts' efforts to fashion remedies after constitutional violations occurred, the Court in *Cuyler v. Sullivan*<sup>202</sup> allowed the prospective use of supervisory power to ensure that appropriate procedures would be instituted to prevent the occurrence of undetected errors of constitutional proportions. In *Cuyler*, the Court upheld the use of supervisory authority to require the district courts to inquire into the existence of conflicts of interest in cases of multiple representation where an objection has been made, even though such an inquiry is not required by the sixth amendment.<sup>203</sup> Although the Court's reference to supervisory authority in *Cuyler* was made only in passing, it seems clear that the Court did not regard the lower courts' use of supervisory authority in that context as an attempt to evade the limitations of the available constitutional remedies.

Like the Supreme Court, the lower federal courts have found supervisory power readily adaptable to many uses. In contrast to the current Supreme Court, which employs its supervisory authority less often than its predecessors, the lower federal courts are employing supervisory power more frequently than ever. In some cases, like *Payner* and *Hasting*, supervi-

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the challenged practices," the lower court's use of supervisory power "amount[ed] to a substitution of individual judgment for the controlling decisions of this Court." *Id.* at 735, 737.

Similarly, in *Hasting* the appellate court's remedy disregarded the limitations established by the Supreme Court to balance the need for redress of constitutional injuries against other values. Upon finding that the prosecutor's closing argument constituted an impermissible comment on the defendant's exercise of his privilege against self-incrimination, the court of appeals reversed the conviction and remanded for a new trial without considering whether the error might have been harmless. *United States v. Hasting*, 660 F.2d 301, 303 (7th Cir. 1981), *rev'd*, 103 S. Ct. 1974 (1983). In so doing, the court ignored the Supreme Court's decision in *Chapman v. California*, 386 U.S. 18 (1967), which upheld a conviction in the face of a similar error because the error was harmless beyond a reasonable doubt considering the record as a whole. The Supreme Court reversed in *Hasting* because the court of appeals had failed to apply the harmless error doctrine, which strikes "the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of victims on the other." 103 S. Ct. at 1981 (footnote omitted). The Court observed that the court of appeals should not have "so lightly and casually ignored" the interests protected by the harmless error rule "in order to chastise what the court viewed as prosecutorial overreaching." *Id.* at 1979.

201. See *Cupp v. Naughten*, 414 U.S. 141, 145-46 (1973) (upholding state conviction, distinguishing federal cases in which court of appeals had disapproved of same jury instruction, since federal appellate courts in a single jurisdiction in the exercise of supervisory power may require the trial courts "to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution"); *Barker v. Wingo*, 407 U.S. 514, 530 n.29 (1972) (cautioning that nothing in the speedy trial clause of the Constitution "should be interpreted as disapproving a presumptive role adopted by a court in the exercise of its supervisory powers which established a fixed time period within which cases must normally be brought").

202. 446 U.S. 335, 346 n.10 (1980).

203. See *id.* at 345-49. Fed. R. Crim. P. 44(c), adopted in 1980, now requires such an inquiry.

sory power has been employed to evade the limitations of the Supreme Court's constitutional rulings. In other cases, supervisory power, which lacks doctrinal limitations, has been employed simply because no other source of authority was readily apparent.<sup>204</sup> The remaining parts of this Article discuss where legitimate sources of authority for the supervisory power exist.

## II. THE FEDERAL COURTS' AUTHORITY TO ESTABLISH PROCEDURAL RULES

The courts and commentators have suggested a number of bases for the supervisory power doctrine. Although a few cases have suggested that supervisory power is based upon the authority conferred by the All Writs Act,<sup>205</sup> no other statutory basis has been identified, and most courts and commentators have characterized supervisory power as an implied or inherent power.<sup>206</sup> Thus, although this point is not always explicitly recognized, supervisory power is generally regarded as an aspect of the judicial power conferred by article III.

Several arguments have been made in support of the view that the federal courts have inherent or implied supervisory power. One of the justifications most commonly offered is that the judiciary must necessarily have the authority to protect its own integrity in order to carry out its functions.<sup>207</sup> The Supreme Court has also suggested that it has inherent authority to regulate procedure and to formulate remedies. Finally, and most generally, it has been suggested that because the subjects of supervisory power rulings are matters of federal concern, supervisory power is an appropriate form of federal common law.<sup>208</sup> As will be shown, none of these theories is sufficient to support all of the significant supervisory power rulings, particularly those in the lower federal courts.

As noted in Part I, the majority of the Supreme Court's supervisory power decisions establish rules for the manner in which judicial proceedings should be conducted,<sup>209</sup> and many of the supervisory power decisions in

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204. For example, in *United States v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983) (en banc), Judges Garth and Gibbons argued that the court should employ its supervisory authority to require the government to postpone a probation revocation hearing until after the trial on related criminal charges or else to give the probationer use immunity for his testimony at the revocation hearing. *Id.* at 836-38 (Garth, J., dissenting); *id.* at 848-49 (Gibbons, J., dissenting). Judges Seitz and Adams disagreed that the case was a proper one for the exercise of supervisory power. *Id.* at 843-45 (Seitz, J., dissenting); *id.* at 849-53 (Adams, J., dissenting).

205. See *infra* notes 286-90 and accompanying text.

206. See *infra* notes 227-34 and accompanying text.

207. See Harvard Note, *supra* note 9, at 1663 (the judiciary's right to keep its own skirts clean is the "most acceptable rationale" for *McNabb*); Stanford Note, *supra* note 9, at 442 (despite its lack of clarity, the "judicial integrity rationale . . . does point to a proper base" for supervisory power).

208. See Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 34-38 (1975).

209. See *supra* notes 102-13 and accompanying text.



each of the courts of appeals address various aspects of judicial procedure.<sup>210</sup> Indeed, if the term “procedure” is given the broadest possible interpretation, virtually all the supervisory power cases to date—including those suppressing evidence because it was improperly obtained<sup>211</sup> and those dismissing a prosecution because of government misconduct<sup>212</sup>—may be described as procedural.

This Part examines the federal courts’ authority to establish procedural rules as a source of authority for supervisory power rulings. It concludes that although the federal courts possess both inherent and statutorily granted authority to adopt procedural rules, this authority is subject to a number of significant limitations that have been largely ignored in supervisory power cases. This Part contends that the federal courts’ implied constitutional authority encompasses the power to formulate procedural rules only in a narrow sense: that is, technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process. Accordingly, although the authority to regulate procedure includes the power to adopt rules designed to enhance the reliability and fairness of the judicial process, it does not encompass the authority to suppress evidence because of extrajudicial misconduct by the government. Perhaps other sources of authority exist for the creation of exclusionary rules. But to the extent supervisory power must be grounded on the power to fashion procedural rules, it does not authorize the formulation of exclusionary rules. This Part also contends that the scope of the federal courts’ authority to fashion procedural rules cannot accurately be assessed without a review of the existing statutory framework, which imposes significant limitations on the authority that the courts would otherwise possess. Under this framework, for example, the authority of the federal courts of appeals is subject to important restrictions that cast serious doubt on those courts’ authority to regulate procedure in the district courts on a case-by-case basis.

#### A. *Constitutional Sources of Authority*

The Constitution contains neither an explicit grant of authority to formulate rules of judicial procedure<sup>213</sup> nor a full definition of the judicial power conferred by article III.<sup>214</sup> The actions of the Supreme Court and

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210. See *supra* notes 165–67 and accompanying text.

211. E.g., *Elkins v. United States*, 364 U.S. 206 (1960); *United States v. Payner*, 590 F.2d 206 (6th Cir. 1979), *rev’d*, 447 U.S. 727 (1980); cf. *Mallory v. United States*, 354 U.S. 449 (1957) (confession excluded because of delay in bringing defendant before judicial officer after arrest); *McNabb v. United States*, 318 U.S. 332 (1943) (same).

212. See, e.g., *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), appeal dismissed *sub nom. United States v. Means*, 513 F.2d 1329 (8th Cir. 1975).

213. But cf. U.S. Const. art. I, § 8, cl. 14 (Congress may establish “Rules for the Government and Regulation of the land and naval Forces”).

214. Article III provides in relevant part: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1.

Congress have established (1) that the power to regulate judicial procedure is not inherently and exclusively an aspect of judicial power,<sup>215</sup> and (2) that the federal courts do possess implied constitutional authority to regulate judicial procedure, concurrent with and largely subsidiary to the power of Congress. This implied judicial authority is analogous to the implied presidential authority recognized in cases such as *United States v. Nixon*.<sup>216</sup>

1. *Congressional Regulation of Judicial Rule-Making.* — Although the records of the Constitutional Convention and the debates on ratification shed little light on the question whether the grant of judicial power conferred the exclusive authority to formulate procedural rules,<sup>217</sup> both Congress and the Supreme Court have consistently viewed congressional regulation of judicial procedural matters as appropriate.

The closest contemporaneous evidence, the action of the first Con-

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215. The contrary position—that Congress has no constitutional authority to establish rules for the judiciary—has occasionally been suggested. The most celebrated statement of this view is Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 Ill. L. Rev. 276 (1928). Other commentators have taken a less extreme position, although they agree with many of Wigmore's arguments. See Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L. Rev. 623, 628-29 (1957); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926). In *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), the New Jersey Supreme Court adopted a position similar to Wigmore's view. Relying on an unusual state constitutional provision granting rulemaking authority to the courts, it held that judicial rules of procedure adopted pursuant to the constitution could not be overridden by subsequent legislation.

216. 418 U.S. 683, 703-13 (1974).

217. See J. Weinstein, *Reform of Court Rule-Making Procedures* 36-44 (1977) (reviewing the discussions of article III in the Constitutional Convention, the Federalist Papers, and the state ratification debates); Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 Tex. L. Rev. 167, 179-80 (1979) (same). The judicial power clause of article III, § 1 took shape during the final weeks of the convention. As the last amendment to the clause, James Madison and Robert Morris moved the substitution of the words "judicial power" to replace the words "jurisdiction of the Supreme Court." 1 J. Goebel, Jr., *History of the Supreme Court of the United States* 241 (1971) (footnote omitted) (quoted with approval in J. Weinstein, *supra*, at 39). About the amendment, the late Professor Goebel wrote, "To speak of jurisdiction in terms of national power and not of a court was a noteworthy extension of the base of judicial authority." *Id.* But Madison, who wrote *The Federalist* Nos. 75-82, which discuss the judiciary, did not elaborate in those papers on the meaning of "judicial power," except to review the various jurisdictional provisions of article III.

It has been suggested that the framers felt no need to define "the judicial Power" because they accepted as their general model the English and colonial courts, which formulated their own rules of procedure and evidence. Martin, *supra*, at 180-81. Perhaps there should be a mild presumption that the powers of the federal judiciary correspond to those of the English and colonial courts. On the other hand, the overall structure of the Constitution implies certain limits on the federal courts which did not limit the powers that were exercised by the English and colonial courts; for example, the federal courts have no authority to recognize new common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). Accordingly, the precedent of the English and colonial courts is not sufficient to establish that the framers believed that the power to formulate rules of procedure was an inherent aspect of "the judicial Power" conferred by article III. See Hill, *supra* note 9, at 207-09.

gress,<sup>218</sup> strongly suggests that the framers viewed the establishment of rules of procedure as a legislative function that might, in appropriate cases, be delegated by Congress to the courts. The Judiciary Act of 1789<sup>219</sup> and the Process Act of 1789<sup>220</sup> regulated judicial procedure in some detail. The pattern of this legislation is incompatible with the idea that formulating procedural rules is inherently and exclusively a judicial function. Beginning in 1789, Congress played the leading role in regulating procedure until the 1930s, when it explicitly proposed rules of procedure. The pattern of this legislation is incompatible with the view that formulating procedural rules is inherently and exclusively a judicial function.

The Supreme Court has consistently endorsed the view that the power to regulate judicial procedure is a legislative function. The Court's early decisions recognized that Congress had the authority under the necessary and proper clause<sup>221</sup> to enact rules of judicial procedure,<sup>222</sup> and that the

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218. "An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" *Marsh v. Chambers*, 103 S. Ct. 3330, 3334 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

219. Ch. 20, 1 Stat. 73 (1789). The Judiciary Act dealt with a number of procedural matters, such as the issuance of writs in aid of the courts' jurisdiction, § 14, 1 Stat. 81; the exercise of subpoena power, § 15, 1 Stat. 82; the grant of new trials, § 17, 1 Stat. 83; juror qualifications and the procedure for jury selection, § 29, 1 Stat. 88; and the mode of proof by oral testimony and depositions, § 30, 1 Stat. 88. Section 17 of the Judiciary Act also expressly empowered each federal court "to make and establish all necessary rules for the orderly conducting business [sic] in the said courts, provided such rules are not repugnant to the laws of the United States." 1 Stat. 83.

220. Ch. 21, 1 Stat. 93 (1789).

221. The Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

222. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), the Court upheld a procedural rule adopted by a federal district court on the ground that Congress had authorized the court to promulgate the rule, *not* on the ground that the power to formulate rules of procedure is an attribute of judicial power. The defendants challenged the validity of the Process Acts of 1789 and 1792; ch. 36, 1 Stat. 275; ch. 21, 1 Stat. 93. The Process Act of 1792 stated that, unless otherwise provided, in suits at common law the forms and writs of execution and the modes of process in the federal courts should be the same as those employed by the state courts in 1789, "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." § 2, 1 Stat. 276. The Court held that:

The Constitution concludes its enumeration of granted powers with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. . . . That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer.

*Wayman*, 23 U.S. (10 Wheat.) at 22. *Accord Bank of the United States v. Halstead*, 23 U.S.

congressional power to "ordain and establish"<sup>223</sup> inferior federal courts "carries with it the power to prescribe and regulate the modes of proceeding in such courts."<sup>224</sup> More than 100 years later, in *Sibbach v. Wilson & Co.*,<sup>225</sup> the Court upheld Rule 35 of the Federal Rules of Civil Procedure, reaffirming its view that Congress may regulate federal procedure or may delegate this power to the federal courts.<sup>226</sup> The Court's opinions in these cases are plainly inconsistent with the claim that the authority to formulate rules of procedure is either inherently or exclusively judicial in nature.<sup>227</sup>

2. *Implied Ancillary Judicial Power.* — Although the regulation of judicial procedure is not inherently and exclusively a judicial function, the Supreme Court's supervisory power decisions suggest that the authority to regulate judicial procedure is an incidental or ancillary power implied in the article III grant of judicial power. The Supreme Court has consistently recognized that every constitutional grant of authority implicitly includes at least the incidental or ancillary authority that is absolutely necessary to permit the exercise of the expressly granted powers,<sup>228</sup> and the cases interpreting the President's implied authority provide support by analogy for a more generous interpretation of the federal courts' implied authority.

The Supreme Court has recognized that the grant of judicial power carried with it some implied powers, but has had little occasion to focus on the scope of that implied authority. Aside from the supervisory power cases, the Supreme Court's decisions are generally consistent with a narrow view of the judiciary's ancillary authority. Early decisions stated that the federal courts have "inherent" authority "to supervise the conduct of [their]

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(10 Wheat.) 51, 60-62 (1825). Accordingly, the Court upheld the delegation of a legislative power. *Wayman*, 23 U.S. (10 Wheat.) at 41-49.

223. U.S. Const. art. III, § 1.

224. *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

225. 312 U.S. 1 (1941).

226. *Id.* at 9-10.

227. Compare Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 *Law & Contemp. Probs.* 102, 124-25 (1976) (Chief Justice Marshall's opinion in *Wayman* assumes the power to fashion rules of procedure is exclusively legislative), with Martin, *supra* note 217, at 186-89 (*Wayman* should not be read broadly since the case did not involve the regulation of matters indispensable to the exercise of the judicial power, and raised a question of federalism, not of separation of powers). The Marshall Court did not, however, view the authority to formulate procedural rules as exclusively legislative. In *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825), decided the same term as *Wayman*, the Court stated that no one regarded the power conferred on the courts as a legislative power; to the contrary, for example, the statute authorizing the Process Act "partakes no more of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases." *Id.* at 61-62. In context, the Court appears to be saying that the power to formulate procedural rules is not a nondelegable legislative power.

228. See, e.g., *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225 (1821) (recognizing ancillary or auxiliary powers even though "the genius and spirit of our institutions are hostile to the exercise of implied powers").

officers, and the execution of [their] judgments and process,"<sup>229</sup> and to punish contempt of court.<sup>230</sup> The Court's analysis in the contempt cases suggests that the federal courts have implied authority only if that authority is indispensable to the exercise of judicial power, not merely helpful or beneficial. The power to punish for contempt has been held to be "inherent in all courts" because "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments . . . and consequently to the due administration of justice."<sup>231</sup> Accordingly, the Supreme Court has stated that "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."<sup>232</sup> The power to punish for contempt is an implied power because it is "necessary to the exercise" of all other judicial powers.<sup>233</sup> Moreover, "[i]n the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules" on matters such as whether to permit jurors to impeach their own verdict.<sup>234</sup>

Although general authority to formulate rules of judicial procedure is not indispensable to the exercise of judicial power,<sup>235</sup> the Supreme Court's

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229. *Griffin v. Thompson*, 43 U.S. (2 How.) 244, 257 (1844) (dictum).

230. Although § 17 of the Judiciary Act of 1789, 1 Stat. 83, authorized the federal courts to punish contempt, that legislation has not been regarded as the source of the federal courts' authority. In *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227-28 (1821), the Supreme Court rejected the suggestion that the federal courts would lack the power to punish contempt in the absence of the statute, which it interpreted as either arising from an abundance of caution on the part of Congress or constituting an attempt to limit courts' inherent powers. The Court stated that the federal courts were "universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. . . ." *Id.* at 227.

231. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874). But the Court recognized that the contempt power of at least the lower federal courts was limited by § 17 of the Judiciary Act of 1789. See *id.* at 510-11.

232. *Id.* at 510.

233. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). But the contempt cases provide only equivocal support for a narrow interpretation of the judiciary's implied powers. The cases do not contrast the narrow implied power of the judiciary with the broader ancillary power of Congress under the necessary and proper clause. On the contrary, the cases by inference equate the implied power of Congress with that of the courts. The Supreme Court's clearest articulation of the limits of the implied power to punish contempt—"the least possible power adequate to the end proposed"—came in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821), a case involving contempt of Congress, not contempt of court. Since this interpretation of the scope of Congress's ancillary authority is at odds with the Supreme Court's broad interpretation of the necessary and proper clause in *McCulloch v. Maryland*, 7 U.S. (4 Wheat.) 316 (1819), the summary contempt cases may simply be *sui generis*, best understood as resting on a concern for procedural due process.

234. *McDonald v. Pless*, 238 U.S. 264, 266 (1915).

235. See *supra* text accompanying notes 17-33. The federal courts could have operated under either the rules of procedure received from the English and colonial courts or rules of procedure adopted by Congress. Judicial power to promulgate rules of procedure would be indispensable to the conduct of judicial business in only two situations. The courts would need residual authority to fashion rules of procedure to deal with any essential matters not governed by any received common law rule or by any act of Congress. The power to formu-

treatment of the implied powers of the President provides support by analogy for the view that the express grant of authority in article III, like that in article II, implicitly carries with it ancillary power similar to the broad authority conferred on Congress by the necessary and proper clause of article I. Since the power to formulate rules of procedure unquestionably is ancillary to the judicial function, this analysis provides an ample basis for the Supreme Court's formulation of procedural rules.

