The Judiciary's Use of Supervisory Power to Control Federal Law Enforcement Activity

Department of Justice Office of Legal Policy

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REPORT TO THE ATTORNEY GENERAL

ON

THE JUDICIARY’S USE OF SUPERVISORY POWER TO CONTROL FEDERAL LAW ENFORCEMENT ACTIVITY

‘Truth in Criminal Justice’
Report No. 5

Office of Legal Policy

December 15, 1986
The Executive Summary for REPORT No. 5 begins on the next page. The full Report, including a Table of Contents, follows the Executive Summary.
EXECUTIVE SUMMARY

In *McNabb v. United States*, the Supreme Court claimed—for the first time in its history—the prerogative of "establishing and maintaining civilized standards of procedure and evidence" in the exercise of "supervisory authority over the administration of criminal justice in the federal courts." Since then, the Court has used this self-declared oversight power on numerous occasions and for a wide variety of purposes, but it has never adequately explained either the provenance or the scope of this type of judicial authority. Lower federal courts have followed suit, on the largely unexamined assumption that they too are endowed with supervisory authority, and have employed that power even more freely than has the Supreme Court.

From the perspective of the executive branch, the most critical aspect of supervisory power has been its use by the judiciary to adopt exclusionary rules of evidence and to recognize defenses unknown to the common law in an effort to deter misconduct on the part of federal investigators. The use of supervisory power by the judicial branch to control law enforcement activities by the executive branch is troubling for several reasons, not the least of which is that there appears to be no sound constitutional or other legal basis for this practice. As a result, such uses of supervisory power violate the fundamental principle of separation of powers. They also disregard the will of Congress and ultimately frustrate the search for truth in criminal investigations and prosecutions.

A. Overview Of The Supervisory Power Doctrine

The supervisory power doctrine, which originated in *McNabb*, holds that, in addition to their customary appellate authority, reviewing courts in the federal system possess a general oversight authority with respect to the administration of justice in the lower federal courts and may, in the exercise of that power, formulate procedural and evidentiary rules that are more stringent than those required by the Constitution or federal statutes.

Proponents of the supervisory power doctrine argue that supervisory power stems from the inherent rulemaking authority of the courts under article III of the Constitution. Yet, neither
history nor logic provides much support for the proposition that rulemaking authority is an inherent aspect of article III judicial power. The historical evidence does not demonstrate that the Framers intended to endow the federal courts with the relatively open-ended rulemaking powers of English common law tribunals. Moreover, the legitimate concept of inherent judicial authority seems quite narrow—encompassing only such power as is indispensable to the effective functioning of the federal courts. It does not appear to include authority to formulate typical rules of procedure and evidence; it has never been essential that the courts create such rules, because legitimate sources of constitutionally acceptable rules have always existed. Apart from questions as to its propriety, supervisory power is limited—at least theoretically—by the constitutional principles of federalism and separation of powers, and by the ultimate authority of Congress to prescribe governing rules of procedure and evidence. But courts have not always observed these limitations. Attracted by the versatility and flexibility of supervisory power in serving judicial purposes, they have employed it in a broad spectrum of contexts.

Most supervisory power decisions have been limited to the federal system and have dealt with matters of traditional concern to the judiciary. Arguably, these decisions are within the judiciary's special competence—jury selection, acceptance of guilty pleas, and permissible cross-examination, for example. In these and similar areas, the courts have employed supervisory power to establish rules of procedure aimed at promoting the fairness and reliability of the truthfinding process in criminal trials. In cases involving government “misconduct,” however, courts have been motivated by other considerations—principally a desire to protect “judicial integrity” and deter resort to “improper” law enforcement methods. In those cases, they have used supervisory power to exclude probative and trustworthy evidence, or to dismiss charges, in derogation of their truthfinding function. Although most of these cases have involved the conduct of federal officers, the Court has apparently used supervisory power to impose nonconstitutional requirements on state officers in search and seizure and interrogation cases as well.
B. The Use Of Supervisory Power To Control Law Enforcement Activities

Although the Supreme Court has occasionally disavowed an intention to use supervisory power as an indirect method of controlling law enforcement activities, these disclaimers are belied by its rulings excluding relevant and reliable evidence, and recognizing the propriety of dismissing charges, in order to deter investigative misconduct. The Court’s fourth amendment exclusionary rule decisions are unmistakable examples of the use of supervisory power for this purpose, as are its rulings suppressing confessions obtained during unlawful delays in arraignment. Other, less obvious, examples are cases in which it has required exclusion of confessions secured in violation of the Massiah “right to counsel” or the Miranda rules for custodial interrogation, and those in which it has approved the dismissal of indictments because of entrapment or similar “overzealous” law enforcement conduct. In each of these types of cases, deterrence has clearly been the Court’s objective, but the supervisory power nature of its ruling has not been so clear. Nevertheless, because these decisions are not mandated by any constitutional or statutory requirement, there is no alternative but to regard them as applications of what the Court believes to be its supervisory authority.

C. Objections To The Use Of Supervisory Power To Control Law Enforcement Activities

The use of supervisory power to control the law enforcement activities of the executive branch is not supported by theoretical justifications for the existence of this type of judicial authority and disregards explicit limitations that Congress has placed on the power of the courts.

Several arguments have been offered to support the proposition that the judiciary has supervisory authority over the administration of justice in the federal courts. Thus, it has been suggested that supervisory power rulings reflect the courts’ inherent authority to adopt procedural and evidentiary rules for the conduct of their business, to fashion remedies for constitutional or statutory violations, to preserve their own integrity, to check improper conduct by the executive branch, and to create federal common law. None of these theories provides a sound legal basis
for decisions that attempt to control the conduct of federal investigators, be that conduct lawful or unlawful.

In situations in which federal investigators violate no constitutional or statutory provision, such as cases involving claims of entrapment or similar "misconduct," the use of supervisory power does not serve to regulate the manner in which the courts carry out their business, in the critical sense of enhancing the efficiency and reliability of the judicial process. And, since no illegality is involved, supervisory power decisions do not function to remedy violations of recognized rights, or to protect the integrity of the courts, or to check unlawful acts by the executive branch. Moreover, since the defenses of entrapment and government "misconduct" were unknown to the common law, the use of supervisory power in these cases does not reflect legitimate judicial recognition of common law doctrine. All it does is violate the constitutional principle of separation of powers by impairing the ability of the executive branch to use constitutionally and statutorily permissible methods in enforcing the laws enacted by the legislative branch.

In cases involving unlawful investigative conduct, the use of supervisory power appears to be equally illegitimate. The search and seizure exclusionary rule and the exclusionary rules of McNabb, Mallory, Massiah, and Miranda are inconsistent with the common law's treatment of illegally obtained evidence and are not the sorts of procedural rules that are arguably within the inherent authority of the judiciary to promulgate for the purpose of facilitating the work of the courts or enhancing the truthfinding process. Furthermore, they are not needed to preserve the integrity of the courts, and they do not, and are not intended to, function in a truly remedial fashion. Moreover, even if the courts have inherent authority to act to prevent unlawful police conduct, they may not employ that power to exclude evidence unless the Constitution requires or Congress permits them to do so. But the Constitution generally does not require exclusion of unlawfully obtained evidence, and Congress has severely restricted the authority of the courts to suppress such evidence.

The enactment of 18 U.S.C. § 3501 plainly undercut the judiciary's authority to exclude voluntary confessions obtained by noncompliance with the McNabb, Mallory, and Miranda rules, and it arguably did the same with respect to incriminating statements produced by violating the expanded "right to counsel" recognized in the Massiah line of cases. Additional and conclusive evidence of the courts' lack of supervisory power to suppress such evidence is Rule 402 of the Federal Rules of Evidence,
which requires the admission of all relevant evidence unless exclusion is required by the Constitution, a federal statute, the Rules of Evidence, or another rule promulgated pursuant to statutory authority.

Finally, it appears that Rule 402 may have also removed the courts' supervisory authority to continue to apply the search and seizure exclusionary rule. The only exception to Rule 402 that supports exclusion of evidence obtained in violation of the fourth amendment is Rule 41(e) of the Federal Rules of Criminal Procedure. However, the exclusionary mandate of that rule seems to have limited practical significance and appears to be ripe for reconsideration by Congress in light of the fact that the theory on which it is premised—that the Constitution requires suppression of evidence obtained by violating the fourth amendment—has been discredited and abandoned.

D. Proposals For Reform And Recommended Implementing Strategies

The federal courts have clearly overstepped the bounds of supervisory authority in cases affecting the conduct of both federal and state law enforcement officials. In general, the judicial branch must be persuaded to display greater respect for the constitutional and statutory limitations on its power to supervise the administration of criminal justice in federal and state courts. More specifically, efforts should be made to reverse judicial decisions employing supervisory power to exclude evidence obtained in violation of the fourth amendment or the rules of Massiah and Miranda, as well as to limit the use of supervisory power to dismiss charges on grounds of entrapment, and to preclude its use in response to "official misconduct" not amounting to entrapment. It is recommended that, to achieve these goals, the Department of Justice undertake a coordinated program of litigative, legislative, administrative, and educational initiatives, as follows:

1. The Department should take full advantage of litigative opportunities in the Supreme Court and lower federal courts to argue that the judiciary has no authority to supervise federal law enforcement conduct unless the Constitution or Congress gives it power to do so.

2. The Department should pursue legislation totally abolishing the search and seizure exclusionary rule. It should also consider proposing an amendment to Rule 41(e) of the Federal Rules of
Criminal Procedure and attempting to secure codification or elimination of the current entrapment defense, as well as statutory delineation of the scope of judicial supervisory authority.

3. The Department should take administrative steps to improve judicial and public perceptions of its ability and willingness to ensure lawful conduct on the part of federal investigators.

4. The Department should expand the public debate on impediments to the truthfinding process in criminal cases by initiating discussions of the courts' lack of authority to impose rules that exclude relevant and reliable evidence, or to recognize defenses based on investigative conduct that does not violate constitutional or statutory standards.
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THE JUDICIARY'S USE OF SUPERVISORY POWER TO CONTROL FEDERAL LAW ENFORCEMENT ACTIVITY

INTRODUCTION

For more than forty years, reviewing courts in the federal system have been wielding a self-declared supervisory power over the administration of criminal justice in the lower federal courts. One of the principal purposes for which they have exerted this purported oversight authority has been to prevent misconduct on the part of federal law enforcement officers by requiring the suppression of evidence and the dismissal of indictments. These efforts by the judicial branch to control the law enforcement activities of the executive branch are troubling in a number of respects. Not only are they devoid of any sound constitutional or other legal basis, they violate the fundamental principle of separation of powers, they disregard the will of Congress, and they frustrate the search for truth in criminal investigations and prosecutions.

This Report examines the doctrine of supervisory power, primarily as it relates to the conduct of federal law enforcement activities. Part I, an overview of the supervisory power doctrine, discusses the dubious legitimacy of supervisory power, examines briefly the origins of the supervisory power doctrine, and describes the general nature and scope of this form of judicial authority. Part II reviews the supervisory power decisions of the Supreme Court and lower courts in cases involving misconduct by federal law enforcement officials. This portion of the Report concludes that the Supreme Court has apparently moderated its

2. The study upon which this Report is based is part of the Office of Legal Policy's "Truth in Criminal Justice Project"—an ongoing effort to identify features of contemporary procedure that unduly hinder the search for truth in criminal cases and to develop specific recommendations for overcoming those impediments.

3. As used in this Report, the term "federal law enforcement activities" refers to the investigative conduct of federal officers but does not include conduct in the course of grand jury investigations. Because of the special relationships between courts, prosecutors, and grand juries, courts may have greater latitude to control the behavior of prosecutors before the grand jury than they do to regulate other kinds of investigative activity.
views of the appropriate application of supervisory power in this context, but lower federal courts generally have not been so circumspect. Part III presents a critical analysis of the supervisory power doctrine, focused on the inadequacy of the various theoretical justifications that have been advanced for the use of supervisory power to control federal law enforcement activities, and on the constitutional, statutory, and other considerations that limit its use for this purpose. The discussion concludes that there appears to be no sound legal basis for the use of supervisory authority by federal courts to establish nonconstitutional and nonstatutory standards to control the law enforcement efforts of the executive branch. Part IV outlines various approaches that might be taken to restore judicial respect for constitutional and statutory limitations on the exercise of supervisory power in this context. Specific recommendations for action are set forth in the Conclusion.

