

Supervisory Power in the United States Courts of Appeals

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NOTES

SUPERVISORY POWER IN THE UNITED STATES COURTS OF APPEALS

INTRODUCTION

Federal courts invoke supervisory power to establish standards of fairness in the administration of justice and to protect the integrity of the judicial system.¹ The exercise of supervisory power can dispose of the case before the court or produce a statement of general applicability and future effect to implement court-prescribed policy.² As a judicial construct devoid of constitutional or statutory mandate,³ however, supervisory power produces law that

¹ The supervisory power of appellate courts encompasses a "general authority over the administration of justice in the inferior federal courts; and has been regarded as a basis for implementing constitutional values beyond the minimum requirements of the Constitution, or at least affording a basis for their implementation on other than constitutional grounds." Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182 (1969). See also Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

The Supreme Court discovered its supervisory power in *McNabb v. United States*, 318 U.S. 332 (1943), but lower federal courts have invoked the doctrine as well. See note 79 and accompanying text *infra*. Instead of analyzing the source of supervisory power, commentators have concentrated on the policy considerations behind specific applications of the Supreme Court's supervisory rulings. See, e.g., Note, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364 (1977); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973).

² These aspects of supervisory power need not appear in the same case. Compare *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976) (one-time sanction to enforce conformity among federal attorneys), *cert. dismissed*, 98 S. Ct. 1873 (1978), with *United States v. Schiavo*, 504 F.2d 1 (3d Cir.) (en banc) (rules regarding pre-trial publicity established), *cert. denied*, 419 U.S. 1096 (1974) and *United States v. Thomas*, 449 F.2d 1177 (D. C. Cir. 1971) (ABA-approved jury instruction adopted).

³ See *McNabb v. United States*, 318 U.S. 332, 340 (1943). Although not constitutionally mandated, a supervisory ruling may be constitutionally inspired. Thus the supervisory power

serves ends that are at least minimally posited by the Constitution, particularly the Bill of Rights. But there is no resort to the Constitution as the source of the governing standard, and the rigidities of constitutional decision, such as they are, are therefore avoided; the results are not binding upon Congress or the states.

Hill, *supra* note 1, at 193. Professor Monaghan draws supervisory power within his broad analytical framework—"constitutional common law." Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 38-40 (1975).

[A] surprising amount of what passes as authoritative constitutional "interpreta-

must yield to congressional action.⁴

Intermediate supervisory power—the supervisory power exercised by federal courts of appeals—has touched all aspects of the judicial process including courtroom activities at both trial and appellate stages and pre-trial activities such as the grand jury process.⁵ When exercising supervisory power, however, courts of appeals have shown little sensitivity to the balance of power between the judiciary and its coordinate branches. They have moved beyond areas of special judicial competence seeking to control law enforcement activities,⁶ and they have neglected one of the two original purposes behind the Supreme Court's independent use of supervisory power—implementation of congressional policy.⁷ All the while, courts of appeals have simply assumed they have the

tion" is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

Id. at 2-3.

⁴ For example, Congress has modified the exclusionary rules of *Mallory v. United States*, 354 U.S. 449 (1957), and *McNabb v. United States*, 318 U.S. 332 (1943). See 18 U.S.C. § 3500(b) (1970); S. REP. NO. 1097, 90th Cong., 2d Sess. 38-41, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2124-27. Congress also limited the discovery rule of *Jencks v. United States*, 353 U.S. 657 (1957). See 18 U.S.C. § 3500 (1970); S. REP. NO. 981, 85th Cong., 1st Sess. 2-3, reprinted in [1957] U.S. CODE CONG. & AD. NEWS 1861, 1862. See also Hill, *supra* note 1, at 195.

Examples of "one-way" common law, supervisory decisions do not apply to state courts through the fourteenth amendment. See *Culombe v. Connecticut*, 367 U.S. 568, 600-01 (1961); *Stroble v. California*, 343 U.S. 181, 197 (1952); *Gallegos v. Nebraska*, 342 U.S. 55, 63-64 (1951); *McNabb v. United States*, 318 U.S. 332, 340 (1943); Monaghan, *supra* note 3, at 38-40. Supervisory rules are also unavailable to plaintiffs in federal habeas corpus proceedings following state court convictions. See, e.g., *Ralph v. Peppersack*, 335 F.2d 128, 139-40 (4th Cir. 1964).

⁵ Intermediate supervisory power is *independently* exercised by courts of appeals. When courts of appeals implement the Supreme Court's supervisory rulings, they exercise *derivative* supervisory power.

⁶ Invoking supervisory power, courts of appeals have developed exclusionary rules to deal with what they characterize as overzealous law enforcement. See note 53 and accompanying text *infra*. Similarly, courts of appeals have threatened to control law enforcement officers by relying on supervisory power to dismiss cases involving law enforcement techniques that offend judicial sensibilities. See note 55 *infra*. *United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974), suggested that supervisory power could justify a federal court's refusal to exercise jurisdiction over a defendant forcibly abducted from a foreign country. See *United States v. Lira*, 515 F.2d 68, 73 (2d Cir.) (concurring opinion, Oakes, J.), *cert. denied*, 423 U.S. 847 (1975).

⁷ See *McNabb v. United States*, 318 U.S. 332, 341-42 (1943); text accompanying notes 60-62 *infra*. The other original purpose was to establish fair and civilized standards of procedure in the federal courts. See 318 U.S. at 340.

right to invoke supervisory power.⁸ Although this assumption is highly questionable, longstanding use of supervisory power virtually ensures its survival in the circuit courts. Judicial circumspection inspired by an understanding of the doctrine's dubious origins remains the only realistic safeguard against future abuse of intermediate supervisory power.

I

INTERMEDIATE SUPERVISORY POWER IN PRACTICE

A. *The Courtroom Process*

Intermediate supervisory power has become a convenient tool with which to control trial judge discretion, enabling appellate courts to overturn lower court decisions in the absence of reversible errors of law.⁹ Eighty years ago, in *Allen v. United States*,¹⁰ the Supreme Court affirmed the use of supplemental instructions to deadlocked juries. The Court approved the trial judge's request that jury members of the minority position reconsider their stand in the interest of judicial efficiency. Since *Allen*, the circuits have disagreed over the extent to which a trial judge may pressure a juror to accept the majority position.¹¹ Seven circuits have developed strict limitations on use of the *Allen* charge.¹² Three circuits have gone further, exercising supervisory power to abolish the *Allen* charge altogether.¹³ Citing interests of justice¹⁴ and the

⁸ See notes 79-83 and accompanying text *infra*. *McNabb v. United States*, 318 U.S. 332, 340 (1943), spoke of supervisory power only in terms of the "court of ultimate review."

⁹ See *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). Dissenting in *Thiel*, Justice Frankfurter would not have reversed a judgment "free from intrinsic infirmity." *Id.* at 234. By promulgating supervisory rules, appellate courts can promote consistency among trial courts.

¹⁰ 164 U.S. 492 (1896).

¹¹ *United States v. Bailey*, 468 F.2d 652, 661-69 (5th Cir. 1972), discusses the history of the *Allen* charge and the problems associated with its use.

¹² See *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977); *United States v. Scott*, 547 F.2d 334, 336-37 (6th Cir. 1977); *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States v. Sawyers*, 423 F.2d 1335, 1340-43 (4th Cir. 1970); *Sullivan v. United States*, 414 F.2d 714, 716-18 (9th Cir. 1969); *Hodges v. United States*, 408 F.2d 543, 552-54 (8th Cir. 1969); *Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir. 1966).

¹³ *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970). *Thomas*, 449 F.2d at 1187, and *Brown*, 411 F.2d at 933, prospectively adopted the procedures recommended by the American Bar Association. See ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4 (Approved Draft 1968). *Fioravanti* adopted similar standards. 412 F.2d at 420 n.32. The

“drain on appellate resources” caused by frequent allegations of prejudice to defendants,¹⁵ the latter three courts established prospective standards for dealing with deadlocked juries. The exercise of intermediate supervisory power thus eliminated a constitutionally permissible procedure.