The Court has never accepted the view, propounded by James Madison among others, that the President has only the powers expressly enumerated in article II and the ancillary authority absolutely necessary for the exercise of those enumerated powers.<sup>236</sup> To the contrary, although the Court has not always spoken with a unified voice, it has recognized that the President possesses significant implied constitutional authority.<sup>237</sup> The Court has interpreted the President's implied constitutional authority expansively in cases dealing with matters such as the President's removal authority,<sup>238</sup> executive privilege,<sup>239</sup> and presidential immunity.<sup>240</sup> Although the scope of the President's authority has not been fully defined, the Court has clearly not limited the President's implied powers to those which are absolutely essential to the exercise of the authority expressly conferred by article II.<sup>241</sup> Indeed, in *United States v. Nixon*,<sup>242</sup> the Court suggested that the President's implied authority, like that of Congress, encompasses all powers that are "reasonably appropriate and relevant to the exercise of a

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late procedural rules would also be indispensable if the common law rules or the rules prescribed by Congress were incompatible with article III or with other constitutional provisions. Professor Martin has suggested, for example, that a rule declaring testimony by males incompetent would significantly impair the courts' duty to decide controversies, and that it would be invalid under article III. Martin, *supra* note 217, at 183. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145-47 (1872) (invalidating, as unconstitutional encroachment on courts' article III powers, statute forbidding Court of Claims from considering evidence concerning issuance of presidential pardons for Civil War activities). In most if not all such cases, a procedural rule that interfered with the courts' article III functions would also deprive one of the litigants of due process of law. See *Chambers v. Mississippi*, 410 U.S. 284 (1973) (rule prohibiting party's impeachment of his own witness violates due process). Relatively few rules would be indispensable; most procedural rules merely increase efficiency and reliability, and are beneficial but not necessary.

236. Madison's and Hamilton's opposing views of the powers of the presidency are described in *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 432-37 (1973).

237. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926).

238. *Myers v. United States*, 272 U.S. 52 (1926). In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court significantly narrowed the scope of *Myers*, refusing to apply it to an independent regulatory agency outside the executive branch.

239. *United States v. Nixon*, 418 U.S. 683 (1974).

240. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

241. See, e.g., Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 467-88 (1979); Van Alstyne, *supra* note 227.

242. 418 U.S. 683 (1974).

granted power.”<sup>243</sup>

Although neither article II nor article III contains any express grant of incidental authority comparable to the necessary and proper clause,<sup>244</sup> a generous interpretation of the ancillary authority of the President and of the judiciary is not inconsistent with the text of the Constitution.<sup>245</sup> In contrast to article III, which vests “[t]he judicial Power of the United States” in the Supreme Court and any lower federal courts created by Congress,<sup>246</sup> and article II, which vests “[t]he executive Power” in the President,<sup>247</sup> the grant in article I is limited. Instead of granting Congress the legislative power of the United States, article I vests in Congress only the “legislative Powers *herein granted*.”<sup>248</sup> The necessary and proper clause may thus be intended only to make it clear that Congress’ enumerated powers are not to be read hypertechnically. Since neither article II nor article III is cast in limited terms that would be likely to give rise to an unduly narrow construction, no necessary and proper clause was needed.<sup>249</sup>

Although the language and structure of articles II and III are not identical, the textual differences between articles II and III suggest, if anything, that the argument for a generous interpretation of the judiciary’s implied

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243. *Id.* at 706 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)); see Van Alstyne, *supra* note 227, at 120–22.

244. Section 2 of article III does describe the classes of cases to which the judicial power “shall extend;” it also defines the original jurisdiction of the Supreme Court and provides that the Court shall have appellate jurisdiction “both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.” U.S. Const. art. III, § 2, cl. 2. In contrast, article I defines the federal legislative power and expressly grants Congress any incidental powers that are “necessary and proper” for carrying into execution not only “the foregoing Powers,” but also “all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18. As interpreted by the Supreme Court, the necessary and proper clause gives Congress broad discretion, authorizing it to employ any means that would be helpful or beneficial to the exercise of enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

245. Professor Van Alstyne, however, has taken a narrower view. He has suggested that the express grant of authority in articles II and III, unaccompanied by any necessary and proper clause, authorizes the exercise of only those ancillary powers absolutely or indispensably necessary to the exercise of the enumerated powers, not those merely beneficial or helpful, unless Congress confers additional authority on the executive branch or the federal courts. Van Alstyne, *supra* note 227, at 110–11. This interpretation would limit the potential for conflict between the legislature’s expansive authority under the necessary and proper clause and the implied authority of the executive and the judiciary. Each branch would be supreme in exercising its enumerated powers and any indispensable ancillary authority. Powers that would be merely helpful or beneficial to the executive or the judiciary could be conferred by Congress, which is empowered to make laws to effectuate the authority of the other branches of government. The representative nature of Congress may be an additional justification for permitting it to override judicially fashioned rules of procedure. See Martin, *supra* note 217, at 194–95.

246. U.S. Const. art. III, § 1.

247. U.S. Const. art. II, § 1.

248. U.S. Const. art. I, § 1 (emphasis added).

249. See Van Alstyne, *supra* note 227, at 133 n.100 for several alternative interpretations.

powers is stronger than the President's claim under article II. The narrow Madisonian view of the President's powers can readily be implied from the enumeration of detailed powers in article II.<sup>250</sup> No similar enumeration of judicial powers is found in article III, perhaps because the framers thought the federal courts would be following established practice.<sup>251</sup>

A generous interpretation of the courts' ancillary authority under article III is fully consistent with the Court's recognition that Congress may establish comprehensive rules of procedure and may alter judicially fashioned procedural rules.<sup>252</sup> The necessary and proper clause expressly empowers Congress to legislate to give effect to the powers of the other branches. If the implied ancillary authority of the executive and the judiciary under articles II and III is given a generous interpretation, it will overlap with the legislative authority under the necessary and proper clause. This does not pose a substantial problem, however. In the case of a conflict, the text of the necessary and proper clause reflects the expectation that Congress would enact laws to govern the other branches of government. Moreover, the lower federal courts are creatures of Congress, created by legislation that may also regulate subsidiary details, such as the procedural rules to be followed. Thus, while the courts have the implied authority to formulate procedural rules, Congress, under the necessary and proper clause, has the final say.

The federal courts' implied authority to regulate judicial procedure may also conflict with the authority of the executive branch. For example, the Supreme Court's decision in *United States v. Nixon*<sup>253</sup> demonstrates that government privileges may be implied ancillary powers of the executive branch under article II. *Nixon* indicates that proper respect for co-equal branches of the federal government will place some restrictions on the federal courts' ancillary authority over procedural matters. Although the Court rejected the President's claim to an absolute and unqualified executive privilege on the ground that it "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts,"<sup>254</sup> it held that the President's need to preserve the confidentiality of his communications must be balanced against "the inroads of such a privilege on the fair administration of criminal justice."<sup>255</sup> *Nixon* holds that in exercising their procedural authority<sup>256</sup> the courts must resolve the conflict between the competing concerns of the executive and the judiciary "in a manner

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250. Article II provides, for example, that the President may require opinions, in writing, from the head of an executive department on any subject related to his official duties. U.S. Const. art. II, § 2, cl. 1.

251. See *supra* note 217.

252. See *supra* text accompanying notes 221-27.

253. 418 U.S. 683, 705-08 (1974).

254. *Id.* at 712.

255. *Id.* at 711-12 (footnote omitted).

256. In *Nixon* the district court was not relying solely on its implied constitutional authority. The Supreme Court held that the district court properly denied the President's motion to quash under Fed. R. Crim. P. 17(c), and that the special prosecutor had made a



that preserves the essential functions of each branch.”<sup>257</sup>

Even assuming a sufficiently broad grant of ancillary authority under article III, the *constitutional* authority of the lower federal courts to establish procedural rules is nevertheless problematic. Article III vests “the judicial Power” in “such inferior Courts as Congress may from time to time ordain and establish.”<sup>258</sup> The first lower federal courts were established by the Judiciary Act of 1789.<sup>259</sup> As already noted, the Judiciary Act also established various rules of procedure and authorized each federal court to establish other rules for its own proceedings.<sup>260</sup> Thus, when the lower federal courts came into being, Congress had already exercised its own authority to establish certain procedural rules and had delegated to the courts the authority to promulgate other rules. Even if lower federal courts would have had broad ancillary authority under article III in the absence of this legislative delegation, the enactment of this limited delegation at the time of their creation may have displaced that general ancillary power, leaving the lower federal courts with only the ancillary authority absolutely indispensable to the exercise of their functions under article III, such as the contempt power.

The Judiciary Act was, of course, only the first of many enactments dealing with procedure. Given the power of Congress to override or limit the courts’ ancillary authority over procedure, the present scope of that ancillary authority cannot be determined without reviewing the legislation establishing rules of procedure and defining the courts’ authority over procedural matters. Because the present scope of the lower courts’ authority is determined by the current statutory scheme, we will return to the issue of the lower courts’ authority when we review the current legislation affecting the scope of the federal courts’ authority.<sup>261</sup>

3. *The Scope of the Federal Courts’ Implied Authority: Defining Procedure.* — The preceding section argues that article III implicitly grants the federal courts authority to regulate judicial procedure, subject to the overriding authority of Congress. The question to be explored in this section is how procedure should be defined in this context. *McNabb* and its progeny raise the question whether the federal courts’ constitutionally based authority to regulate procedure is broad enough to authorize rulings that exclude evidence or dismiss criminal charges because of undesirable conduct by federal investigators or prosecutors.

Although the term “procedure” may properly be defined more broadly for other purposes, separation of power principles provide strong support for the application of the narrow definition when the issue is the scope of

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sufficient showing to justify a subpoena for production under Rule 17 before trial. 418 U.S. at 697–702.

257. 418 U.S. at 707.

258. U.S. Const. art. III, § 1.

259. Ch. 20, 1 Stat. 73, 73–74, § § 3, 4.

260. See *supra* note 29 and accompanying text.

261. See *infra* notes 278–301 and accompanying text.

the federal courts' implied constitutional authority. *Erie R.R. Co. v. Tompkins*<sup>262</sup> repudiated the concept of a general federal common law because the federal courts' lawmaking authority must be defined in a manner that respects the Constitution's allocation of authority. The recognition of implied authority on the part of federal courts to create a general common law would be inherently inconsistent with the division of authority between the federal government and the states, and equally inconsistent with the horizontal division of authority among the three branches of government. In other words, the concept of a specialized rather than a general federal common law is essential to both the horizontal and vertical separation of power required by the Constitution. In this context, the concept of a specialized federal common law requires an effort to distinguish rulings that are procedural from those that are substantive.<sup>263</sup>

Rulings excluding evidence or dismissing a prosecution because of extrajudicial governmental misconduct appear procedural, but are so in form only. This Article proposes that a ruling should be regarded as procedural and thus within the implied authority of the federal courts only if its purpose is to enhance the fairness, reliability, or efficiency of the litigation process, rather than to advance some policy extrinsic to the litigation process.<sup>264</sup> A ruling is procedural in this sense if it involves the technical details of the litigation process, but not if it resolves broad issues of general public policy. The judiciary has special competence in dealing with technical matters of the litigation process.<sup>265</sup> The federal courts' implied ancillary

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262. 304 U.S. 64 (1938).

263. There have been many attempts to describe the distinction between substance and procedure. Joiner and Miller suggested that the standard should be whether a particular subject involves something more "than the orderly dispatch of judicial business." Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L. Rev. 623, 635 (1957). Riedl, considering rules of evidence, distinguished between evidentiary rules designed to "promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial" and rules "having nothing to do with procedure, [which are] grounded upon a declaration of a general public policy." Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 604 (1940). Levin and Amsterdam, who favor a degree of concurrent legislative and judicial control, argue that the question of characterization should be resolved differently if the characterization is sought to determine whether the court had the authority to act than if it is sought to determine whether the legislature has the authority to review and supersede a rule. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Program in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 20-24 (1958).

264. In *Hanna v. Plumer*, 380 U.S. 460, 464 (1965), the Court quoted *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941), which defined procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

265. Rules of privilege involve public policy issues, not merely technical tools of the legal profession. See 23 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5422 (1980); Louisell and Crippin, *Evidentiary Privileges*, 40 Minn. L. Rev. 413 (1956). The definition and application of standard common law privileges, however, do not involve the judiciary in the supervision of another branch of government. See *infra* notes 501-04 and accompanying text.

authority over procedural matters is recognized because of this special competence, and because the adoption of procedural rules is helpful and in some instances necessary in order for the courts to perform their function under article III. However, a ruling should not be regarded as procedural for this purpose when it is merely procedural in form, if the purpose of the ruling is to affect primary extrajudicial conduct.

The distinction proposed here is a familiar one. Substantive rules are concerned principally with policies extrinsic to litigation. Substantive legal rules define the conditions in which a legal right arises, the extent of the right, and the nature and extent of the available remedies. Thus the requirements for the formation of a valid contract, the extent of the rights and/or duties created by the contract, what constitutes a material breach, and the nature and extent of the remedy (e.g., damages for lost profit or right to specific performance) are all ordinarily regarded as substantive rules. Because the parol evidence rule is founded principally on the policies of substantive contract law rather than on policies intrinsic to the litigation process, the parol evidence rule is almost universally recognized as a substantive legal rule, not an evidentiary or procedural one.<sup>266</sup> Accordingly, the federal courts' implied ancillary power over procedural matters should not encompass the parol evidence rule despite the fact that the rule is stated in procedural terms.

The rules that regulate the relationship between the government and its citizens are also generally matters of substantive law.<sup>267</sup> The rule that the government may not ordinarily restrict freedom of the press is one such substantive rule. The rules governing police investigative practices are also substantive. The rule involved in *McNabb* and *Mallory*, which required that an arrested suspect must be taken promptly before a magistrate, is substantive in this sense: it regulates extrajudicial conduct, not judicial procedure. Such a rule limits the means the government may employ to investigate criminal conduct and creates a right on the part of the suspect. The right created by the latter rule might be enforced by a variety of remedies, such as civil damages, injunctive relief, immunity from prosecution for the offense under investigation, or exclusion of any statements made in the course of any unlawful detention.<sup>268</sup> Even though both rules are stated in procedural terms, the rule announced in *McNabb*, like the parol evidence rule, should be regarded as substantive because it is founded on policies of sub-

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266. See, e.g., 3 A. Corbin, *A Comprehensive Treatise on the Rules of Contract Law* § 573 (1960) (parol evidence rule "is a Rule of Substantive Contract Law"); 10 J. Moore and H. Bendix, *Moore's Federal Practice* § 302.02, at III-41 (2d ed. 1982) (since parol evidence rule is a rule of substantive law, state law is applicable in federal diversity cases); 4 S. Williston, *A Treatise on the Law of Contracts* § 631 at 955 (3d ed. 1961) ("The parol evidence rule, in spite of its name, is not a rule of evidence.").

267. By contrast, the rules that relate specifically to rights in litigation with the government—such as the right to trial by jury in civil and criminal cases—are procedural.

268. See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (civil damages); *McNabb v. United States*, 318 U.S. 332 (1943) (exclusion of evidence).

stantive law extrinsic to the litigation process.<sup>269</sup>

As in contract law, it also seems appropriate to regard the question of what remedy should be recognized as an issue of substantive law. This seems particularly clear in the case of the creation of a new cause of action for civil damages, but the same principle applies to the implication of other remedies. In contrast to true procedural rules, which are principally concerned with the policies intrinsic to the litigation process, the decision whether to imply a civil cause of action or an exclusionary rule is principally concerned with substantive policies extrinsic to the litigation process, and with the interpretation of the underlying substantive rule of law.<sup>270</sup> Since the implication of remedies for violations of federal law is a matter of substantive rather than procedural law, it is discussed in the next section.

Of course there are gray areas that are difficult to characterize as procedural or substantive. This issue arose in the cases construing the Rules Enabling Act,<sup>271</sup> and the Supreme Court's resolution of those cases provides a useful precedent. If the appropriate characterization of a particular rule is open to doubt (and might reasonably be treated as either procedural or substantive), *Hanna v. Plumer*<sup>272</sup> holds that the rule should be treated as presumptively valid if it was promulgated pursuant to express statutory authority. The Court's approach in *Hanna v. Plumer* is broadly consistent with its approach to claims of implied ancillary authority under article II. For example, in rejecting the claims of executive authority in both the *Steel Seizure Case*<sup>273</sup> and the *Pentagon Papers Case*,<sup>274</sup> many members of the Court

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269. Wigmore's reasoning regarding the parol evidence rule applies with equal force to the exclusion of evidence in cases such as *McNabb*.

First and foremost, *the [parol evidence] rule is in no sense a rule of Evidence*, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this . . . (like any other ruling of substantive law) results in forbidding the fact to be proved at all. . . . When a thing is not to be proved at all, the rule of prohibition does not become a rule of Evidence merely because it comes into play when the counsel offers to “prove” it or “give evidence” of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; a ruling (for example) that on a plea of self-defense, in an action of battery, no evidence of the plaintiff's insulting words is to be received, would become the legitimate progeny of the law of evidence.

9 Wigmore on Evidence § 2400 at 3 (3d ed. 1940) (footnote omitted, emphasis in original).

270. The Supreme Court's reluctance to imply new statutory causes of action appears to be indicative of the Court's view that Congress is the appropriate body to make the policy choices that must be resolved in recognizing a new cause of action. See Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 885–92 (1983); Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 571–72 (1981). The federal courts' power to fashion nonstatutory remedies is discussed in Part III, *infra*.

271. See 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4508 (1982).

272. 380 U.S. 460 (1965).

273. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

emphasized the fact that the President had acted without congressional authorization. To paraphrase Justice Jackson's opinion in the *Steel Seizure Case*, when the President or the federal courts act pursuant to an express authorization by Congress, the authority of each is at its maximum.<sup>275</sup>

Accordingly, any provision promulgated pursuant to statutory authority as part of the Federal Rules of Criminal Procedure should have presumptive validity, even if it has clearly substantive overtones.<sup>276</sup> If, for example, the Supreme Court were to promulgate an amendment to the rule involved in *Mallory*—Federal Rule of Criminal Procedure 5—that expressly excluded statements obtained in violation of the rule, the amended rule should be regarded as presumptively valid.<sup>277</sup> On the other hand, no such presumptive validity should attach to judicial rulings based solely on the federal courts' implied ancillary authority. Supervisory power rulings grounded solely on this implied ancillary authority are appropriate when they are procedural in the narrowest sense—when they deal with technical matters of judicial procedure on which the courts have special competence. But if a court invokes its supervisory power to manipulate a rule that is procedural on its face in order to advance some social policy extrinsic to litigation, the nature of the ruling is substantive, not procedural, and the question should be whether the federal courts have the authority to fashion such a *substantive* rule of law.

#### B. *Statutorily Granted Authority to Regulate Procedure*

The federal courts' implied constitutional authority has been supplemented by statutory grants of authority such as the legislation empowering the Supreme Court to promulgate rules of civil and criminal procedure.

A review of the current legislative scheme indicates that, except in the case of the district courts, there is no plausible statutory foundation for the

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274. *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring); *id.* at 732 (White, J., concurring); *id.* at 742-43 (Marshall, J., concurring).

275. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

276. It is not clear whether this presumption should be extended to local court rules adopted pursuant to 28 U.S.C. § 2071, Fed. R. Crim. P. 57(a), and Fed. R. Civ. P. 83. Local rules, unlike rules proposed by the Supreme Court, need not be submitted to Congress before they become effective. Moreover, the procedure for the promulgation of local rules has been left entirely to the discretion of the local courts. In many districts rules have been promulgated in a haphazard manner, without providing an opportunity for notice and comment on proposed rules. See 12 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 3152 (1973). The problem is sufficiently serious that an amendment to Fed. R. Civ. P. 83 has been proposed by the Advisory Committee on Civil Rules to remedy these problems. See 52 U.S.L.W. 2144 (1983). The proposed amendment provides that local rules may be made and amended "after giving appropriate public notice and an opportunity to comment." *Id.* The amendment also authorizes the judicial council of the circuit to abrogate local rules. *Id.*

277. The early draft of Fed. R. Crim. P. 5 included a provision incorporating the *McNabb* rule, but after the American Bar Association voted overwhelmingly to disapprove that provision, the Advisory Committee on Criminal Rules deleted it from the rule submitted to the Court and eventually adopted. Inbau, *supra* note 99, at 452.

federal courts' general authority to announce procedural rules on a case-by-case basis. No statute expressly confers this authority on the Supreme Court or the courts of appeals, and, in view of the carefully tailored express grants of authority, the case for implied statutory authority is weak. Congress has, however, granted the various federal courts significant authority over procedural and evidentiary matters, defining the scope of that authority differently at each level of the federal judicial system. The Federal Rules of Civil and Criminal Procedure provide ample authority for district court decisions adopting procedural rules on a case-by-case basis when there is no statute or Supreme Court rule on point, and the courts of appeals and the Supreme Court also have similar authority to adopt rules governing their own procedures. There is, however, no clear statutory support for the formulation of *common law* rules of evidence and trial court procedure by either the Supreme Court or the courts of appeals. Although this authority might be deemed to be implicit in the legislation authorizing appellate and Supreme Court review, that implication is by no means a necessary one, since Congress has provided alternative mechanisms for the promulgation of both local court rules and uniform national rules of evidence and procedure.