I. OVERVIEW OF THE SUPERVISORY POWER DOCTRINE

A. Supervisory Power Generally

Simply stated, the supervisory power doctrine holds that: (1) in addition to their customary appellate authority, reviewing courts in the federal system possess a general oversight authority with respect to the administration of justice in the lower federal courts; and, (2) in the exercise of this authority, the courts may formulate—on a case-by-case basis—rules of procedure and evidence more stringent than those required by the Constitution or laws of the United States.4

There has been much confusion regarding the source, nature, and scope of supervisory power. The courts have never adequately explained either the provenance or the scope of their supervisory authority. Nor have they fully acknowledged inherent limitations on its exercise. Instead, beguiled by the many attractive qualities of supervisory power, and without pausing to examine questions of legitimacy too closely, they have employed it to implement a wide variety of judicial policy preferences. The most conspicuous applications of supervisory power—and those that have caused the most concern—have occurred in the criminal rather than in the civil law context. One reason for concern is that, while a few exercises of supervisory power may have a legitimate jurisprudential basis, most apparently do not. More serious, some common applications of the supervisory power doctrine have fostered the impression that federal courts may appropriately exercise general supervision over federal law enforcement practices. Not only is this perception clearly erroneous, it has led to judicial decisions that, more often than not, have contributed to the erosion of the search for truth in criminal justice.

B. The Dubious Legitimacy Of Supervisory Power

If the federal judiciary has any supervisory authority, this authority must have its source either in the Constitution or in an Act of Congress. However, neither article III nor any other provision of the Constitution expressly authorizes the courts to oversee the administration of justice in the federal system, and Congress has never empowered the judiciary to exercise such authority. Thus, if supervisory power does exist, it must be an in-

5. See Georgetown Note, supra note 4, at 1050 (“[S]upervisory power has become a catch-all doctrine on which to base decisions designed to maintain ‘civilized standards’ of judicial administration in the federal courts and to update those standards in line with modern sociological thinking.”).

6. In the fourth amendment’s warrant clause, the Constitution does authorize some judicial oversight of the administration of justice by means of searches and seizures, but this area of authorized supervision is quite narrow and under the warrant clause, the courts have power only to reject applications for warrants—not to suppress evidence.

7. The various Rules Enabling Acts that have been promulgated by Congress have permitted legislative rulemaking by the Supreme Court, subject to congressional oversight, as opposed to formulation of rules on a case-by-case basis, but those enabling acts have generally required at least an opportunity for congressional review before the rules adopted by the Court become effective. See, e.g., 18 U.S.C. § 3771 (1982) (rules of criminal procedure to and including verdict); see also Georgetown Note, supra note 4, at 1051.
herent or implied aspect of article III judicial power. In fact, those who have sought to justify the existence of supervisory power have generally relied on this rationale. However, an examination of the original understanding of the term “judicial power,” buttressed by analysis of the concept of “inherent” judicial authority, suggests that such reliance is not well-founded.

Article III, section 1 of the Constitution, which vests “the judicial power of the United States” in the Supreme Court and such inferior courts as Congress chooses to establish, does not specify what is meant by “judicial power,” and nothing in the remainder of article III or elsewhere in the Constitution gives precise meaning to this term. Nor do records and discussions contemporaneous with the drafting and adoption of the Constitution illuminate the matter. Under these circumstances, it has been argued, it is fair to conclude that the term was meant to signify the various forms of judicial authority with which the Framers were familiar.

The types of judicial authority with which the Framers were familiar included authority to establish rules of procedure and evidence. In England, the courts had traditionally formulated rules to govern the conduct of judicial proceedings, including rules relating to the kinds of proof that could be offered and the manner of its presentation. In this country, prior to 1789, the colonial and state courts also developed their own rules to govern the process by which cases were presented and decided. Thus, it might be supposed that the Framers regarded common law rulemaking authority as an inherent component of the judicial power provided in article III. The difficulty with this hypothesis is that it ignores the critical fact that the Framers intended to create a distinctive form of government—one in which powers were limited and dispersed among the separate branches.

8. See Beale, supra note 4, at 1464.
12. See Martin, supra note 9, at 181.
Given this overall intent, one cannot simply postulate "a wholesale transfer of powers from the English courts to the federal judiciary of the United States." It is at least equally conceivable that the Framers did not regard the prerogative of formulating rules of judicial procedure as an inherent aspect of article III judicial power, and that they did not intend to follow English precedent regarding the locus of this authority.

The closest contemporary evidence—legislation enacted by the first Congresses and early Supreme Court opinions—strongly suggest that the latter view is more accurate. The Judiciary Act of 1789 and the Process Act of 1789, which regulated judicial procedure in some detail, show that Congress viewed the establishment of rules of procedure as a legislative function—one that might be delegated to the courts in appropriate cases—rather than inherently and exclusively a judicial function. Early Supreme Court decisions also recognized that the necessary and proper clause authorized Congress to enact rules of judicial procedure, and that the power of Congress to "ordain and establish" inferior federal courts "carries with it the power to prescribe and regulate the modes of proceedings for such courts." The decision in Wayman v. Southard is particularly instructive. There, in upholding a procedural rule adopted by a federal district court pursuant to a delegation of authority by Congress, Chief Justice Marshall relied not on the argument that authority to formulate rules of procedure is an attribute of judicial power, but on the grounds that the necessary and proper clause gave Congress the power to regulate judicial procedure, and that it had validly delegated this power to the courts.

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15. Georgetown Note, supra note 4, at 1053; see also Beale, supra note 4, at 1466 n.217; Hill, supra note 4, at 208; Martin, supra note 9, at 181; Note, The Federal Common Law, supra note 10, at 1516. One of the powers of English courts which the Framers certainly did not intend to bestow on federal courts was authority to issue prerogative writs. See infra note 34.

16. See Beale, supra note 4, at 1467; Weinstein, supra note 13, at 916-17. The argument for legislative supremacy in the rulemaking area is buttressed by the fact that federal courts are courts of limited jurisdiction and, apart from the restricted original jurisdiction of the Supreme Court, they have no jurisdiction except as conferred by Congress.


22. As one commentator has pointed out, the Chief Justice's serious concern over the constitutionality of Congress' delegation of its rulemaking power "would appear to make no sense if one were to assume that the courts already possessed an incidental rule-making power of their own that the act of Congress merely confirmed." Van Alstyne,
Taken together, these early actions by Congress and the Supreme Court are inconsistent with the view that the Framers regarded rulemaking authority as either an inherent or an exclusive element of article III judicial power. Analysis of the concept of “inherent” judicial authority supports this historical conclusion.

The inherent power of a court has been described as that which is “essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.” The notion is that courts must have certain powers if they are to function as courts. The Supreme Court has long recognized that the article III grant of judicial power carried with it such authority as is “necessary to the exercise” of all other judicial authority, such as the power to punish for contempt. However, the Court’s contempt decisions suggest that the concept of inherent judicial authority is quite narrow, encompassing only authority that is indispensable to the exercise of judicial power and excluding authority that is merely helpful or beneficial.

Under this narrow view of inherent judicial authority, it is difficult to maintain that federal courts inherently possess general authority to formulate rules of judicial procedure. Although it seems clear that courts could not function effectively without


23. See Beale, supra note 4, at 1467-68; Van Alstyne, supra note 22, at 124-25.
25. See Frankfurter & Landis, supra note 10, at 1020-22. These indispensable powers are sometimes referred to as being “inherent” in the constitutional grant of judicial authority, see Martin, supra note 9, at 184, and sometimes as “incidental” or “ancillary” to the grant of judicial authority, or “implied” from that grant, see Beale, supra note 4, at 1468-69.
26. See United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); see also Anderson v. Dunn, 17 U.S. (6 Wheat.) 204, 227 (1821) (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. . . ”); Beale, supra note 4, at 1469; Martin, supra note 9, at 183.
27. See Beale, supra note 4, at 1469; Frankfurter & Landis, supra note 10, at 1022 (“As an incident to their being, courts must have the authority ‘necessary in a strict sense’ to enable them to go on with their work.”) (citation omitted); Van Alstyne, supra note 22, at 120. Cf. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821) (recognizing inherent congressional power to punish for contempt as an indispensable power to enable the legislature to perform its duties, but describing this authority as “the least possible power adequate to the end proposed”); Meyers v. United States, 272 U.S. 52, 246-47 (1926) (“A power implied on the ground that it is inherent in the executive, must, according to established principles of constitutional construction, be limited to ‘the least possible power adequate to the end proposed.’ ”) (Brandeis, J., dissenting).
applying some rules of procedure to govern the conduct of their business, it does not follow that the power to formulate procedural rules is indispensable to the proper exercise of judicial authority.\[28]\ So long as necessary rules are provided by some authoritative source—e.g., directly by Congress or indirectly by the example of English and colonial courts—and the rules so provided are compatible with constitutional requirements, there is no need for courts to formulate such rules,\[29]\ and no basis for concluding that authority to do so is indispensable to the exercise of article III judicial power.

In fact, legitimate sources of constitutionally acceptable rules of procedure did exist at the time the federal courts were created and have continued to exist since that time. Beginning with the passage of the first Judiciary and Process Acts in 1789, which contained numerous provisions regulating procedure in the federal courts, and continuing into the 1930s, Congress either established the procedures to be followed by the federal judiciary in criminal cases, directed the federal courts to follow local procedure and practice regarding matters not covered by statutory provisions, or authorized the Supreme Court itself to develop rules of procedure.\[30]\ Although Congress did not specifically address the rules of evidence to be applied in federal trials, this omission did not require the formulation of evidentiary rules pursuant to some sort of inherent judicial power. The courts could have borrowed rules of evidence from English and colonial courts, or adopted the rules in force in state courts in 1789.\[31]\ In fact, this is what they did in the early years.\[32]\ And,

\[28]\ See Martin, supra note 9, at 182.
\[29]\ See Beale, supra note 4, at 1469 n.235. It has been argued that “[t]he power to make rules of evidence is an indispensable component of the judicial power for if all evidence law were made outside the courts, evidence rules could be fashioned that would prevent courts from fulfilling their constitutional function of deciding controversies.” Martin, supra note 9, at 183. One answer to this argument is that “[T]he Anglo-American experience with rulemaking demonstrates no need for the courts to have unfettered control over procedure through rulemaking.” Weinstein, supra note 13, at 923. Another answer is that rules incompatible with the courts’ discharge of their article III functions would be unconstitutional. See United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1872) (statute forbidding Court of Claims to consider evidence of presidential pardons for civil war activities is an unconstitutional encroachment on the courts’ article III powers).
\[30]\ See Beale, supra note 4, at 1436-40.
\[31]\ See id. at 1469 n.235.
\[32]\ See Hill, supra note 4, at 208; Martin, supra note 9, at 174. Some years later, the Supreme Court concluded that Congress, when it established the lower federal courts in the Judiciary Act of 1789, intended those courts to follow then existing state evidentiary rules. The Court reasoned that “it must have been the intention of Congress to refer [the new courts] to some known and established rule,” and that “the only known rule upon
although it appears that from time to time the courts indulged
in the common law mode of developing new rules and modifying
old rules on a case-by-case basis,\(^3\) their periodic resort to this
practice does not demonstrate that it was necessary for them to
do so in order to carry out their constitutional responsibilities.

More recently, Congress has adopted Rules Enabling Acts, au-
thorizing the Supreme Court to promulgate rules of civil and
criminal procedure. Also, in 1975, Congress adopted, in modified
form, the Federal Rules of Evidence.

To summarize, neither history nor logic provides much sup-
port for the proposition that rulemaking authority is an inherent
component of article III judicial power.\(^3\) Since this proposition
is the mainstay of the case for inherent supervisory
power,\(^3\) it
follows that the legitimacy of supervisory power is dubious to
say the least. Rather than being an inherent attribute of tradi-
tional judicial power within the original meaning of the Consti-
tution, the concept of supervisory power appears to have been a
post-constitutional addition, and—as will be seen in the follow-
ing section—a relatively recent one at that.\(^3\)

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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.”
the Supreme Court to regulate “forms and modes of taking and obtaining evidence” in
1842, but this power went unused and was revoked in 1872, by which time Congress had
begun to prescribe statutory rules of evidence. See C. Wright & K. Graham, Federal
with the slow pace of legislative reform of outmoded evidentiary rules, the Court, in the
mid-1930s decided that, although Congress had the power to adopt rules of evidence, the
courts could—in the absence of congressional action—reevaluate the common law rules
and modify them to better promote the search for the truth. See Wolfe v. United States,
291 U.S. 7 (1934); Funk v. United States, 290 U.S. 371 (1933).

