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RECENT DEVELOPMENT

EXCLUSION OF EVIDENCE UNDER THE SUPERVISORY POWER: United States v. Payner

Since first exercising federal supervisory power to suppress evidence in a federal criminal prosecution, the Supreme Court has justified the doctrine as a means of preserving the integrity of the federal judiciary.1 At the same time, the Court has curtailed the reach of the exclusionary rule, which suppresses evidence obtained in violation of the fourth amendment’s search and seizure clause, in order to deter police misconduct.2 These two doctrines collided in United States v. Payner.3 In Payner, the Supreme Court held that a trial court had improperly exercised its supervisory power when it excluded evidence—otherwise admissible under the exclusionary rule—that federal agents had seized in deliberate violation of the constitutional rights of a third party.4 To insure that courts would not use the supervisory power to evade the limits of the fourth amendment exclusionary rule, the Court deemed deterrence of police misconduct, not preservation of judicial integrity, to be the primary rationale for evidence exclusion under the supervisory power.5

By applying the deterrence rationale of the fourth amendment exclusionary rule to the supervisory power, the Court rendered the two doctrines coterminous in challenges to evidence seized in violation of the search and seizure clause, thereby obscuring the distinctions it had previously drawn between the two suppression doctrines.6 Yet the decision enabled the Court to preserve the balance it had struck in previous exclusionary rule cases between society’s interest in deterring unconstitutional police conduct and in promoting the truth-seeking function of criminal adjudications.7 Although the Court’s decision in Payner may render the supervisory power a superfluous remedy for constitution-

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1 See McNabb v. United States, 318 U.S. 332 (1943); notes 33-44, 50-61, and accompanying text infra.
2 See notes 21-32 and accompanying text infra.
3 100 S. Ct. 2439 (1980).
4 Id. at 2446-47.
5 Id. at 2445-46.
6 See notes 16-20, 50-61, 82-85, and accompanying text infra.
7 See notes 27-32, 81-85, and accompanying text infra.
ally prohibited searches and seizures, lower courts may continue to use the power to exclude evidence obtained through statutory violations.  

I

HISTORICAL BACKGROUND

A. The Fourth Amendment Exclusionary Rule

An examination of the development of the fourth amendment exclusionary rule illuminates Payner's effect on the supervisory power. The rule protects fourth amendment rights by rendering evidence obtained from defendants in violation of the Constitution's search and seizure clause inadmissible in criminal prosecutions. The Supreme Court established the rule in Weeks v. United States to exclude unlawfully seized evidence. The Court reasoned that use of the evidence would produce "a denial of the constitutional rights of the accused."  

As the application of the rule evolved, its underlying rationale shifted, causing uncertainty among courts and commentators about whether the rule was constitutionally compelled or a mere judicial creation. The Weeks Court designed the rule to protect personal constitutional rights of defendants. In Mapp v.

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8 See notes 90-91, and accompanying text infra.

9 The fourth amendment states:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

10 232 U.S. 383 (1914).

11 Id. at 398.


13 232 U.S. at 390-92, 394, 398. Both before and during his trial, the defendant unsuccessfully requested the court to return evidence seized by a United States marshal who had searched his room without a warrant. Id. at 386-88. He also objected to the use of the evidence against him. Id. at 388. The Court stated:

   We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.

Id. at 398.
Ohio, the Court observed that since Weeks, it had consistently held the exclusionary rule "to be a clear, specific, and constitutionally required ... safeguard." After characterizing the rule as a substantive constitutional right, the Mapp Court acknowledged its utility as a deterrent of governmental misconduct and as a means of preserving judicial integrity. Dissenting in Mapp,

15 Id. at 648. The Court referred to the rule as "our constitutional exclusionary doctrine," id. at 659, and the "most important constitutional privilege," id. at 656, of the search and seizure clause. In holding the exclusionary rule enforceable against the states through the fourteenth amendment, id. at 644, the Court noted that the factual support for its earlier failure in Wolf v. Colorado, 388 U.S. 25 (1949), to extend the exclusionary rule to the states "while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling." 367 U.S. at 653.
16 367 U.S. at 651.
17 Id. at 659-60. Both the deterrence and judicial integrity rationales have generated a great deal of controversy. Critics of the deterrence rationale say that little or no conclusive data exist to demonstrate that the suppression of "tainted" evidence has any deterrent effect on law enforcement activity. See, e.g., Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 33-34. Chief Justice Burger, dissenting in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1970), said that the suppression sanction "is both conceptually sterile and practically ineffective." Id. at 415.