Through use of intermediate supervisory power, courts of appeals have developed criteria to guide trial judges faced with questions of law. They have established new standards to determine whether a confession was voluntary and therefore admissible,¹⁶ developed criteria for consideration of guilty pleas,¹⁷ and abandoned

Fifth Circuit still approves of the *Allen* charge, although it recognizes its supervisory power to “abolish *Allen*, to limit it, or to replace it with the ABA standard.” *United States v. Bailey*, 468 F.2d 652, 668 (5th Cir. 1972).

¹⁴ *United States v. Thomas*, 449 F.2d 1177, 1186 (D.C. Cir. 1971); *United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

¹⁵ *United States v. Thomas*, 449 F.2d 1177, 1184 (D.C. Cir. 1971). *See also* *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

Courts of appeals have exercised intermediate supervisory power to cure other problems relating to jury instructions. The Fifth Circuit, for example, retroactively proscribed a jury instruction on proof of intent “couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence.” *United States v. Chiantese*, 560 F.2d 1244, 1255 (5th Cir. 1977) (en banc). The Third Circuit prospectively promulgated guidelines on jury instructions concerning the reliability of witnesses’ identifications. *United States v. Barber*, 442 F.2d 517, 526-28 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). In *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971), the same court prospectively required trial judges in personal injury actions to instruct jurors that awards are not subject to federal income taxation. *Id.* at 1251. The Third Circuit explained its rationale for promulgating a prospective supervisory rule:

[W]e recognize that our approach to this problem represents a new view in this judicial circuit as well as in other Circuits. Indeed, the position we adopt has been accepted by only a handful of state jurisdictions. In this situation, it cannot be said that the trial court erred in refusing the instruction at the time it was proffered. Paying even the most scrupulous attention to the sometimes subtle shifting of appellate winds, the district court could not have been expected to forecast the decision we reach here.

Id. at 1252 (footnote omitted).

¹⁶ *See* *Pea v. United States*, 397 F.2d 627 (D.C. Cir. 1968) (rehearing en banc); *United States v. Inman*, 352 F.2d 954 (4th Cir. 1965).

The Supreme Court in *Lego v. Twomey*, 404 U.S. 477 (1972), ruled four-to-three that the voluntariness of a confession should be judged by a preponderance-of-the-evidence test rather than the beyond-a-reasonable-doubt standard adopted in *Pea* and *Inman*. The Fifth Circuit maintains that *Lego* foreclosed courts of appeals from adopting the beyond-a-reasonable-doubt standard through intermediate supervisory power. *United States v. Watson*, 469 F.2d 362, 365 (5th Cir. 1972). The two circuits that decided *Pea* and *Inman* have since read *Lego* to require a uniform national rule. *See* *United States v. Wiggins*, 509 F.2d 454 (D.C. Cir. 1975); *United States v. Johnson*, 495 F.2d 378 (4th Cir.), *cert. denied*, 419 U.S. 860 (1974).

¹⁷ *See* *Moody v. United States*, 497 F.2d 359 (7th Cir. 1974) (trial court required to

the M'Naughten Rule in favor of the *Model Penal Code* determination of insanity.¹⁸ Although the Sixth Circuit, in *United States v. Florea*,¹⁹ held that innocent contact between a prosecution witness and the jury in deliberation did not constitute reversible error,²⁰ the court did exercise supervisory power prospectively to promulgate a per se rule prohibiting jury contact with interested parties.²¹ Appellate courts have also altered sentences,²² established pro-

determine if plea bargain precipitated guilty plea). In *Burton v. United States*, 483 F.2d 1182 (9th Cir.), *rev'd on rehearing*, 483 F.2d 1190 (9th Cir. 1973), two judges initially read FED. R. CRIM. P. 11 to require judges to find factual bases for guilty pleas at the time of the pleas rather than at the time of judgment. 483 F.2d at 1185-86. Invoking intermediate supervisory power, the Ninth Circuit remanded with instructions that the defendant be allowed to plead again rather than with directions to determine if a factual basis did exist at the time of the original pleading. *Id.* at 1187-88. In support of this exercise of intermediate supervisory power, Judge Ely engaged in an exhaustive analysis of the doctrine's applications in the federal courts of appeals. *Id.* Many courts of appeals still rely on this delineation for justification of intermediate supervisory power. *See, e.g.*, *United States v. Jacobs*, 547 F.2d 772, 776 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978). Dissenting, Judge Byrne seriously questioned the existence of intermediate supervisory power. 483 F.2d at 1189-90 (9th Cir. 1973). *See* note 80 *infra*. On rehearing, the court concluded that Rule 11 had been misconstrued. 483 F.2d at 1190-91. The final majority adopted Judge Byrne's position with the exception of his discussion of intermediate supervisory power. *Id.* Judge Ely's discussion of intermediate supervisory power became dictum. Thus, a foundation case often cited as support for intermediate supervisory power involved no exercise of the power at all.

¹⁸ *See* *Blake v. United States*, 407 F.2d 908, 915 (5th Cir. 1969); *United States v. Freeman*, 357 F.2d 606, 623-25 (2d Cir. 1966). For another example of the use of intermediate supervisory power to alter evidentiary standards, see *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (use of F.E.L.A. evidentiary standards limited to F.E.L.A. issues only).

¹⁹ 541 F.2d 568 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

²⁰ An FBI agent who had previously testified for the prosecution was present when an evidentiary tape was played for the jury during their deliberations. *Id.* at 570.

²¹ Although we do not hold the contact with the jury in this case violated due process as it did in *Turner* [379 U.S. 466 (1965)], we nonetheless do not—and in the future we will not—condone similar acts. We are required to exercise supervisory authority over the administration of justice in courts of this circuit even in cases where departures from ideal procedures fall short of a violation of due process. . . . We determine that a *per se* rule is necessary here because although the danger of improper influence inheres in every contact between an interested party and a jury, actual prejudice may be difficult to establish.

541 F.2d at 572. The per se rule called for reversal upon proof of any unauthorized contact between jurors and interested parties. *Id.*

In *Virgin Islands v. Bodle*, 427 F.2d 532 (3d Cir. 1970), the Third Circuit exercised supervisory power to grant a new trial after the defendant had been convicted for rape. There was a substantial possibility that one juror had not made an objective determination of the facts because his sister had also been raped. *Id.* at 534.

²² *See* *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (defendant who received increased sentence due to refusal to waive fifth amendment rights had sentence vacated and case remanded for resentencing). *See also* *United States v. Mendoza*, 565 F.2d 1285, 1292 (5th Cir. 1978) (deadlines for motions to reduce sentences); *United States v. Pinkney*,

cedural standards for criminal contempt proceedings,²³ and restructured *in forma pauperis* appeals.²⁴

Courts of appeals have even exercised supervisory power to reach prosecutorial behavior.²⁵ When prosecutors failed to reveal an FBI report containing information favorable to the defendant, the Seventh Circuit, in *United States v. Poole*,²⁶ reversed the conviction by invoking intermediate supervisory power.²⁷ Similarly, the

551 F.2d 1241, 1249-51 (D. C. Cir. 1976) (standards for effective representation at sentencing).

Although the Supreme Court has used supervisory power to control sentencing (*Yates v. United States*, 356 U.S. 363, 366-67 (1958)) courts of appeals have been hesitant to exercise their power in this area. See *United States v. Holder*, 412 F.2d 212, 214-15 (2d Cir. 1969); *Russell v. United States*, 288 F.2d 520, 524-25 (9th Cir. 1961), *cert. denied*, 371 U.S. 926 (1962).