33. See C. Wright & K. Graham, supra note 32, § 5003, at 45.
34. Even if it could be established that the federal courts inherited some sort of com-
mon law rulemaking power from their English ancestors, they could not have inherited
more than the common law courts had to bequeath. Except for the power to issue pre-
rogative writs, see 4 Coke, Institutes of the Law of England § 74 (1797); Georgetown
Note, supra note 4, at 1055; Northwestern Comment, supra note 4, at 614, which is not
an apt precedent for the federal courts in this country, see Hill, supra note 4, at 208;
Georgetown Note, supra note 4, at 1055-56, the legacy of those courts appears to have
been limited to authority to develop rules of a very technical, housekeeping nature, such
as rules governing the filing of pleas and the making up of the record after trial. See
Georgetown Note, supra note 4, at 1055.

35. Other rationales that have been offered for the existence of supervisory power are
considered infra Part III.A.3, in relation to the question of the legitimacy of supervisory
power as a device for controlling law enforcement activities.

36. See Georgetown Note, supra note 4, at 1056.
C. The Origins Of The Supervisory Power Doctrine

The supervisory power doctrine, as it is known today, is commonly regarded as having originated with Justice Frankfurter's announcement in *McNabb v. United States* that:

[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force.\(^{37}\)

In *McNabb*, the Court employed this self-declared supervisory power\(^{38}\) to require the exclusion of incriminating statements it thought had been obtained from the defendants in flagrant disregard of statutory prompt arraignment requirements intended to check resort to secret interrogation and other "third degree" practices.\(^{39}\) The Court expressly declined to rest its decision on constitutional grounds,\(^{40}\) and it is clear that the ruling was not a matter of statutory construction—at least not in any conventional sense—since the Court conceded that "Congress has not explicitly forbidden the use of evidence so procured." Nevertheless, the Court reasoned, exclusion was required in order not to "stultify" congressional policy, as well as to avoid "making the courts themselves accomplices in willful disobedience of law."\(^{41}\) In reaching this conclusion, the Court added, it was confining itself to its "limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases."\(^{42}\) It was not, it claimed, "concerned with

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37. 318 U.S. 332, 340 (1943).
38. The Court denied that it was creating a new form of judicial authority: "In the exercise of supervisory authority over the administration of justice in the federal courts, [citation omitted] this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." 318 U.S. at 341.
39. *Id.* at 342-45.
40. *Id.* at 340.
41. *Id.*
42. *Id.* at 347.
law enforcement practices except insofar as courts themselves become instruments of law enforcement.”

D. The Nature And Scope Of Supervisory Power

From a judicial perspective, supervisory power has a number of useful and attractive qualities. To begin with, “oversight” is essentially an amorphous concept. Unless standards or limits are imposed to govern its exercise, its meaning can be expanded or contracted at the will of the overseer. Although, as will be seen in the discussion below, some such standards and limits do in fact exist, the Supreme Court’s failure clearly to articulate the source and scope of this form of judicial authority has led to confusion and has enabled the courts to behave as if they do not.

One aspect of supervisory power that remains unclear is which courts possess such authority. The McNabb opinion was ambiguous on this question. At one point, the Court appeared to suggest that supervisory power is limited to the Supreme Court, but elsewhere the Court indicated that lower federal courts also have such power. The Court has since endorsed the existence of supervisory power at the appellate court level, but it is not

43. Id. The McNabb opinion was curious in several respects, apart from its bald assumption of the existence of general oversight authority over the administration of criminal justice in the federal courts. First, the Court reached out to decide, sua sponte, an issue not raised by the defendants. See 318 U.S. at 349 (Reed, J., dissenting). Second, the Court was mistaken in its belief that the defendants had not been arraigned promptly. In fact, as demonstrated during the proceedings on remand, the defendants were taken before a judicial officer and arraigned within a few hours after their arrest. Accordingly, their confessions were admitted into evidence at a new trial, they were again convicted, and their convictions were again upheld on appeal. See United States v. McNabb, 142 F.2d 904 (6th Cir. 1944). Third, the Court also seems to have misconstrued the purpose of the statutory requirement of prompt arraignment before the nearest judicial officer. That requirement apparently was intended to prevent federal marshals from increasing their fees by transporting prisoners farther than necessary. See Inbau, The Confession Dilemma in the United States Supreme Court, 43 ILL. L. REV. 442, 445-48 (1948).

44. See Beale, supra note 4, at 1434; Hill, supra note 4, at 193; Harvard Note, supra note 4, at 1166-67.

45. See infra Parts III.B.-C.

46. See McNabb v. United States, 332 U.S. at 340-41 (asserting that the scope of its reviewing authority included supervisory power over the administration of criminal justice in the federal courts).

47. See id. at 347 (referring to review of “the standards formulated and applied by federal courts in the trial of criminal cases”).

48. See Thomas v. Arn, 474 U.S. 140, 146 (1985) (“[C]ourts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation.”); Cupp v. Naughten, 414 U.S. 141, 146 (1973) (An appellate court may exercise supervisory power to require a trial court “to follow procedures
clear whether judicial supervision is exclusively an appellate function or whether it is shared by the district courts as well.49 The cases also demonstrate judicial uncertainty concerning the scope of supervisory power. On the one hand, *McNabb* and most other supervisory power decisions claim that the object to be supervised is "the administration of criminal justice in the federal courts."50 On the other hand, there have been aberrant opinions referring to the Supreme Court's "supervisory powers over federal law enforcement"51 and to a district court's "powers to supervise the law enforcement officials and the United States Attorney within its jurisdiction."52

The confusion and absence of definitive guideposts in this area have enabled some courts to take an expansive view of their supervisory authority. These courts have felt relatively free to employ that power to adopt rules that they believe will best promote the ends of justice and sound public policy. In effect, they have equated supervisory power with discretion to do good.

The courts have also been captivated by the versatility and flexibility of supervisory power. The doctrine can be applied in all manner of situations merely by avowing a purpose to enhance the administration of justice. Moreover, supervisory power serves nicely as a basis for rulings that the courts might be hesitant to ground on constitutional theory. Since—at least theoretically—supervisory power decisions apply only in federal proceedings,53 they entail no risk of friction between federal and

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49. At least two courts of appeals believe that district courts also have supervisory power. United States v. Premises Known as 603 Taylor Ave., 584 F.2d 1297 (3d Cir. 1978) (referring to the supervisory power of the district court); Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964) (approving the district court's use of "local supervisory power").


52. United States v. Premises Known as 603 Taylor Ave., 584 F.2d at 1302.

53. See, e.g., *Mapp* v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting) ("[N]o one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts."); *Townsend* v. Burke, 334 U.S. 736, 738 (1948) (the *McNabb* rule does not apply to trials in state courts); *McNabb* v. United States, 318 U.S. at 340 (contrasting the scope of review of state court convictions, which may only be reversed for fourteenth amendment violations, with that of federal convictions, which may be upset in the exercise of supervisory power); *Smith* v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Doyle* v. Ohio, 426 U.S. 610, 618 n.8 (1976) (state court cases "provide no occasion for the exercise of our supervisory power"); *cf. Baker* v. *Wingo*, 407 U.S. 514, 523 (1972) ("We do not establish procedural rules for the States, except when mandated by the Constitution."). Despite such periodic disclaimers, however, the Court continues to apply *Mapp* and *Miranda* to the states,
state courts. Because such rulings are nonconstitutional, they are far more amenable to revision by the courts or by Congress if they prove to be impractical or otherwise undesirable. Finally, supervisory power permits the experimental adoption of more rigorous standards for federal proceedings than those minimally required by the Constitution. If the experiment succeeds, the courts frequently seem to believe, those standards can then be placed on a constitutional footing and applied to the states.\footnote{54}

These advantages of the supervisory power doctrine have led to its frequent use for a variety of purposes. Focusing for the moment on Supreme Court cases,\footnote{55} supervisory power decisions have dealt with such matters as summary contempt,\footnote{56} jury selection,\footnote{57} discovery and disclosure of evidence,\footnote{58} acceptance of guilty pleas,\footnote{59} the use of tainted evidence,\footnote{60} the limits of permi-

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54. For example, the Supreme Court's constitutional rulings in state cases that due process was violated by use of the defendant's prior silence, after the receipt of \textit{Miranda} warnings, to impeach his exculpatory trial testimony, \textit{see} Doyle v. Ohio, 426 U.S. 610 (1976), and that the "fair cross section" standard is an essential element of the sixth amendment right to trial by jury, \textit{see} Taylor v. Louisiana, 419 U.S. 522 (1975), were presaged by supervisory power decisions on these points in Hale v. United States, 422 U.S. 171 (1973) and Ballard v. United States, 329 U.S. 187 (1946).

55. Supervisory power decisions by lower federal courts are discussed \textit{infra} Part II.C.


59. \textit{See} McCarthy v. United States, 394 U.S. 459 (1969) (vacating a guilty plea because the district court did not personally address the defendant to determine whether he understood the nature of the charge and the consequences of his plea).

60. \textit{See} Masarosh v. United States, 352 U.S. 1 (1956) (requiring a new trial because the testimony of a key prosecution witness had subsequently been discredited by his untruthful testimony in other judicial proceedings).
sible cross-examination, and—most importantly—out-of-court misconduct in the acquisition of evidence.

To a considerable degree, these decisions reflect the Court's concern with the accuracy and fairness of federal judicial proceedings. Certainly, this seems true of the contempt, jury selection, discovery, guilty plea, tainted evidence, and cross-examination cases. In each of these cases, the Court adopted rules that it believed would enhance the fairness of criminal trials or the reliability of the truthfinding process. But the government misconduct cases are another matter. The avowed purposes of the decisions in McNabb, Rea, and Elkins, for example, were to provide remedies for recognized rights, to protect the integrity of the courts, and to deter official misconduct. Whether federal courts have authority to seek these goals through self-declared supervisory authority is a questionable proposition that is considered in Part III below. Suffice it to observe here that the method chosen to effect these aims—exclusion of relevant and apparently reliable evidence—runs counter to the goal of ensuring the accuracy and reliability of the truthfinding process. The Supreme Court has recognized this anomaly and, in two of its more recent supervisory power decisions, has made it clear that the search

61. See Grunewald v. United States, 353 U.S. 391 (1957) (holding it an abuse of discretion to permit showing on cross-examination that the defendant had claimed his fifth amendment privilege before the grand jury concerning questions he answered at trial); United States v. Hale, 422 U.S. 171 (1975) (holding it improper to cross-examine the defendant regarding his failure when arrested to offer the exculpatory explanation he tendered at trial).

62. See, e.g., United States v. Russell, 411 U.S. 423 (1973) (refusing to broaden the defense of entrapment to encompass "overzealous law enforcement" directed at a predisposed defendant); Lopez v. United States, 373 U.S. 427 (1963) (declining to require suppression of evidence obtained by means of surreptitious electronic surveillance); Elkins v. United States, 364 U.S. 206 (1960) (overruling the "silver platter" doctrine, which had permitted federal courts to accept evidence seized illegally by state officers); Rea v. United States, 350 U.S. 214 (1956) (enjoining federal officer from testifying in a state trial about evidence that had been seized unlawfully by federal agents and suppressed in an earlier federal prosecution).

63. See Elkins v. United States, 364 U.S. at 216-23; Rea v. United States, 350 U.S. at 217; McNabb v. United States, 318 U.S. 333, 345, 346 (1943); United States v. Hasting, 461 U.S. 497, 505 (1983) ("The purposes underlying the use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights . . . to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . and finally, as a remedy designed to deter illegal conduct." [citations omitted]); cf. United States v. Payner, 447 U.S. 727, 735 n.8 (1980) ("[T]he supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity.").

64. See infra Part III.
for truth is the predominant goal, at least as long as no right of
the defendant has been violated. 65

II. USE OF SUPERVISORY POWER TO CONTROL LAW
ENFORCEMENT ACTIVITIES

Although the Supreme Court claimed in McNabb not to be
"concerned with law enforcement practices except insofar as
courts themselves become instruments of law enforcement," 66
consideration of the forces that led to the McNabb decision 67
makes it clear that this disclaimer was disingenuous. Skepticism
is also warranted by subsequent decisions in which the Supreme
Court and lower federal courts have either used or threatened to
use their supervisory power in ways that are plainly intended to
influence the conduct of law enforcement officials.