The district courts have statutorily granted authority to establish common law rules of procedure. As previously noted,<sup>278</sup> the Judiciary Act of 1789 authorized the federal courts to "make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States."<sup>279</sup> A virtually identical provision may now be found in 28 U.S.C. § 2071,<sup>280</sup> and similar authority has been restated in Rule 57 of the Federal Rules of Criminal Procedure and in analogous provisions in the Federal Rules of Civil and Appellate Procedure.<sup>281</sup> Although some of the other provisions may apply

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278. See *supra* note 29 and accompanying text.

279. Judiciary Act of 1789, ch. 17, § 17(b), 1 Stat. 83.

280. 28 U.S.C. § 2071 (1982) provides: "The Supreme Court and all courts established by Acts of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

281. See Fed. R. App. P. 47, Fed. R. Civ. P. 83, and Fed. R. Crim. P. 57(a). Fed. R. App. P. 47 authorizes rulemaking by a majority of the judges of the court of a circuit, and also provides that "[i]n all cases not provided for by rule, the court of appeals may regulate their practice." Fed. R. Civ. P. 83 authorizes rulemaking by a majority of the judges of each district, and also provides that "[i]n cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." In contrast to Fed. R. Civ. P. 83, which states that each district court by action of "a majority of the judges thereof may from time to time make and amend rules governing its practice," Fed. R. Crim. P. 57(a) merely refers to "[r]ules made by district courts for the conduct of criminal proceedings." It has generally been assumed that the omission of the requirement that rules be made by the district court as a whole (which clearly requires legislative rulemaking as opposed to rulemaking in the context of a particular dispute) was inadvertent. See 3A Wright, *supra* note 151, § 901, at 369 (requirement that district court rules be made by majority of active judges of district is "doubtless implicit" in Rule 57(a)).

only to legislative-style rulemaking,<sup>282</sup> Rule 57(b)<sup>283</sup> clearly authorizes the district courts to adopt appropriate procedural rules on a case-by-case basis. Rule 57(b), which authorizes a district court to “proceed in any lawful manner” where no procedure is specified by statute or rule, is thus broad enough to encompass many district court procedural rulings made under the supervisory power rubric.

It is more difficult to identify a statutory basis for the appellate courts’ exercise of supervisory authority to declare new procedural rules for the district courts in the course of adjudication of individual cases. In defining the appellate courts’ powers, it is necessary to distinguish between provisions conferring authority only on the courts of appeals, such as Federal Rule of Appellate Procedure 47, and provisions conferring authority exclusively on the Supreme Court, such as 18 U.S.C. § 3771. It is doubtful whether either 28 U.S.C. § 2071, which applies to both the Supreme Court and the courts of appeals, or Federal Rule of Appellate Procedure 47, which applies only to the latter, provides an appropriate basis for a reviewing court’s announcement of procedural rules to govern the lower courts. On their face, section 2071 and Rule 47 merely authorize the courts to fashion appropriate procedural rules to govern their own practice and the conduct of business in their own courts.<sup>284</sup> Neither provision makes any express reference to the promulgation of rules to govern practice and procedure in the lower courts. And, although the history of Rule 47 is less clear, the narrow

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282. 28 U.S.C. § 2071 (1982) authorizes the federal courts to “prescribe rules.” Although it is not explicitly limited to legislative rulemaking, the language and the structure of § 2071 are similar in some respects to the provisions that authorize the Supreme Court’s promulgation of the federal rules. The verb “prescribe” is also used in the legislation authorizing the Supreme Court to promulgate rules of civil and criminal procedure, as well as bankruptcy rules and amendments to the Federal Rules of Evidence. See 18 U.S.C. § 3771 (1982); 28 U.S.C. §§ 2072, 2075, 2076 (1982). In each of these provisions there are clear indications that legislative rulemaking is intended, such as the requirement that proposed rules be presented to Congress well in advance of their effective date. See *infra* notes 297–298 and accompanying text. In addition, 28 U.S.C. §§ 2072 and 2075 refer to “general rules.” The reported cases involving § 2071 and its predecessors have involved only legislative rulemaking. The inference that § 2071 refers only to legislative rulemaking is also supported by the Advisory Committee’s comments regarding Fed. R. Crim. P. 57, which describe the predecessor of § 2071 as the model for the rulemaking provisions of Rule 57(a), but not for the provisions of Rule 57(b) regarding adjudication. Fed. R. Crim. P. 57, Advisory Committee Note 1. Rule 57(a) authorizes the district courts to “make” rules for the conduct of criminal proceedings not inconsistent with the Federal Rules of Criminal Procedure. In contrast with Rule 57(b) (see *infra* note 283 and accompanying text), Rule 57(a), like § 2071, appears to refer only to legislative-style rulemaking.

283. The Advisory Committee’s comments on Rule 57(b) reflect the expectation that the district courts would employ this authority to adopt procedures on matters of detail where no uniform rule was deemed necessary, such as “the mode of impaneling a jury, the manner and order of interposing challenges to jurors.” Fed. R. Crim. P. 57(b), Advisory Committee Note 2.

284. 28 U.S.C. § 2071 (1982) authorizes the federal courts to “prescribe rules for the conduct of their business.” Fed. R. App. P. 47 authorizes each court of appeals to promulgate rules “governing its practice.” It could be argued that it is part of the “practice” of appellate courts to prescribe rules for lower courts, but that interpretation seems strained.

scope of section 2071 is borne out by the legislative history of that provision and its statutory predecessors.<sup>285</sup>

One final statutory source of authority for the appellate courts remains to be considered. In *La Buy v. Howes Leather Co.*,<sup>286</sup> the Supreme Court spoke of the "supervisory control of the District Courts by the Courts of Appeals"<sup>287</sup> under the All Writs Act,<sup>288</sup> and a number of lower federal courts have cited *La Buy* as authority for their exercise of supervisory power.<sup>289</sup> The lower courts' reliance on the All Writs Act is misplaced. Even a liberal interpretation of the All Writs Act would not provide a source of authority for either the promulgation of new procedural rules or general supervision of the administration of criminal justice. The chief importance of supervisory or advisory mandamus is that it expands the scope of interlocutory appellate review in the federal courts. It does not enlarge the appellate courts' authority to establish particular rules of law.<sup>290</sup>

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285. Congress has consistently distinguished between authorizing the federal courts to establish their own rules and authorizing the Supreme Court to prescribe rules for the lower courts. For example, the Process Act of 1792 provided that the forms of process in the lower courts would be governed by earlier federal legislation, subject to amendments by the lower courts, and to "such regulations as the supreme court [sic] of the United States shall think proper from time to time by rule to prescribe to any circuit or district court—" Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276.

In contrast, in 1793 Congress considered and rejected a proposal to amend the rulemaking provision of the Judiciary Act—the forerunner of § 2071—to shift the rulemaking power from individual courts to the Supreme Court. The consideration of a House bill containing this proposal is described in J. Weinstein, *supra* note 217, at 59-60. As enacted, the Process Act of 1793 authorized the federal courts "from time to time, as occasion may require, to make rules and orders for *their respective courts* . . . ." Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 335 (emphasis added). More than 100 years later, when Congress finally did grant the Supreme Court the authority to establish national rules of procedure for the district courts, it did so by adopting new legislation, with no suggestion that § 2071 already conferred this authority. See *supra* text accompanying notes 36-39. Accordingly, even assuming that § 2071 authorizes the promulgation of rules in the course of adjudication, not merely legislative rulemaking, it appears to provide no authority for decisions by either the Supreme Court or the courts of appeals that regulate procedure or evidence in the courts below.

286. 352 U.S. 249 (1957).

287. *Id.* at 259.

288. 28 U.S.C. § 1651 (1982).

289. See, e.g., *United States v. Jacobs*, 547 F.2d 772, 776 & n.8 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978); *Burton v. United States*, 483 F.2d 1182, 1187 (9th Cir.), rev'd on rehearing on other grnds, 483 F.2d 1190 (9th Cir. 1973); *United States v. Thomas*, 368 F.2d 941, 946-47 (5th Cir. 1966). Although the traditional function of mandamus was limited to confining a lower court to lawful exercise of its prescribed jurisdiction, the Supreme Court's decisions in *La Buy* and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), have been interpreted as authorizing a more liberal use of the writ of mandamus to perform the "supervisory" function of correcting the lower courts' persistent disregard of limiting rules or the "advisory" function of resolving novel and important issues of law.

290. *La Buy* and *Schlagenhauf* involved legal issues that the appellate courts unquestionably had the authority to decide on direct appeal from a final judgment if not by interlocutory appeal on a petition for a writ of mandamus. *La Buy* involved the propriety of the district court's reference of all issues in two related antitrust cases to a special master for trial. The Supreme Court held that the exercise of mandamus was appropriate because the trial judge's



Of course the absence of an express statutory grant does not negate the possibility of an implied statutory grant of authority, but the case for implied statutory authority is weak.<sup>291</sup> The Supreme Court has suggested that the general scheme of appellate review in the federal system authorizes the appellate courts to require the district courts "to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution,"<sup>292</sup> but it is difficult to reconcile this expansive view of the function of appellate review with the pattern of congressional delegation of authority over procedural matters.

Although the appellate courts' power to review and correct errors in the lower courts includes the power to review the procedures followed by a district court, Federal Rule of Criminal Procedure 57 suggests that appellate review should be narrowly confined to the question whether the district court proceeded unlawfully or abused its discretion. Rule 57(b) authorizes the district courts to "proceed in any lawful manner" when no statute or rule establishes the proper procedure, and nothing in Rule 57(b) suggests that appellate courts have the authority to demand uniformity among district courts or to require them to follow what the reviewing court deems to be better practice.<sup>293</sup> In view of the broad delegation of authority in Rule 57(b), reversal on the ground that the district court failed to follow what the appellate court deems the better practice also seems inconsistent with the statutory directive that judgment shall be rendered on appeal "without regard to errors or defects which do not affect the substantial rights of the parties."<sup>294</sup>

Other barriers to the appellate courts' imposition of procedural rules by adjudication also exist. The appellate courts' announcement of general procedural rules with *only* prospective effect poses special problems, since it is well settled that article III does not authorize the federal courts to render advisory opinions.<sup>295</sup> Moreover, Congress has specifically authorized the

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abuse of his authority under Fed. R. Civ. P. 53(b) was so palpably improper as to be beyond the scope of the rule. 352 U.S. at 256. The Court also emphasized the fact that the Seventh Circuit had repeatedly admonished the district judges in this district against overuse of masters. *Schlagenhauf* involved a challenge to the district court's authority under Fed. R. Civ. P. 35 to order a defendant in a negligence action to submit to a variety of medical examinations requested by adverse parties. The issue in *La Buy* and *Schlagenhauf* was whether an interlocutory ruling under the All Writs Act was appropriate in light of the traditional restrictions on mandamus and the policy against piecemeal appeal. In contrast, the issue in the supervisory power cases is the source of the federal courts' authority to fashion particular legal rules.

291. But see Schwartz, *supra* note 6 at 517-19 (arguing that exercises of supervisory power that "aid a court of appeals in carrying out its traditional functions" such as "the regulation and improvement of the quality of the judicial process" can be legitimized by reference to legislation establishing the courts of appeals).

292. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973).

293. See Schwartz, *supra* note 6, at 519-22 (criticizing cases in which the Third Circuit has employed supervisory authority "in such a manner as to usurp functions of the district courts").

294. 28 U.S.C. § 2111 (1982). Fed. R. Crim. P. 52(a) states a similar harmless error rule.

295. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)

appellate courts to review only final judgments.<sup>296</sup> Thus, it appears that rules that will operate prospectively only, and have no bearing on the validity of the final judgment entered by the lower court, may conflict with both article III and the legislation defining the appellate courts' jurisdiction.

Although the Supreme Court does have statutory authority to develop rules of procedure and evidence for the lower federal courts, the Court's statutorily granted authority extends only to legislative rulemaking, not to the announcement of general rules in the course of adjudication. The legislation authorizing the Supreme Court to prescribe rules of "pleading, practice, and procedure" for criminal cases is qualified by the requirements that each proposed rule must be submitted to Congress, and that no rule becomes effective until ninety days after its submission.<sup>297</sup> The Supreme Court's authority to promulgate rules of evidence is even more carefully circumscribed.<sup>298</sup> These provisions clearly provide no express authority for the announcement of general procedural rules in the course of adjudication, as opposed to rulemaking. If anything, they undermine the argument for an implicit legislative grant. As the Court itself has recognized, the rulemaking procedures were "designed to insure that basic procedural innovations [would] be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords."<sup>299</sup> The announcement of a general rule in the course of the adjudication of a specific case or controversy provides less opportunity for the consideration of views from all relevant quarters, and is less likely to lead to comprehensive and integrated treatment of related problems. Congress has recognized, and the Supreme Court has acknowledged, the importance of the requirement that rules be submitted to Congress before they may take effect.<sup>300</sup> These careful restrictions on the Court cast grave doubt on the

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(Supreme Court "early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive").

296. 28 U.S.C. § 1291 (1982). See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 780 (1969) (Harlan, J., dissenting) (an agency is not adjudicating when it refuses to apply a rule it announces to the case then before the agency).

297. 18 U.S.C. § 3771 (1982).

298. The Court is authorized to propose amendments to the Federal Rules of Evidence that were adopted by Congress, but no amendment becomes effective until 180 days after its submission to Congress, and no amendment creating, abolishing, or modifying a privilege becomes effective unless adopted by Act of Congress. 28 U.S.C. § 2076 (1982). Section 2076 also states that no proposal will become effective if it is disapproved by a resolution of either house of Congress. In light of the Supreme Court's decision in *INS v. Chadha*, 103 S. Ct. 2764 (1983), the legislative veto provisions may be invalid.

299. *Miner v. Atlass*, 363 U.S. 641, 650 (1960).

300. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941) (value of reserving an opportunity to veto proposed rules before their effective date was well understood by Congress); cf. H.R. Rep. No. 1597, 93d Cong., 2d Sess. 10 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7098, 7103 (comparing House and Senate proposals for legislation codified as 28 U.S.C. § 2076 (1982) with regard to length of time that must elapse before proposed rule becomes effective, whether affirmative congressional approval is required, etc.).

claim that Congress implicitly granted the courts adjudicative authority to establish procedural rules free of both procedural restrictions and congressional oversight.<sup>301</sup>

C. *Potential Statutory Restrictions on the Federal Courts' Authority to Regulate Procedure*

Unlike the preceding section, which considered legislation that arguably grants authority to the federal courts, this section considers the degree to which Congress has restricted the authority of the federal judiciary, considering both general limitations and limitations regarding particular kinds of procedural rules.

1. *General Restrictions.* — The adoption of rules-enabling legislation (as well as legislation regulating particular aspects of procedure) raises the question whether the statutory scheme has preempted the federal courts' implied authority to regulate procedure in the course of adjudication. This question is significant because interpreting the rules-enabling legislation as the sole means by which the courts could regulate procedure would significantly restrict the authority of both the Supreme Court and the lower federal courts. When the Supreme Court engages in rulemaking pursuant to statutory authority, it must submit its proposals to Congress, where they may be modified or rejected. As the congressional response to the Court's proposed rules of evidence demonstrates,<sup>302</sup> there is a real possibility that Congress might intervene to reject or amend controversial rules. Although the Court has recognized that Congress also has the authority to override supervisory power decisions (as it has done on a few occasions<sup>303</sup>), the requirement that procedural rules be submitted to Congress ensures that Congress has an opportunity to consider each rule before it becomes effective. In contrast, supervisory power rulings need not be brought to the attention of Congress, and Congress can act, if at all, only after a supervisory power ruling has been issued. The restriction of the lower federal courts' implied authority would have an even more profound effect on the powers of the courts of appeals, since they have no statutory rulemaking authority comparable to that of the Supreme Court.<sup>304</sup>

It may quite plausibly be argued that the current federal rules and the various pieces of rules-enabling legislation are intended to be the exclusive

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301. Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-66 (1969) (plurality opinion) (rulemaking procedures of the Administrative Procedure Act may not be "avoided by the process of making rules in the course of adjudicatory proceedings"); *id.* at 775-77 (Douglas, J., dissenting); *id.* at 780-81 (Harlan, J., dissenting). But cf. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974) (agency with both adjudicatory and rulemaking authority has discretion to decide which procedure to employ to announce new rules).

302. See 1 J. Weinstein & M. Berger, *Weinstein's Evidence* viii-x (rev. ed. 1984).

303. See *supra* text accompanying notes 148-52.

304. The courts of appeals' rulemaking authority under 28 U.S.C. § 2071 (1982) and Fed. R. App. P. 47 appears to be limited to rules governing the appellate courts' own procedures, not those of the district courts. See *supra* notes 284-85 and accompanying text.

mechanisms for the promulgation of new procedural rules in the federal judicial system. Each court has statutorily granted authority to regulate its own practice and procedure if there is no statute or Supreme Court rule on point and if uniformity is not deemed necessary. If, however, uniformity is desirable, the Supreme Court is expressly authorized to promulgate a legislative rule that will have nationwide application. But when the Supreme Court does not exercise its rulemaking authority, Rule 57(b) seems to allocate discretion regarding the appropriate procedure to the district courts, not to the courts of appeals or to the Supreme Court.<sup>305</sup>

Although these statutes and rules seem to provide a comprehensive scheme for regulating procedure, they should not be construed as limiting the Supreme Court's implied authority because they manifest no clear congressional intent to do so. The explicit congressional grant of rulemaking authority does not necessarily imply any intent to strip the Supreme Court of its authority to establish procedural rules on a case-by-case basis. Congress may simply have intended to supplement the Court's adjudicative powers with a form of nonadjudicative authority that the Court clearly does not possess in the absence of legislation. Certainly the adoption of Federal Rule of Criminal Procedure 57 exactly as proposed by the Supreme Court does not demonstrate congressional purpose to supplant the Supreme Court's implied powers. Indeed, in the forty years since the decision in *McNabb*, Congress has generally acquiesced in the Court's supervisory power rulings. The adoption of the Jencks Act and section 3501 of the Code of Criminal Procedure may be seen as the exceptions that confirm the general rule. Congress enacted legislation to clarify and limit the scope of the Supreme Court's rulings in *Jencks*, and to overrule *Mallory* and the lower court decisions following it,<sup>306</sup> but there was no congressional claim that the Court's rulings in these cases were beyond the scope of its authority.<sup>307</sup> Further, no effort was made to restrict the Court's adjudicative authority. In addition, the supervisory power cases demonstrate that the availability of alternative mechanisms has not, in fact, eliminated the use of common law decisions by the appellate courts to establish procedural rules to guide the lower courts.

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305. Cf. Schwartz, *supra* note 6, at 522-23 (legislative grant to district court of authority over grand jury confers no supervisory authority on appellate court).

306. The legislative history indicates that Congress was particularly concerned about lower court decisions following *Mallory*, such as *Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965). See S. Rep. No. 1097, 90th Cong., 2d Sess. 38, reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2124; 114 Cong. Rec. 11,202 (1968) (remarks of Sen. McClellan).

307. See S. Rep. No. 1097, 90th Cong., 2d Sess. 38-41, reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2124; 114 Cong. Rec. 11,201-202 (1968) (remarks of Sen. McClellan). The general theme of the discussion in both the Committee report and the debates was one of criticism of the substance of the rule in *Mallory*, not attacks on the Court's authority. In contrast, at some points in the discussion of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), it was suggested that the Court had exceeded its authority by amending the Constitution to include a detailed code of criminal procedure. See, e.g., 114 Cong. Rec. 11,203, 11,230 (1968) (remarks of Sen. McClellan) (Supreme Court usurped power to amend the Constitution in *Miranda*).

In the current legislative framework, the Supreme Court's implied authority to regulate procedure by adjudication stands on relatively firm ground. The Constitution itself vests the Supreme Court with the federal judicial power and all the ancillary powers that are implied from it. The adoption of a legislative framework not inconsistent with the exercise of the Supreme Court's implied power to regulate procedure should not, without more, be deemed to strip the Supreme Court of its constitutionally based powers. This argument does not, however, apply with equal force to the lower federal courts, which are created by and receive their jurisdiction from Congress.