Critics of the judicial integrity rationale contend that courts, while attempting to nurture respect for the law by excluding illegally-seized evidence, may nonetheless generate disrespect and disillusionment by freeing guilty defendants because of abstract notions of the sanctity of the judicial process. Chief Justice Burger has commented:

If a majority—or even a substantial minority—of the people in any given community ... come to believe that law enforcement is being frustrated by what laymen call "technicalities," there develops a sour and bitter feeling that is psychologically and sociologically unhealthy. ... I do not challenge these rules of law [applying the suppression doctrine]. But I do suggest that we may have come the full circle from the place where Brandeis stood, and that a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is defeating justice.
Burger, Who Will Watch the Watchman?, 14 Am. U.L. Rev. 1, 22 (1964). Others challenge the judicial integrity rationale because no analogous rule "is observed in other common law jurisdictions, such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 Chi. L. Rev. 665, 669 (1970) (footnote omitted).

Finally, some critics question the validity of the exclusionary rule in general. They argue that the "disparity... between the error committed by the police... and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." Stone v. Powell, 428 U.S. 465, 490 (1976) (footnote omitted); accord, Allen, supra, at 36. Proponents of this view contend that the trier of fact performs a vital function for the accused as well as for society. Thus, the benefits to the defendant must be great to justify the costs of suppression to society. In Nardone v. United States, 308 U.S. 338 (1939), the Supreme Court 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." Id. at 340. See also United States v. Janis, 428 U.S. 433, 453-54 (1976).
Justice Harlan argued that the rule was not constitutionally compelled, but derived from the Supreme Court's supervisory power over the federal judicial system. He viewed the rule as "a basic federal remedy ... which, by penalizing past official misconduct, is aimed at deterring such conduct in the future." Later decisions preserved the rule's constitutional basis, but increasingly emphasized the deterrence rationale. Recently, 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." Subsequent decisions adhered to Calandra's view of

Others contend that the rule serves only a defendant whom the tainted evidence incriminates; it benefits neither the victim nor society. See 8 Wigmore, EVIDENCE § 2184a, at 51-52 (McNaughten ed. 1961) ("The rule serves] neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal in their midst."); Oaks, supra, at 736.

Critics of the exclusionary rule have called for its modification or abolition. Suggested remedies include statutory sanctions against unlawful police activity, more effective tort actions, more stringent internal review and discipline of police misconduct, and abolition of the standing requirement, which limits the class of defendants who can invoke the rule. See Kaplan, The Limits of the Exclusionary Rule, 26 STAN. L. REV. 1027, 1042-43, 1050-51 (1974); Oaks, supra, at 673-74, 756-57; Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. CHI. L. REV. 342, 366 (1967). For an explanation of the standing requirement, see note 27 infra.

18 Id. at 678 (Harlan, J., dissenting). Justice Harlan believed that the Court in Mapp had held that the rule was constitutionally mandated "because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts." Id.

19 Id. at 680 (Harlan, J., dissenting).


22 Id. at 348 (footnote omitted). Although commentators agree that the exclusionary rule is a judicially created remedy rather than a constitutional right, they disagree whether the Court has authority to create such a remedy. On one side of the debate, Professor Monaghan places the rule in a category of "quasi-constitutional" law—"a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions." Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2-3 (1975). The creation of such rules is, in effect, an exercise of a common law power. Id. at 3. Although conceding that the "Court's authority to [impose such rules] is not evident," id. at 8, Monaghan concludes that the Court's tradition of defining the limits of governmental power "make [the Court] a singularly appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees." Id. at 19 (footnote omitted).

Professors Schrock and Welsh, the leading proponents of the opposing view, consider the concept of a constitutional common law to be "neither constitutional nor common law but pragmatism without either precedent or principle." Schrock & Welsh, supra note 12, at 1124. They argue that the theory of judicial review, set forth in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and the constitutional principles of separation of powers and federalism foreclose any subconstitutional power of the Court. Schrock & Welsh, supra, at 1127. In addition, Schrock and Welsh point to the absence of any textual authority for the
the nature of the exclusionary rule.\textsuperscript{23} In Stone v. Powell,\textsuperscript{24} for example, the Court recognized that the rule is "a judicially created means of effectuating" fourth amendment rights,\textsuperscript{25} and denied federal habeas corpus relief to a state prisoner after the state had provided an opportunity for full and fair litigation of his allegation that illegally seized evidence invalidated his conviction.\textsuperscript{26}