²³ See *United States v. CBS*, 497 F.2d 107 (5th Cir. 1974).

²⁴ See *Tate v. United States*, 359 F.2d 245 (D.C. Cir. 1966) (retroactive rule); *Wildeblood v. United States*, 273 F.2d 73 (D.C. Cir. 1959).

²⁵ A striking example of supervisory control of prosecutorial behavior is *United States v. Banks*, 383 F. Supp. 389 (D.S.D. 1974), *appeal dismissed sub nom. United States v. Means*, 513 F.2d 1329 (8th Cir. 1975). *Banks* involved the exercise of independent supervisory power by a district court rather than an exercise of intermediate supervisory power. During the trial, prosecutors elicited false testimony and obfuscated other testimonial inconsistencies. The trial concluded with no verdict because a juror had become ill and the government would not acquiesce to a decision by 11 jurors. Judge Nichol dismissed the charges on the basis of supervisory power:

Although it hurts me deeply, I am forced to the conclusion that the prosecution in this trial had something other than attaining justice foremost in its mind. In deciding this motion I have taken into consideration the prosecution's conduct throughout the entire trial. The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case.

383 F. Supp. at 397. The government appealed in *United States v. Means*, 513 F.2d 1329 (8th Cir. 1975), but the court of appeals held that double jeopardy barred further prosecution. *Id.* at 1332-36.

²⁶ 379 F.2d 645 (7th Cir. 1967).

²⁷ The Seventh Circuit recognized separation-of-powers problems but exercised intermediate supervisory power after finding other overriding considerations:

Balancing the factors of the availability of the evidence and conduct of government counsel against the probability of prejudice, we think the failure to disclose the report denied Poole a fundamentally fair trial. The interest of the government in the integrity of the criminal process weighs heavily in the balance against its interest in avoiding a retrial in this case. It had no interest, security or otherwise, in not disclosing the report. . . . We are aware that the exercise of our supervisory power here has a substantial, although indirect, effect on the executive branch of government. But we are impelled to use it to protect the integrity of the criminal fact-finding process.

Id. at 649 (footnote omitted). Judge Knoch dissented: "If we are not prepared to say that the government counsel's conduct (in failing voluntarily to disclose the correct name of the

Ninth Circuit, in *Guam v. Camacho*,²⁸ refused to permit the government to withdraw a concession to the defendant.²⁹

B. *Beyond the Courtroom*

In the pre-trial stage,³⁰ courts of appeals have relied on supervisory power in reviewing activities ranging from the first contact between the government and the accused to grand jury proceedings.³¹ In *United States v. Jacobs*,³² the Second Circuit confronted the failure of a Strike Force attorney to warn a witness before the grand jury that she was also a target of investigation.³³ The dis-

examining physician) violated the standards of due process, then I think we should not reach the same practical result through the exercise of our supervisory power." *Id.*

²⁸ 470 F.2d 919 (9th Cir. 1972).

²⁹ Defendant had been convicted of first and second degree burglary. However, on appeal the government conceded reversal on the charge of first degree burglary because the evidence was insufficient. Before oral argument, the government informally attempted to reverse its position. *Id.* at 920. The court directed a judgment of dismissal on the first degree burglary count through an exercise of supervisory power. *Id.*

³⁰ Although intermediate supervisory power at the pre-trial stage focuses primarily on agents of the executive branch (government attorneys and law enforcement officers), it has also controlled *judicial* conduct. In *United States v. Schiavo*, 504 F.2d 1 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974), for example, the Third Circuit promulgated a supervisory rule for pre-trial publicity. Judge Aldisert criticized the decision:

Under the aegis of the exercise of the court's supervisory power the plurality retroactively enunciates a new rule of procedure requiring that a silence order vindicating a criminal defendant's Sixth Amendment rights, if it refers to non-parties, must (a) be reduced to writing, (b) state specifically the terms of the order and the reasons therefor, and (c) be entered on the district court docket.

But this court has no power to prescribe procedural rules for the governance of the district courts. That power is vested, by statute, in the Supreme Court. 18 U.S.C. §§ 3771, 3772; 28 U.S.C. §§ 2072, 2075. At the very most, the suggestions of the plurality should have been directed to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 28 U.S.C. § 331, instead of incorporating them by judicial fiat in an in [*sic*] banc opinion.

Id. at 17 (dissenting opinion, Aldisert, J.).

³¹ The willingness of courts of appeals to exercise supervisory power over the grand jury process varies among the circuits. *Compare, e.g., In re Grand Jury Proceedings* (Hergenroeder), 555 F.2d 686 (9th Cir. 1977) (government not required to show relevance of handwriting sample due to narrow construction of supervisory power over grand juries), with *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85, 93 (3d Cir. 1973) (court will not issue subpoena for handwriting samples, fingerprints, or mugshots until government makes showing of relevance).

³² 531 F.2d 87 (2d Cir.), *vacated and remanded mem.*, 429 U.S. 909 (1976).

³³ *Id.* at 88-89. A Strike Force attorney based in Washington, D.C., had informally advised defendant Jacobs of her constitutional rights, but had not told her that she was under investigation. Jacobs was subsequently indicted for perjury because her testimony before the grand jury contradicted an incriminating recorded conversation in the government's possession. In *Jacobs*, only the perjury charge, not the substantive count, was under attack. *Id.*

strict court concluded that such warnings were of constitutional dimension,³⁴ relying on the Fifth Circuit's decision in *United States v. Mandujano*.³⁵ On appeal, the Second Circuit affirmed but refused to reach the constitutional issue.³⁶ Judge Gurfein determined that United States Attorneys within the circuit regularly inform putative defendants that they are subjects of investigation.³⁷ Exercising supervisory power to suppress the defendant's grand jury testimony and dismiss the indictment, the Second Circuit instructed Strike Force attorneys to conform to established standards of practice.³⁸

Soon after the Second Circuit decided *Jacobs*, the Supreme Court reversed the Fifth Circuit's holding in *Mandujano*,³⁹ concluding that putative defendants in grand jury proceedings do not have a constitutional right to full *Miranda* warnings.⁴⁰ Shortly after this decision, the Supreme Court summarily remanded *Jacobs* for reconsideration in light of *Mandujano*.⁴¹ On remand, the Second

³⁴ See 531 F.2d at 89.

³⁵ 496 F.2d 1050 (5th Cir. 1974), *rev'd*, 425 U.S. 564 (1976).

³⁶ 531 F.2d at 89-91. The Second Circuit thus protected earlier decisions holding that, after proper warnings, a putative defendant's testimony before a grand jury could be the basis of a perjury indictment. See, e.g., *United States v. Del Toro*, 513 F.2d 656, 664-66 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975).

³⁷ 531 F.2d at 90. The court clerk had conducted a survey of the practices of United States Attorneys in each district of the circuit. *Id.*

³⁸ *Id.* Judge Gurfein found that the United States Attorneys followed ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3.6(d) (Approved Draft 1971): "If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights." 531 F.2d at 90.

³⁹ *United States v. Mandujano*, 425 U.S. 564 (1976).

⁴⁰ *Id.* at 580-84. The Supreme Court in *Mandujano* held that a witness could be indicted for perjury on the basis of inconsistent grand jury testimony even though he had not received *Miranda* warnings or notice that he was a target of investigation. More recently, in *United States v. Washington*, 431 U.S. 181 (1977), the Court held that a subsequent substantive indictment could stand against a grand jury witness who had testified without first receiving target warnings. *Id.* at 186-91.

⁴¹ *United States v. Jacobs*, 429 U.S. 909 (1976) (mem.). In separate opinions, four Justices argued that the Second Circuit could expand defendants' rights beyond the narrowly drawn constitutional limits of *Mandujano* through use of intermediate supervisory power.