One of the major issues that has been disguised by the use of the rubric "supervisory power" is whether, given the current statutory scheme, the courts of appeals have any authority to establish procedural rules for the district courts on a case-by-case basis. The resolution of this question turns on the interaction between the judiciary's implied authority under article III and the legislature's authority under article I to establish the lower federal courts. Although article III vests any inferior federal court created by Congress with all indispensable aspects of the judicial power of the United States, Congress is otherwise free to limit the jurisdiction of those courts and to define their powers. The Supreme Court has never regarded the authority to regulate judicial procedure, unlike the contempt power, as an indispensable aspect of judicial power.<sup>308</sup> To the contrary, the Court has recognized that the congressional power to create inferior federal courts encompasses the right to promulgate the procedural rules those courts will follow.<sup>309</sup>

Since Congress must act affirmatively to create the lower federal courts and grant them jurisdiction, it might be argued (1) that some affirmative indication of congressional intent is necessary to grant the authority to regulate procedure, (2) that implied authority exists only in the absence of some alternative provision for interstitial rules, or (3) that a definite indication of congressional intention to supplant implied authority is necessary. Since Congress has not indicated its intention to grant authority to the courts of appeals and has established other mechanisms to develop procedures for the district courts, the application of either the first or second test compels the conclusion that the courts of appeals have no authority to establish procedural rules for the district courts.

If the third test is applied, a plausible case for the appellate courts' authority can be made, since there has been no clear expression of congressional intent to supplant the appellate courts' authority. This interpretation is attractive because it legitimizes powers that have been employed for more than thirty-five years, and it provides a flexible means for improving the efficiency and fairness of federal judicial proceedings.

The chief objection to this interpretation is that it does not seem

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308. See *supra* notes 229-34 and accompanying text.

309. See *supra* note 224 and accompanying text.

wholly consonant with the overall legislative scheme. The combination of the explicit grant to the district courts in Rule 57 and to the Supreme Court in the rules-enabling legislation suggests a system in which the appellate courts play a much less active role and the scope of the district courts' discretion is substantially enlarged. There is no legislative mechanism in that two-tier scheme for requiring uniformity within a circuit, or for requiring the district courts to follow what the appellate courts regard as the better practice.

Although occasional conflicts among the circuits are inevitable even when the issue is one of constitutional law or statutory construction,<sup>310</sup> the conflicts generated by the supervisory power doctrine are especially troubling. Regulation of significant procedural matters by the courts of appeals is inconsistent with the general premise of the legislation authorizing the promulgation of uniform nationwide rules of procedure. The Advisory Committee clearly contemplated that the only matters not covered by uniform national rules would be minor details which could appropriately be left in the hands of the district courts.<sup>311</sup> Despite the legislative policy favoring uniform national rules of procedure, the doctrine of supervisory power is understood by the courts of appeals to allow each court to impose its own view of good procedure, whether or not that view is accepted by other circuits. Since the norm of good practice inevitably varies from judge to judge, the application of supervisory power by the lower federal courts fosters conflicts among the circuits on matters where Congress has called for uniformity. Resolution of significant matters in supervisory power rulings by the courts of appeals also makes the job of congressional oversight doubly difficult. Although it may be appropriate to assume that Congress is aware of the Supreme Court's supervisory power rulings, and that congressional silence is acquiescence,<sup>312</sup> it is doubtful whether Congress is aware of and acquiesces in the many supervisory power decisions by panels of the twelve circuits that hear federal criminal cases.

Moreover, the content of the supervisory power rulings by the courts of appeals is frequently different from that which would be adopted by the statutory rulemaking process. It seems likely, for example, that many of the controversial supervisory power rulings that have been rejected by other circuits<sup>313</sup> would also have been rejected by the Advisory Committee or by Congress if they had been proposed for inclusion in the Federal Rules of Criminal Procedure.

The question of the appellate courts' authority should be directly ad-

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310. The expectation that conflicts on these matters will develop, and that they should be resolved, is reflected in Supreme Court Rule 17.1(a), which states that a conflict among the circuits is a ground upon which the Supreme Court will grant certiorari.

311. See *supra* note 283 and accompanying text.

312. Cf. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *Ind. L.J.* 515, 524-29 (1982) (the meaning of congressional silence varies, depending upon the underlying constitutional allocation of authority).

313. See *supra* text accompanying notes 194-97.

dressed in each case in which the courts are asked to employ their supervisory authority. Unless a consensus can be reached identifying a satisfactory foundation for the exercise of this power, a new grant of authority will be necessary for the appellate courts to continue to function as they do now. This might be done either by the enactment of statutory authority or by the promulgation of an amendment to the Federal Rules of Criminal (and Civil) Procedure expressly granting the courts of appeals the authority to establish procedures for the district courts within their circuits. Such a statute or rule could clarify the subjects, if any, to be left solely to the discretion of the district courts, and also clarify whether the appellate courts would be free to establish such rules by adjudication, or legislative rulemaking, or both.

2. *Specialized Restrictions.* — In addition to the statutes and rules dealing with the courts' general authority to formulate procedural rules, there are statutes and rules imposing more specialized restrictions on the federal courts' authority to fashion procedural rules. No attempt will be made to identify and analyze all the provisions that might play such a role, but two significant examples will be considered.

The Federal Rules of Evidence include both provisions that expand or confirm, and those that explicitly restrict, the federal courts' authority. Rule 501 expressly authorizes the federal courts to develop and apply common law rules of privilege for witnesses, for other persons, and for the government.<sup>314</sup> In other respects, however, the legislation creating the Federal Rules of Evidence<sup>315</sup> and the rules themselves appear to limit the federal

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314. Fed. R. Evid. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.

315. A special committee on evidence appointed by the Chief Justice advised the Court that its authority under existing rules-enabling legislation was sufficiently broad to encompass the promulgation of rules of evidence. See J. Weinstein, *supra* note 217, at 72. The Supreme Court adopted this view and submitted the proposed rules to Congress with the statement that they were promulgated pursuant to the authority conferred by 28 U.S.C. §§ 2072, 2075 (1982), and 18 U.S.C. §§ 3402, 3771 & 3772 (1982). See S. Rep. No. 1277, 93d Cong., 2d Sess. 28, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7074-75. Congress, which did not acquiesce in that view, modified and then enacted the Federal Rules of Evidence. Pub. L. No. 93-595, 88 Stat. 1926 (1975). The House Judiciary Committee noted that the text of several rules had been amended "[t]o accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence." H.R. Rep. No. 650, 93d Cong., 1st Sess. 7, reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7081. The adoption of the statute, now codified as 28 U.S.C. § 2076 (1982), which provided separate authority for the promulgation of amendments and additions to the Federal Rules of Evidence, was also intended to distin-

courts' authority to formulate new evidentiary rules. Professors Wright and Graham conclude that "the record rather strongly suggests that Congress assumed that, except where the Evidence Rules otherwise provide, there would be no decisional law of evidence."<sup>316</sup> For example, the adoption of the catch-all exception to the hearsay rule<sup>317</sup> was based on Congress' assumption that without such a provision the courts would not have the power to recognize new exceptions on a case-by-case basis.<sup>318</sup> Congress provided that the Supreme Court might propose amendments to the current rules or propose new rules only by prospective rulemaking, submitting each proposal to Congress at least 180 days in advance of its effective date.<sup>319</sup> The congressional discussion of the proposals for limiting the Supreme Court's rulemaking authority "seems to assume that the Court could no longer alter the rules of evidence by decision."<sup>320</sup>

These general restrictions are buttressed by Rule 402, which appears on its face to strip the federal courts of the authority to adopt new common law rules of exclusion. Rule 402 provides that "[a]ll relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, by Act of Congress, by these rules, *or by other rules prescribed by the Supreme Court pursuant to statutory authority*."<sup>321</sup> Although Rule 402 was regarded as relatively uncontroversial when the Rules of Evidence were under consideration in Congress,<sup>322</sup> and while some lower courts have interpreted the rule as having no impact on supervisory power,<sup>323</sup> the Justice Depart-

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guish the process of promulgating the rules of evidence from the process of promulgating other procedural rules. The committee reports in both houses of Congress emphasized that many of the rules of evidence involve "substantive policy judgments as to which it is appropriate that the Congress play a greater role than that provided for in the present Enabling Acts," and accordingly new statutory authority was adopted "to insure adequate congressional participation in the evidence rule-making process." H.R. Rep. No. 650, 93d Cong., 1st Sess. 18, reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7091; see S. Rep. No. 1277, 93d Cong., 2d Sess. 23, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7069.

316. 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5199, at 222 (1978) (footnotes omitted).

317. Fed. R. Evid. 803(24).

318. The legislative history of Rule 803(24) is described in 22 C. Wright & K. Graham, *supra* note 316, § 5199, at 222-23 n.21.

319. 28 U.S.C. § 2076 (1982).

320. 22 Wright & Graham, *supra* note 316, § 5199, at 223 (footnote omitted).

321. Fed. R. Evid. 402 (emphasis added).

322. The legislative history of Rule 402 is described in 22 C. Wright & K. Graham, *supra* note 316, § 5191, at 173-75.

323. In *United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978), the court of appeals rejected the government's contention that Rule 402 precluded the exclusion of defendant's perjurious statements under the court's supervisory power. Without any specific citation to the legislative history, the court stated that "[t]he obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent." *Id.* With this purpose in mind the court concluded it would require "a good deal of stretching to say that [Rule 402 was] preclusive of supervisory power which is exercised, not in derogation of a procedural rule or statute, but for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures."



ment has urged the Supreme Court to interpret Rule 402 as a restriction on the courts' authority to fashion new common law rules of exclusion.<sup>324</sup> The government's argument is supported by the language of Rule 402 and by the general congressional policy in favor of admitting relevant probative evidence. In light of the Supreme Court's recognition of the societal costs of exclusionary rules,<sup>325</sup> the Court may find this interpretation attractive.

Since Rule 402 provides for exclusion when required by the Constitution or a statute, the Justice Department's interpretation of Rule 402 would have its principal impact in cases like *Jacobs*. There, the Second Circuit employed its supervisory power to exclude evidence as a sanction for improper governmental conduct (the prosecutor's failure to follow a consistent practice of providing warnings to grand jury targets) that violated neither the Constitution nor any statute.

In cases in which a statute or procedural rule has been violated, the impact of Rule 402 will depend upon how narrowly the courts read the proviso that evidence is admissible "except as otherwise provided . . . by Act of Congress." On its face the proviso seems to apply only to cases where legislation expressly or implicitly provides for exclusion, leaving little room for judicial creativity. By this standard it seems doubtful whether exclusion would be proper on the facts of *McNabb*. The legislative history reveals no support for the Court's view that the statutes in question were intended to prohibit third degree tactics, and, more importantly, nothing on the face of the legislation or in its history suggests that Congress "provided" for exclusion. Yet the Advisory Committee's comments describe both *McNabb* and *Mallory* as being in harmony with Rule 402 because the provisions involved there were held to require exclusion.<sup>326</sup>

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*Id.* *Jacobs* suggests a dichotomy between common law rules of evidence—which are barred by Rule 402—and supervisory power rulings. This ignores the Court's reliance in *McNabb* on previous common law evidence cases as the principal precedent for the exercise of supervisory power. See *supra* text accompanying notes 81–85. Moreover, if Rule 402 merely barred the application of "inconsistent" common law or state rules of evidence, it would be superfluous in light of Fed. R. Evid. 101 and 1101, which provide that the Federal Rules of Evidence govern in civil and criminal cases in the federal district courts.

324. The government advanced this argument in both *United States v. Caceres*, 440 U.S. 741 (1979), and *United States v. Jacobs*, 436 U.S. 31 (1978). The Court found it unnecessary to reach the issue in *Caceres*, 440 U.S. at 755 n.22, and it dismissed certiorari in *Jacobs* as improvidently granted after twice hearing oral argument.

325. See *infra* note 430.

326. The Advisory Committee note to Rule 402 states:

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. . . . Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner of [sic] other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States* [citation omitted]; 18 U.S.C. § 3501(c).

28 U.S.C. app. at 689 (1982).

Unlike Rule 5(a) and the statute it supercedes, many of the rules of civil and criminal

Another significant restriction on the federal courts' ancillary power over procedure is found in 18 U.S.C. § 3501, which provides that in federal criminal prosecutions any "confession," as that term is defined by the statute, "shall be admissible in evidence if it is voluntarily given."<sup>327</sup> Subsection (c) of section 3501 was intended to override *McNabb* and *Mallory*.<sup>328</sup> It provides that a confession made or given while a suspect is under arrest or other detention by law enforcement officials "shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession is found . . . to have been made voluntarily[,] if the weight to be given the confession is left to the jury[,] and if such confession was made . . . within six hours . . . following his arrest or . . . detention."<sup>329</sup> The directive in section 3501(a) that all voluntary confessions be admitted also casts doubt on various supervisory power rulings by the lower courts that exclude confessions, such as the Second Circuit cases excluding all confessions made by an indicted defendant to a federal prosecutor prior to an arraignment and assignment of counsel unless the defendant has first had the advice of a judicial officer.<sup>330</sup>

#### D. Conclusion

Applying these principles, it is relatively easy to analyze many of the Supreme Court's supervisory power rulings. For example, the impartiality of the jury involves concerns intrinsic to the judicial process, since it implicates the reliability of the verdict.<sup>331</sup> Moreover, the proper mode for selecting an impartial jury is a technical matter of procedure on which the courts have special competence, and upon which common law rulings seem clearly appropriate in the absence of legislation. Accordingly, the Supreme Court's rulings regarding the selection of the trial jury fall comfortably within the

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procedure cited in the Advisory Committee note implicitly require exclusion. For example, the Advisory Committee referred to Fed. R. Crim. P. 15, which restricts the use of depositions in criminal cases. Rule 15(a) authorizes the deposition "of a prospective witness of a party [to] be taken and preserved for use at trial" only in "exceptional circumstances." Although Rule 15 does not expressly so provide, the intent of the Rule seems plain: absent "exceptional circumstances" depositions are not admissible.

327. 18 U.S.C. § 3501(a) (1982).

328. The impact of § 3501(c) is evaluated in Wright, *supra* note 151, at § 74.

329. 18 U.S.C. § 3501(a) (1982).

330. *United States v. Mohabir*, 624 F.2d 1140, 1153 (2d Cir. 1980).

331. *Grunewald v. United States*, 353 U.S. 391 (1957), and *United States v. Hale*, 422 U.S. 171 (1975), discussed *supra* notes 108 & 110, also involved a traditional judicial function: weighing the probative value of the evidence against the likelihood of unfair prejudice and confusion of issues. In *Hale*, the Court concluded that the defendant's constitutionally protected silence was inherently ambiguous and not logically inconsistent with his subsequent exculpatory evidence. Since use of the defendant's prior silence to impeach his trial testimony had minimal probative value, but posed a substantial risk of unfair prejudice, the Court held that permitting the impeachment was improper. Although constitutional concerns clearly influenced the Court, its decisions in these cases can be justified by reference to traditional concerns intrinsic to the litigation process. Cf. Fed. R. Evid. 403 (relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

scope of the Court's implied authority to regulate judicial procedure.<sup>332</sup> Similarly, the Court's decision regarding the procedures that must be followed in order to take a valid guilty plea<sup>333</sup> fits comfortably within the narrow definition of procedure suggested here, since the appropriate procedures for determining voluntariness and finding a factual basis are technical matters on which the judiciary clearly has special competence.<sup>334</sup> The same analysis applies to the Court's rulings on discovery and disclosure issues, which were intended to enhance the accuracy of the fact-finding process by ensuring the parties' access to relevant information.

A second group of the Supreme Court's supervisory power decisions, including *McNabb*, *Mallory*, and *Elkins*, cannot be justified as procedural rulings. The Court's principal aim in *McNabb* was to deter the use of third degree tactics such as prolonged custodial interrogation by enforcing the statutory requirement that suspects be brought before a judicial officer promptly after arrest.<sup>335</sup> Although the Court's ruling was procedural (or evidentiary) on its face, it was not intended principally to enhance the efficiency or reliability of the judicial process or the search for the truth. The Court did not fashion a rule that would exclude unreliable confessions made as a result of prolonged custodial interrogation.<sup>336</sup> Rather, it created a rule that mandates compliance with the statute requiring prompt arraignment, thereby discouraging use of third degree tactics.<sup>337</sup> The same analysis applies in *Mallory* and *Elkins*, where evidence was excluded to advance substantive policies.<sup>338</sup> The questions involved in these cases were not technical procedural issues, but rather issues of public policy not within the special competence of the courts. Accordingly, the Court was not exercising its authority over judicial procedure. Instead, these cases involved the federal courts' authority to interpret and implement substantive law created by the Constitution, statute, or court rule; and it is to that issue which we will turn in Part III.

How does this analysis apply to some of the controversial supervisory power cases in the lower courts, such as *Jacobs* and *Schofield I* and *II*? These cases raise the question whether the federal courts' ancillary authority over

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332. The Court might also have grounded its decisions in criminal cases on the defendant's sixth amendment right to trial by jury, but it elected not to do so.

333. *McCarthy v. United States*, 394 U.S. 459 (1969).

334. Although the Court referred to the exercise of supervisory power, *id.* at 464, it elected instead to rely on its authority to interpret and implement Fed. R. Crim. P. 11, which governs the taking of guilty pleas, and the defendant's trial-related constitutional rights. Because the implication of remedies from the federal rules, statutes and the Constitution generally involves substantive rather than procedural law, this subject is discussed in the sections that follow.

335. See *supra* text accompanying notes 81-99.

336. Indeed, the issue upon which the Court granted certiorari in *McNabb* was whether the defendants' statements were voluntary or were, instead, the product of police coercion. See *supra* notes 89-90 and accompanying text; cf. *Brown v. Mississippi*, 297 U.S. 278 (1936) (defendants beaten until they confessed, admission of confession violative of due process).

337. See *supra* text accompanying notes 81-99.

338. See *supra* text accompanying notes 122-28.

judicial procedure properly extends to grand jury proceedings. The Supreme Court has not addressed this issue directly, and the lower federal courts are divided on the proper approach.<sup>339</sup>

The federal grand jury cannot be easily pigeonholed. It serves a dual function as a procedural protection for the accused and also as an "important instrument of effective law enforcement."<sup>340</sup> Although the Supreme Court has recognized that the powers of grand juries "are not unlimited and are subject to the supervision of a judge,"<sup>341</sup> the scope of judicial review of federal grand jury proceedings is narrow. The federal grand jury is an independent constitutional institution not part of either the executive or the judicial branch.<sup>342</sup> The Supreme Court has indicated that judicial interference with ongoing grand jury proceedings is justified only in exceptional circumstances,<sup>343</sup> and that federal grand jury proceedings should generally remain closed to discovery and review.<sup>344</sup> Although judicial supervision is appropriate when necessary to protect the constitutional rights of witnesses,<sup>345</sup> the grand jury should ordinarily "be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it."<sup>346</sup>

Accordingly, although the grand jury may, for some purposes, be treated as an arm of the court,<sup>347</sup> grand jury proceedings are not simply an

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339. The Supreme Court refused to employ its supervisory authority to require the lower courts to evaluate the nature or sufficiency of the evidence supporting an indictment in *Costello v. United States*, 350 U.S. 359, 363-64 (1956), but it did not address the general question of the propriety of using supervisory power in grand jury cases. The lower federal courts that have exercised supervisory authority in grand jury cases have generally emphasized the grand jury's status as an arm of the court and the grand jury's reliance on the court to summon the grand jury and to subpoena the witnesses that will appear before it. On the other hand, the courts that have refused to employ supervisory power to intervene in grand jury proceedings have generally emphasized the fact that the grand jury is intended to be independent of both the prosecutor and the court, not to be an arm of the court. See *supra* notes 185-86 and accompanying text.

340. *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972); see *United States v. Sells Engineering*, 103 S. Ct. 3133, 3137 (1983); *United States v. Calandra*, 414 U.S. 338, 343 (1974).

341. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

342. See *supra* note 184.

343. See *United States v. Calandra*, 414 U.S. 338, 349-50 (1974); *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973).

344. *United States v. Costello*, 350 U.S. 359 (1956) (fifth amendment does not require review of nature or sufficiency of evidence to support indictment, and Supreme Court will not employ its supervisory authority to require such review); see *United States v. Sells Engineering*, 103 S. Ct. 3133, 3138 (1983).

345. See *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (grand juries subject to judicial control and courts will quash subpoenas intended to harass press or disrupt reporter's relationship with his news source); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973).

346. *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973).

347. In *Brown v. United States*, 359 U.S. 41 (1959), the question was whether the district court could try the defendant for summary contempt pursuant to Fed. R. Crim. P. 42(a) for his refusal to testify before the grand jury. In upholding the summary contempt proceedings, the Supreme Court observed in passing that "[a] grand jury is clothed with great inde-

extension of the judicial proceedings regulated by the federal courts' ancillary authority. Grand jury proceedings are a gray area on the margin of the federal courts' ancillary authority to establish procedural rules. Although provisions such as Rule 6 of the Federal Rules of Criminal Procedure,<sup>348</sup> which was promulgated pursuant to statutory authority, are presumptively valid, no presumptive validity should attach to rulings premised only on supervisory power. Since the lower federal courts do have some statutory authority over grand jury proceedings, the nature of the courts' ruling is relevant.

In *Schofield I* and *II*, the prosecutor had invoked the court's subpoena power, and Rule 17 of the Federal Rules of Criminal Procedure authorized the district court to quash a subpoena it found to be unreasonable or oppressive. Thus, the *Schofield* court might have justified its ruling as an interpretation or application of Rule 17.<sup>349</sup> In the alternative, *Schofield* might also fall within the ambit of cases holding that the federal courts have implied authority to prevent misuse of their own processes.<sup>350</sup> However, since the subpoena authority is vested directly in the district courts under Rule 17, *Schofield I* and *II* raise the difficult question of the source of the appellate courts' authority to establish procedural rules for the district courts.

The Second Circuit's ruling in *Jacobs* is even more difficult to justify by reference to the federal courts' ancillary authority to establish procedural rules. The exercise of supervisory power in *Jacobs* was not directly related to the use of the district court's authority to subpoena witnesses. The court focused exclusively on the prosecutor's conduct in failing to warn a witness that she was a target of the grand jury's investigation, and on the difference in practice between the United States Attorney and the local strike force. Although recognizing that target warnings are not constitutionally required, the court of appeals held that the local United States Attorney and the strike force must follow the same practice with regard to warnings. The court of appeals based its decision, in part, on regulations placing the strike force under the control of the United States Attorney.<sup>351</sup>

Even assuming the propriety of the federal courts' exercising their ancillary authority to adopt other procedural rules in connection with grand

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pendence in many areas, but it remains an appendage of the court, powerless itself to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses." 359 U.S. at 49. The Court held only that summary contempt was appropriate when a witness who had been ordered by the district court to testify was returned to the grand jury room, refused to testify, and then reiterated his refusal when he was brought before the district judge a second time. *Id.* at 49-51.

348. Fed. R. Crim. P. 6 governs, inter alia, the number of grand jurors, the number needed to indict, grand jury secrecy, and who may be present at grand jury proceedings.

349. See *United States v. Calandra*, 414 U.S. 338, 346 n.4 (1974) (noting that the grand jury "is subject to the court's supervision in several respects," citing Fed. R. Crim. P. 17).

350. See *supra* text accompanying notes 229-34.

351. See *Jacobs*, 547 F.2d at 774 & n.5 (citing Office of the Attorney General, Order No. 431-70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices).

jury proceedings, the decision in *Jacobs* is difficult to defend. The courts' special competence regarding technical matters of judicial administration provides no justification for efforts to supervise the relationship between the United States Attorney and the local strike force attorneys. Indeed, the question whether the strike force attorney's action violated the internal rules of the United States Attorney's office seems a matter peculiarly within the competence of the executive branch, not the judiciary.<sup>352</sup> Moreover, if matters of prosecutorial policy and practice rather than judicial procedure are involved, it seems obvious that the courts have no authority to require uniformity within their circuit.<sup>353</sup> Here, in contrast to *United States v. Nixon*,<sup>354</sup> the prosecutor was acting pursuant to a statutory grant of authority,<sup>355</sup> and the court was relying solely on a generalized claim of ancillary authority over procedural matters, which may not apply with full force in the context of grand jury proceedings. The remedy chosen by the court—exclusion of relevant evidence of perjury—raises an additional problem in light of the explicit command of Federal Rule of Evidence 402, which declares that all relevant evidence is admissible, with exceptions not pertinent in *Jacobs*.<sup>356</sup> Finally, even as to matters clearly within the purview of the courts, the question of the source, if any, of the appellate courts' power to require intracircuit uniformity is a difficult one.<sup>357</sup>

This review of the federal courts' authority to regulate procedure underscores the importance of identifying the nature and scope of the authority being exercised in supervisory power cases. Although many supervisory power decisions fit comfortably within the scope of that authority, Part II argues that other decisions that might have been loosely termed procedural cannot be so justified. Accordingly, Parts III and IV will explore other possible sources of authority for the supervisory power decisions of the Supreme Court and the lower federal courts.

### III. THE FEDERAL COURTS' AUTHORITY TO REMEDY VIOLATIONS OF FEDERAL LAW

This Part evaluates the federal courts' authority to fashion nonstatutory remedies for violations of federal law as a second source of authority for supervisory power rulings. The Supreme Court recently reaffirmed that su-

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352. Indeed, at oral argument in the Supreme Court, the Deputy Solicitor General informed the Court that the court of appeals had misconstrued the Justice Department regulations governing the relationship between the United States Attorney and the strike force.

353. It seems clear, for example, that the court of appeals would have no authority to compel all federal prosecutors within a circuit to follow identical practices in exercising prosecutorial discretion in charging or plea bargaining.

354. 418 U.S. 683 (1974); see *supra* notes 242-43 and accompanying text.

355. See 28 U.S.C. § 515 (1982) (any attorney specially appointed by the Attorney General under law may conduct any kind of legal proceeding, including grand jury proceedings, which United States attorneys are authorized by law to conduct).

356. The *Jacobs* court rejected the conclusion that Fed. R. Evid. 402 was intended to restrict the federal courts' supervisory authority. See *supra* note 323.

357. See *supra* notes 309-13 and accompanying text.

pervisory power may be employed "to implement a remedy for violation of recognized rights"<sup>358</sup> and as a remedy "designed to deter illegal conduct."<sup>359</sup> Part II argued that *McNabb* and other remedy cases cannot be justified as exercises of the federal courts' authority to regulate procedure. This Part examines whether *McNabb* and other supervisory decisions involving violations of federal law are justified as exercises of the federal courts' remedial authority. Part IV will deal with the related but more general question of the federal courts' authority to fashion federal common law in the interstices of the Constitution, statutes, and rules of procedure.

When jurisdiction has been conferred, the federal courts unquestionably have general authority under article III to interpret and apply the federal Constitution, statutes, and procedural rules. *Marbury v. Madison*<sup>360</sup> established the principle that the article III grant of judicial power authorizes and requires the federal courts to interpret federal law in the cases that come before them. The power to fashion appropriate nonstatutory remedies for violations of federal law is equally well established. There is, however, some disagreement regarding the scope and source of that power. Recent cases suggest that when the Constitution has been violated, the constitutional and statutory authority of the federal courts authorizes the formulation of an appropriate judicial remedy. In contrast, when a statute, rather than the Constitution, has been violated, Congress need not act affirmatively to limit the courts' authority. In cases involving statutory violations, a majority of the Court has declared that its task is essentially one of statutory construction: unless Congress intended the federal courts to formulate a remedy, they will not do so.<sup>361</sup> The Court's unwillingness to fashion nonstatutory remedies reflects its view that ordinarily Congress, not the federal courts, should make federal law. This attitude, which has been most pronounced in cases involving implied actions for private damages, reflects the Supreme Court's general understanding regarding the appropriate relationship between Congress and the courts.

This section considers only remedies, not related issues of prophylactic rulings that do not rest on a finding that federal law has been violated.<sup>362</sup> The fourth amendment exclusionary rule is remedial in the sense that it comes into play only where there has been a violation of the fourth amendment. In contrast, although the original opinion in *Miranda v. Arizona*<sup>363</sup> is ambiguous,<sup>364</sup> subsequent decisions indicate that *Miranda* creates prophy-

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358. *United States v. Hasting*, 103 S. Ct. 1974, 1978 (1983).

359. *Id.* at 1979.

360. 5 U.S. (1 Cranch.) 137 (1803).

361. See *infra* notes 410-13 and accompanying text.

362. The difference between prophylactic rules and remedies is analyzed in Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy* (forthcoming).

363. 384 U.S. 436 (1966).

364. Several passages in the opinion refer to custodial interrogation as inherently coercive, *id.* at 467-68, 478, and the Court stated at one point that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

lactic rules. *Miranda* warnings are not required in order to avoid a fifth amendment violation, and they are "not themselves rights protected by the Constitution."<sup>365</sup> *Miranda* warnings cannot be justified as a remedy for a fifth amendment violation, because the Supreme Court has held that the absence of warnings does not, without more, establish that a statement has been compelled in violation of the privilege against self-incrimination.<sup>366</sup> In other words, *Miranda* requires exclusion even if there has been no violation of the Constitution.<sup>367</sup> The *Miranda* line of cases thus requires prophylaxis, not remedy. This section considers the federal courts' remedial powers. The courts' authority to fashion prophylactic rules intended to promote constitutional interests is one of the issues addressed in Part IV.

#### A. Authority to Fashion Remedies for Constitutional Violations

Some decisions involving constitutional remedies may be characterized as constitutional interpretation.<sup>368</sup> In other cases the remedy is not inextricably bound up in a constitutional command, but rather is fashioned by the judiciary to implement a constitutional command.<sup>369</sup> Unless Congress has

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These passages suggest that the failure to give warnings would establish that a statement was compelled in violation of the privilege against self-incrimination.

365. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), quoted in *New York v. Quarles*, 104 S. Ct. 2626, 2631 (1984).

366. *New York v. Quarles*, 104 S. Ct. 2626, 2631 & n.5 (1984); cf. *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (admission of statements made in absence of *Miranda* warnings to impeach the conflicting testimony of defendant does not violate privilege against self-incrimination).

367. This point seems to be accepted by all members of the present Court except Justice O'Connor. Compare *Quarles*, 104 S. Ct. at 2631 n.5, and *id.* at 2647 (Marshall, J., dissenting), with *id.* at 2634 (O'Connor, J., concurring in part in the judgment and dissenting in part) (*Miranda* held admission of statements unconstitutional because they were inherently compelled).

368. The rule excluding compelled confessions may be derived directly from the text of the fifth amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added). The Supreme Court has shifted ground on the question whether the exclusionary rule is a necessary corollary to the fourth amendment. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court seemed at one point to state that the admission of illegally seized evidence would constitute a violation of the fourth amendment. Although some portions of the *Weeks* opinion focus on the idea that the courts should not sanction illegal means of obtaining evidence, the Court also stated that the admission of illegally seized evidence itself constitutes "a denial of the constitutional rights of the accused." *Id.* at 398. Similarly in *Olmstead v. United States*, the Court stated that the fourth amendment "really forbade" the introduction of illegally seized evidence. 277 U.S. 438, 462-63 (1928). The Court emphasized the latter portion of the *Weeks* opinion in *Mapp v. Ohio*, 367 U.S. 643, 647-49 (1961), noting that despite "some passing references to the *Weeks* rule as being one of evidence," the plain language of *Weeks* indicated that it was a constitutional rule. Compare *id.* at 678 (Harlan, J., dissenting) (questioning majority's assumption that the exclusionary rule in *Weeks* is constitutionally mandated). Recent decisions, however, reflect quite a different view. See *infra* notes 375-76 and accompanying text.

369. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 401-07 (1971) (Harlan, J., concurring); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1541-43 (1972); cf. Merrill, Lynch, Pierce,



formulated an alternative remedy,<sup>370</sup> the Supreme Court has interpreted the constitutional and statutory grant of jurisdiction in cases arising under federal law<sup>371</sup> as conferring not only the authority to interpret the Constitution, but also the authority to "choose among available judicial remedies."<sup>372</sup> Despite its recognition that the formulation of remedies involves the use of discretion and the weighing of competing concerns that is characteristic of legislative decisions,<sup>373</sup> the Court now presumes that "justiciable constitutional rights are to be enforced through the courts."<sup>374</sup>

Judicially fashioned constitutional remedies are now commonplace. Recent exclusionary rule decisions, for example, reject the view that the admission of illegally seized evidence constitutes an independent violation of the Constitution,<sup>375</sup> and identify the exclusionary rule as a judicially fashioned remedy designed to deter fourth amendment violations, not a necessary corollary of the fourth amendment.<sup>376</sup> The federal courts have also recognized private damage actions as an appropriate remedy for constitutional violations. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>377</sup> the Court acknowledged that "the Fourth Amendment does not in so many words provide for its enforcement by an award of monetary damages,"<sup>378</sup> but held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>379</sup> Since damages have historically "been regarded as the ordinary remedy for an invasion of personal interests in liberty,"<sup>380</sup> the Court held that a private action for damages could be based on the fourth amendment. Subsequent decisions have recognized private damage actions for violations of the fifth amendment due process clause<sup>381</sup> and the eighth amendment.<sup>382</sup> The decisions recognize that when a constitutional violation can be proved, in the

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Fenner & Smith v. Curran, 456 U.S. 353, 375-76 (1982) (private right of action implied to enforce statutory command).

370. Compare *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (judicial remedy precluded if "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective"), with *Bush v. Lucas*, 103 S. Ct. 2404, 2411 (1983) (judicial remedy precluded when Congress provides an alternate and "indicate[s] its intent . . . that the Court's power should not be exercised.").

371. U.S. Const. art. III, § 2; 28 U.S.C. § 1331 (1982). Jurisdiction over federal criminal cases, which also arise under federal law, is conferred by 18 U.S.C. § 3231 (1982).

372. *Bush v. Lucas*, 103 S. Ct. 2404, 2409 (1983).

373. See *Davis v. Passman*, 442 U.S. 228, 252 (1979) (Powell, J., dissenting).

374. *Davis v. Passman*, 442 U.S. 228, 242 (1979).

375. *United States v. Leon*, 104 S. Ct. 3405, 3412 (1984); *United States v. Calandra*, 414 U.S. 338, 354 (1974).

376. *United States v. Leon*, 104 S. Ct. 3405, 3412 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974); see *United States v. Peltier*, 422 U.S. 531, 538-39 (1975).

377. 403 U.S. 388 (1971).

378. *Id.* at 396.

379. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

380. *Id.* at 395.

381. *Davis v. Passman*, 442 U.S. 228 (1979).

382. *Carlson v. Green*, 446 U.S. 14 (1980).

absence of a contrary congressional directive, "the federal courts must make the kind of remedial determination that is appropriate for a common law tribunal."<sup>383</sup>

The federal courts' authority to fashion constitutional remedies is not absolute. The judiciary clauses of articles I<sup>384</sup> and III,<sup>385</sup> supplemented by the necessary and proper clause,<sup>386</sup> also authorize Congress to establish remedies for constitutional violations.<sup>387</sup> Unless a particular remedy is inextricably bound up with a constitutional right,<sup>388</sup> the Supreme Court has acknowledged that Congress has the authority to direct the federal courts to employ one constitutionally adequate remedy rather than another.<sup>389</sup> In practical terms Congress may also limit the federal courts' remedial powers by restricting their jurisdiction.<sup>390</sup> Dicta in several Supreme Court cases do

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383. *Bush v. Lucas*, 103 S. Ct. 2404, 2411 (1983).

384. U.S. Const. art. I, § 8 provides that Congress shall have the power "[t]o constitute Tribunals inferior to the Supreme Court."

385. U.S. Const. art. III, § 1 provides that the judicial power of the United States shall be vested "in such inferior Courts as the Congress may from time to time ordain and establish."

386. U.S. Const. art. I, § 8 provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof*" (emphasis added).

387. See *Dellinger*, *supra* note 369, at 1546-47.

388. In some instances the Constitution grants particularized rights, rather than a generalized right to due process. For example, although other pretrial screening mechanisms such as the preliminary hearing are adequate to satisfy due process, *Hurtado v. California*, 110 U.S. 516 (1884), the fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Congress could not, absent a constitutional amendment, override the specific command of the grand jury clause by providing that an accused may be brought to trial on federal charges if he has been denied review by a grand jury but held to answer after a preliminary hearing, even if the court determined that a preliminary hearing afforded an accused greater protection than review by a grand jury. But see *Dellinger*, *supra* note 368, at 1548 (Even when a remedy is "part and parcel" of a constitutional right, Congress is "not necessarily barred from substituting an alternative remedial scheme, provided it affords comparable vindication of the constitutional provisions involved").

389. See *Bush v. Lucas*, 103 S. Ct. 2404, 2411 (1983); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). The Civil War Amendments expressly provide for enforcement by Congress. U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

390. The commentators have generally agreed that Congress can abolish the lower federal courts or limit their jurisdiction. See *Hill*, *Constitutional Remedies*, 69 *Colum. L. Rev.* 1109, 1116-18 (1969); *Redish & Woods*, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 *U. Pa. L. Rev.* 45 (1975); *Van Alstyne*, *A Critical Guide to Ex Parte McCordle*, 15 *Ariz. L. Rev.* 229 (1973). But see *Sager*, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17 (1981); *Eisenberg*, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *Yale L.J.* 498 (1974).

Not all scholars agree that Congress has the same authority to restrict the Supreme Court's appellate jurisdiction. See *Redish*, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 *Nw. U.L. Rev.* 143, 145 (1982).

suggest that in some situations the Constitution may require a judicially fashioned remedy,<sup>391</sup> but in those situations a remedy could be provided in the state courts of general jurisdiction if Congress deprived the federal courts of jurisdiction.<sup>392</sup>

The analysis that justifies the recognition of the implied *Bivens* cause of action and the fourth amendment exclusionary rule can also justify remedies under the rubric of supervisory power, subject to the limitations imposed by Congress. Indeed, in light of the recent decisions explicitly recognizing the federal courts' remedial authority, it seems puzzling that the courts continue to cite supervisory authority as a basis for constitutional remedies.

Although the Supreme Court has not explicitly acknowledged this point,<sup>393</sup> given its broad interpretation of the federal courts' authority to fashion constitutional remedies, reliance on supervisory authority to create a remedy for a constitutional violation is unnecessary and serves no useful purpose. As the exclusionary rule cases indicate, the analysis is the same whether or not supervisory authority is invoked. The exclusionary rule cases demonstrate that it is entirely appropriate for the federal courts to consider the deterrent effects of their rulings and the integrity of the courts, even if they do not rely on supervisory authority.<sup>394</sup> On the other hand, even when supervisory power is invoked, these are not the only factors to be considered. As the Court itself has recognized in numerous supervisory power cases,<sup>395</sup> the ultimate aim of the proceedings—determining the truth

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391. Compare *Davis v. Passman*, 442 U.S. 228, 242 (1979) (Justiciable constitutional rights are to be enforced through the courts in the absence of "textually demonstrable constitutional commitment of [the] issue to a coordinate political department."), with *Bush v. Lucas*, 103 S. Ct. 2404, 2411 n.14 (1983) (The question whether the Constitution requires a judicially fashioned damages remedy need not be reached unless "there is an express textual command to the contrary.").

392. See Hill, *supra* note 390, at 1117–18. But see Sager, *supra* note 390 (Congress may not deprive both Supreme Court and lower federal courts of jurisdiction to review state court decisions on constitutional challenges to governmental behavior).

393. In *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980), a majority of the Court rejected Justice Marshall's claim that it had "limit[ed] the traditional scope of the supervisory power in any way . . . [or] render[ed] that power 'superfluous.'" Instead, the majority stated that it merely rejected the use of supervisory power analysis "as a substitute for established Fourth Amendment doctrine." *Id.* The decision in *Payner* thus suggests that supervisory power analysis may be somehow distinct from the analysis of constitutional remedies. The resolution of *Payner* and *United States v. Hastings*, 103 S. Ct. 1974 (1983), belies that suggestion. The Court has never identified any independent source of authority for the exercise of supervisory power, and it has indicated that supervisory power remedies serve the same function as other judicially fashioned remedies.