Because the Court no longer regards the exclusionary rule as a personal constitutional right, it applies the rule only when exclusion of tainted evidence furthers society's interests. To make this determination, the Court balances society's interest in making all evidence available to aid the truth-finding process against the harm caused by the use of illegally obtained evidence.\textsuperscript{27} In

\textit{concept. Id. at 1145. They assert that Monaghan "can ultimately do no better than infer authority from utility," id. at 1131, and use his suggestion "that such legislative rules can be adequately rationalized as constitutional common law," Monaghan, supra, at 23, as an illustration. Schrock and Welsh urge that the Court "should confine itself to Marbury-style constitutional interpretation," Schrock & Welsh, supra, at 1171, rather than "assume and exercise the power to impose on coordinate departments, and especially on the states, rules developed at a subconstitutional level." Id. at 1171.

\textsuperscript{23} In United States v. Williams, 622 F.2d 830 (5th Cir. 1980), the court emphasized the deterrence rationale in employing a "good-faith exception" to the judicially-created exclusionary rule—evidence will not be excluded when a law enforcement officer acts in the good faith belief that his conduct is constitutional and he has a reasonable basis for that belief. Because deterrence of future police misconduct justifies the rule, it "is not applied in those contexts where it does not effectively deter official misconduct." \textit{Id. at 842.} The court quoted Professor Wright's observation that "a police officer will not be deterred from an illegal search if he does not know that it is illegal." \textit{Id. at 842} (quoting Wright, \textit{Must the Criminal Go Free if the Constable Blunders?}, 50 Texas L. Rev. 736, 740 (1972)). \textit{See also} Brewer v. Williams, 430 U.S. 387, 421 (1977) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Peltier, 422 U.S. 531, 538 (1975).

\textsuperscript{24} 428 U.S. 465 (1976).

\textsuperscript{25} \textit{Id. at} 482.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} The Court used interest-balancing to limit the application of the exclusionary rule when it was regarded as constitutionally required. Many decisions have echoed the view expressed in Alderman v. United States, 394 U.S. 165 (1969):

The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Alderman v. United States the Court struck such a balance, albeit a curious one, by holding that a defendant may invoke the exclusionary rule only when police conduct violates his own fourth amendment rights. The Court reasoned that the deterrence of police misconduct did not justify impeding the truth-finding function when police violate a third party's fourth amendment rights. Nor does such police conduct reduce the probative value of otherwise admissible evidence.

Concern with disclosure of all relevant evidence in the truth-finding process led the Supreme Court to develop the concept of standing, which limited the class of defendants who could invoke the exclusionary rule. In Olmstead v. United States, 477 U.S. 438 (1928), the Court held that a defendant must have a property interest in the object of the search and seizure to allege a violation of his fourth amendment rights. The Olmstead property requirement prevailed until the Court radically altered the boundaries of the doctrine. In Jones v. United States, 362 U.S. 257 (1960), the Court granted standing to a defendant charged with possession of items seized in the search, id. at 264, or to "anyone legitimately on premises where a search occurs... when its fruits are proposed to be used against him." Id. at 267. When faced with the illegal wiretapping of a public telephone booth, the Court recognized that "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). In Katz the Court expanded standing to encompass violations of what Justice Harlan, in his concurrence, called a defendant's "reasonable" expectation of privacy. Id. at 361. Katz is also significant for its extension of standing to cover instances of electronic surveillance in which no physical trespass occurs.

In Rakas v. Illinois, 439 U.S. 128 (1978), the Court reversed this expansive trend. The Court rejected standing analysis in favor of an inquiry focused on substantive fourth amendment rights. Writing for the majority, Justice Rehnquist stated, "[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." Id. at 139. The analysis examined "whether the disputed search and seizure... infringed an interest of the defendant which the Fourth Amendment was designed to protect." Id. at 140. The Court rejected petitioners' fourth amendment claim because they had asserted neither a property nor a possessory interest in the searched premises or the seized object. The Court explicitly overruled Jones in United States v. Salvucci, 100 S. Ct. 2547 (1980). Moreover, in Rawlings v. Kentucky, 100 S. Ct. 2556 (1980), the Court held that the mere ownership of property does not entitle a defendant to challenge an illegal search and seizure when the property is in the custody of a third party.