Justice Stevens, concurring, stated: "I agree completely that a constitutional holding is not controlling on a question involving nothing more than an exercise of an appellate court's supervisory power." *Id.* He supported the remand to permit the Second Circuit to address directly whether failure to warn putative defendants inexorably precludes a perjury indictment. *Id.*

Justice Marshall, with whom Justice Brennan and Justice Stewart joined, dissented:

There is no reason to expect the Court of Appeals to reach a different result in light of our decision in *United States v. Mandujano* Our holding that

Circuit reaffirmed its earlier holding on the basis of intermediate supervisory power, assuming its authority to control the actions of federal attorneys involved in the grand jury process.⁴² Although the Second Circuit did not promulgate a continuing requirement dealing with warnings to putative defendants testifying before grand juries, the court imposed a "one-time sanction to encourage uniformity of practice"⁴³ between Strike Force and United States Attorneys.⁴⁴

An earlier Second Circuit opinion foreshadowed *Jacobs*. In *United States v. Estepa*,⁴⁵ the court confronted the introduction of hearsay evidence before grand juries⁴⁶ by United States Attorneys in violation of provisos developed in earlier cases.⁴⁷ Chief Judge

respondent would not have had a constitutional right to have her testimony suppressed simply has no bearing on a lower court decision which did not assume the existence of such a constitutional right. And it is clear that the well-established supervisory power of the courts of appeals over the district courts in their respective jurisdictions is not limited to enforcing constitutional rights.

Id. at 910-11.

In a separate opinion, Justice Stewart took the Court to task for issuing such an order: "[T]his order of the Court is little short of irrational. While our heavy caseload necessarily leads us sometimes to dispose of cases summarily, it must never lead us to dispose of any case irresponsibly. Yet I fear precisely that has happened here." *Id.* at 910 (dissenting opinion).

⁴² *United States v. Jacobs*, 547 F.2d 772, 774-75 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978).

⁴³ *Id.* at 773.

⁴⁴ Two courts have refused to follow *Jacobs*. *United States v. Crocker*, 568 F.2d 1049 (3d Cir. 1977), did not invoke supervisory power to promote consistency within the Third Circuit because the government attorneys followed no uniform practice. *Crocker*, however, did not foreclose the possibility of exercising supervisory power to implement the A.B.A. standards followed in the Second Circuit. *Id.* at 1056. *United States v. Hilliard*, 436 F. Supp. 66 (S.D.N.Y. 1977), found *Jacobs* inapposite because in December 1976 the Strike Force had merged into the United States Attorney's Office for the Southern District of New York. *Id.* at 70.

⁴⁵ 471 F.2d 1132 (2d Cir. 1972).

⁴⁶ The law enforcement officers most intimately connected with the narcotics arrest of defendants did not testify before the grand jury. Rather, the prosecution called one officer remotely connected to the arrest to present detailed evidence. The grand jury was unaware of the limited knowledge of the witness. *Id.* at 1134-35.

⁴⁷ The Second Circuit's hearsay provisos require prosecutors (1) not to mislead grand juries as to the quality of the evidence; (2) not to use hearsay evidence if a high probability exists that the grand jury would not indict if it heard direct testimony; and (3) to use hearsay evidence only when direct evidence is unavailable. *See United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969); *United States v. Arcuri*, 405 F.2d 691, 692-93 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); *United States v. Umans*, 368 F.2d 725, 730-31 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967). *See also* 40 BROOKLYN L. REV. 1239 (1974). These Second Circuit provisos extended the constitutional minima established in *Lawn v. United States*, 355 U.S. 339 (1958), and *Costello v. United States*, 350 U.S. 359 (1956), which upheld indictments based on hearsay evidence.

Friendly attacked the laxity of the United States Attorneys and argued that an admonition would not serve the purposes of the court because such warnings had been ignored in the past.⁴⁸ Invoking intermediate supervisory power, he reversed the conviction with orders to dismiss the indictment in the hope that a one-time sanction would bring about future adherence to established standards.⁴⁹

In *Jacobs and Estepa*, the Second Circuit exercised intermediate supervisory power to force federal attorneys within the circuit to comply uniformly with established rules. But courts of appeals have also promulgated *new* standards significantly altering the grand jury process.⁵⁰ The Third Circuit, for example, ordered the government to make preliminary showings of relevance, jurisdiction, and purpose before courts would issue subpoenas to obtain handwriting samples, fingerprints, and mug shots.⁵¹

⁴⁸ 471 F.2d at 1135-37.

⁴⁹ Here the Assistant United States Attorney, whether wittingly or unwittingly—we prefer to think the latter, clearly [did not inform the grand jury of the weakness of hearsay evidence and the fact that better evidence was available]. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants.

Id. at 1137. Since *Estepa*, two district courts have similarly dismissed indictments to enforce the Second Circuit hearsay provisos. See *United States v. Pastor*, 419 F. Supp. 1318, 1323-24 (S.D.N.Y. 1976); *United States v. Gallo*, 394 F. Supp. 310, 314-15 (D. Conn. 1975).

⁵⁰ See, e.g., *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir.) (same grand jury that heard immunized testimony cannot indict witness after he testifies), *cert. denied*, 429 U.S. 980 (1976), 429 U.S. 1066, 430 U.S. 982 (1977) (separate petitions). See also *United States v. Anzalone*, 555 F.2d 317, 319 (2d Cir.) (retroactive application of *Hinton* rule), *aff'd on rehearing*, 560 F.2d 492 (2d Cir. 1977).

⁵¹ *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 93 (3d Cir. 1973) [hereinafter cited as *Schofield I*]. *Schofield I* retroactively established that the government must "make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *Id.* The Third Circuit recognized that these standards extended the constitutional minima set forth in *United States v. Dionisio*, 410 U.S. 1 (1973), and *United States v. Mara*, 410 U.S. 19 (1973), 486 F.2d at 89. The case reached the Third Circuit again two years later. *In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975) [hereinafter cited as *Schofield II*]. *Schofield II* held that the government had complied with the criteria announced in *Schofield I* and affirmed the conviction of the defendant. The court justified the criteria as a proper exercise of its supervisory power over grand juries:

Our supervisory power over grand juries is derived from several sources. Under 18 U.S.C. § 3331 and F.R.Cr.P. 6(a) a district court is given power to call a grand jury into existence; under F.R.Cr.P. 17(a), and 28 U.S.C. § 1826(a) respectively, the district court is given the power to issue and the duty to enforce grand jury subpoenas.

If courts refrain from exercising supervisory power over grand juries for fear of infringing upon executive prerogatives,⁵² they should not reach activities earlier in the law enforcement process where claims of judicial competence are even more tenuous. Courts of appeals have controlled activities of government agents in the field through supervisory suppression—the refusal to permit introduction of tainted evidence in judicial proceedings.⁵³ In

Id. at 964 n.2. *But see In re Grand Jury Proceedings* (Hergenroeder), 555 F.2d 686 (9th Cir. 1977) (refused to adopt *Schofield I* procedures due to narrow construction of supervisory power over grand juries).

⁵² The grand jury contrary to what seems to be the prevailing general belief is an integral part of the judicial arm of the government and is not a mere tool of the prosecutor. The United States Attorney, the Federal Bureau of Investigation and other branches of the Department of Justice are integral parts of the executive branch of the government. The grand jury, being part and parcel of the judicial branch of government, is subject to a supervisory power in the courts, aimed at preventing abuses of its process or authority. However, inasmuch as the United States Attorney's Office and the Federal Bureau of Investigation are not part of the judicial branch of the government they are not in the performance of their executive functions, by reason of our constitutional separation of powers system, subject to the supervisory power of the courts.

In re Grand Jury Subpoena to Central States, 225 F. Supp. 923, 925 (N.D. Ill. 1964). *But see United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974) (concurring opinion, Hufstедler, J.) (federal prosecutors at grand jury stage subject to court's supervisory power).