A. The Background Of McNabb

During the two decades immediately preceding the McNabb
decision, the Supreme Court was becoming increasingly aware of
and concerned about the prevalence of a number of disturbing
investigative practices. It was becoming apparent that, in enforc-
ing recently adopted federal laws that criminalized consensual
conduct, 68 federal agents were relying heavily on intrusive
and—in the view of some observers—potentially unfair investi-
gative techniques such as electronic surveillance and the use of
undercover agents and informants. Also, as a result of the 1931
Wickersham Report, public attention began to focus on the ap-
parently common use by state and local police of abusive tactics
during the interrogation of suspects—illegal detention, relentless

65. See United States v. Payner, 447 U.S. at 734 (use of supervisory power "to en-
force ideals of governmental rectitude" by excluding relevant evidence seized in violation
of a third party's fourth amendment rights "would impede unacceptably the truth-find-
ing functions of judge and jury"); Lopez v. United States, 373 U.S. at 440 (the Court's
supervisory power to exclude lawfully obtained material evidence must be "sparingly ex-
ercised" lest it interfere with the function of a criminal trial—determination of the truth
or falsity of the charges).
66. 318 U.S. at 347. The Court reiterated this disavowal the following year in United
States v. Mitchell, 322 U.S. 65, 70-71 (1944) ("Our duty in shaping rules of evidence
relates to the propriety of admitting evidence. This power is not to be used as an indirect
mode of disciplining misconduct.").
67. See Beale, supra note 4, at 1441-43.
68. E.g., the eighteenth amendment, the Mann Act, and the Harrison Narcotics Act.
questioning, physical brutality, lengthy incommunicado interrogation, and the like.

During the same period, several members of the Supreme Court—most notably Justices Brandeis and Holmes—were urging the Court to deal forthrightly with misconduct on the part of federal law enforcement officers by refusing to accept illegally obtained evidence. Until McNabb, however, a majority of the Court adhered to the common law view that the admissibility of evidence ordinarily is not dependent on the legality of the means used to obtain it. Thus, in Olmstead v. United States, the Court refused to suppress wiretap evidence because the wiretapping, although "unethical," was held not unconstitutional. The Court concluded that "without the sanction of congressional enactment, [we cannot] subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured." The Court acknowledged that it was a question of policy—to be determined by the legislature—whether evidence should be excluded because of the means used to obtain it.

The McNabb decision represented a clear repudiation of this view of limited judicial authority, and subsequent Supreme Court decisions have confirmed the Court's willingness to intrude upon the prerogatives of the other branches of government under the guise of reviewing "standards formulated and applied by federal courts in the trial of criminal cases."

69. See, e.g., Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting); id. at 483-85 (Brandeis, J., dissenting); Casey v. United States, 276 U.S. 413, 423-25 (1928) (Brandeis, J., dissenting); Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

70. The Court did not follow the common law rule in cases in which evidence had been secured through fourth amendment violations, because, at the time, it believed that exclusion of such evidence was constitutionally mandated. See Weeks v. United States, 232 U.S. 383 (1914). The Court has since concluded that exclusion is not constitutionally required. See United States v. Leon, 468 U.S. 897, 905-06 (1984); United States v. Calandra, 414 U.S. 338, 347-48 (1974).

71. 277 U.S. 438 (1928).

72. Id. at 468.

73. Id.

74. It is true that in its earlier Nardone opinions, see Nardone v. United States, 302 U.S. 379 (1937); 308 U.S. 338 (1939), the Court had excluded evidence obtained directly and derivatively from telephone conversations that were intercepted in violation of a federal statute. However, unlike the opinions in those cases, which purported merely to enforce congressional intent, the McNabb opinion asserted a general authority in the judiciary to establish "civilized standards of procedure and evidence" for the federal courts. McNabb v. United States, 318 U.S. 332, 340 (1943).

75. McNabb v. United States, 318 U.S. at 347.
B. Post-McNabb Supreme Court Decisions

Since 1943, the Supreme Court has invoked its supervisory power on numerous occasions, but in only a handful of cases has it done so to control the conduct of federal investigators. The few cases in which it has overtly employed supervisory power for this purpose have involved violations by federal agents of provisions of the Federal Rules of Criminal Procedure relating to prompt arraignment\(^7\) and unlawfully seized evidence.\(^7\) On the other hand, where federal agents did not violate the law or the defendant’s constitutional rights,\(^7\) the Court has refused to exercise its supervisory power to enforce “ideals of governmental rectitude.”\(^7\) The principal cases reflecting the development of the Court’s views regarding the propriety of employing supervisory power to prevent various kinds of misconduct by federal investigators are discussed below.

1. Delay in Arraignment

In *Upshaw v. United States*\(^8\) and *Mallory v. United States*,\(^9\) the Court employed the general reasoning of *McNabb* to reverse theft and rape convictions based on confessions that had been obtained in violation of the requirement of Rule 5(a), Fed. R. Crim. P., that an arrested person be taken before the nearest committing officer “without unnecessary delay.” Concluding in each case that this requirement was intended to protect individual rights, the Court held that effectuation of congressional intent required that the confessions be excluded from evidence. Neither opinion expressly invoked the Court’s supervisory power, but the references to *McNabb*, together with the absence

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80. 335 U.S. 410 (1948).
of any requirement of exclusion under the Constitution or a federal statute or rule, leave little doubt that these were supervisory power decisions, masquerading as "statutory construction."

2. Search and Seizure

The Court has also made significant use of its supervisory power in the fourth amendment area. For example, in *Rea v. United States*, in an opinion by Justice Douglas, the Court employed its supervisory power to enjoin a federal narcotics agent from making available in a state prosecution evidence previously excluded from federal proceedings because the warrant under which it had been seized was invalid under Rule 41, Fed. R. Crim. P. Justice Douglas attempted to justify this use of what he referred to as "our supervisory powers over federal law enforcement agencies," by arguing that the Court was merely enforcing the federal rules governing searches and seizures against those owing obedience to them. Those rules, he said, "prescribe standards for law enforcement . . . designed to protect the privacy of the citizen," and "[t]hat policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings." Four justices dissented, led by Justice Harlan who observed in part: "So far as I know, this is the first time it has been suggested that the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such."

Having used a broad conception of supervisory power to thwart the creation of a reverse "silver platter" doctrine in *Rea*, the Court then employed a narrower version of the same authority to overturn the "silver platter" doctrine itself in *Elkins v. United States*. In an opinion by Justice Stewart, 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." To justify this exercise of what he characterized as "the Court's supervi-
sory power over the administration of criminal justice in the federal courts," Justice Stewart made reference to considerations of deterrence, federalism, and "the imperative of judicial integrity."

Subsequent decisions have made it clear that the search and seizure exclusionary rule itself is a product of the Court's supervisory power, rather than a constitutional requirement as originally suggested by Weeks v. United States, and subsequently reaffirmed in Mapp v. Ohio. Thus, in United States v. Calandra, the Court characterized the exclusionary rule as "a judicially-created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." In United States v. Janis, the Court declined to extend the exclusionary rule to civil tax proceedings on the ground that "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." Both of these points—the nonconstitutional status of the exclusionary rule and its supervisory power basis—were recently reaffirmed in United States v. Leon, and INS v. Lopez-Mendoza, respectively.

The relationship between supervisory power and the exclusionary rule was also considered in United States v. Payner. There, the district court had employed its supervisory power to exclude evidence of tax fraud obtained by deliberately violating

88. Id. at 216.
89. Id. at 222.
90. 232 U.S. 383 (1914).
96. The Miranda rules have undergone a similar metamorphosis. Miranda v. Arizona, 384 U.S. 436 (1966), held that the fifth amendment would necessarily be violated if statements were obtained in a custodial interrogation in which the rules announced in that case, or equally effective alternatives, were not followed. However, the Court has since rejected the view that compliance with Miranda or equivalent rules is constitutionally required. See Michigan v. Tucker, 417 U.S. 433 (1974); Oregon v. Elstad, 470 U.S. 298 (1985). As a result, the only conceivable basis for continued application of the Miranda rules is the Court's supervisory power, yet—even assuming that the Court has such power—it is clear that the Court has no supervisory jurisdiction over the administration of justice in state courts. See Office of Legal Policy, U.S. Dep't of Justice, 'Truth in Criminal Justice' Series, Report No. 1, The Law of Pretrial Interrogation Part II.C.1 (1986) [hereinafter Report No. 1]; reprinted in 22 U. Mich J.L. Rev. 437 (1989); supra note 53.
the fourth amendment rights of a third party, not the defendant. In an opinion by Justice Powell, the Supreme Court reversed, on the grounds that this unrestrained use of supervisory power conflicted with the careful balance of interests embodied in the Court's fourth amendment standing decisions. Pointing out 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 rather than the Fourth Amendment," Justice Powell concluded that such an extension of the supervisory power "amounts to a substitution of individual judgment for the controlling decisions of this Court." That approach, he said, "would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule to enforce the Fourth Amendment," "in disregard [of] the considered limitations of the law [they are] charged with enforcing."

3. Electronic Surveillance

The two Nardone decisions appear to be the earliest examples of the Supreme Court's use of supervisory power to exclude illegally obtained evidence. At issue in these cases was the ad-

98. The Court's opinion noted that "[t]he supervisory power is applied with some caution even when the defendant asserts a violation of his own rights," id. at 734-35 (citing United States v. Caceres, 440 U.S. 741 (1979), a case in which the Court refused to exclude evidence tainted by violation of internal IRS regulations concerning the use of electronic surveillance).

99. United States v. Payner, 447 U.S. at 736. Justice Powell rejected the argument of three dissenting Justices that the need to protect the integrity of the federal courts alters the balance of interests under a supervisory power analysis. Agreeing that "supervisory power serves the 'two-fold' purpose of deterring illegality and protecting judicial integrity," he pointed out that "the Fourth Amendment exclusionary rule serves precisely the same purposes." Because there had been no violation of the defendant's rights, he added, "the interest in preserving judicial integrity and in deterring [illegal] conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact." Id. at 735 n.6.

100. Id. at 737.

101. Id. at 733.

102. Id. at 737. In a concurring opinion, Chief Justice Burger added: "Orderly government under our system of separation of powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts." Id. at 737.


104. Both Nardone opinions purported to construe congressional intent, and neither opinion mentioned supervisory power, but Nardone II was subsequently identified as a supervisory power decision in McNabb v. United States, 318 U.S. 332, 341 (1943). Assuming that characterization to be correct, it would seem to apply to Nardone I as well.
missibility of evidence obtained directly and derivatively by wiretapping in violation of the Communications Act of 1934. In *Nardone I*, relying on the plain words of the statute and what it took to be the desire of Congress to forbid law enforcement methods "deemed inconsistent with ethical standards and destructive of personal liberty," the Court held that testimony concerning the contents of unlawfully intercepted telephone conversations was inadmissible. In *Nardone II*, the Court reached the same conclusion with respect to evidence derived from those contents: "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'"  

However, in cases in which the electronic surveillance was not unlawful, the Court has refused to exercise its supervisory power to require the exclusion of evidence. Thus, in *On Lee v. United States*, the Court rejected an argument that a narcotics conviction should be reversed because it was based on testimony of an agent who overheard incriminating post-indictment statements made by the defendant to an old acquaintance who was cooperating with the government and had been "wired for sound." Writing for the Court, Justice Jackson held that this method of acquiring evidence did not violate the fourth amendment or the Federal Communications Act. Nor, he said, did it call for exclusion "as a means of disciplining law enforcement officers," since—unlike the situation in *McNabb*—"neither agent nor informer violated any federal law." Under these circumstances, he concluded, there were no reasons of public policy sufficiently strong to warrant a departure from the primary evidentiary criteria of relevancy and trustworthiness.

Similarly, in *Lopez v. United States*, the Court refused to use its supervisory power to reverse a bribery conviction based on lawful recordings of the defendant's conversations with an IRS agent. In the view of Justice Harlan, who wrote the majority opinion, "the courts' inherent power to refuse to receive material evidence is a power that must be sparingly exercised," in order to permit proper fulfillment of the function of a criminal
trial—determination of the truth.\footnote{112} Here, Justice Harlan concluded, where there had been no manifestly improper conduct by federal officials, \textit{i.e.}, no violation of constitutionally protected rights and no violation of federal statutes or rules of procedure, application of supervisory power to exclude relevant, competent evidence "would be wholly improper."\footnote{113}

\section{4. Entrapment and Similar Conduct}

Defendants in federal criminal cases have occasionally argued that irrefutable proof of their guilt should be disregarded because they would not have acted unlawfully but for improper conduct by government agents. In \textit{Sorrells v. United States},\footnote{114} the Court accepted this proposition, at least to the extent of recognizing a defense of entrapment where government officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."\footnote{115} The Court has been sharply divided, however, as to both the source and the scope of the defense.