394. See, e.g., *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Calandra*, 414 U.S. 338 (1974). For a criticism of the Court's analysis, see Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"? 16 Creighton L. Rev. 565 (1983); Schrock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974).

395. See *supra* notes 110–16, 146–47 and accompanying text.

of the charges against the accused—must also be considered.<sup>396</sup> Other relevant factors are the interest of the public in “the prompt administration of justice” and “the interests of the victims.”<sup>397</sup> The cases demonstrate that these factors are pertinent whether or not the courts rely on their supervisory authority in fashioning a remedy. As the Court explained in *United States v. Payner*, “the values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power.”<sup>398</sup>

One question remains. The Court in *Elkins v. United States*,<sup>399</sup> which held that evidence illegally seized by state agents was not admissible in federal court, plainly intended to fashion a remedy that would be available *only* in the federal courts.<sup>400</sup> This raises the question whether the federal courts’ authority to interpret and apply the federal Constitution authorizes the creation of remedies that will be applied only in the federal courts. If the remedy is an integral aspect of a constitutional command,<sup>401</sup> the Supreme Court’s recognition of that constitutional command will bind the state courts<sup>402</sup> (assuming that the constitutional provision in question is applicable in state proceedings<sup>403</sup>). If, however, the Constitution does not itself mandate a particular remedy, the federal courts are generally free to choose among available common law remedies. If there is more than one constitutionally adequate remedy, Congress and the states should ordinarily be free to select another adequate remedy.<sup>404</sup> If, however, no other adequate rem-

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396. See *United States v. Payner*, 447 U.S. 727, 734 (1980); *Stone v. Powell*, 428 U.S. 465, 485–89 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

397. *United States v. Hastings*, 103 S. Ct. 1974, 1981 (1983).

398. 447 U.S. 727, 736 (1980).

399. 364 U.S. 206 (1960).

400. The Court’s discussion of supervisory power assumes throughout that the ruling would affect federal proceedings only. See *id.* at 216–24. The Court held that “evidence obtained by State officers during a search which, if conducted by federal officers, would have violated the defendant’s immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant’s timely objection *in a federal criminal trial.*” *Id.* at 223 (footnote omitted, emphasis added).

401. For example, the right not to have a compelled confession admitted at trial appears to be an integral aspect of the fifth amendment privilege against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436, 460–65 (1966); *Bram v. United States*, 168 U.S. 532, 542–45 (1897); see also *supra* note 368 (discussion of differing views on the question whether the exclusionary rule is an integral aspect of the fourth amendment).

402. See *Hill*, *supra* note 9, at 181–84.

403. Not all constitutional limitations on the conduct of the federal government are applicable to the states. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 369–77 (1972) (Powell, J., concurring) (sixth amendment requirement of unanimous jury verdict not applicable to the states via the fourteenth amendment); *Hurtado v. California*, 110 U.S. 516 (1884) (fifth amendment grand jury clause not applicable to the states, not part of due process guaranteed by the fourteenth amendment).

404. See *Hill*, *supra* note 9, at 181–95. The notion that although the Constitution requires a remedy, there is more than one permissible remedy, is not peculiar to criminal cases. For example, in cases where there has been unlawful segregation, which must be eradicated root and branch in a school system, the district courts have wide latitude in framing a remedy that is “reasonable, feasible and workable.” *Swann v. Charlotte-Mecklenburg Bd. of Educ.*,

edy has been devised, the state courts will presumably be bound to accept the remedy adopted by the federal courts.

B. *Authority to Fashion Remedies for Violations of Federal Statutes and Procedural Rules*

Many cases not employing the supervisory power rubric involve an implication of remedies. For example, on a number of occasions the Supreme Court has recognized a nonstatutory right of action for damages as a remedy for a statutory violation.<sup>405</sup> The Court's approach in supervisory power cases such as *McNabb* is similar in many respects to the analysis in cases such as *J.I. Case v. Borak*<sup>406</sup> that recognized implied private damage actions for statutory violations. The majority opinion in *Borak* states that the federal courts have a duty "to be alert to provide such remedies as are necessary to make effective the congressional purpose."<sup>407</sup> The broad language in *Borak* has been cited as authority for the view that the federal courts have inherent judicial power to create common law remedies for statutory violations.<sup>408</sup> In this view, the authority to create a specialized federal common

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402 U.S. 1, 31 (1971). Although the district court's remedy may not exceed the scope of the violation, see *id.* at 16, in many circumstances there will be more than one permissible means to remedy the discrimination.

Professor Monaghan has argued that the federal courts have the authority to develop what he calls "one-way" constitutional common law that is applicable to the federal government, but not to the states. Monaghan, *supra* note 208, at 38-40 (1975). Professor Monaghan's argument is distinguishable from the point addressed here because he asserts that the federal courts may impose different constitutional limits on the powers of the federal government than on the states, not merely that different remedies should be available in the federal and state courts.

405. For discussions of cases involving nonstatutory remedies, see generally Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 889-90 (1983); Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553 (1981); Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?* 51 Colo. L. Rev. 355-62 (1980).

406. 377 U.S. 426 (1964).

407. *Id.* at 433.

408. See Dent, *supra* note 405, at 889-90; Frankel, *supra* note 405, at 557. *Borak* quoted *Bell v. Hood*, 327 U.S. 678, 684 (1946), for the proposition that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 377 U.S. at 433. The Court also stated that "[t]he power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available." *Id.* at 433-34 (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). Despite the Court's statement that the statutory purpose to protect investors "certainly implies the availability of judicial relief where necessary to achieve that result," *id.* at 431-32, Justice Harlan subsequently observed that "*Borak* simply cannot be justified in terms of statutory construction . . . nor did the *Borak* Court purport to do so." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring). Justice Powell has described *Borak* as "a break in [the] pattern" of cases recognizing implied causes of action because it was based on the judgment of the Supreme Court—not Congress—that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Cannon v. University of Chicago*, 441 U.S. 677, 735-36 (1979) (Powell, J., dissent-

law in areas of important federal interest encompasses the authority to fashion remedies for statutory violations.<sup>409</sup> Supervisory power cases such as *McNabb* and *Mallory* may be justified if the federal courts have implied constitutional authority to provide remedies to effectuate purposes outlined by Congress.

Recent decisions indicate that a majority of the Supreme Court no longer believes that the federal courts may properly recognize any and all nonstatutory remedies the courts consider necessary to effectuate congressional policies. A majority of the present Court regards its task in deciding whether to recognize a private damage action as one of statutory interpretation, not statutory implementation.<sup>410</sup> Instead of asking whether a private cause of action would promote statutory objectives, or even whether the absence of a remedy might frustrate those objectives, the federal courts should seek to determine "whether Congress intended to create, either expressly or by implication, a private cause of action."<sup>411</sup> The Supreme Court views the decision whether to provide for a private damage action as one for the legislature and not the courts. Justice Powell has argued that the federal courts' appropriation of this legislative function violates the principle of separation of powers.<sup>412</sup> Other members of the Court have not clearly indicated whether their unwillingness to recognize new private damage actions is motivated by constitutional or merely prudential considerations.<sup>413</sup>

Some of the concerns relevant to the recognition of a private damage action do not apply to the creation of the remedies generally employed in supervisory power cases. Judicial recognition of a private damage action effectively expands the federal courts' jurisdiction at a time when federal courts are already overburdened.<sup>414</sup> The judiciary's expansion of its own

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ing) (quoting *Borak*, 377 U.S. at 432). And Justice Rehnquist, in an opinion joined by Justice Stewart, stated that the Court's current treatment of the issue as one of statutory construction "is quite different from the analysis" in cases such as *Borak*. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring). But see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-77 & n.56 (1982).

409. Frankel, *supra* note 405, at 565.

410. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 91 (1981); *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 639 (1981); *Stewart & Sunstein, Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1221-23, 1302-07 (1982).

411. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979). If a federal court discovers no evidence that Congress intended to create such a remedy, its task is ended. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979).

412. See *Cannon v. University of Chicago*, 441 U.S. 677, 730-31, 742-47 (1979) (Powell, J., dissenting).

413. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-78 (1982) (stating that the courts' task is determining congressional intent; rejecting the claim that the implication of private damage remedies violates separation-of-power principles).

414. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982) (increased volume of federal litigation strongly supported desirability of more careful scrutiny of legislative intent); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 24-25 (1981) (because of concerns "about the burdens imposed on the federal judiciary, the quality of the work product of Congress, and the sheer bulk of new

jurisdiction raises separation-of-power concerns<sup>415</sup> as well as federalism concerns if state law is displaced.<sup>416</sup> In contrast, jurisdiction in federal criminal prosecutions is statutorily based and exclusive.<sup>417</sup> The implication of any exclusionary remedy neither expands the federal courts' jurisdiction nor displaces state law.

Although jurisdictional concerns have played a role in the Court's recent reluctance to recognize private damage actions absent a showing of congressional intent to authorize judicial remedies, the cases dealing with private damage actions also illustrate a broader trend in the Court's approach to statutory interpretation. Cases such as *Borak* and *McNabb* demonstrate judicial activism that goes far beyond the interpretation of statutory language in light of the purpose of the legislation. The shift in the Supreme Court's approach to the recognition of private damage actions is consistent with its emphasis in other recent cases on statutory interpretation, not judicial activism that effectively expands or modifies legislation.<sup>418</sup> For example, recent decisions generally refuse to disregard statutory language to achieve what the Court deems a fairer result, or to extend statutes beyond their terms.<sup>419</sup> The Court's approach has been characterized as a "literalist reading of statutory terms."<sup>420</sup>

The Supreme Court's current approach to statutory interpretation reflects its view of the limited institutional competence of the courts and a heightened concern for separation-of-power principles. In decisions refusing to go beyond the interpretation of the language and plainly expressed intent of federal statutes, the Court has repeatedly stressed the federal courts' institutional limitations.<sup>421</sup> For example, in refusing to weigh the potential hazards of genetic research in determining whether a genetically engineered life form was patentable, the Court observed: "[w]e are without

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federal legislation," the Court has been "more and more reluctant to open the courthouse door to the injured citizen"); *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting) (when Congress has chosen not to provide a private civil remedy, federal courts should not "assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction").

415. See *Cannon v. University of Chicago*, 441 U.S. 677, 730-31, 745-46 (Powell, J., dissenting); Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 Temp. L.Q. 469, 484-86 (1980).

416. See *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 78 (1975).

417. See 18 U.S.C. § 3231 (1982).

418. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 894-98 (1982).

419. *Id.*

420. *Id.* at 894; see Dent, *supra* note 405, at 885-89 (describing the Supreme Court as edging away from a purposive approach to statutory interpretation); see also Stewart & Sunstein, *supra* note 410, at 1220-23 (describing the "formalist thesis" that federal courts must have some textual authority for adding new remedies to administrative systems).

421. See, e.g., *TVA v. Hill*, 437 U.S. 153, 194 (1978) (Court has "no expert knowledge on the subject of endangered species, . . . [nor] a mandate from the people to strike a balance of equities on the side of Tellico Dam"). For a general discussion of the inherent limitations of the judicial process, see D. Horowitz, *The Courts and Social Policy* (1977).

competence to entertain these arguments . . . .The choice . . . is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot."<sup>422</sup> The decision, the Court found, required "the balancing of competing values and interests, which in our democratic system is the business of elected representatives."<sup>423</sup> The Court has recognized that because federal legislation is often the product of compromises among many competing values and interests, there is frequently no overriding purpose the courts may effectuate by fashioning appropriate remedies.<sup>424</sup> To the contrary, judicial formulation of new remedies or judicial extension of general legislative purposes to new subjects may upset the deliberate legislative balance.<sup>425</sup>

Separation-of-power principles are closely related to the concept of the limited institutional competence of each branch of the federal government. Several of the Supreme Court's recent opinions emphasize that Congress holds principal lawmaking authority in the federal system,<sup>426</sup> with the task of balancing competing interests and policies.<sup>427</sup> Unlike the federal courts, Congress is politically accountable.<sup>428</sup> If the federal courts usurp policymaking authority, "the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned."<sup>429</sup>

These concerns are plainly relevant to the creation of nonstatutory remedies under the rubric of supervisory power. For example, a rule that excludes relevant evidence impairs the reliability of the fact-finding process, and exclusion may result in the acquittal of a defendant who is factually guilty. In other words, an exclusionary rule carries substantial social costs.<sup>430</sup> When there has been a statutory violation, Congress seems to be the appropriate branch to balance the competing interests and decide

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422. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

423. *Id.*

424. See *Dent*, *supra* note 405, at 886-87 (citing cases).

425. See *Stewart & Sunstein*, *supra* note 410, at 1199, 1222.

426. See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-14 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *TVA v. Hill*, 437 U.S. 153, 194 (1978) (It is the "exclusive province of Congress . . . to formulate legislative policies and . . . programs.").

427. See *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 646-47 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980); *TVA v. Hill*, 437 U.S. 153, 194 (1978) (Congress has the authority not only to establish policies and programs, "but also to establish their relative priority.").

428. See *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (Because courts are "free to reach a result different from that which the normal play of political forces would have produced," intended beneficiaries of legislation lose full protection and the public "is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process.").

429. *Id.*

430. See *United States v. Payner*, 447 U.S. 727, 734-35 (1980); *Stone v. Powell*, 428 U.S. 465, 489-91 (1976) (application of exclusionary rule "deflects the truthfinding process and often frees the guilty"); *United States v. Janis*, 428 U.S. 433, 448-49 (1976); cf. *United States*



whether its statutory policies should be advanced at the cost of impairing the judicial process and impeding the enforcement of the federal criminal laws.<sup>431</sup>

Judged by the standards of the Supreme Court's current decisions rather than the far more expansive view of the judiciary's role that has been advocated by some legal scholars,<sup>432</sup> the decision in *McNabb* is questionable. As previously noted, the Supreme Court made no effort to explore the legislative history of the statutes in question, and it certainly identified no evidence that Congress intended to authorize the federal courts to formulate an exclusionary remedy if a suspect was not presented promptly to a judicial officer.<sup>433</sup>

The decision in *Mallory*, however, stands on firmer ground. The division of responsibility between Congress and the federal courts is significantly different when the case involves the consequences of violation of the Federal Rules of Criminal Procedure, than when it involves a federal statute. The Supreme Court promulgated the rules pursuant to an express statutory delegation,<sup>434</sup> which authorized the Supreme Court, not Congress, to identify the relevant policies and to balance competing interests.<sup>435</sup> Accordingly, it can be argued that the value assigned to the policies underlying the rules, and the choice of appropriate means for implementing the commands of the rules, should ordinarily be matters left to the Supreme Court. The principal objection to this argument is that it ignores the terms of the congressional delegation, which authorizes only legislative rulemaking and conditions the effectiveness of the rules on their prior submission to Congress, thereby providing a substantial check on the Court by the politically accountable branches. The Court's ruling in *Mallory* was not subject to this congressional check. Rule 5 itself was submitted to Congress, which was presumably aware of the construction the Court had given to a similar provision in *McNabb*. It seems doubtful, however, that Congress acquiesced in the *McNabb* rule by allowing Rule 5 to go into effect, since the Advisory Committee had deleted a section from Rule 5 that would have expressly incorporated the *McNabb* exclusionary rule.<sup>436</sup>

This review of the remedial authority of the federal courts reinforces the importance of exploring the source and limits of what has been called

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v. Calandra, 414 U.S. 338, 349-52 (1974) (application of exclusionary rule to grand jury proceedings would impede grand jury's functions).

431. One of Professor Horowitz's principal conclusions, D. Horowitz, *supra* note 421, at 257, is that the judicial process is a particularly "poor format for the weighing of alternatives and the calculation of costs."

432. See, e.g., Greene, *supra* note 415; Note, *supra* note 418.

433. See *supra* notes 81-99 and accompanying text.

434. 18 U.S.C. § 3771 (1982); see *supra* notes 297-301 and accompanying text.

435. Upon occasion, however, Congress modifies the rules proposed by the Supreme Court and enacts a substitute rule. On these occasions, the modified rule clearly reflects the intention of Congress. See, e.g., Fed. R. Crim. P. 16, which Congress amended to delete the requirement that the prosecution disclose its witness list upon request to the defense.

436. See *supra* note 282.

supervisory power. A remedial ruling that is grounded on supervisory power raises the same concerns about institutional competence and separation of powers that have been addressed in the cases involving the implication of civil remedies. Reliance on the concept of supervisory power adds nothing to the analysis.

#### IV. OTHER SOURCES OF AUTHORITY FOR SUPERVISORY POWER

The limitations discussed in Parts II and III have practical significance only if there is no other major source of authority for the exercise of supervisory power. This Part considers whether there is authority for the exercise of supervisory power in cases where there is no valid claim of special judicial competence and authority to establish procedural rules and the court is not construing or applying the implicit command of the Constitution or a federal statute. Although all of the major Supreme Court supervisory power decisions can be analyzed as procedural or remedial cases,<sup>437</sup> a number of lower court decisions, including *Jacobs*, fall into this residual category.<sup>438</sup> Some of these involve the formulation of prophylactic rules.<sup>439</sup> The most significant cases in this category impose limits on the extrajudicial conduct of federal investigators and prosecutors, or on the exercise of prosecutorial discretion. Three possible bases for the exercise of supervisory power in this residual category of cases will be examined: the courts' inherent power to protect their own integrity, the courts' authority to check improper conduct by other branches of government, and the courts' authority to create federal common law.

None of these theories provides a satisfactory basis for the exercise of general supervision over prosecutorial discretion or the extrajudicial conduct of federal investigators and prosecutors. Although judicial integrity and separation-of-power principles are important considerations in formulating an appropriate remedy for a violation of federal law, they provide no independent source of authority for the exercise of supervisory power when there has been no violation of any constitutional provision or federal statute. The federal courts' authority to create federal common law may provide an additional basis for some supervisory power decisions, but it cannot be expanded to control matters left by the Constitution either to the states or to a coordinate federal branch.

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437. The residual category would include, however, several cases in which a significant minority of the Court favored the exercise of supervisory power. See *Lopez v. United States*, 373 U.S. 427, 453-63 (1963) (Brennan, J., dissenting); *On Lee v. United States*, 343 U.S. 747, 758 (1952) (Black, J., dissenting); *id.* at 758-62 (Frankfurter, J., dissenting). In addition, some of the cases in which the Supreme Court employed its supervisory power to remedy injustice without establishing any general rule are difficult to characterize. See *supra* note 101.

438. The Second Circuit's decision in *Jacobs* is described *supra* notes 180-82 and accompanying text. Other lower court decisions in this category are discussed *supra* notes 159-79 and accompanying text.

439. The distinction between prophylactic rules and remedies is discussed in the text accompanying notes 362-67.

*A. Judicial Integrity*

Both the Supreme Court and the lower federal courts have employed supervisory power to ensure the integrity of judicial proceedings,<sup>440</sup> and there has been both judicial and academic support for the view that the federal courts have inherent authority to protect and preserve the integrity of their own proceedings.<sup>441</sup> Many supervisory power opinions reflect the influence of Justice Brandeis' view that the courts must "preserve the judicial process from contamination"<sup>442</sup> by denying judicial aid in cases where the government itself has become a "lawbreaker."<sup>443</sup> This argument begins with the premise that the effective functioning of the judicial system requires general public respect for and acceptance of the courts' rulings, which would be undermined if the courts ratified illegal behavior by accepting its fruits.<sup>444</sup> It follows that the authority to preserve respect for the courts by excluding illegally seized evidence is, like the contempt power,<sup>445</sup> implicit in the grant of judicial power because it is indispensable to the exercise of that authority.