The history of the grand jury does not dispel the confusion surrounding the scope of supervisory power. The grand jury process exhibits characteristics of both the executive and judicial branches. In England, the grand jury originally served an investigatory function and was intimately connected with the Crown. In time, the grand jury began to serve as a buffer between the Crown and the citizenry, maintaining its investigatory function as well. The protective role of the grand jury has been emphasized by the Supreme Court. *See Branzberg v. Hayes*, 408 U.S. 665, 686-87 (1972); *Wood v. Georgia*, 370 U.S. 375, 390 (1962). *But see Blair v. United States*, 250 U.S. 273, 282 (1919) ("grand inquest"). When the grand jury serves as a buffer between the citizenry and the State it implicates purely judicial concerns; executive interests predominate when the grand jury serves as an investigative body. The problem is that the grand jury serves both functions simultaneously. For further information on the development of the dual role of the grand jury, see generally 1 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 34-37 (1931); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 137-40 (1947); Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME—ANNOTATIONS AND CONSULTANT'S PAPERS 80, 83 app. C (1967); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

⁵³ The exercise of supervisory suppression is a power so intimately linked with Supreme Court rulings as to approach the line dividing intermediate supervisory power from derivative supervisory power. *See* note 5 *supra*. *See also* Note, *supra* note 1, 62 CORNELL L. REV. 364.

Courts of appeals have exercised supervisory suppression. *See, e.g., United States v. Broadhead*, 413 F.2d 1351, 1354-58 (7th Cir. 1969) (exclusionary rule extended to defendants who faced line-up without counsel), *cert. denied*, 396 U.S. 1017 (1970); *Ricks v.*

most cases, however, courts have declined to exercise intermediate supervisory power over activities of government agents that are not in themselves illegal.⁵⁴ Such judicial restraint is discretionary.⁵⁵

II

SUPERVISORY POWER IN THEORY

Intermediate supervisory power must be analyzed in light of the development of the supervisory power of the Supreme Court. The Court discovered its supervisory power over inferior federal courts thirty-five years ago in *McNabb v. United States*.⁵⁶ When viewed as the product of earlier decisions rather than the embodiment of intrinsic principles,⁵⁷ *McNabb* reveals much about the na-

United States, 334 F.2d 964, 968 (D.C. Cir. 1964). But they have been hesitant to do so. See, e.g., *United States v. Jones*, 433 F.2d 1176, 1181-82 (D.C. Cir. 1970) (supervisory grounds rejected for suppression of evidence obtained by telephone monitor installed with third-party consent), *cert. denied*, 402 U.S. 950 (1971); *Butterwood v. United States*, 365 F.2d 380, 384-85 (10th Cir. 1966) (arrest by state police followed by FBI interrogation survives *McNabb-Mallory* rule).

⁵⁴ See, e.g., *United States v. Dowdy*, 479 F.2d 213, 229-30 (4th Cir.) (refusal to suppress evidence derived from consensual electronic surveillance as "dirty business"), *cert. denied*, 414 U.S. 823 (1973); *Henry v. United States*, 432 F.2d 114 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.) (refusal to exercise supervisory power to require presence of counsel when pubic hair removed from defendant for evidence), *cert. denied*, 400 U.S. 1011 (1971); *Whitted v. United States*, 411 F.2d 107, 108-09 (9th Cir. 1969) (defendant convicted of sale of narcotics even though six months passed between sale to agent and defendant's arrest), *cert. denied*, 399 U.S. 911 (1970); *Ford v. United States*, 352 F.2d 927 (D.C. Cir. 1965) (*en banc*) (rejecting rule requiring arrest warrant whenever obtainable); *United States v. D'Angiolillo*, 340 F.2d 453, 456 (2d Cir.) (unlawful search by government agents that produced evidence not used at trial did not warrant supervisory power dismissal), *cert. denied*, 380 U.S. 955 (1965); *United States v. Costello*, 255 F.2d 876 (2d Cir. 1958) (exercise of supervisory power not warranted when prosecuting attorneys requested I.R.S. agent to inspect tax returns of veniremen).

⁵⁵ In *Hampton v. United States*, 425 U.S. 484 (1976), five Justices recognized that supervisory power could protect defendants from outrageous conduct by law enforcement officers even when a traditional entrapment defense is unavailable. See *id.* at 495 (concurring opinion, Powell, J.); *id.* at 497 (dissenting opinion, Brennan, J.). Two circuits have since recognized the supervisory power defense. See *United States v. Graves*, 556 F.2d 1319, 1324-25 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1485 (1978); *United States v. Reifsteck*, 535 F.2d 1030, 1034-35 (8th Cir. 1976).

Courts of appeals have not agreed over the use of supervisory power to reverse convictions resulting from testimony of government informers paid on contingent fee bases. Compare *United States v. Grimes*, 438 F.2d 391, 394-96 (6th Cir.) (conviction affirmed), *cert. denied*, 402 U.S. 989 (1971), with *Williamson v. United States*, 311 F.2d 441, 444-45 (5th Cir. 1962) (conviction reversed).

⁵⁶ 318 U.S. 332 (1943).

⁵⁷ This mode of analysis is rejected in Note, *supra* note 1, 76 HARV. L. REV. at 1662-63,

ture and scope of supervisory power.

McNabb involved the conviction of defendants for murder on the basis of statements procured after their arrest but before they were brought before a magistrate.⁵⁸ The Supreme Court reversed the convictions by invoking supervisory power. Subsequent development of the doctrine has turned on one paragraph of Justice Frankfurter's opinion:

[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.⁵⁹

Read in isolation, this discussion imposes no limits on supervisory power. The Court in *McNabb*, however, did circumscribe the doctrine by relying on federal statutes for the basic policy underpinnings of its decision:

and is not followed in Note, *supra* note 1, 53 GEO. L.J. 1050. These discussions concentrate on the principles of judicial integrity and inherent power which, although crucial to understanding supervisory power, distort its meaning when viewed in light of *McNabb* and its progeny.

⁵⁸ 318 U.S. at 334-38. Federal officers held two of the McNabb brothers incommunicado in a detention cell for 14 hours and intensively questioned them over the next two days. *Id.* at 334-37. Upon his surrender, a third McNabb also underwent intensive interrogation. *Id.* at 337. The federal officers had not brought the defendants before a magistrate before questioning.

⁵⁹ 318 U.S. at 340. Courts of appeals cite this paragraph as the primary justification of intermediate supervisory power and generally do not engage in independent analysis. *See, e.g.,* United States v. Broadhead, 413 F.2d 1351, 1355 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

Immediately before this paragraph, Justice Frankfurter outlined the application of due process principles to roughly similar situations. He stressed the effect of due process holdings by citing cases in which the Supreme Court had imposed procedures upon the states. Only after that discussion did the Court refuse to reach the constitutional issue presented. 318 U.S. at 340. Instead of relying on the due process clause, the Court exercised supervisory power, thus enabling the states to develop their own fair procedures:

[R]eview by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

Id. at 340-41.

In holding that the petitioners' admissions were improperly received in evidence against them, and that having been based on this evidence their convictions cannot stand, *we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases.* We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. *In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.*⁶⁰

Because the arresting officers had acted in a manner Congress had "explicitly denied them,"⁶¹ the Court implemented congressional policy by developing an exclusionary rule.⁶²

McNabb was not the first instance in which the Court implemented legislative policy by creating an exclusionary mechanism not specifically required by statute. *Nardone v. United States*⁶³ set forth a rule suppressing evidence that federal law enforcement of-

⁶⁰ *Id.* at 347 (emphasis added).