The majority in \textit{Sorrells}, claiming to be simply construing the statute "so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose,"\footnote{116} adopted a subjective view of en-
trapment. In a separate opinion, Justice Roberts criticized the majority's "strained and unwarranted construction of the statute," and argued that, on the basis of its "inherent right . . . not to be made an instrument of wrong," the Court should recognize entrapment as a defense whether or not the defendant was predisposed, in order to "protect itself and the government from such prostitution of the criminal law."\footnote{117}

The controversy on these points was renewed in \textit{Sherman v. United States}.\footnote{118} There, a majority of the Court, led by Chief Justice Warren, refused to reconsider the Sorrells concept of entrapment and its supposed roots in legislative intent,\footnote{120} while a four-member minority, led by Justice Frankfurter, describing the legislative intent theory as "sheer fiction," argued for recognition of an objective view of entrapment in the exercise of the Court's "supervisory jurisdiction over the administration of criminal justice."\footnote{121}

The debate was resumed, and broadened to include constitutional issues, in \textit{United States v. Russell},\footnote{122} a case in which a predisposed defendant had been convicted of illegally manufacturing "speed" with the assistance of an undercover agent who had supplied an essential ingredient that was difficult to obtain lawfully. In an opinion by Justice Rehnquist, a 5-4 majority of the Court reinstated the conviction, which had been reversed by the court of appeals on entrapment and due process grounds. The most significant aspect of Justice Rehnquist's discussion of the entrapment issue\footnote{123} was his reaction to several lower court

detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." \textit{Id.} at 448.\footnote{117}

The subjective view of entrapment focuses on the state of mind of the defendant, rather than on the conduct of the government and denies him the defense if he was predisposed to commit the crime charged. \textit{Id.} at 451.\footnote{118}

This approach, which focuses on the wrongdoing of the government, has come to be known as the objective view of the entrapment defense. This view concedes that the defendant has committed the crime in question, but holds that "[w]hatever may be the demerits of the defendant or his previous infractions of the law," he should not be held liable if the government instigated and induced the offense. \textit{Id.} at 458-59.\footnote{119}

\textit{Sherman} was a narcotics case in which the Court ruled that, in light of the equivocal nature of the evidence of predisposition, the government's conduct in importuning the defendant to commit the offense was entrapment as a matter of law. \textit{Id.} at 373-76.\footnote{120}

\textit{Id.} at 372, 376.\footnote{121}

\textit{Id.} at 379, 380.\footnote{121}

\textit{411 U.S. 423} (1973).\footnote{122}

The Court again refused to reconsider the subjective theory of entrapment and asserted that it rested on the intent of Congress. \textit{Id.} at 433, 435.\footnote{123}
decisions that had broadened the entrapment defense to bar prosecutions because of the government's excessive zeal in aiding the commission of the offense. Disapproving this development, Justice Rehnquist declared that the defense of entrapment enunciated in Sorrels and Sherman was not rooted "in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement,'" and "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." 124 The Court also rejected the defendant's constitutional argument that the government's involvement in the manufacture of the drug was so pervasive that his criminal prosecution violated the fundamental principles of due process. Pointing out that the defendant could have obtained the necessary ingredient from other sources, Justice Rehnquist concluded that the agent's contribution of that ingredient to a criminal enterprise already in process was "scarcely objectionable," much less a law enforcement tactic that could be said to violate "fundamental fairness" or be "shocking to the universal sense of justice." 125

The Court's most recent consideration of these issues occurred in Hampton v. United States, 126 a case in which the government had supplied the very heroin for the sale of which the defendant was then prosecuted. However, because the defendant's predisposition to commit the offense was clear, five members of the Court rejected his claim that the government's conduct amounted to either entrapment or a violation of due process. The plurality opinion, written by Justice Rehnquist, dismissed the entrapment issue with the observation that the Court in Russell had "ruled out the possibility that the defense of entrapment could ever be based on governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." 127 Nor was there any due process violation, said Justice Rehnquist, since the police conduct—undertaken in concert with the defendant—"no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in Russell deprive Russell of any rights." 128

124. Id. at 435.
125. Id. at 431-32.
127. Id. at 488-89.
128. Id. at 490-91. Justice Rehnquist added that "[i]f the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not
In a concurring opinion joined by Justice Blackmun, Justice Powell agreed that the government’s supplying of contraband to one later prosecuted for trafficking in contraband did not constitute a per se denial of due process, but was unwilling to concede that due process principles or the Court’s supervisory power could never be used to bar conviction of a predisposed defendant because of outrageous police conduct. Three dissenting Justices, in an opinion by Justice Brennan, agreed with Justice Powell that “Russell does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to make such a defense might be ‘predisposed.’”

C. Lower Court Decisions

Like the Supreme Court, lower federal courts have simply assumed that they possess supervisory power, and have used that authority to compel adherence to judicially favored standards of conduct in a variety of situations, including the law enforcement area. The most frequent applications of “intermediate supervisory power” by the federal courts of appeals have occurred in cases presenting routine evidentiary or procedural questions, and in cases raising the possibility that false or potentially false statements might impair the integrity of the truthfinding process. Less frequent but more troublesome from an executive branch perspective have been decisions in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.” Id. at 490.

129. Id. at 491.
130. Id. at 492-95.
131. Id. at 497.
132. See generally Beale, supra note 4, at 1455-62; Schwartz, supra note 4; CORNELL Note, supra note 4.
133. See CORNELL Note, supra note 4, at 643 & n.5 (characterizing as “intermediate” the supervisory power exercised independently by courts of appeals, as distinct from derivative exercises of supervisory power that merely implement the supervisory power rulings of the Supreme Court).
136. See, e.g., United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) (false information presented to obtain a warrant); see also United States v. Di Bernardo, 552 F. Supp.
which supervisory power has been used to deal with alleged prosecutorial misconduct in connection with grand jury proceedings,\textsuperscript{137} to control the charging discretion of federal prosecutors,\textsuperscript{138} and to enforce ethical or professional standards against attorneys for the government.\textsuperscript{139}

Even more questionable are applications of supervisory power by courts of appeals to control the conduct of federal investigators. Included in this category are decisions requiring investigating agencies to adopt procedures to safeguard discoverable evidence,\textsuperscript{140} decisions requiring the suppression of evidence because of the manner in which it was obtained,\textsuperscript{141} and decisions reversing convictions because the defendant's presence before the

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\item \textsuperscript{137} See, e.g., United States v. Hogan, 712 F.2d 757 (2d Cir. 1983) (conviction reversed because of prosecutor's use in grand jury of hearsay, inflammatory language, speculative references, and false testimony); United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), \textit{cert. dismissed}, 436 U.S. 31 (1978) (perjurious grand jury testimony suppressed for failure to give target warning).
\item \textsuperscript{138} See United States v. Gonsalves, 691 F.2d 1310 (9th Cir. 1982), \textit{vacated}, 464 U.S. 806 (1983) (indictment dismissed because too complex and unmanageable); \textit{see also} United States v. Ottley, 439 F. Supp. 587 (S.D.N.Y. 1977) (indictment dismissed on speedy trial grounds because of failure to join related charges in earlier indictment).
\item \textsuperscript{139} See, e.g., United States v. Premises Known as 603 Taylor Ave., 584 F.2d 1297, 1302 (3d Cir. 1978) ("The district court under its powers to supervise the law enforcement officials and the United States Attorney within its jurisdiction may require the return of property held solely as evidence if the government has unreasonably delayed in bringing a prosecution."); United States v. Poole, 379 F.2d 645 (7th Cir. 1967) (conviction reversed because of prosecutor's failure to reveal FBI report favorable to the defendant); \textit{see also} United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974), \textit{appeal dismissed sub nom.} United States v. Means, 513 F.2d 1329 (8th Cir. 1975) (charges dismissed after trial ended without verdict, because of pattern of prosecutorial misconduct and bad faith during discovery and at trial).
\item \textsuperscript{140} See United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (threatening sanctions for nondisclosure of evidence resulting from loss of the material unless the government establishes vigorous and systematic procedures to preserve all discoverable evidence gathered during a criminal investigation).
\item \textsuperscript{141} See, e.g., United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) (excluding evidence obtained by means of search warrant based on affidavit containing false statements); United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977), \textit{rev'd}, 447 U.S. 727 (1980) (excluding evidence derived from a violation of a third party's fourth amendment rights); United States v. Valencia, 541 F.2d 618 (6th Cir. 1976) (suppressing information obtained from secretary of defendant's attorney); Birdsell v. United States, 346 F.2d 755 (5th Cir.), \textit{cert. denied}, 382 U.S. 963 (1965) (excluding evidence that federal agents had induced foreign agents to gather improperly); Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964) (approving district court's use of "local supervisory power" to exclude evidence obtained during police interrogation in the absence of counsel).
\end{itemize}
court was secured by unlawful means, or because government informants were paid on a contingent fee basis.

However, the opinions of several appellate courts and individual judges reflect a growing awareness that separation of powers principles and other limitations restrict the use of supervisory power to control executive branch activities. The Second Circuit has recognized, for example, that "the federal judiciary's supervisory power over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all." And two members of the D.C. Circuit have declared that "we lack authority, where no specific constitutional right of the defendant has been violated, to dismiss indictments as an exercise of supervisory power over the conduct of federal law enforcement agents." In addition, Judge Bork of the D.C. Circuit has perceptively noted that, in light of Rule 402, Federal Rules of Evidence, which makes no exception for the exclusion of evidence solely pursuant to a supervisory power, "there is doubt as to our continued authority ever to reject any evidence under that power."

D. Summary

The most liberal construction and application of the supervisory power doctrine by the Supreme Court occurred in Rea v. United States. There, despite McNabb's disclaimer of direct

142. See United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (approving use of supervisory power to dismiss charges against defendant if he could prove that jurisdiction over his person had been obtained by kidnapping him in a foreign country and torturing him before bringing him to the United States for trial).

143. See United States v. Cervantes-Pacheco, 800 F. 2d 452 (5th Cir. 1986) (en banc); United States v. Waterman, 732 F.2d 1527, vacated en banc by an equally divided court, 732 F.2d 1533 (5th Cir. 1984); Williamson v. United States, 311 F.2d 441 (5th Cir. 1952).

144. United States v. Lau Tung Lam, 714 F.2d 209, 210 (2d Cir.), cert. denied, 464 U.S. 942 (1983) (refusing to dismiss drug importation and conspiracy charges on the grounds that government's agents "created the federal nexus which permitted prosecution").


146. Rule 402 directs federal courts to admit relevant evidence "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."

concern with law enforcement practices, Justice Douglas’ opinion for the Court asserted and exerted supervisory authority “over federal law enforcement agencies.” Since then, though a minority of the Court’s members have tried to perpetuate the Rea view, the Court as a whole has taken a more modest approach. None of its supervisory power opinions has actually required the exclusion of evidence or the dismissal of charges since Elkins in 1960, and its more recent decisions—particularly those in Lopez, Russell, and Payner— suggest, both in rhetoric and result, a greater awareness of the limitations on this form of judicial authority.

That awareness apparently remains imperfect, however. The Court has yet to confront explicitly the doctrinal and legislative restrictions on the use of supervisory power to control law enforcement activities. This failure, which may be due only to the lack of a suitable opportunity, is perhaps most obvious in search and seizure cases, where the Court seemingly continues to regard imposition of an exclusionary rule in response to fourth amendment violations as an appropriate exercise of its supervisory authority. It is disquieting also that five members of the Court in Hampton were unwilling to eschew the exercise of supervisory power to prevent the use of lawful investigative techniques against defendants predisposed to criminal activity.

Lower federal courts have shown a greater tendency than the Supreme Court to employ supervisory power liberally as an antidote to disfavored investigative practices, not limiting that intervention to cases in which government agents violated the defendant’s constitutional rights or otherwise acted unlawfully. However, some lower courts and judges appear to recognize the need for cautious application of intermediate supervisory power. That recognition may spread in the wake of the Supreme Court’s warnings in Payner and Hasting that supervisory power is not to be used to upset the careful balance of interests reflected in its fourth amendment and harmless error decisions. Even so, the question remains whether there is any sound legal basis upon which the Supreme Court and lower federal courts

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148. See, e.g., Lopez v. United States, 373 U.S. 427, 462 (1963) (dissenting opinion of Justice Brennan, joined by Justices Douglas and Goldberg, referring to “the scope of supervisory power over federal law enforcement.”).