29 As one commentator noted, "The standing requirement seems unrelated to the factors relevant in such a balancing process, such as the relative egregiousness of police infractions of privacy, the relative susceptibility of police practices to judicial deterrence, the relative ease of acquiring evidence by other means, and so on." The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 169 (1969).
30 394 U.S. at 171-72. "Fourth Amendment rights... may not be vicariously asserted. ... [W]e think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion." Id. at 174.
31 Id. at 174-75.
32 One commentator explains reliability of illegally seized evidence in the following manner:
B. Exclusion of Evidence Under the Supervisory Power

The Supreme Court first invoked its supervisory power over federal courts as an independent basis for excluding evidence in *McNabb v. United States*. In *McNabb*, federal agents arrested the defendants and held them for two days without a statutorily required preliminary hearing. The Supreme Court reversed their convictions, holding that confessions obtained by federal officers during the illegal detention were inadmissible in federal court. The Court grounded its decision on its “supervisory authority over the administration of criminal justice in the federal courts” rather than on a constitutional or statutory provision. The supervisory authority conferred inherent power to formulate “rules of evidence to be applied in federal criminal prosecutions” that were necessary to avoid “making the courts themselves accomplices in willful disobedience of law.” Although the statute in *McNabb* did not explicitly forbid the use of evidence procured during an illegal detention, the Court

An application of the exclusionary rule... is probably more vulnerable to a complaint of “freeing the guilty” than the exclusion of an improperly obtained confession or eyewitness identification. Physical evidence is no less reliable when illegally obtained. The nature of burglary tools, blood stains, or white powder in a glassine wrapper is not changed by the circumstances of their acquisition. In contrast, identifications obtained by faulty lineup procedures are of doubtful reliability. So are confessions obtained by coercive methods. In addition, under current law enforcement methods, evidence obtained by a search is likely to be vital to conviction in most types of crimes where searches are commonly involved. Confessions are generally less vital.


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33 318 U.S. 322 (1943).
35 318 U.S. at 345. The trial court, applying a rule that excluded only coerced confessions, had admitted into evidence confessions obtained during the illegal detention. *Id.* at 338-39 n.5. The Supreme Court held the confession inadmissible regardless of whether it was coerced. *Id.* at 345.
36 *Id.* at 341.
37 "In the view we take of the case... it becomes unnecessary to reach the Constitutional issue pressed upon us." *Id.* at 340. The Court added that the scope of its "reviewing power... is not confined to ascertainment of Constitutional validity." *Id.*
38 "Congress has not explicitly forbidden the use of evidence so procured." *Id.* at 345.
39 *Id.* at 341.
40 *Id.* at 345.
41 *Id.*
reasoned that admission of such evidence would undermine both congressional policy and the "integrity of the criminal proceeding." Thus, without claiming the right to oversee law enforcement activities directly, the McNabb Court, under the "rubric of keeping [its] own skirts clean," simply denied the judicial machinery to government agents who had engaged in illegal or unfair conduct.

Since McNabb, the Court has continued to exercise supervisory power to suppress evidence obtained by federal governmental misconduct. Because this power is rooted in the federal judiciary's authority to oversee federal proceedings, the Court has not applied the power to upset state court convictions in the absence of federal participation. The Court has used the supervisory power to ensure a level of fairness in the judicial

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42 Id.
43 Id. at 342. "We hold only that a decent regard for the duty of the courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here." Id. at 347.
45 "[W]e 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." 318 U.S. at 347.
46 Mallory v. United States, 354 U.S. 449, 455 (1957) ("We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard."); Mesarosh v. United States, 352 U.S. 1, 14 (1956) ("[T]he government witness, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity."); Upshaw v. United States, 335 U.S. 410, 414 (1948) ("[T]he arresting officer in effect conceded that the confessions here were the fruits of wrongdoing by the police officers.").
47 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."). The Court, however, has excluded from a state criminal proceeding evidence seized illegally by a federal agent. In Rea v. United States, 350 U.S. 214 (1956), state authorities sought to prosecute a defendant using evidence which had already been excluded from a federal prosecution. The defendant petitioned to prevent transfer of the evidence from the federal court and to enjoin the federal agent from testifying in the state proceeding. Id. at 214-16. The Court stressed that the federal agent had violated the Federal Rules of Criminal Procedure:

The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. . . . The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States Commissioner.