⁶¹ *Id.* at 342. Congress had promulgated several procedural laws emphasizing the need to bring the accused before a magistrate quickly. Act of August 18, 1894, ch. 301, 28 Stat. 372, 416 (1894) (marshal, deputy, or other officer must take accused before nearest United States Commissioner or judicial officer with jurisdiction) (superseded by FED. R. CRIM. P. 5(a)); Act of June 18, 1934, ch. 595, 48 Stat. 1008 (1934) (officer of FBI must take accused immediately before committing officer) (superseded by FED. R. CRIM. P. 5(a)); Act of March 1, 1879, ch. 125, § 9, 20 Stat. 327 (1879) (persons arrested for operating illegal distillery to be taken forthwith before magistrate) (superseded by FED. R. CRIM. P. 5(a)). The modern counterpart of these early enactments, FED. R. CRIM. P. 5(a), fully captures their flavor:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

⁶² Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

318 U.S. at 345.

⁶³ 308 U.S. 338 (1939) [hereinafter referred to as *Nardone*].

ficers had obtained as the "fruit" of illegal wiretaps.⁶⁴ Justice Frankfurter stated:

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.⁶⁵

The legislation construed in *Nardone* was a response to an earlier Supreme Court decision, *Olmstead v. United States*,⁶⁶ which refused to extend an exclusionary rule without congressional authority to victims of illegal government wiretapping because wiretapping, albeit illegal, did not violate defendant's fourth amend-

⁶⁴ *Id.* at 341. Defendants were originally convicted on the basis of evidence obtained through illegal wiretaps. *Nardone v. United States*, 302 U.S. 379, 380 (1937) [hereinafter referred to as *Nardone I*]. The Court construed the Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064 (current version at 47 U.S.C. § 605 (1970)):

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, . . . or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority.

The Court held: "To recite the contents of the message in testimony before a court is to divulge the message." 302 U.S. at 382.

On remand, the Second Circuit tentatively held that the exclusionary rule fashioned by the Court did not reach the fruits of the wiretap. *United States v. Nardone*, 106 F.2d 41, 44 (2d Cir. 1939). On appeal, the Supreme Court reversed, in an opinion by Justice Frankfurter: "Such a reading of § 605 would largely stultify the policy which compelled our decision in [*Nardone I*]." 308 U.S. at 340. Justice Frankfurter misread *Nardone I*, a decision based on tight statutory construction and only tangentially on policy considerations. See 302 U.S. at 384. According to Justice Frankfurter, the earlier decision "was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being." 308 U.S. at 340. To further congressional policy, Justice Frankfurter established procedures for hearings that placed the burden on defendants to show that wiretaps were illegal and that a substantial portion of the prosecutor's evidence was the "fruit of the poisonous tree." 308 U.S. at 341.

⁶⁵ 308 U.S. at 340.

⁶⁶ 277 U.S. 438 (1928).

ment rights.⁶⁷ Dissenting in *Olmstead*, Justice Brandeis⁶⁸ and Justice Holmes⁶⁹ argued that the integrity of the judicial system must not be compromised by convictions based on tainted evidence; the courts should not condone illegal acts by upholding convictions of victimized defendants.⁷⁰

McNabb combined *Nardone's* implementation of congressional policy with the protection of judicial integrity called for in the *Olmstead* dissents.⁷¹ In fact, the Court did not have to look beyond the decisions of the previous fifteen years to "discover" supervisory power. Moreover, *McNabb* implicitly circumscribed the policy initiative of the Court by recognizing that Congress indirectly controlled the Court's exercise of supervisory power.

⁶⁷ Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

Id. at 465-66.

⁶⁸ *Id.* at 471.

⁶⁹ *Id.* at 469.

⁷⁰ Both Justices discussed the constitutional issues. Justice Holmes stated:

While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.

Id. at 469. Justice Brandeis argued that the policy if not the literal meaning of the fourth and fifth amendments protects the defendant. *Id.* at 471-79. Justice Brandeis then applied the principles of equity to the criminal law and developed a doctrine of judicial integrity:

Will this Court by sustaining the judgment below sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . . Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

. . . .

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 483-85 (footnotes omitted).

⁷¹ *McNabb* explicitly relies upon *Nardone* (318 U.S. at 341) but does not cite *Olmstead*. The spirit of Justice Brandeis' *Olmstead* dissent, however, is pervasive. See *id.* at 343-44.

The *McNabb* model, however, quickly disintegrated. Acting in areas of traditional judicial concern, the Court removed congressional input from the model.⁷² As the Court began to follow its own policy preferences, the protection of the integrity of the judicial

⁷² Although it is beyond the purview of this Note to analyze the development of supervisory power on the Supreme Court level, it may be useful to summarize critical cases in which the Court sub silentio repudiated the restrictions recognized in *McNabb*.

In *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), the Court ended the practice of exempting working men from jury duty because they could not afford to serve:

It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. . . . On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. . . . It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

Id. at 225. Importantly, *Thiel* extended supervisory power to civil cases. Justice Frankfurter, joined by Justice Reed, dissented:

If it be suggested that until there is legislation this decision will be the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

Id. at 233-34.

Reviewing the New York Blue Ribbon Jury in *Fay v. New York*, 332 U.S. 261 (1947), the Court stated: "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process." *Id.* at 287.

In *Mesarosh v. United States*, 352 U.S. 1 (1956), the Court moved beyond traditional judicial concerns and ruled on the credibility of a paid government informer who testified falsely before a Senate committee after testifying in a Smith Act case:

This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Id. at 14 (footnote omitted).

When exercising supervisory power over the activities of law enforcement officers, the Court has respected the *McNabb* model. *See Rea v. United States*, 350 U.S. 214, 216-18 (1956). *See also Lopez v. United States*, 373 U.S. 427, 440 (1963); *On Lee v. United States*, 343 U.S. 747, 754-55 (1952).

The growth of supervisory power cannot be attributed to a natural growth of the law. By departing so drastically from the *McNabb* model, supervisory power has become a rudderless source of law. *See* notes 74-78 and accompanying text *infra*.

system became the sole rationale for the exercise of supervisory power. Supervisory power emerged as a nonstatutory rulemaking power motivated solely by the Court's conceptions of procedural fairness. As a convenient tool for extending judicial power, the doctrine permitted decisions on the merits that would have been impossible under traditional analyses of error and prejudice.⁷³

III

THE FABRICATED DOCTRINE OF INTERMEDIATE SUPERVISORY POWER

No justification exists for the unlimited exercise of supervisory power. Unrestrained by the requirement to implement congressional policy, supervisory policy-making can no longer look to *McNabb* for its source. But the search for alternative foundations produces no satisfactory result. Supervisory power does not arise solely from the inherent power of courts⁷⁴ because supervisory power can affect activities that lie beyond traditional judicial concerns. It may be distinguished from the long-standing power of courts to fashion evidentiary rules⁷⁵ because supervisory decisions

⁷³ See note 72 *supra*.

⁷⁴ One court has defined inherent power as "that which is essential to the existence, dignity and functions of the court from the very fact that it is a court." *In re* Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 288, 275 N.W. 265, 267 (1937). See also Note, *supra* note 1, 53 GEO. L.J. at 1052 (quoting Dowling, *Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 635 (1935)). Of particular interest is the inherent procedural rulemaking power of courts. See Pound, *The Rule-Making Power of Courts*, 12 A.B.A.J. 599 (1926); Note, *supra* note 1, 53 GEO. L.J. at 1052-53. Traditionally, rulemaking through inherent power was limited to technical procedural matters. See Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 35-36 n.18 (1952). It is doubtful that English courts possessed inherent powers of a scope equal to supervisory power. See Note, *supra* note 1, 53 GEO. L.J. at 1054-55. Professor Hill states: "We do not think of our own judges as heirs to the English practice, such as it was, of constraining the executive branch by rules developed from common law sources, subject to the ultimate authority of the legislature." Hill, *supra* note 1, at 208. See also Monaghan, *supra* note 3, at 34-35.