There are two major objections to the suggestion that the imperative of preserving judicial integrity provides an independent basis for the exercise of supervisory power. First, both the fairly recent recognition of exclusionary rules and the present relatively narrow scope of the fourth amendment exclusionary rule belie the suggestion that judicial integrity is an absolute principle that is indispensable to the functioning of the federal judicial system. In contrast to contempt power, which was recognized and employed by the federal courts from the date of their establishment,<sup>446</sup> the fourth amendment exclusionary rule was not recognized until 1914.<sup>447</sup> Moreover, even after the adoption of the exclusionary rule, the federal courts have not invariably denied aid to the government in cases in which it has broken the law. For example, third parties have consistently been denied standing to assert the exclusionary rule.<sup>448</sup> At present the exclusionary rule is subject to a number of judicially fashioned exceptions.<sup>449</sup> At a minimum these exceptions weaken the claim that the judiciary must disassociate itself from gov-

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440. See *supra* notes 114-116, 121-128, 132-135 and accompanying text.

441. See *Mesarosh v. United States*, 352 U.S. 1, 14 (1956); *Hogan & Snee*, *supra* note 9, at 30-33; *Harvard Note*, *supra* note 9, at 1663-64; *Stanford Note*, *supra* note 9, at 442.

442. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). See *supra* notes 61-65 and accompanying text.

443. *Olmstead v. United States*, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting).

444. See *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

445. See *supra* notes 229-34 and accompanying text.

446. See *id.*

447. See *Weeks v. United States*, 232 U.S. 383 (1914). An earlier decision, *Boyd v. United States*, 116 U.S. 616 (1886), held that the fourth and fifth amendments barred compelled production of the defendant's private papers. This position was abandoned in later search and seizure cases, although it formed the basis for Justice Black's concurrence in *Mapp v. Ohio*, 367 U.S. 643, 661-62 (1961) (Black, J., concurring).

448. See *Rakas v. Illinois*, 439 U.S. 128 (1978); *Alderman v. United States*, 394 U.S. 165 (1969).

449. See *Immigration and Naturalization Service v. Lopez-Mendoza*, 104 S. Ct. 3479

ernmental misconduct to perform its article III functions effectively.<sup>450</sup>

There is also a second more fundamental objection to treating judicial integrity as an independent basis for the exercise of supervisory power. Assuming that the federal courts have inherent authority to preserve the integrity of the judicial process by disassociating the courts from illegal extrajudicial conduct, this authority is generally coextensive with the authority described in Part III. The preservation of judicial integrity provides an additional justification for the courts' power to fashion nonstatutory remedies for violations of federal law.<sup>451</sup> But where no provision of the Constitution, federal statutes or procedural rules has been violated, there is no significant threat to judicial integrity.<sup>452</sup> If the extrajudicial conduct of government investigators and prosecutors meets all relevant constitutional and statutory standards, it is difficult to see how providing judicial aid to the government either contaminates the courts or imperils their integrity. As the Supreme Court has observed, a proper regard for the integrity of the judicial branch does not justify a "chancellor's foot veto" over the activities of coequal branches of government.<sup>453</sup>

The power to declare constitutionally valid and statutorily authorized

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(1984); *United States v. Leon*, 104 S. Ct. 3405 (1984); *Stone v. Powell*, 428 U.S. 465, 486-89 (1976).

450. In *United States v. Peltier*, 422 U.S. 531, 536-39 (1975), the Court indicated that the exclusionary rule should be applied only when it would achieve the desired deterrent effect, or when required by "the imperative of judicial integrity." But the Court now seems to have determined that exceptions to the exclusionary rule will be based only on whether use of the rule will have a deterrent effect, and it has rejected separate considerations of judicial integrity. See *United States v. Leon*, 104 S. Ct. 3405, 3412-14, 3420 n.22 (1984); see also Monaghan, *supra* note 208, at 5-6 (imperative of judicial integrity cannot readily be squared with the doctrine of separation of powers, which implies limits of authority and corresponding limits of responsibility for each branch).

451. A focus on judicial integrity might also suggest a reason for allowing the federal courts greater leeway in formulating remedies for statutory violations by the government. Ultimately, however, this argument is unpersuasive. The Supreme Court has generally acknowledged and scholars have generally assumed that Congress has the authority to override supervisory power decisions like *McNabb* and *Mallory*, as it did by the adoption of 18 U.S.C. § 3501 (1982), because the exclusionary rule in these cases is not constitutionally required. See *supra* notes 151-52, 328 and accompanying text. In the absence of any constitutional necessity for such an exclusionary rule, the courts' remedial authority is limited by the nature of judicial competence and by separation-of-power concerns, as discussed in greater detail in Part III. Recognizing judicial power to remedy all statutory violations by the government would limit the authority of both Congress and the executive branch by depriving them of the option of establishing a standard for government conduct without providing a *private* remedy for its violation. No theory justifying such a restriction on the authority of Congress has been proposed. See Stewart & Sunstein, *supra* note 410, at 1259 (No clear authority exists for courts to prohibit Congress from enacting legislation "that is to some degree hortatory."); cf. *United States v. Caceres*, 440 U.S. 741, 756 (1979) (refusing to formulate exclusionary remedy for violation of executive branch regulation where executive has provided for only internal sanctions).

452. See *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976) ("The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution.").

453. See *United States v. Russell*, 411 U.S. 423, 435 (1973).

governmental conduct judicially untouchable would grossly intrude on the functions of both Congress and the executive branch.<sup>454</sup> An illustration may be helpful. Several members of the Supreme Court have suggested that supervisory power should be employed to disassociate the federal courts from the use by the executive branch of undesirable investigative practices, particularly the use of undercover agents and informants,<sup>455</sup> which is said to be a "dirty business."<sup>456</sup> The use of undercover agents involves deception, and it may invade personal privacy.<sup>457</sup> Nevertheless, Congress knowingly permits the use of federal undercover agents to investigate possible criminal activity.<sup>458</sup> Therefore in a particular cases, the conduct of an undercover agent may be consistent with the Constitution and any pertinent federal statutes. In any such case the courts impermissibly infringe on the province of both Congress and the executive branch if they suppress evidence developed by the agent or dismiss charges based on that evidence because of their disapproval of either the agent's conduct or the practice of using undercover agents. Rhetorical appeals to the necessity of preserving the judicial process from contamination do not alter the fact that denying a forum for the trial of federal criminal charges conflicts with the federal courts' duty to exercise the jurisdiction conferred by Congress.<sup>459</sup> The refusal of federal courts to provide a forum for the trial of criminal

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454. See Hill, *supra* note 9, at 202-07.

455. On *Lee v. United States*, 343 U.S. 747, 758-61 (1952) (Frankfurter, J., dissenting); see *Hampton v. United States*, 425 U.S. 484, 493-95 (1976) (Powell, J., concurring) (leaving open question whether supervisory power may be employed in cases where undercover agent's inducements were made to defendant predisposed to commit the crime); cf. *Lopez v. United States*, 373 U.S. 427, 453, 461-62 (1963) (Brennan, J., dissenting) (supervisory power should be used to exclude evidence obtained by surreptitious electronic recording and broadcasting).

456. On *Lee v. United States*, 343 U.S. 747, 758, 760-61 (1952) (Frankfurter, J., dissenting).

457. See Dix, *Undercover Investigations and Police Rulemaking*, 53 *Tex. L. Rev.* 203, 210-12 (1975) (privacy interests); Rotenberg, *The Police Detection Practice of Encouragement*, 49 *Va. L. Rev.* 871, 877-78 (1963) (undercover agents' work founded on deliberate deception and agent is often required to do things that are "vulgar, profane, and indecent.").

458. The general authority to conduct criminal investigations is conferred on the Attorney General and his delegates by 28 U.S.C. § 533 (1982). Congress is well aware that the investigation of federal crimes frequently requires undercover activities, and occasionally Congress enacts legislation reflecting its understanding and approval of undercover activities. See, e.g., Act of Nov. 30, 1979, Pub. L. No. 96-132, § 7(d), 93 Stat. 1046 (1979) (requiring Federal Bureau of Investigation to conduct yearly financial audit of its "undercover operations" and to report regarding its audit to Congress and the Department of Justice).

459. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (when a federal court is properly appealed to in a case over which it has jurisdiction, "it is its duty to take such jurisdiction."). The Court reiterated this general principle in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17, 820 (1976), although it held that in the "exceptional" circumstances of that case the district court had properly declined to exercise its jurisdiction in favor of concurrent proceedings in state court. Since 18 U.S.C. § 3231 (1982) grants the district courts exclusive jurisdiction over federal criminal proceedings, a federal court's refusal to exercise its jurisdiction in a criminal case effectively terminates the prosecution. See Hill, *supra* note 9, at 206-07.

charges because of judicial disapproval of particular investigative practices would also impede the enforcement of the substantive criminal laws enacted by Congress. Indeed, a rule prohibiting proof derived from the use of undercover agents could virtually nullify criminal prohibitions against consensual criminal activity, which is difficult to detect without the use of undercover agents or other controversial investigative techniques.<sup>460</sup> Finally, a federal court's refusal to exercise its jurisdiction in such a case would also impair the executive's article II function of enforcing the laws enacted by Congress.

Such a substantial intrusion on the powers of Congress and the executive branch cannot be justified by the judiciary's desire not to associate itself with constitutionally permissible but judicially disfavored conduct. The Constitution, federal statutes, and rules of procedure establish the limits that must be observed by Congress and the executive branch,<sup>461</sup> and the judiciary's disapproval of permissible conduct does not justify refusal to enforce the federal criminal laws enacted by Congress.<sup>462</sup>

#### B. *Checks and Balances*

A second possible justification for supervisory power is closely related to concern for judicial integrity. It has been suggested that "the complementary principles of separation of power and checks and balances" authorize the use by the federal courts of supervisory authority in order "to

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460. The Supreme Court has recognized that "the infiltration of drug rings and a limited participation in their unlawful present practices" is "one of the only practicable means of [their] detection." *United States v. Russell*, 411 U.S. 423, 432 (1973). See *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (Contraband offenses are "difficult to detect in the absence of undercover Government involvement."). Electronic surveillance is also an effective means to develop evidence of consensual criminal activity. During Prohibition, the use of undercover agents, electronic interception, and other questionable investigative techniques increased substantially. See *supra* notes 47-55 and accompanying text. Cf. *Sherman v. United States*, 356 U.S. 369, 377 n.7 (1958) (suggesting it would probably be impossible to secure convictions of offenses consisting of transactions carried out in secret if government agents could not offer inducements to suspects).

461. This statement applies only to the extrajudicial conduct of investigators and police officials in the executive branch. The federal courts' authority over procedural matters is frequently employed to impose limitations on federal prosecutors. See Part II, *supra*.

462. The Supreme Court recognized a similar point in *Ex parte United States*, 242 U.S. 27 (1916). The Court held that the district court had exceeded its authority by permanently suspending the defendant's sentence for embezzlement, so long as he exhibited good behavior. The Court reasoned:

[I]f the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, . . . there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus . . . the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

242 U.S. at 42.

check the governmental excesses of the executive and legislature."<sup>463</sup> Reliance on the principles of separation of power and checks and balances, like reliance on judicial integrity, is unpersuasive as an independent source of authority for supervisory power decisions. Judicial review clearly does serve as a check on governmental excesses. *Marbury v. Madison*<sup>464</sup> established that if a justiciable case or controversy is presented the grant of judicial power authorizes and requires the federal courts to determine whether the conduct of coequal branches of government is consistent with the Constitution and other pertinent federal laws. Moreover, as discussed in Part III, when the federal courts determine that governmental conduct has violated federal law, the courts have the authority to fashion nonstatutory remedies subject to limitations imposed by considerations of institutional competence and separation of powers.

Reliance on the concepts of separation of powers or checks and balances cannot, however, justify a judicial check on extrajudicial conduct of the executive or legislative branch that is consistent with the Constitution and pertinent federal statutes.<sup>465</sup> The example discussed above in connection with the judicial integrity rationale is equally pertinent here. If neither the Constitution nor any federal statute imposes any limitations, the imposition of judicially fashioned standards for the use of undercover agents in federal criminal investigations constitutes an unwarranted intrusion into matter allocated by the Constitution to other coequal branches. The doctrine of checks and balances is complementary to and does not wholly override the doctrine of separation of powers. Accordingly it does not justify general judicial supervision of the discretionary functions of Congress and the executive branch.

### C. *Federal Common Law*

The final source that has been suggested as the basis for supervisory power is the federal courts' authority to create federal common law. Procedural and remedial rulings, which are discussed in Parts II and III, are specialized forms of federal common law. The federal courts have long created federal common law dealing with matters such as defenses to criminal liability<sup>466</sup> and evidentiary privileges.<sup>467</sup> It has been suggested that the fed-

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463. *United States v. Gonsalves*, 691 F.2d 1310, 1318-19 (9th Cir. 1982) (footnote omitted), rev'd, 104 S. Ct. 54 (1983) (vacated and remanded for reconsideration in light of *United States v. Hasting*, 103 S. Ct. 1974 (1983)), citing Stanford Note, *supra* note 9, at 443-44. For a general discussion of separation of powers, see, e.g., G. Marshall, *Constitutional Theory* 100-24 (1971); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 *Stan. L. Rev.* 661, 681-706 (1978).

464. 5 U.S. (1 Cranch) 137, 177-78 (1803).

465. The Court recognized this point in *Marbury* when it observed that the federal courts would reject "without hesitation" any application for a writ to control the discretionary acts of the executive. *Id.* at 170-71.

466. See *infra* notes 405-08 and accompanying text.

467. See *infra* notes 501-04 and accompanying text.

eral courts also have the authority to formulate a constitutional common law.

Although federal courts, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers,"<sup>468</sup> the Supreme Court has recognized that the federal courts have "a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern."<sup>469</sup> Federal common law is "a 'necessary expedient' "<sup>470</sup> because the federal courts "are compelled to consider federal questions 'which cannot be answered from federal statutes alone.' "<sup>471</sup> The authority to formulate interstitial federal common law is "subject to the paramount authority of Congress." "<sup>472</sup>

The doctrine of separation of powers poses the principal obstacle to justifying supervisory power as a form of federal common law. The authority to formulate federal common law does not alter the structural limitations imposed by the Constitution. It is well established that there is no general federal common law<sup>473</sup> and that the mere vesting of jurisdiction in the federal courts does not, as a general matter, confer authority to fashion federal common law.<sup>474</sup> To the contrary, *Erie Railroad Co. v. Tompkins*<sup>475</sup> established that the extension of federal jurisdiction to diversity cases did not authorize the federal courts to fashion federal rules of decision.<sup>476</sup> As Judge Friendly has observed, *Erie* rests on the recognition that it would be inconsistent with the constitutional allocation of authority to allow the federal courts to "frustrate the ability of the states to make their laws fully effective in areas generally reserved to them."<sup>477</sup> The Supreme Court has recognized that the power to formulate federal common law is also limited by the constitutional allocation of authority to the other branches of the federal government. As the Court recently observed, nothing in the process of formulating federal common law "suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable."<sup>478</sup> In criminal cases as well as civil diversity cases

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468. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

469. *Id.*

470. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981), quoting *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc).

471. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1979), quoting *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

472. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), quoting *New Jersey v. New York* 283 U.S. 336, 348 (1931).

473. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

474. See *Texas Indus., Inc. v. Radcliff Materials, Inc.* 451 U.S. 630, 640-41 (1981).

475. 304 U.S. 64 (1938).

476. See *id.* at 78.

477. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 397 (1964).

478. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).



the federal courts must respect the Constitution's structural limitations in formulating federal common law.

1. *Constitutional Common Law.* — Some scholars, most notably Professor Henry Monaghan, have suggested that the federal courts have the authority to create a constitutionally based federal common law regulating the conduct of federal investigators and prosecutors.<sup>479</sup> Constitutional common law is inspired by the Constitution but not required by it. Thus constitutional common law, like supervisory power, may be made applicable in federal but not state proceedings, and may be reversed by Congress.<sup>480</sup>

Supervisory power rulings establishing standards for the conduct of government investigators and prosecutors might be one form of such a constitutionally based common law. For example, a constitutional common law theory might be employed to justify decisions such as *Schofield I* and *II*,<sup>481</sup> which buttress the privacy interest protected by the fourth amendment by a requirement that federal prosecutors make a preliminary showing to obtain enforcement of grand jury subpoenas. Similarly, a constitutional common law theory might be used to justify the Second Circuit's supervisory power ruling that no uncounseled statement made by an indicted defendant will be admissible unless a judicial officer has provided the defendant with particular warnings, including an explanation of the significance and content of the sixth amendment right to counsel,<sup>482</sup> since this prophylactic rule provides additional protection for the defendant's privilege against self-incrimination and right to counsel.

Some support for Professor Monaghan's theory of constitutional common law may be derived from the Supreme Court's recognition that "[b]roadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common law tradition,"<sup>483</sup> and its acknowledgment that some of its decisions have announced constitutionally based prophylactic standards that may be reversed by Congress.<sup>484</sup> Although the proper characterization of some decisions is debatable, several of the Supreme Court's decisions, most notably the prophylactic rules imposed by *Miranda* and the cases following it, can fairly be characterized as constitutional common law.<sup>485</sup>

Some forms of what Professor Monaghan would call constitutional common law pose no substantial difficulties. For example, Part II argues that the federal courts have the authority to fashion what this Article has

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479. See Monaghan, *supra* note 208, at 35, 38–40.

480. See *id.* at 34, 38–40.

481. See *supra* note 176; *supra* text accompanying notes 349–50.

482. See *United States v. Mohabir*, 624 F.2d 1140, 1153 (2d Cir. 1980).

483. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

484. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

485. For a discussion of the distinction between prophylactic rules and remedies, see *supra* notes 362–67 and accompanying text.

called true procedural rules, which are intended to promote the efficiency and accuracy of the judicial process. Some of those rules, particularly those relating to discovery, confrontation, cross examination, and the jury, promote constitutional interests although the rules themselves may not be constitutionally required. Part III argues that the federal courts have the authority to fashion remedies for constitutional violations. Some procedural and remedial decisions under the supervisory power rubric may thus be characterized as constitutional common law. Subject to the limitations described in Parts II and III, these forms of constitutional common law are valid.

Proposals for constitutional common law to control government investigators and prosecutors, in contrast, cannot be reconciled with the Constitution's horizontal division of authority. Professor Monaghan himself recognized that a "general, undefined, residual judicial power to pass judgment on the propriety of executive law enforcement methods would, by intruding on executive autonomy, violate sound separation of powers principles."<sup>486</sup> As others have demonstrated,<sup>487</sup> subconstitutional or what Professor Monaghan describes as constitutional common law rules limiting the conduct of government investigators and prosecutors are subject to precisely this objection: the federal courts' article III authority to interpret and apply the Constitution does not authorize the courts to formulate common law rules to control the conduct of the executive branch of the federal government.<sup>488</sup> The Constitution (including the due process clause of the fifth amendment) and any pertinent federal statutes establish the standards for the conduct of the executive branch. In fashioning federal common law, the courts may not seek to regulate matters allocated by the Constitution to other branches of government.

Although *Miranda* appears to provide a precedent for the use of supervisory power to control the executive branch, the legitimacy of *Miranda* itself has been seriously questioned.<sup>489</sup> Recent decisions make it clear that the *Miranda* exclusionary rule is not based directly on the Constitution. As interpreted by the Supreme Court, the privilege against self-incrimination

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486. Monaghan, *supra* note 208, at 34-35. Professor Monaghan has argued, however, that if constitutional common law is limited to vindicating rights and policies found in the Constitution's text and structure, a traditional function of judicial review, separation-of-power principles are not violated. See *id.* at 35.

487. See Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1126-29 (1978). As Professors Schrock and Welsh note, *id.* at 1128, Professor Monaghan's suggestion that constitutional common law would be open to revision by the Congress does not alleviate the constitutional problem inherent in the prior judicial invasion of the legislative sphere.

488. See *id.* at 1129.

489. The most comprehensive discussion of the legitimacy problem posed by the *Miranda* line of cases is Grano, *supra* note 362; see also Schrock & Welsh, *supra* note 487, at 1145, 1152-53 (Court lacks constitutional authority to impose subconstitutional rules on states); Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 119-20 & n.113 (if *Miranda* safeguards are not constitutionally based, derivation is unclear, as Court has no supervisory power over the states).

does not make it unlawful for the police to compel a statement in the absence of particular warnings,<sup>490</sup> and not all statements made in the absence of such warnings are compelled in violation of the privilege against self-incrimination.<sup>491</sup> Nevertheless, with exceptions not relevant here,<sup>492</sup> the Court has held that a state or federal conviction must be reversed if statements made in the absence of *Miranda* warnings were admitted as part of the prosecution's case-in-chief.<sup>493</sup> As Professor Stone has observed, the Court's more recent decisions "deprived *Miranda* of a constitutional basis but did not explain what other bases for it there might be."<sup>494</sup>

As interpreted in subsequent cases, the prophylactic *Miranda* rules cannot be justified by the theory of judicial review articulated in *Marbury v. Madison*.<sup>495</sup> *Marbury* established that the federal courts have the authority to set aside a state or federal conviction obtained in violation of the federal Constitution. But since proof of a *Miranda* violation does not establish a constitutional violation, by the same token a *Miranda* violation does not establish the federal courts' authority to reverse an otherwise valid conviction.