Id. at 216 (citation omitted). But see Wilson v. Schnettler, 365 U.S. 381 (1961) (Court denied exclusion where federal agents arrested defendant without a warrant, initiated no federal prosecution, but gave narcotics taken from defendant to state authorities).
process above the minimum requirements of the Constitution.\textsuperscript{49} Until 1960, the Court adhered to the judicial integrity rationale to support its exercise of the power in the face of deliberate misconduct by law enforcement officials.\textsuperscript{50}

In \textit{Elkins v. United States},\textsuperscript{51} the Court appeared to adopt deterrence as an additional rationale for suppressing evidence under the supervisory power. In \textit{Elkins}, the Court invoked its supervisory power to exclude from a federal criminal prosecution evidence seized by state officers whose violations of the fourth amendment would have triggered the exclusionary rule had they been federal officers.\textsuperscript{52} While retaining the traditional judicial in-
tegrity rationale of supervisory power, the Elkins Court also used the exclusionary rule's rationale of deterrence to support its application of the supervisory power. A closer examination, however, suggests that Elkins' use of the deterrence rationale was a temporary aberration to circumvent an earlier decision holding that the fourth amendment exclusionary rule did not apply to state conduct. After establishing that the state officers had violated the fourth amendment, the Elkins Court examined the constitutional development of the federal exclusionary rule and reasons for its extension to conduct by state agents. The Court appeared to regard the judicial integrity rationale as secondary support for its decision. Thus, the Elkins Court clearly intended to effectuate fourth amendment guarantees. In prior supervisory power decisions, the court had not used such a constitutionally based analysis, but merely relied on the need to protect judicial integrity. Because the Court extended the exclusionary rule to
dence handed on a "silver platter" to federal agents by state officers who had acted on their own in violation of the same rights. Id. at 398. The Weeks court excluded only the evidence seized directly by the federal agent, because the fourth amendment was not then enforceable against state conduct. Id.

For a discussion of the fourth amendment exclusionary rule, see notes 9-32 and accompanying text supra.

In Wolf v. Colorado, 338 U.S. 25, 33 (1949), the Court determined that the fourteenth amendment extended the fourth amendment to limit conduct of state law enforcement officers but did not require states to adopt the exclusionary rule to bar from state courts evidence seized illegally by state officers. In Elkins the Court stated, "[N]othing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which Wolf established. . . . [T]hat the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." 364 U.S. at 213.

The Court discussed the exclusion of evidence strictly in the context of the fourth amendment exclusionary rule. Id. at 218 ("The federal courts . . . have operated under the exclusionary rule . . . for almost half a century."); id. at 222 ("[I]n applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."); id. ("[I]t can hardly be said that in the over-all pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary.").

After discussing the fourth amendment rationales for exclusion for 14 pages of the opinion, the Court added two pages of discussion of the judicial integrity rationale. Compare id at 208-22 with id. at 222-23.

See, e.g., Mesarosh v. United States, 352 U.S. 1, 3 (1956) ("The decision herein passes only on the integrity of a criminal trial in the federal courts."); Rea v. United States, 350 U.S. 214, 216-17 (1956) ("[W]e have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies."); McNabb v. United States, 318 U.S. 332, 341-42 (1943) ("Quite apart from the Constitution . . . we are constrained to hold that the evidence elicited from the petitioners . . . must be excluded. . . . [The arresting officers] subjected the accused to the pressures of a procedure . . . which tends to undermine the integrity of the criminal proceeding.").
state trials just one year later. Elkins' application of the deterrence rationale to the supervisory power should be viewed as merely the Court's final effort to avoid extending the exclusionary rule to upset state convictions. Until the Court's decision in Payner, then, the supervisory power and the exclusionary rule were supported by distinct, separate rationales.

II

UNITED STATES v. PAYNER

During an Internal Revenue Service (IRS) investigation of American citizens' financial activities in the Bahamas, an IRS informer stole a briefcase belonging to a Bahamian bank official who was visiting Miami. Documents found in the briefcase provided leads resulting in a subpoena of Florida bank records that, in turn, led to the indictment of Jack Payner on a charge of falsifying his 1972 federal income tax return. The district court

61 In Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in a state court. The Court thus overruled that part of Wolf v. Colorado, 338 U.S. 25 (1949), that held that the Constitution did not mandate state adherence to the exclusionary rule. The Mapp Court reasoned that the constitutional prohibition of unreasonable searches and seizures would be "a form of words" if unaccompanied by the exclusionary rule. 367 U.S. at 655 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919) (Holmes, J., dissenting)). "In short," the Mapp Court stated, "the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure." Id. at 656. The Court also noted its recognition, one year earlier in Elkins, of the deterrent purpose of the exclusionary rule. Id.