Discussions of the inherent powers of courts, and particularly of inherent rulemaking powers, may center on English and state courts because judicial rulemaking in the federal system derives from congressional legislation empowering federal courts to establish "all necessary rules for the orderly conducting [of] business." The Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73 (1789). Cf. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 916-17 (1976) (Judiciary Act of 1789 underlines inherent procedural and rulemaking powers of federal courts).

⁷⁵ In *McNabb*, Justice Frankfurter tried to rest the decision on evidentiary grounds:

The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone v. United States*, 308 U.S. 338,

do not depend on the nature of the evidence⁷⁶ and often involve no evidentiary rulings at all. And although courts and commentators urge that the need to promote fairness in the administration of justice suffices to justify supervisory power,⁷⁷ this justification alone was inadequate in *McNabb*.⁷⁸ Certainly, applications of supervisory power that range beyond the narrow confines of special judicial competence cannot avoid criticism based on the separation of powers simply because courts invoke the need to protect *judicial* integrity.

Intermediate supervisory power magnifies the insubstantiality of the supervisory power doctrine. Courts of appeals never pause to question whether the Supreme Court intended them to exercise supervisory power at all.⁷⁹ Few courts seriously investigate the

341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

318 U.S. at 341 (footnote omitted). But supervisory decisions encompass much more than evidentiary rules. See notes 56-73 and accompanying text *supra*.

⁷⁶ Supervisory evidentiary rulings often involve supervisory suppression. These rulings look to the activities that produced the evidence and seek to deter such conduct. See *generally* Note, *supra* note 1, 62 CORNELL L. REV. 364.

⁷⁷ Some analysts have accepted protection of the integrity of the judicial system as an adequate justification. See Comment, *supra* note 1, at 1147; Note, *supra* note 1, 76 HARV. L. REV. at 1663-64.

⁷⁸ See text accompanying notes 60-71 *supra*.

⁷⁹ The exercise of supervisory power by federal courts of appeals is a relatively recent development. Prior to *McNabb*, courts of appeals had "supervisory power" but the term referred to their longstanding ability to control inferior courts through the issuance of writs. See, e.g., *Armour v. Kloeb*, 109 F.2d 72, 75 (6th Cir. 1939). Courts of appeals retain this "supervisory power" under the All Writs Act, 28 U.S.C. § 1651(a) (1970). This type of power, exercised pursuant to congressional mandate, bears no relation to intermediate supervisory power, but courts have nonetheless confused the two doctrines. One source of this confusion is *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957), in which the Supreme Court said: "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *Id.* at 259-60. This language is often quoted in support of the existence of intermediate supervisory power. See, e.g., *United States v. Jacobs*, 547 F.2d 772, 776 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978). Forgotten, however, is the sentence of *LaBuy* that immediately follows: "The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." 352 U.S. at 260.

After *McNabb*, courts of appeals generally exercised derivative supervisory power and only considered the possibility that they could independently promulgate supervisory power rules. See, e.g., *United States v. Cone*, 354 F.2d 119, 124 n.10 (2d Cir. 1965) (en banc); *United States v. Costello*, 255 F.2d 876, 884 (2d Cir. 1958). The first exercise of intermediate supervisory power seems to have been *Helwig v. United States*, 162 F.2d 837, 840 (6th Cir. 1947) (verdict set aside and case remanded for testimony from witness who

foundations of the power they so freely wield.⁸⁰ Judge Gurfein may have found some support for the power in dicta drawn from *Cupp v. Naughten*:⁸¹

Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.⁸²

did not testify at first trial). Intermediate supervisory power, however, did not reach its potential until the early 1960's.

⁸⁰ See note 59 and accompanying text *supra*. But see *Schofield II*, *supra* note 51, at 969-71 (dissenting opinion, Aldisert, J.); *Burton v. United States*, 483 F.2d 1182, 1187-88 (9th Cir.), *rev'd on rehearing*, 483 F.2d 1190 (9th Cir. 1973).

Several judges have questioned the existence of intermediate supervisory power. Judge Byrne attacked the doctrine in his dissent in *Burton*:

Until 1943, in the Anglo-American system of justice, the rule that appellate courts could reverse lower courts only when error was present, was never questioned. In *McNabb v. United States* . . . the Supreme Court announced the new doctrine that, *as the court of ultimate review*, it had supervisory powers over lower courts which permitted the reversal of judgments even in absence of error. . . .

A court of appeals is not "the court of ultimate review" and its province as a court is limited to reversing district courts *only when prejudicial error is found*.

Id. at 1189-90 (emphasis in original). Judge Byrne used similar language in *Henry v. United States*, 432 F.2d 114, 119-20 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971). This language was excised from *Henry* in a per curiam modifying opinion. 434 F.2d at 1284.

⁸¹ 414 U.S. 141 (1973).

⁸² *Id.* at 146, *quoted in* *United States v. Jacobs*, 547 F.2d 772, 776 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978). *Cupp* was a habeas corpus proceeding reviewing a state court criminal conviction. The trial judge gave a "presumption of truthfulness" instruction, directing the jury to presume a witness is telling the truth unless his demeanor or credibility signified otherwise. 414 U.S. at 142. Justice Rehnquist found that courts of appeals disapproved of the instruction: "The appellate courts were, in effect, exercising the so-called supervisory power of an appellate court to review proceedings of trial courts and to reverse judgments of such courts which the appellate court concludes were wrong." *Id.* at 146. The "supervisory power" discussed in this passage is not the supervisory power this Note criticizes. In *Cupp*, the Court cited cases that found the "presumption of truthfulness" instruction to be prejudicial error and reversed on that ground. *See id.* at 144 n.4. Since the prejudicial error in *Cupp* was not of constitutional dimension, the Court denied petitioner habeas corpus relief. *Id.* at 146.

In support of intermediate supervisory power, courts of appeals have also cited *Barker v. Wingo*, 407 U.S. 514 (1972), and *Bartone v. United States*, 375 U.S. 52 (1963) (per curiam). *See* *United States v. Pinkney*, 551 F.2d 1241, 1248 n.50 (D.C. Cir. 1976); *United States v. Schiavo*, 504 F.2d 1, 7 n.13 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974); *Virgin Islands v. Bodle*, 427 F.2d 532, 534 (3d Cir. 1970). In *Barker*, the Court faced the issue of speedy trial but stated: "Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervisory powers which

But this analysis made no attempt to explain the existence of intermediate supervisory power. Judge Gurfein also failed to distinguish between those cases where the doctrine controls purely judicial concerns from those where it affects executive prerogatives.⁸³ To date, no court has adequately analyzed whether courts of appeals should possess independent supervisory power in the first place.

Finally, intermediate supervisory power cannot be defended on the ground that Congress or the Supreme Court may overturn rules based on its exercise. Congress has rarely acted to control the Supreme Court's use of the power;⁸⁴ the multiplicity of rules based on intermediate supervisory power can only add to the complexity of congressional oversight and the likelihood of congressional inaction.⁸⁵ Nor can the prospect of Supreme Court review sustain the doctrine. To date the Court has never directly confronted inter-

establishes a fixed time period within which cases must normally be brought." 407 U.S. at 530 n.29. The Court referred to the Second Circuit's Rules Regarding Prompt Disposition of Criminal Cases. *Id.* at 523 n.18. But the Second Circuit had adopted those rules pursuant to 28 U.S.C. § 332 (1970) (Judicial Council). See 2d CIR. R. app. In *Bartone*, the Court found plain error when the trial court improperly enlarged the petitioner's sentence. 375 U.S. at 53. The Court referred to judicial control of errors of law when stating: "[B]oth the Courts of Appeals and this Court (*McNabb v. United States*, 318 U.S. 332) have broad powers of supervision." *Id.* at 54.

⁸³ 547 F.2d at 776.

⁸⁴ For examples of such rare congressional action, see note 4 *supra*.