149. United States v. Hasting, 461 U.S. 499 (1983). In Hasting, the Court held that lower courts may not evade the harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967), by using supervisory power to discipline prosecutors for continuing violations of the rule in Griffin v. California, 380 U.S. 609 (1965), prohibiting comment on a defendant’s failure to take the stand.
may exercise supervisory power to control federal law enforcement activities. That question will be addressed in the following section of this Report.

III. OBJECTIONS TO THE USE OF SUPERVISORY POWER TO CONTROL LAW ENFORCEMENT ACTIVITIES

As has been noted above, the Supreme Court and lower federal courts have simply assumed that they possess a kind of oversight authority with respect to the administration of criminal justice that is sufficiently broad to permit rulings designed to control the law enforcement activities of the executive branch. That assumption is not correct. Examination of the theoretical justifications for the existence of judicial supervisory power, and reference to the recognized limitations on the exercise of that authority, make clear that there is no sound jurisprudential basis for the use of supervisory power in this manner.

A. The Inadequacy Of Theoretical Justifications

As noted above, supervisory power is generally believed to be an inherent or implied aspect of the judicial authority conferred by article III of the Constitution.150 Various commentators and judges have offered several arguments to support the view that federal courts have such inherent or implied authority. It has been suggested that supervisory power rulings reflect the courts’ inherent authority to adopt procedural and evidentiary rules for the conduct of their business,151 to fashion remedies for violations of constitutional or statutory rights,152 to preserve their own integrity,153 to check improper conduct by other branches of government,154 and to create federal common law.155 Some of

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150. See supra text accompanying note 8.
151. See, e.g., Beale, supra note 4, at 1465-73; Hill, supra note 4, at 194-96; see also McNabb v. United States, 318 U.S. 332, 341 (1943).
152. See, e.g., Beale, supra note 4, at 1494-98; HARVARD Note, supra note 4, at 1663; STANFORD Note, supra note 4, at 442; see also United States v. Hasting, 461 U.S. 499, 505 (1983).
153. See, e.g., Beale, supra note 4, at 1494-1501; Hill, supra note 4, at 197-98; see also United States v. Hasting, 461 U.S. at 505.
154. See, e.g., Beale, supra note 4, at 1510-11; STANFORD Note, supra note 4, at 443-45; see also Rea v. United States, 350 U.S. 214, 216-17 (1956).
these theories may explain some uses of supervisory power, but none is broad enough to encompass all of the significant supervisory power decisions. More to the point, however, none provides a sound legal basis for decisions that attempt to control the conduct of federal investigators.

1. The Rulemaking Theory

The rulemaking theory holds that federal courts possess inherent as well as statutorily granted authority to promulgate rules of procedure, including evidentiary rules. But even if the courts do have some rulemaking authority, that authority is subject to significant limitations concerning the nature of the rules that the courts may formulate, the manner in which they may be adopted, and their authoritativeness.

In assessing this potential source of supervisory power, it is important at the outset to distinguish between rules that can fairly be regarded as procedural and those that appear to be procedural but are so in form only. True procedural rules are those that regulate technical details and policies intrinsic to the litigation process, in the interest of enhancing the fairness, reliability, and efficiency of that process. Falling within this category are rules relating to the selection of juries, the acceptance of guilty pleas, and other similar matters as to which, it could be argued, the judiciary has special competence. In contrast, rules that are designed to regulate out-of-court behavior, and thereby affect policies extrinsic to the litigation process, are more properly regarded as substantive than procedural. Such rules, including the various exclusionary rules, do not guide the judicial process so much as they regulate the relationship between the government and the people, limiting the methods that may be used to investigate criminal conduct. Equally important, they are not designed to promote the accuracy or efficiency of the judicial process; indeed, by excluding probative and reliable evidence, they have precisely the opposite effect. The validity of the rulemaking theory as a source of supervisory power depends, therefore, on the nature of the rule in question. The theory may support supervisory formulation of rules that are truly proce-

156. The proposition that courts have inherent rulemaking power is dubious at best. See supra Part I.B.
157. See Beale, supra note 4, at 1464-94.
158. See id. at 1474-75; Hill, supra note 4, at 194-95.
159. See Beale, supra note 4, at 1475-76.
dural, but not those that regulate primary conduct and, hence, that are procedural only in a spurious sense. Thus, the theory does not support the adoption of the exclusionary rules of McNabb, Mallory, Miranda, and Massiah,\textsuperscript{160} or the continued existence of the search and seizure exclusionary rule.

The force of the rulemaking justification is diminished by other considerations as well. First, to the extent that authority to regulate judicial procedure can be regarded as an incidental or ancillary prerogative implied from the article III grant of judicial power, such implied authority exists only when indispensable to the exercise of judicial power, not when its existence would be merely helpful or beneficial.\textsuperscript{161} Thus, implied rulemaking authority does not support the creation of rules to control the conduct of investigators rather than the conduct of trials.

Second, although Congress has given the Supreme Court statutory authority to promulgate rules of procedure, including rules of evidence, for use in the trial courts, the legislative scheme indicates that this authority extends only to legislative rulemaking, not to the announcement of general rules in the course of adjudication.\textsuperscript{162} Recognition of implicit judicial authority to adopt new rules on a case-by-case basis would, therefore, undercut the rulemaking process envisioned by Congress in the Rules Enabling Acts. Moreover, in contrast to the federal district courts, which have ample statutory authority to adopt common law rules of procedure and evidence when there is no statute or Supreme Court rule on point,\textsuperscript{163} the federal courts of appeals have no express statutory basis for declaring new procedural

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\item \textsuperscript{160} We have argued elsewhere that the rule of Massiah v. United States, 377 U.S. 201 (1964), which mandates exclusion of evidence obtained in violation of the “right to counsel” created in that case, is not constitutionally required. See Office of Legal Policy, U.S. Dept. of Justice, “Truth in Criminal Justice” Series, Report No. 3, The Sixth Amendment Right to Counsel Under the Massiah Line of Cases Part II.B.1 (1986) [hereinafter Report No. 3], reprinted in 22 U. Mich. J.L. Ref. 661 (1989). If that argument is sound, the only possible basis for the Massiah exclusionary rule is supervisory power.
\item \textsuperscript{161} See Van Alstyne, supra note 22, at 110-11; supra text accompanying notes 24-27.
\item \textsuperscript{162} The legislation authorizing the Supreme Court to prescribe rules of “pleading, practice, and procedure” for criminal cases is qualified by the requirement that each proposed rule must be submitted to Congress and by the provision that no rule becomes effective until 90 days thereafter. See 18 U.S.C. § 3771 (1982). The Court’s authority to establish rules of evidence is even more carefully circumscribed. See 28 U.S.C. § 2076 (1982).
\item \textsuperscript{163} See 28 U.S.C. § 2071; Fed. R. Crim. P. 57(b).
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rules for the district courts on a case-by-case basis, and the argument for implied statutory authority is not persuasive.

Third, whether the Supreme Court’s rulemaking authority is inherent or legislatively granted, its exercise is subject to revision by Congress. Congress has always regarded the establishment of rules of judicial procedure to be a legislative function, and the Supreme Court has consistently endorsed this view. Consequently, the rulemaking justification for exercising supervisory power lacks persuasiveness to the extent that Congress preempts or overrules the Court’s choices by statute. As the discussion below points out, Congress has significantly curtailed the Court’s freedom to adopt exclusionary rules that have the effect of regulating federal law enforcement activities.

2. The Remedial Authority Theory

The frequently asserted authority of the federal courts to devise remedies for constitutional and statutory violations has also been invoked to support the existence of supervisory power over the conduct of federal investigators. Whether such authority actually exists is a question that is beyond the scope of this Report. But, even if it does, it supports the use of supervisory power only if investigators have acted unlawfully, because only then is there occasion to provide a remedy. Thus, the courts’ remedial authority does not permit the use of supervisory power to dismiss an indictment or exclude evidence on account of law enforcement practices that the courts find distasteful but that do not violate any right of the defendant. The Supreme Court has recognized as much in Lopez, Russell, and Payner.


165. See Beale, supra note 4, at 1481-82.

166. See Beale, supra note 4, at 1465-67; supra text accompanying notes 16-22.

167. See Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) (“The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.”); United States v. National City Lines, 334 U.S. 573, 589 (1948) (“Our power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it.”).

168. See infra Part III.B.

169. See supra text accompanying notes 97-102, 111-13, 122-25. In Hampton, however, five members of the Court suggested that supervisory power might be used to re-
Moreover, even when federal law enforcement agents violate a defendant’s rights, unless the Constitution requires a particular remedy, the courts’ power to formulate palliatives is limited by considerations of institutional competence and separation of powers principles. To illustrate, a judicially-created rule that excludes relevant evidence because of a statutory violation, as in McNabb, carries a substantial social cost in terms of damage to the truthfinding process at trial and acquittals of defendants who are unquestionably guilty. Whether those costs are worth bearing is not a question of law regarding which the courts have particular competence. Rather, it is a question of legislative choice that should be resolved by Congress, because the Constitution assigns such decisions to Congress and because Congress is both politically accountable and in a better position to gather the facts and to balance the competing values and interests.

Now that it is clear that the search and seizure exclusionary rule is not mandated by the Constitution, the same arguments can be made regarding the theory that the Supreme Court’s remedial authority justifies the use of supervisory power to exclude evidence obtained through fourth amendment violations.

Another flaw in the remedial authority theory is that it simply does not apply to judicially created exclusionary rules, because such rules do not, and are not intended to, remedy antecedent violations. It is clear, for example, that although loosely called a “remedy,” the fourth amendment exclusionary rule provides no redress for an unlawful search and seizure; its existence is justified solely by the hope that it may deter fourth amendment violations in the future. Similarly, the McNabb, Mallory, Miranda, and Massiah exclusionary rules have a predominantly deterrent purpose and effect, which means that they too cannot be justified by the remedial authority theory of supervisory power.

verse a conviction procured by outrageous but not unlawful investigative conduct. See supra notes 126-31 and accompanying text.

170. It was once thought, for example, that the search and seizure exclusionary rule is a constitutionally required remedy for fourth amendment violations. See Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court has since repudiated the notion that there is any constitutional basis for this rule. See supra notes 90-96 and accompanying text.

171. See Beale, supra note 4, at 1503-06.

172. See id. at 1504-05.

Finally, it must be remembered that the remedial authority of the courts is ever subject to being modified or superseded by Congress, so long as a particular remedy is not inextricably bound up with a constitutional right. 174 This means that when Congress establishes conditions for the admission of evidence in criminal trials, as it has done by statute and rule, 175 the courts are not free to impose more onerous conditions in the guise of providing redress for violations of law.

3. The Judicial Integrity, Executive Excesses, and Federal Common Law Theories

The claims that supervisory power over law enforcement activity emanates from an inherent authority of the courts to protect their own integrity, or to curb the excesses of the executive branch, or to create federal common law, are equally tenuous. According to the judicial integrity theory, the effective functioning of the judicial system requires general public respect for and acceptance of judicial rulings. This respect is undermined if the courts ratify illegal behavior by accepting its fruits, so the argument goes. Therefore, authority to preserve respect for the courts by excluding illegally obtained evidence is implicit in the grant of judicial power because it is indispensable to the exercise of that power. 176

There are several problems with this theory. First, even though maintenance of judicial integrity is indispensable to the effective functioning of the federal judicial system, it does not follow that judicial integrity is fatally compromised by the admission of tainted evidence. Indeed, the relatively recent vintage of exclusionary rules in general, and the present narrow scope of the fourth amendment exclusionary rule in particular, demonstrate the contrary—that federal courts need not exclude illegally obtained evidence in order to maintain their integrity. 177

174. See Beale, supra note 4, at 1498-1500.
175. See, e.g., 18 U.S.C. § 3501 (admissibility of confessions); Fed. R. Evid. 402 (admissibility of relevant evidence); see also infra Part III.B.-C for a discussion of these provisions.
176. See Beale, supra note 4, at 1507.
177. It is worth noting in this connection that the Supreme Court seems to have abandoned the judicial integrity rationale as an independent justification for the search and seizure exclusionary rule. See United States v. Leon, 468 U.S. 897, 921 n.22 (1984) ("Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts 'is essentially the same as the inquiry into
Second, the judicial integrity theory is plausible only if federal investigators have violated the law and sought judicial acceptance of the fruits of their illegality. Even then, however, the superior authority of Congress to establish rules of evidence for federal courts dictates that judicial preferences give way to explicit legislative standards concerning the admissibility of evidence. Third, if federal investigators have not violated the law—as is true in entrapment and “official misconduct” cases—there is no threat to judicial integrity sufficiently serious to even arguably support judicial intrusion upon the prerogatives of a coequal branch of government.\(^{178}\) In such cases, denying a forum for the trial of federal criminal cases not only conflicts with the federal courts’ duty to exercise the jurisdiction conferred by Congress, it also impedes the enforcement of the substantive criminal laws enacted by Congress and impairs the ability of the Executive to discharge its article II function of executing those laws.\(^{179}\) Finally, a strong case can be made that public confidence in the integrity of the courts is damaged more seriously when relevant evidence is thrown out and criminals go free than when the evidence is admitted even though its origin may be tainted.\(^{180}\)

Similar considerations undermine the theory that supervisory power over federal law enforcement officers can be derived from the courts’ authority in a constitutional system of checks and balances to put a stop to excessive uses of power by the executive branch. The authority of the courts to curb executive excesses presumes the occurrence of conduct that violates constitutional or statutory requirements. But if neither the Constitution nor any other federal law has been violated, there is no “excess” with which the courts may properly concern themselves. In that event, the imposition of judicially fashioned standards for the conduct of investigations is but an unwarranted arrogation of power entrusted by the Constitution to the legislative and executive branches.\(^{181}\) Moreover, even when the Executive has ex-

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\(^{178}\) See Beale, supra note 4, at 1508; see also United States v. Russell, 411 U.S. 423, 435 (1973) (proper regard for the integrity of the judicial branch does not justify a “chancellor’s foot veto” over lawful investigation practices of which the courts do not approve).