62 The investigation, known as "Operation Trade Winds," began in 1965. In 1972, the IRS focused on the Castle Bank and Trust Co. of Nassau, which investigators suspected was an illegal tax haven for United States citizens. An IRS informer cultivated a friendship with the vice-president of the bank and introduced him to a female detective. When the informer learned that the bank official would carry bank records on a January 1973 trip to Miami, the IRS agent in charge of the investigation approved the outline of the informer's plan to acquire them. While the bank official and the female detective were at dinner, the informer entered the latter's apartment and removed the bank official's briefcase. United States v. Payner, 434 F. Supp. 113, 118-20 (N.D. Ohio 1977), aff'd, 590 F.2d 206 (6th Cir. 1979), rev'd, 100 S. Ct. 2439 (1980).

63 The briefcase documents disclosed Payner's account in the Bahamian bank and linked that bank with a Florida bank. A subpoena subsequently issued to the Florida bank produced a loan agreement in which Payner pledged his Bahamian account as security for a loan. The loan guarantee triggered an IRS investigation of Payner's 1972 tax return. 434 F. Supp. at 122.

Payner's indictment charged him with falsely stating on that return that he did not have a foreign bank account, id. at 117-18, in violation of 18 U.S.C. § 1001 (1976), which provides in relevant part: "Whoever, in any matter within the jurisdiction of any depart-
held that Payner lacked standing to object to the prosecution’s use of a Florida bank document as the fruit of the seizure that had violated the Bahamian bank official’s fourth amendment rights. The court, however, granted a defense motion to suppress the Florida bank document under its supervisory power and the due process clause of the fifth amendment. Stressing the egregiousness of the IRS’s behavior, the court invoked its supervisory authority “to exclude evidence obtained by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right.” The Sixth Circuit affirmed on the basis of the supervisory power, but did not address the due process issue.

The Supreme Court, in a six to three decision, held that the district court had improperly exercised its supervisory power in suppressing evidence otherwise admissible under the fourth amendment. Although commending the district court for its
desire to deter misconduct by law enforcement officials,\textsuperscript{72} Justice Powell, writing for the majority,\textsuperscript{73} held that the interests of justice do not require the suppression of all illegally seized evidence.\textsuperscript{74} Rather, a court must weigh society's interest in enforcing "ideals of governmental rectitude" against its interest in ascertaining the truth in a criminal trial.\textsuperscript{75} A court must balance the same interests when a defendant invokes the supervisory power as it does when he invokes the fourth amendment exclusionary rule.\textsuperscript{76} Justice Powell observed that the Court's fourth amendment decisions establish "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices."\textsuperscript{77} The majority observed that if it failed to strike the same final balance under the supervisory power, the judiciary would have unbridled discretion to disregard "the considered limitations of the law it is charged with enforcing."\textsuperscript{78}

III

PAYNER'S EFFECT ON THE SUPERVISORY POWER

In Payner, the ever-shrinking exclusionary rule collided with the supervisory power, a relatively unharnessed doctrine. Over
the years, the Court has recognized that the exclusionary rule may not deter misconduct, yet has been reluctant to repudiate such an entrenched principle. Instead, the Court has gradually restricted the reach of the rule. The Payner decision represents a logical accommodation of the supervisory power to these cutbacks in the exclusionary rule. If the Court had not applied the restrictions of the exclusionary rule to limit the discretionary exercise of supervisory power, trial courts might easily circumvent the established balance between deterrence and truth-finding, at least in cases of deliberate misconduct by law enforcement officials.

To prevent this end run, the Payner Court shifted to the deterrence rationale—used in its previous exclusionary rule decisions—to support the use of the supervisory power. Al-
though acknowledging that the judicial integrity rationale supported both doctrines, though acknowledging that the judicial integrity rationale supported both doctrines, the Court ignored prior decisions that had established judicial integrity as the primary justification for the supervisory power and deterrence as the foundation of the exclusionary rule. This construction enabled the Court to pre-

defendants in a criminal prosecution. . . . Indeed, the decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

. . . . Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury. . . . The same societal interests are at risk when a criminal defendant invokes the supervisory power to suppress evidence seized in violation of a third party's constitutional rights.