⁸⁵ One might well wonder how Congress must speak either to overturn or to preempt an exercise of supervisory power. In *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978), the government argued that supervisory power could not support the suppression of relevant evidence—the incriminating grand jury testimony of defendant *Jacobs*. *Id.* at 776-77. The government relied upon 18 U.S.C. § 3501(a) (1970) (admissibility of voluntary confessions) and the Federal Rules of Evidence:

All 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.

FED. R. EVID. 402 (emphasis added). Without reaching the issue, the Second Circuit disapproved the "extreme" position that Congress had intended to preempt exercises of supervisory power:

It requires a good deal of stretching to say that these general statutes, in any event, were preclusive of supervisory power which is exercised, not in derogation of a procedural rule or statute, but for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures.

547 F.2d at 777. The government clearly rejects this formulation. See Brief for the United States at 14-23, *United States v. Jacobs*, 98 S. Ct. 1873 (1978). Cf. *United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir. 1976) (18 U.S.C. § 3501 (1970) precludes use of supervisory power), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Crook*, 502 F.2d 1378, 1381 (3d Cir. 1974) (18 U.S.C. § 3501(a) (1970) prohibits exercise of supervisory suppression), *cert. denied*, 419 U.S. 1123 (1975).

mediate supervisory power,⁸⁶ but has permitted inconsistencies among the circuits to stand.⁸⁷ This history unmask judicial review as an ineffective control.

Supervisory power has long provided circuit courts with the ability to expand the law to satisfy their policy preferences. Courts must, however, begin to resist the temptation to invoke this doctrine. The questionable legitimacy of intermediate supervisory power, its potential for abuse, and the absence of any carefully articulated standards for its exercise necessitate such circumspection.⁸⁸ Courts of appeals should confine themselves to following the *McNabb* model of implementing specific congressional policies and should focus carefully on the actors and activities potentially affected by supervisory rulings.⁸⁹ Absent a clear need to

⁸⁶ Research has disclosed no instance where the Supreme Court has overturned an exercise of intermediate supervisory power. The Court recently dismissed certiorari in *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978). Courts of appeals have occasionally overturned exercises of supervisory power by district courts as abuses of discretion. *See, e.g.*, *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). The Government had raised this argument in *Jacobs*. *See* Brief for the United States at 23-36, *United States v. Jacobs*, 98 S. Ct. 1873 (1978).

⁸⁷ The best example of inconsistency among the circuits is the body of rules governing the *Allen* charge. *See* notes 10-15 and accompanying text *supra*.

⁸⁸ Courts should be aware of alternatives to supervisory power. For example, various enabling acts authorize the Supreme Court to enact rules with the acquiescence of Congress. 28 U.S.C. § 2072 (1970) (civil rules); 18 U.S.C. §§ 3771-72 (1970 & Supp. V 1975) (criminal rules); 28 U.S.C. § 2075 (1970) (bankruptcy rules). The Supreme Court may amend the Federal Rules of Evidence. 28 U.S.C. § 2076 (Supp. V 1975). Most important, 28 U.S.C. § 2071 (1970) states: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Courts may also promulgate rules by judicial conference on either a nationwide or circuit-wide basis. 28 U.S.C. § 331 (1970) (Judicial Conference of United States) (Chief Justice chairs panel of Chief Judges of all circuits); 28 U.S.C. § 332 (1970) (Judicial Council) (Chief Judge of circuit chairs panel of cross-section of circuit's judges); 28 U.S.C. § 333 (1970) (Judicial Conference of Circuit) (Chief Judge of circuit chairs panel of all federal judges within circuit). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973); Weinstein, *supra* note 74, at 905.

⁸⁹ Professor Hill developed three overlapping classifications in his analysis of supervisory power:

1. Supervisory power exercised to protect the quality of the judicial process;
2. Supervisory power triggered by government's violation of statutes; and
3. Supervisory power triggered by government actions that do not violate statutory language but are wrong from the judicial perspective.

Hill, *supra* note 1, at 194. Professor Hill concludes that courts should not invoke supervisory power over activities falling into category three:

[U]nder the Constitution and the governing statutes, it is, to say the least, less

implement congressional policy, courts should not attempt to invade traditionally executive concerns.

The Ninth Circuit, in *United States v. Chanen*,⁹⁰ recently demonstrated this sensitivity when reviewing a prosecutor's presentation of hearsay evidence before a grand jury.⁹¹ Exercising supervisory power, the district court had dismissed the indictment due to the "fundamental unfairness" of the prosecutor's conduct.⁹² The Ninth Circuit reversed,⁹³ recognizing the overlapping executive and judicial functions of grand juries:

obvious that the judiciary has authority to pass *independent* judgment on the propriety of investigational and enforcement activity of the executive branch. The constitutional prerogatives of the executive branch in this regard are subject to a large measure of control by Congress, but it is not clear that the courts may go beyond the implementation of constitutional and statutory limitations.

Id. at 205 (emphasis in original).

⁹⁰ 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

⁹¹ The government brought defendants before a grand jury alleging a false claim against the United States in the Court of Claims. After testimony by several witnesses, the government neither presented an indictment nor requested a true bill. Several months later, the government again brought defendants before a grand jury where the government presented one witness who summarized the testimony of several witnesses at the first grand jury. The second grand jury indicted but the indictment was dismissed because no court reporter had been present at the second grand jury and no transcript was available. A second ground for dismissal was the prosecution's use of hearsay evidence. A third grand jury indicted defendants on the basis of the testimony of one witness and readings of the transcript of the first proceeding. Exercising supervisory power, the district court dismissed this indictment: "[A]s long as the Government presented their case live before [the first] grand jury, . . . any subsequent grand jury should have the same opportunity." *Id.* at 1308-09 (quoting district judge).

⁹² See *id.* at 1309 n.2.

⁹³ Defendant argued that the court of appeals could reverse only upon finding abuse of discretion because the district court had dismissed the indictment pursuant to its supervisory power. *Id.* at 1312. Judge Wallace rejected this argument and limited the discretion of the trial judge due to the close connection between the executive branch and the grand jury:

In its broadest conceptual outlines, this case presents a conflict between the Executive and Judicial branches of the federal government over their respective relationships to the federal grand jury. The defendants perceive the district court as endowed with broad discretionary powers to supervise the grand jury. By contrast, the government contends that "the manner of conducting grand jury proceedings lies in the discretion of the executive branch guided by law, not in the trial court." In our view, tradition and the dynamics of the constitutional scheme of separation of powers define a *limited* function for both court and prosecutor in their dealings with the grand jury. In this case, it is the court, not the prosecutor, which has exceeded those limits.

Id. (emphasis in original). The court found grand juries to be independent bodies not wholly controlled by either the executive or judicial branch: "[U]nder the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." *Id.* The court considered the presentation of evidence an executive function. *Id.*

[G]iven the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its “supervisory power” in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so.⁹⁴

Discretionary restraint, of course, cannot excuse the lack of theoretical and practical justification for intermediate supervisory power. Why courts of appeals should extend procedural protections beyond constitutional requirements remains unanswered.⁹⁵ The unprincipled exercise of intermediate supervisory power has accelerated the erosion of limited government and the separation of powers. Only increased judicial self-restraint and effective control by the Supreme Court and Congress can halt this dangerous trend.

L. Douglas Harris

⁹⁴ *Id.* at 1313 (footnote omitted).

⁹⁵ Judge Gurfein has stated:

While we did not think the warning to be necessary on *Miranda* grounds, we also did not believe that because an omission by a prosecutor is within constitutional limits, he *must* necessarily omit that which he is constitutionally permitted to omit. What the Constitution does not require it does not necessarily forbid.

United States v. Jacobs, 547 F.2d 772, 774 (2d Cir. 1976), *cert. dismissed*, 98 S. Ct. 1873 (1978) (emphasis in original).