\(^{179}\) See Beale, supra note 4, at 1509-10.

\(^{180}\) Cf. Stone v. Powell, 428 U.S. 465, 491 (1976) (“[I]f applied indiscriminately [the exclusionary rule] may well have the . . . effect of generating disrespect for the law and the administration of justice.”).

\(^{181}\) See Beale, supra note 4, at 1510-11.
ceeded its authority by obtaining evidence unlawfully, the courts must respect the decisions of Congress regarding the consequences unless, of course, the Constitution decrees otherwise. Accordingly, unless unconstitutional, Congress’ determinations that evidence shall be admissible if it meets certain standards is binding on the courts, notwithstanding whatever authority they might claim to have to deny admission in order to check unlawful executive actions.

Finally, there is no basis for crediting the theory that the authority of federal courts to create federal common law provides a source of supervisory power over law enforcement activities. The federal judiciary has long claimed authority to formulate interstitial federal common law and has used such authority to create evidentiary privileges and defenses to criminal liability.\(^{182}\) It is not at all clear from where this authority is derived in the first place. What is clear, however, is that—as the Supreme Court itself recognizes—this species of judicial power is “subject to the paramount authority of Congress.”\(^{183}\) It is also clear that this power cannot properly be exercised in a manner that interferes with the constitutional responsibilities of Congress and the President to make and enforce the laws.\(^{184}\) In short, in exerting their supposed authority to fashion federal common law, the courts may not disregard the will of Congress or seek to regulate the conduct of the executive branch.

These limitations belie the existence of authority to formulate federal common law rules that require the exclusion of relevant evidence, whether that evidence has been secured illegally or by means of lawful but judicially disfavored investigative practices. Since Congress has already determined the circumstances under which confessions and other relevant evidence shall be admitted in federal criminal trials,\(^ {185}\) the courts have no power to impose contrary nonconstitutional rules. In addition, reliance on judicial authority to create federal common law as a justification for suppression of evidence infringes on the authority of the executive branch to enforce the law through investigation and prosecution.

Equally suspect is the claim that courts have common law authority to create defenses based on investigative misconduct by federal officers.\(^ {186}\) In the case of traditional defenses, such as

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182. See id. at 1511-12.
184. See Beale, supra note 4, at 1513-14; Schrock & Welsh, supra note 14, at 1126-29.
186. See Beale, supra note 4, at 1517-20.
self-defense, one can at least argue that their recognition by the courts accords with the presumed intent of Congress, because they advance the general policy of the substantive criminal law not to impose liability in the absence of blameworthiness. But even this questionable mode of analysis does not support judicial recognition of defenses based on official misconduct. In the first place, the "intent" of Congress that supposedly underlies the entrapment defense is "wholly fictional." Second, a defense of official 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. Third, defenses based on police conduct have no necessary relationship to the culpability of the accused. Their primary purpose, it seems, is to prevent what federal courts deem undesirable, albeit constitutionally permissible, police behavior. Therefore, recognition of such defenses is objectionable on two grounds. First, it tends to frustrate rather than foster the policies of the substantive criminal law, an outcome that cannot fairly be regarded as having been the intent of Congress; second, it invades the authority of the executive branch to enforce the law by methods that are not so offensive as to violate the due process clause of the fifth amendment.

B. The Effects Of Statutory Restrictions On The Use Of Supervisory Power

As noted above, the principal limitation on the use of supervisory power to control law enforcement activities is the authority of Congress to modify or supersede the judiciary's supervisory power decisions. In the four decades since McNabb, Congress has exercised this authority sparingly, but on two occasions it


188. Notwithstanding the Supreme Court's suggestions to the contrary, a defendant who is entrapped is not innocent of wrongdoing. Rather, he is a person who has committed all elements of the crime charged, with the requisite state of mind, but is excused because of wrongdoing by the government. However, it is a mystery why the government's conduct should provide an excuse, since inducement by private persons does not constitute a defense. See Park, The Entrapment Controversy, 60 Minn. L. Rev. 163, 240 (1976).

189. Other limitations are imposed by separation of powers principles, self-restraint, and—in cases in the lower federal courts—controlling decisions of the Supreme Court.
has acted in a manner that clearly restricts the reach of supervisory power to law enforcement practices. These constraints were created by the enactment of 18 U.S.C. § 3501 and the promulgation of Rule 402 of the Federal Rules of Evidence.\textsuperscript{190} Section 3501 clearly bars the use of supervisory power to exclude confessions under the \textit{Miranda} and \textit{McNabb-Mallory} cases, and possibly under \textit{Massiah} as well. Rule 402 has the same effect, and a good argument can be made that it also prohibits supervisory power exclusion of tangible evidence seized in violation of the fourth amendment.

1. \textit{18 U.S.C. § 3501}

Section 3501 of Title 18, enacted in 1968, contains two principal provisions relating to the admissibility of self-incriminating statements in federal criminal trials. The first, subsection (a), provides that a confession—defined in subsection (e) to include any self-incriminating statement—“shall be admissible in evidence if it is voluntarily given.” The second, subsection (c), provides in relevant part that a person’s voluntary confession made while in custody “shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession was made or given by such person within six hours immediately following his arrest or other detention.”

Subsection (a) of section 3501 was enacted to overcome the Supreme Court’s \textit{Miranda} decision, which created a code-like set of rules to govern custodial interrogations and required the exclusion of confessions—without regard to their voluntariness—if the police did not comply with those rules.\textsuperscript{191} Similarly, subsection (c) was designed to overrule the \textit{McNabb-Mallory} line of cases concerning the impact of delay in arraignment on the admissibility of confessions.\textsuperscript{192} It can also be argued that section 3501 governs the admissibility of incriminating statements obtained in violation of the “right to counsel” created by \textit{Massiah v. United States}.\textsuperscript{193} This argument, which we have devel-


\textsuperscript{192} \textit{See} Beale, \textit{supra} note 4, at 1484.

\textsuperscript{193} 377 U.S. 201 (1964).
oped elsewhere, is based on the theory that the Massiah exclusionary rule is not constitutionally required and that the text and legislative history of section 3501 can reasonably be read to support the admissibility of post-indictment incriminating statements as well as pre-arraignment confessions.

In short, by enacting section 3501, Congress established the conditions under which confessions would be admissible in federal criminal trials. It follows that the courts may not exercise supervisory power to suppress confessions that meet these conditions. It further follows that the exclusionary rules adopted by the courts to control the conduct of federal investigators in obtaining such confessions are invalid.

2. Rule 402, Federal Rules of Evidence

The enactment into law of the Federal Rules of Evidence in 1975 eliminated the authority of federal courts, in the exercise of supervisory power, to adopt common law rules of evidence "in the light of reason and experience." More particularly, the promulgation of Rule 402 had the effect of prohibiting the use of supervisory power to control law enforcement activities by excluding relevant evidence, except in specified situations. 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."

Rule 402 plainly requires federal courts to admit relevant evidence unless one of the stated exceptions applies. Under this standard, it seems clear that courts may not exercise supervisory

194. See Report No. 3 supra note 160, Part IV.B.
195. This conclusion is most significant in relation to the Miranda exclusionary rule. Because the Court has concluded that the Constitution does not require suppression of confessions obtained in violation of Miranda's requirements, see Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974). Section 3501's removal of a supervisory power basis for exclusion leaves the Miranda exclusionary rule without any jurisprudential foundation whatever.
196. See C. Wright & K. Graham, supra note 32, §§ 5191, 5192, 5199, at 173-80, 219-26. Prior to 1975, the admissibility of evidence in federal criminal trials was determined under former Fed. R. Crim. P. 26, which codified the Supreme Court's decision in Funk v. United States, 290 U.S. 371 (1933). Rule 26 stated that, except as otherwise provided by act of Congress or the rules themselves, the admissibility of evidence was to 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." For a succinct review of the background and meaning of Rule 402, see Brief for the United States at 19-33, United States v. Payner, 447 U.S. 727 (1980) (No. 78-1729).
power to exclude voluntary confessions obtained in violation of the *Miranda* rules, nor may they suppress voluntary incriminating statements secured during a delay in arraignment that does not exceed the six hour grace period provided by 18 U.S.C. § 3501(c), because no provision of the Constitution or of a statute or statutorily authorized rule provides for exclusion. For the same reasons, Rule 402 also appears to prohibit supervisory exclusion of voluntary statements produced by post-indictment interrogation in violation of the *Massiah* "right to counsel." 197

Whether Rule 402 also precludes use of supervisory power to suppress tangible evidence obtained in violation of the fourth amendment is less clear. Although exclusion of such evidence is not provided for by the Constitution, a federal statute, or the Rules of Evidence themselves, Rule 41(e) of the Federal Rules of Criminal Procedure seems on its face to require exclusion. That Rule, entitled Motion for Return of Property, provides in relevant part that "[a] person aggrieved by an unlawful search and seizure may move. . . . for the return of the property [seized] on the ground that he is entitled to lawful possession. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial."

In theory, at least, Rule 41(e) seems to preclude an argument that Rule 402 requires admission of relevant evidence obtained by means of an unlawful search and seizure. As a practical matter, however, the Rule's exclusionary requirement may have less significance. Moreover, if Rule 41(e) does significantly restrict Rule 402's general requirement of admissibility, there exists the possibility of legislative modification of Rule 41(e).

Considering the text of Rule 41(e), it is not at all clear that the Rule's suppression provision would have much practical effect if the judicially created exclusionary rule were abolished. The Rule 41(e) exclusionary requirement comes into play only if the defendant makes a motion for return of illegally seized property and shows that he is "entitled to lawful possession." Since a person is not entitled to lawful possession of contraband, fruits of crime, or other things criminally possessed, 198 the court may not order such property returned and, therefore, the Rule's

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197. The Notes of the Advisory Committee on Proposed Rules indicated that Rule 402 would not require the admission of statements obtained in violation of *Massiah*, because the Constitution required their exclusion. See Fed. R. Evid. 402 advisory committee notes. However, if—as we argue— *Massiah* 's exclusionary rule is not constitutionally mandated, Rule 402 does require the admission of such statements since none of the other exceptions specified in the rule is applicable.

exclusionary requirement is inapplicable in cases in which contraband or similar material has been seized unlawfully. Moreover, even with respect to non-contraband constituting evidence of an offense, it can be argued that the defendant is not entitled to the return of such property until after it has served its evidentiary purpose. If that argument is valid, then the practical scope of Rule 41(e)'s exclusionary provision is even more narrow. In any event, legislative modification of Rule 41(e) seems a distinct possibility. The argument for congressional reform would be based on the premise that the theoretical foundation of Rule 41(e)'s exclusionary requirement has been eroded. The Supreme Court decisions that were codified in Rule 41(e) were based on the theory that suppression of unlawfully seized evidence was mandated by the fourth amendment. But the Court has since rejected that view, and now concedes that continued application of the search and seizure exclusionary rule merely reflects the exercise of supervisory power to deter fourth amendment violations. Since the original constitutional foundation for Rule 41(e)'s exclusionary requirement no longer exists, it is certainly open to Congress to dispense with the requirement itself.