Despite the compelling criticisms of the constitutional common law theory, the Supreme Court has never discussed the question of the legitimacy of its authority in any of the decisions following *Miranda*. Although this omission might be interpreted as an indication that the concept of constitutional common law is so well established that it needs no explanation or defense, Professor Stone's analysis suggests a more persuasive interpretation. The *Miranda* cases may simply be *sui generis*, reflecting not so much an affirmation of constitutional common law as an unwillingness to overrule *Miranda* directly, despite the majority's belief that *Miranda* itself was "seriously misguided or worse."<sup>496</sup> So understood, *Miranda* and its progeny provide no general precedent for supervisory power decisions controlling federal prosecutors and judges.

The principles that limit the application of constitutional common law are those discussed in connection with judicial integrity and checks and balances. In the absence of any constitutional violation, the exclusion of evidence or the dismissal of a prosecution infringes on the authority of Congress to enact substantive criminal laws and the authority of the execu-

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490. See Stone, *supra* note 489, at 139-40, analyzing *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

491. See *supra* note 366.

492. See, e.g., *New York v. Quarles*, 104 S. Ct. 2626, 2630 & n.3, 2632 (1984) (public safety).

493. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." Cf. *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (statements made in absence of *Miranda* warnings admissible to impeach defendant's conflicting testimony).

494. Stone, *supra* note 489, at 123.

495. 5 U.S. (1 Cranch) 137 (1803); see Grano, *supra* note 362.

496. Stone, *supra* note 489, at 99.

tive branch to enforce those laws by investigation and prosecution.<sup>497</sup> The federal courts must also respect the prosecutorial discretion which the Constitution confers on the executive branch. As the Supreme Court has explained: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before grand jury, generally rests entirely in his discretion."<sup>498</sup> Accordingly, contrary to the suggestion in several lower court decisions, neither supervisory power nor federal common law may be used to limit the constitutionally permissible exercise of prosecutorial discretion.<sup>499</sup>

2. *Other Uses of the Federal Common Law.* — Although the principle of separation of powers precludes the creation of common law rules regulating the authority of the executive branch, it does not preclude the creation of federal common law that has only an incidental effect on the other

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497. See *supra* text accompanying notes 454–60.

498. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted); see also *United States v. Batchelder*, 442 U.S. 114, 123–25 (1979) (prosecutorial discretion to seek greater or lesser penalty provided under same statute is only subject to constitutional constraints, such as equal protection and due process clauses); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive and absolute discretion to decide whether to prosecute a case"); cf. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457–59 (1869) (Attorney General controls prosecution of civil suits by the United States and has discretion to consent to dismissal).

499. See *supra* note 171. The *Gonsalves* decision is, perhaps the most blatant example of a court's effort to control prosecutorial charging discretion. The court of appeals affirmed the district court on the ground that the district court had inherent authority to dismiss an indictment that was so complex and unmanageable that it would impair the basic function of the court to provide a manageable and fair trial. *United States v. Gonsalves*, 691 F.2d 1310, 1320–21 (9th Cir. 1982), rev'd and remanded, 104 S. Ct. 54 (1983) (mem.). In fact, however, although the indictment involved a complex international drug conspiracy, it included only two counts, and Gonsalves was the only defendant before the court. The transcript of the proceedings in the district court and the district court's order (reprinted in the government's petition for a writ of certiorari) reveal that the district judge was determined to alter the United States Attorney's charging practices, even though they complied fully with the federal rules regarding joinder and the statutes regarding venue. The judge specifically expressed his hope that the upcoming presidential election would bring about a change of administration in the U.S. Attorney's office, and stated that he would like to screen all indictments coming from that office:

I don't know what the matter is, I don't know how he thinks. I think he has some kind of sense of delight in conjuring these things up, creating these massive puzzles and saying, "Let's see how Judge Foley can handle that." I don't know what is going on, but I will tell you this much, I'm not going to put up with it any more. Please God, we'll have a change of administration and he'll be gone. I don't know about that either, but I'm not going to put up with Semenza any more.

So, I won't try this. If the Court of Appeals should say that I am wrong, I don't think they are going to, and this case comes back, I won't try it. And I won't try any more of Larry Semenza's cases that are this ill. *I'm going to have to work out some system when I get copies of the indictment where I can demand in advance a trial brief so I can see what we are into before we go through all of the time and energy, the motion stage and impanelling the jury and so forth.*

See Petition for Writ of Certiorari at 40a (emphasis added).

branches of government and that does not seriously impair their ability to carry out their constitutional functions. For example, the federal courts have authority to fashion what are properly called procedural rules, which are intended to promote the efficiency and accuracy of the judicial process, not to control or supervise the conduct of the executive branch. As noted in Part II, procedural rules may have an incidental effect on the executive branch, and the power to formulate procedural rules must be exercised in a manner that gives due regard to the authority of coordinate branches.<sup>500</sup>

So restricted, procedural rulings do not invade the province of either Congress or the executive branch. For the same reason, the formulation of common law evidentiary privileges, which is now authorized by Federal Rule of Evidence 501,<sup>501</sup> is not inconsistent with the constitutional allocation of authority. Although evidentiary privileges, unlike other evidentiary rules, are generally based upon policy considerations extrinsic to the litigation process,<sup>502</sup> the definition and application of the standard common law privileges does not involve the judiciary in the supervision of another branch of government. For example, the recognition of evidentiary rules such as the marital privilege<sup>503</sup> and the attorney-client privilege<sup>504</sup> has an incidental impact on the government as well as other litigants, but such privileges are not adopted for the purpose of controlling governmental conduct, and they do not violate the principle of separation of powers.

Similarly, the formulation of common law defenses does not conflict with the constitutional allocation of authority. Although it clearly has the authority to do so, Congress has generally not codified the traditional defenses, such as immaturity, duress, and self-defense.<sup>505</sup> Since Congress legislated against a common law background and generally adopted the common law approach to criminal liability,<sup>506</sup> the federal courts have generally assumed that Congress intended to carry forward the traditional common law defenses as well.<sup>507</sup> A defense is permitted either because the

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500. See *supra* notes 253-57 and accompanying text.

501. Rule 501 superseded Fed. R. Crim. P. 26, which authorized the federal courts to formulate rules of evidence for criminal cases. For a discussion of the case law prior to the adoption of Rule 26, see *supra* notes 40-45 and accompanying text.

502. See *supra* note 265.

503. The federal courts recognize the common law marital privilege. See *Trammel v. United States*, 445 U.S. 40 (1980) (modifying the marital privilege rule, holding that only the witness spouse may invoke the privilege).

504. The federal courts recognize the common law attorney-client privilege. See *Fisher v. United States*, 425 U.S. 391, 403 (1976).

505. See National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code *lix* (1970). Although both Houses of Congress passed a bill codifying the insanity defense, other aspects of the legislation were controversial, and the final enactment of the bill was uncertain as of the date of this writing. See *N.Y. Times*, Oct. 4, 1984, at A29, col. 1; *id.*, Sept. 26, 1984, at A1, col. 3. The bill reprinted in 130 Cong. Rec. H10,102-05 (daily ed. Sept. 25, 1984).

506. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978); *Morissette v. United States*, 342 U.S. 246 (1952).

507. *United States v. Bailey*, 444 U.S. 394, 415-16 n.11 (1980) (*dicta*) (duress or coer-

conduct of the accused was justified and hence not blameworthy, or because the accused should be excused.<sup>508</sup> Accordingly, the recognition of the traditional defenses is in accord with the intent of Congress.

In contrast, a "defense" arising out of the extrajudicial misconduct of a federal investigator or prosecutor would not be based upon the policies of the substantive criminal law. Misconduct by public officials has no necessary relationship to the culpability of the accused or to the societal interest in his incapacitation or in general deterrence. Accordingly, the recognition of such a defense would frustrate, not foster, the policies of the substantive criminal law, and the refusal to provide a forum for the trial of such cases would violate the federal courts' obligation to exercise the jurisdiction conferred by Congress. Moreover, recognition of a defense of government misconduct could not be based on an assumption that Congress intended to carry forward traditional defenses, since such a defense was not recognized at common law. Of course, the federal courts must recognize constitutional (or statutory) defenses, although such defenses may rest on rules limiting governmental conduct rather than on the substantive policies of the criminal law. By itself, however, the grant of jurisdiction over federal criminal cases provides no authority for judicial establishment of nonconstitutional and nonstatutory standards for the conduct of the executive branch that are to be enforced by the recognition of new common law defenses or rules of exclusion.

This analysis is consistent with the Supreme Court's major supervisory power decisions, but it casts doubt on the propriety of numerous lower court decisions and the Supreme Court's entrapment decisions. Although a majority of the Supreme Court has consistently held that Congress did not intend to criminalize the conduct of an individual who has been entrapped by government agents,<sup>509</sup> other members of the Court have agreed with commentators who have concluded that the statutory basis for the defense is "wholly fictional."<sup>510</sup> Moreover, despite the Supreme Court's suggestion

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cion); *United States v. Scott*, 437 U.S. 82, 97-98 & n.10 (1978) (dicta) (insanity); see *Brown v. United States*, 256 U.S. 335, 343 (1921) (self-defense); *Rowe v. United States*, 164 U.S. 546, 555-58 (1896) (self-defense); *Davis v. United States*, 160 U.S. 469, 478-93 (1895) (insanity); *Tucker v. United States*, 151 U.S. 164, 169-70 (1894) (intoxication as a defense to crime of specific intent); *United States v. Brawner*, 471 F.2d 969, 985-86 (D.C. Cir. 1972) (en banc) (insanity defense may not be abolished by judiciary); *Durham v. United States*, 214 F.2d 862, 869-76 (D.C. Cir. 1954) (insanity).

508. For a discussion of the relationship of the principal common law defenses to the purposes of the criminal law, see G. Fletcher, *Rethinking Criminal Law* ch. 10 (1978); H. Packer, *The Limits of the Criminal Sanction* 103-35 (1968).

509. See *United States v. Russell*, 411 U.S. 423, 428-29, 433-35 (1973); *Sorrells v. United States*, 287 U.S. 435, 446-52 (1932).

510. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 S. Ct. Rev. 111, 129-30. But cf. Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 246-47 & n.271 (1976) (while legislative intent rationale may have been "fictitious" when originally formulated, modern criminal statutes are enacted against a background of Supreme Court recognition of the entrapment defense).

to the contrary,<sup>511</sup> the federal entrapment defense does not focus principally on the accused's lack of criminal culpability.<sup>512</sup> A defendant who is entrapped is not innocent of wrongdoing. Defendants who claim the entrapment defense generally concede that the government can establish all of the elements of the offense, including culpable mens rea. Indeed some circuits will not allow the defense to be raised unless the accused concedes that he committed the crime charged.<sup>513</sup> That the accused was enticed into committing his crime provides no excuse: it is well established that persons who succumb to inducements by private persons may be held guilty of any ensuing offense.<sup>514</sup> Accordingly, although the focus on the presence or absence of criminal predisposition on the part of an accused who raises the defense of entrapment<sup>515</sup> suggests a degree of concern for culpability, it seems clear that one of the principal purposes of the federal entrapment defense is the deterrence of what the federal courts deem undesirable (though constitutionally permissible) police behavior. Perhaps the entrapment defense itself has been legitimated by four decades of congressional acquiescence.<sup>516</sup> In any event, the recognition of any new defense based on the undesirable conduct of government investigators would invade the authority allocated by the Constitution to Congress and to the executive branch unless the con-

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511. *United States v. Scott*, 437 U.S. 82, 97-98 & n.10 (1978); see *United States v. Russell*, 411 U.S. 423, 435-36 (1973); *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

512. See Model Penal Code § 2.10, comment 1 at 14 (Tent. Draft No. 9, 1959) (entrapped defendant "is neither less reprehensible or dangerous nor more reformable or deterrable than other defendants who are properly convicted"); Seidman, *supra* note 510, at 127-36. Professor Park argues that the defense may still be concerned with culpability, even though it is concerned with other goals as well. Park, *supra* note 510, at 240-43.

513. See, e.g., *United States v. Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984); *United States v. Hill*, 655 F.2d 512, 514 (3d Cir. 1981), *aff'd on remand*, 716 F.2d 893 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 699 (1984); *United States v. Caron*, 588 F.2d 851, 852 n.4 (1st Cir. 1978), *aff'd on remand*, 615 F.2d 920 (1st Cir. 1980). Other circuits permit the defendant to raise the entrapment defense and also deny guilt in some circumstances. See, e.g., *United States v. Garrett*, 716 F.2d 257, 269-71 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1910 (1984); *United States v. Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980) (defendant may raise entrapment and deny involvement if he does not testify to deny participation and does not introduce evidence of his noninvolvement), *reh. denied*, 669 F.2d 37 (2d Cir. 1981). Several circuits permit any defendant to claim entrapment and deny involvement. See, e.g., *United States v. Demma*, 523 F.2d 981, 982 (9th Cir. 1975) (*en banc*); *Crisp v. United States*, 262 F.2d 68, 69 (4th Cir. 1958) (*per curiam*). See generally Groot, *The Serpent Beguiled Me and I (Without Scierter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. Ill. L.F. 254 (in crimes involving both scienter and action, defendant should not be required to admit the whole crime in order to invoke the entrapment defense).

514. See, e.g., *Holloway v. United States*, 432 F.2d 775, 776 (10th Cir. 1970); *Henderson v. United States*, 237 F.2d 169, 175 (5th Cir. 1956). See generally Park, *supra* note 509, at 240 (defense never permitted where "entrapment" was accomplished by a private party).

515. See *Hampton v. United States*, 425 U.S. 484, 488 (1976); *United States v. Russell*, 411 U.S. 423, 429 (1973).

516. Compare Park, *supra* note 510, at 247 (congressional silence is acquiescence); with Seidman, *supra* note 510, at 130 n.74 (Park's argument assumes that Congress focused on the issue and consciously chose not to act, and that congressional silence is "an endorsement of the specific holding in a case rather than of judicial power to develop the law.).

duct is so outrageous that it violates the due process clause of the fifth amendment.

Part IV has considered the remaining sources of authority for supervisory power rulings that are neither procedural nor remedial in nature. In the absence of statutory restrictions, the federal courts may fashion common law rules of general application regarding matters such as evidentiary privileges. Although such common law rules of general application may have an incidental effect on all litigants, including the government, they present a far different problem than common law rules intended to apply solely to the government. No authority exists for common law rules intended to control the extrajudicial conduct of government investigators and prosecutors. The phrase supervisory power is powerfully misleading precisely because it suggests that the federal courts may properly exercise general supervision over matters allocated by the Constitution to coequal branches of government.

#### CONCLUSION

Supervisory power as such does not exist. The supervisory power label has been used to describe the exercise of several different forms of judicial power. Use of the term supervisory power has diverted attention from the nature, source, and limits of the authority being exercised in each case. Although this Article identifies sources of authority for rulings that have been labeled supervisory power, it seems plain that the term supervisory power should be abandoned.

Many supervisory power decisions establish procedural rules. This Article has identified sources of authority for the federal courts' formulation of procedural rules and demonstrated that this authority is subject to significant limitations that generally have been ignored in supervisory power cases. The supervisory power decisions formulating procedural rules have failed to consider seriously the effect of legislation that appears to limit the courts' authority to regulate procedure on a case-by-case basis. The cases also have ignored the differences among the authority possessed by the district courts, the courts of appeals, and the Supreme Court. This Article has shown that it is questionable, given the current statutory framework, whether the courts of appeals have the authority to establish procedural rules for the district courts. Moreover, the supervisory power decisions generally make no attempt to define what constitutes a ruling that is procedural in nature. This Article argues that in the absence of any statutory authority, procedure should be defined narrowly to include only matters relating to the efficiency and reliability of the judicial process. Supervisory power rulings that are intended to influence extrajudicial conduct are not procedural in this sense, and must be justified by some other source of authority.

Other supervisory power decisions fashion remedies for violations of federal law. These decisions have generally failed to distinguish between the judiciary's role in formulating remedies for constitutional and for statutory violations, and have tended to ignore limiting principles established by



the Supreme Court to balance competing interests. This Article argues that the supervisory power decisions have erred in failing to acknowledge that the same limitations apply in remedy cases whether or not reference is made to supervisory power, and have also erred in failing to identify congressional intent as the factor that determines when a common law remedy may be provided for a statutory violation.

Finally, the Article demonstrates that there is no other significant source of authority for the residual class of supervisory power decisions that cannot be characterized as procedural or remedial in nature. Although the federal courts have the authority to fashion federal common law on matters such as defenses and evidentiary privileges, this authority is subject to limitations implicit in the concept of separation of power. The federal courts may not employ their lawmaking authority to control matters left by the Constitution either to the states or to a coordinate federal branch. Whether the label supervisory power or federal common law is used, judicial efforts to control matters such as prosecutorial discretion are clearly improper. The courts may not establish nonconstitutional and nonstatutory standards to control either the investigation or prosecution of federal criminal cases. The exclusion of evidence or the dismissal of a prosecution because of constitutionally and statutorily permissible conduct by government investigators and prosecutors violates the separation of powers because it impairs the President's ability to enforce the laws and frustrates the substantive criminal law enacted by Congress.

The approach advocated here is a more careful observance of the boundaries of the executive, legislative, and judicial powers at the federal level. This analysis is bottomed upon separation of power principles, and it rests on the assumption that it is both possible and desirable to make a meaningful distinction between the authority allocated to the courts and the authority allocated to the other branches of government.

If the analysis proposed here is adopted, it will deprive the federal courts of some of the flexibility that has been provided by the undefined concept of supervisory power. In cases not involving questions of judicial procedure or a statutory violation, this Article contends that the federal courts have no authority to exclude evidence or to dismiss a prosecution unless the government's conduct violated the Constitution. This analysis requires the federal courts to decide some constitutional issues they are now able to avoid—or at least defer—by grounding their rulings on supervisory power. Unlike supervisory power rulings, constitutional rulings generally apply to state as well as federal prosecutions. Requiring the federal courts to ground decisions not involving judicial procedure or remedies on a constitutional basis would be likely to result in eliminating some restrictions on federal investigators and prosecutors that have been grounded solely on supervisory power. This is as it should be.

But this approach need not straitjacket the courts. Where there has been a legislative grant of authority, such as the rules enabling legislation, the power of the courts is extensive. Amendments to the Federal Rules of

Criminal Procedure may properly regulate some matters that have been the subject of highly questionable supervisory power rulings. For example, the warnings required in *Jacobs* and the preliminary showing required in *Schofield I* and *II* could properly be codified as amendments to Rule 6 and Rule 17 of the Federal Rules of Criminal Procedure. Regulation of such matters by rules adopted pursuant to congressional delegation would be quite different from ad hoc supervisory power rulings by individual judges (or panels). Before an addition or amendment to the Federal Rules of Criminal Procedure is adopted, the public, the government, and members of the bar are given an opportunity to comment on the proposal, and Congress is provided with notice and given an opportunity to intervene before the proposed rule takes effect. These procedures are particularly desirable in the case of rules that would restrict otherwise lawful executive conduct and hamper the investigation and prosecution of criminal cases because of a judgment that certain forms of executive conduct are undesirable or that the benefits to be gained by such outweigh the costs. If circuit-wide rather than national rules are appropriate for some matters, the courts of appeals might be statutorily authorized to promulgate such rules, subject to appropriate procedural limitations. But the concept of separation of powers dictates that federal prosecutors and investigators, like their state counterparts, should perform their duties subject only to the requirements imposed by the federal Constitution and statutes, not subject to the federal judiciary's preference for particular policies and practices.