That Congress might be inclined to take that step is suggested by the fact that Rule 41(e)'s exclusionary provision apparently was never intended to have greater force than the judicially created exclusionary rule. That is to say, Rule 41(e) apparently did nothing more than codify the Supreme Court's fourth amendment decisions and establish the procedure for vindicating the rights created by those decisions to have illegally seized property returned and excluded from evidence. This conclusion is supported by the Notes of the Advisory Committee on Rules, which describe subdivision (e) of Rule 41 as "a restatement of existing law and practice," as well as by the Supreme Court's declaration that "Rule 41(e) is 'no broader than the constitutional rule'" and, consequently, that it "does not constitute a statutory expansion of the exclusionary rule." The conclusion is also reinforced by a number of cases in which the Court has created

201. See Fed. R. Crim. P. 41(e) advisory committee notes.
exceptions to the exclusionary rule without even mentioning Rule 41(e). These decisions would make no sense if Rule 41(e) independently barred the use of the unlawfully seized evidence at issue in those cases.

C. Summary

The use of supervisory power to control federal law enforcement activities by excluding evidence or dismissing charges cannot be justified by any of the theoretical arguments for the existence of supervisory authority, and conflicts with statutory and other limitations on the exercise of supervisory power. This conclusion seems valid whether the conduct of federal investigators is lawful or unlawful.

In cases involving lawful investigative conduct, such as those in which the defendant claims entrapment or similar government “misconduct,” the use of supervisory power does not serve to establish procedures for conducting the business of the courts efficiently and reliably. Neither does it function to remedy a violation of recognized rights, to preserve the integrity of the courts, or to check illegal action by the executive branch. All it does is violate separation of powers principles by creating non-common-law defenses that impair the ability of the executive branch to enforce the laws enacted by the legislative branch.

The situation is more complicated in cases involving unlawful investigative conduct, but the conclusion is much the same. Supervisory power is commonly exercised in such cases to impose rules requiring the exclusion of evidence obtained in violation of law. But exclusionary rules are not the sort of procedural rules that are within the inherent authority of the courts to promulgate for “housekeeping” or truthfinding purposes. Nor are they truly remedial. They reflect, simply, the courts’ decisions to seek to preserve judicial integrity and deter unlawful police conduct at the expense of making all relevant and otherwise admissible evidence available to the trier of fact. These judicial choices are objectionable not only because they are unwise as a matter of policy, but—more fundamentally—because they are choices that the Constitution has assigned to Congress and because Congress

203. See, e.g., United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule does not bar admission of evidence seized unlawfully but in good faith reliance on a warrant subsequently held to be invalid); United States v. Havens, 446 U.S. 620 (1980) (exclusionary rule does not preclude use of illegally obtained evidence to impeach a defendant’s testimony on cross-examination).
IV. PROPOSALS FOR REFORM AND IMPLEMENTING STRATEGIES

A. The Need For Reform And The Objectives To Be Sought

The executive branch has never mounted a comprehensive attack on the judicial branch's misuse of supervisory power in cases affecting the conduct of both federal and state law enforcement officials. Such a campaign is needed for two reasons: first, because the supervisory power doctrine has given currency to the notion that federal courts may properly exercise oversight authority with respect to matters allocated by the Constitution to coordinate branches of government; and, second, because specific applications of supervisory power—those that seek to control investigative conduct by excluding evidence or dismissing charges—actually frustrate the law enforcement mission of the executive branch and thwart the truthfinding function of the criminal justice process. In short, judicial misuse of supervisory power requires a strong response because it raises both law enforcement and constitutional (separation of powers) issues of great importance.

The first objective of reform in this area of the law, therefore, should be generally to correct the mistaken perceptions of some federal judges concerning the scope of their supervisory authority. They must be persuaded to respect constitutional and statutory barriers to the exercise of supervisory power over law enforcement activities. The second objective of reform should be more specific—to reverse judicial decisions that rely on supervisory power to exclude evidence obtained in violation of the fourth amendment or in violation of the Miranda or Massiah rules, as well as those that use supervisory power as the predicate for dismissing indictments because of "official misconduct" not amounting to entrapment.204 Both of these objectives could

204. Although we doubt that the Court's creation of the entrapment defense can be justified as a valid exercise of supervisory power, we hesitate to suggest that an effort be made at this time to abolish the defense, since the defense may have been "legitimated by four decades of congressional acquiescence." Beale, supra note 4, at 1519 & n.516. Two alternatives are possible, however. One would be to seek codification of the current "subjective" view of the defense for the reasons discussed in/ra note 208 and accompanying text. The other would be to strengthen—administratively or by statute—alternatives to the entrapment defense, such as rules for undercover operations and mechanisms for
be pursued through the coordinated application of the following litigative, legislative, administrative, and educational strategies.

B. Litigative Strategy

The most direct, and probably the most effective, method of attacking improper uses of supervisory power is to seek through litigation to establish the proposition that the scope of the judiciary’s supervisory authority over the administration of criminal justice is not broad enough to permit the exclusion of evidence or the dismissal of charges because of misconduct, or even unlawful conduct, by federal investigators. Since the contrary view rests largely on Supreme Court decisions, arguments to this effect must ultimately be directed to that court. They should, however, first be presented to the lower courts, in order to establish a proper record and to generate favorable and possibly influential lower court opinions, and also because cases in the lower courts may present issues concerning the application of supervisory power in contexts that the Supreme Court has not considered.

The specific arguments we can make for reversal of supervisory power decisions that attempt to control law enforcement conduct have been discussed in Part III and need not be detailed here. The principal points to be made with respect to exclusionary rule decisions—those based on Miranda, Massiah, or fourth amendment violations—are that exclusion of relevant evidence is not a proper exercise of whatever inherent rulemaking or remedial authority the courts may possess, and that—in any event—18 U.S.C. § 3501 and Rule 402 of the Federal Rules of Evidence preclude such uses of supervisory power. With re-

205. The Department apparently has never argued to the Supreme Court that section 3501 and Rule 402 generally bar the use of supervisory power to deter Miranda, Massiah, and fourth amendment violations, although we have contended on several occasions that specific applications of supervisory power by lower federal courts were at odds with those provisions. See Brief for the United States at 14-23, United States v. Jacobs, 431 U.S. 937 (1977) (No. 76-1193), cert. dismissed, 436 U.S. 31 (1978) (arguing that section 3501 and Rule 402 precluded use of supervisory power to suppress grand jury testimony because of the prosecutor’s failure to give target warning); Brief for the United States at 40-44, United States v. Caceres, 440 U.S. 741 (1979) (No. 76-1309) (arguing that these provisions prohibited use of supervisory power to exclude tape recordings obtained in violation of internal IRS regulations); Brief for the United States at 14-34, United States v. Payner, 447 U.S. 727 (1980) (arguing that Rule 402 barred supervisory power decision suppressing evidence obtained by violating fourth amendment rights of disciplining agents who violate the rules. The existence of effective alternatives could then be used as an additional argument for abolition of the defense.
gard to cases involving allegations of "official misconduct" not amounting to entrapment, we should continue to argue, as we did successfully in *Russell* and *Hampton*, that the supervisory power doctrine does not give the judiciary a "chancellor's foot veto" over law enforcement practices that do not violate the Constitution or a federal statute or rule.

**C. Legislative Strategy**

Concurrently with litigative efforts, the Department should consider proposing legislation that would go beyond section 3501 and Rule 402 in curtailing the courts' ability to use supervisory power to control law enforcement practices. The most significant step that Congress could take to this end would be to abolish the search and seizure exclusionary rule. We have recommended elsewhere that, for policy reasons, the Department should seek outright abolition of the rule rather than adoption of a statutory "good faith" exception.\(^\text{206}\) We now suggest that the case for complete abolition be buttressed by arguing in Congress that the Supreme Court's supervisory authority simply does not empower it to require the exclusion of evidence because of fourth amendment violations. As a related matter, we suggest that consideration also be given to proposing a legislative modification of the exclusionary rule component of Rule 41(e).

Another legislative initiative that might be considered is a statutory proposal designed specifically to reduce the scope of judicial supervisory power to the adoption of "housekeeping" procedures or rules designed to facilitate the courts' truth-finding functions. Such a statute could provide, in substance: "The courts of the United States possess only those powers that are essential to the performance of their constitutional duties, and can exercise a wider scope of authority only if Congress has declared such wider authority to be necessary and proper."\(^\text{207}\) In essence, a statute along these lines would be a codification of one aspect of the constitutional principle of separation of powers. Its effect would be to prohibit federal courts from excluding evi-


\(^\text{207}\) Cf. Van Alstyne, supra note 22, at 111.
dence on nonconstitutional or nonstatutory grounds, and from expanding the current scope of the entrapment defense.

A third possibility in this area would be to seek statutory codification of the current judicially recognized defense of entrapment. Such a statute, which could logically be pursued in formulating a revised Criminal Code Reform Act, would have several benefits. First, it would "freeze" the current "subjective" version of the defense, thereby foreclosing adoption of the "objective" view of the defense by a future Supreme Court and removing a perennial source of litigation. Second, it would prevent judicial creation of an "official misconduct" defense based on investigative activity that does not constitute entrapment or a violation of due process. Third, it would free the Department's challenge to judicial applications of supervisory authority from the appearance of being motivated by a desire to curtail or eliminate the entrapment defense.

D. Administrative Strategy

Litigative and legislative efforts in this area should be supported by the simultaneous adoption or strengthening of administrative measures designed to prevent and punish unlawful investigative conduct. Effective steps to these ends would demonstrate that the executive branch is both willing and able to control its agents. Such a demonstration would, in turn, help to dispel the erroneous notion that there is a need for the federal courts to play what the Supreme Court has characterized as "an undesired and undesirable supervisory role over police officers." We have previously identified and recommended various measures, ranging from improvements in the training of federal law enforcement officers, to the adoption of guidelines and other more effective controls on investigative activities, to the improvement of mechanisms for investigating allegations of unlawful or improper conduct by federal agents and for imposing appropriate disciplinary sanctions when warranted.

208. This latter objective is particularly compelling in light of the concurring and dissenting opinions in Hampton v. United States, 425 U.S. 484, 495, 497 (1976), in which five Justices held out the possibility that supervisory power could properly be exercised to recognize such a defense.


E. Educational Strategy

The Attorney General and other Department officials have been engaged in a "consciousness raising" program aimed at making *Miranda* and the fourth amendment exclusionary rule more visible public issues. The Department has also begun to call attention to the *Massiah* exclusionary rule and other impediments to the search for truth in criminal justice that have been relatively obscure to the public. To date, these educational efforts have focused primarily on the ill effects of rules adopted in *Miranda, Weeks, Mapp,* and *Massiah*; less attention has been paid to the question of the Court's authority to create these rules, and no mention has been made of the defenses of entrapment and official "misconduct." This emphasis is understandable, since the public may be more apt to appreciate and condemn the unfortunate consequences of decisions in these areas than it is to understand and agree with what appear to be highly technical jurisprudential arguments over the proper scope of judicial authority. Nevertheless, we think it would be desirable and productive to expand the public debate by stressing more forcefully the fundamental issues of the Court's lack of authority to impose these exclusionary rules or to recognize these non-common-law defenses, and the absence of any need for it to do so in light of actions taken by the executive branch to control its agents. Emphasis of these matters could generate support for any legislative initiatives the Department might care to propose, and could conceivably enhance our litigative efforts as well.

Accordingly, we suggest that consideration be given to making this Report available to the public; to providing a distillation of the Report to the press; to preparing an Op Ed piece on the subject; to including a discussion of supervisory power in *Miranda* and exclusionary rule speeches by Department officials; and to having a high-ranking Department official deliver a speech devoted solely to the issue of misuse of supervisory power by the courts.

Whichever avenues are taken to deliver the message, it will be important to stress that the consequence of reining in the courts will not be unbridled law enforcement activity. This point can best be made by stressing the constitutional and statutory limitations on the manner in which the executive branch enforces the law, the administrative steps taken by the Department to control its agents, the oversight role of Congress, and the ulti-
mate authority of the judiciary to intervene when the Constitution or a federal statute or rule permit.

CONCLUSION

The use of supervisory power to control law enforcement activities is an illegitimate exercise of judicial authority and frustrates the truth-seeking function of the criminal justice process. The executive branch should resist more strenuously this incursion upon its prerogatives and the prerogatives of Congress, and should enlist the support of Congress and the public in this effort. To that end we recommend a concerted response by the Department along the lines suggested above.