100 S. Ct. at 2445-46 (emphasis added) (citations omitted). Justice Marshall argued that the majority opinion ignored the judicial integrity rationale in its analysis of the supervisory power. Id. at 2451-54 (Marshall, J., dissenting). "Since the supervisory powers are exercised to protect the integrity of the court, rather than to vindicate the constitutional rights of the defendant, it is hard to see why the Court today bases its analysis entirely upon Fourth Amendment standing rules." Id. at 2452.

In a footnote responding to Marshall, the Court makes clear that it is balancing deterrence and judicial integrity against society's interest in truth-finding. Id. at 2446-47 n.8.

Although the District Court in this case relied upon a deterrent rationale, we agree [with the dissent] that the supervisory power serves the "two-fold" purpose of deterring illegality and protecting judicial integrity. As the dissent recognizes, however, the Fourth Amendment exclusionary rule serves precisely the same purposes. Thus, the . . . rule, like the supervisory power, is applied in part "to protect the integrity of the court rather than to vindicate the constitutional rights of the defendant. . . ."

Id. (citations omitted).

83 Id.

84 See notes 50-61 and accompanying text supra.

Even if the Court had viewed judicial integrity as the primary rationale for the supervisory power and deterrence as a secondary concern, both interests arguably would not have outweighed the interest in truth-finding, in light of the Court's emphasis on that societal interest and its reluctance to exclude probative evidence even if obtained in violation of a defendant's fourth amendment rights. See 100 S. Ct. at 2445-46 ("The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. . . . Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." (citations omitted)). Where a third party's constitutional rights were infringed, the Payner Court would not have ascribed greater weight to the interest of judicial integrity under the supervisory power than it had ascribed to deterrence in similar circumstances under the fourth amendment rule. See Alderman v. United States, 394 U.S. 165 (1968); note 27 supra. The Court, in fact, noted, "The supervisory power is applied with some caution even when the defendant asserts a violation of his own rights." 100 S. Ct. at 2446.

85 See Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment
vent defendants from invoking the supervisory authority to achieve what they could not accomplish through the exclusionary rule.

The Payner Court may have overestimated the extent to which the use of the supervisory power to exclude evidence would upset the fourth amendment balance between deterrence and truth-finding. The facts of Payner would limit such use of the supervisory power to cases of deliberate law enforcement misconduct.\textsuperscript{86} Moreover, the discretionary nature of the supervisory power would limit its exclusionary application; courts are never compelled to exercise the power.\textsuperscript{87}

Nonetheless, the Payner decision comports with the generally held view that the exclusionary rule is judicially created rather than constitutionally compelled.\textsuperscript{88} Applying the supervisory power to exclude evidence obtained in violation of the fourth amendment would simply engraft one judicially created remedy upon another to effectuate the same constitutional principle.

The Court’s decision may render the supervisory power superfluous,\textsuperscript{89} but only in the context of unreasonable searches and seizures. Because the holding hinged on the Court’s refusal to upset its established fourth amendment balance between deter-

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\textsuperscript{86} See notes 68-69, and accompanying text supra.

\textsuperscript{87} In addition, federal courts’ infrequent exercise of the supervisory power would have further limited the effect of a contrary decision in Payner. The Supreme Court had not used the power to exclude evidence since 1959, when deciding Elkins v. United States, 364 U.S. 206 (1960).

\textsuperscript{88} See notes 21-26 and accompanying text supra.

\textsuperscript{89} The Seventh Circuit does not so regard the supervisory power. In United States v. Cortina, No. 79-2226 (7th Cir. Sept. 11, 1980), the court exercised its supervisory power to exclude from evidence corporate records seized pursuant to a fraudulently obtained search warrant. The trial court found that an FBI agent had lied in an affidavit presented to a magistrate to support the search warrant. The court also concluded that without this deliberate misrepresentation, the FBI would not have made the requisite showing of probable cause. Affirming the district court’s use of supervisory power, the court of appeals stated that the “fraud upon the judicial system” required suppression.

Cortina may be regarded as an “end run” around established fourth amendment doctrine proscribed by the Supreme Court in Payner. In Rakas v. Illinois, 439 U.S. 138, 140-48 (1978), the Court held that a defendant must demonstrate a “legitimate expectation of privacy” in evidence he seeks to exclude under the fourth amendment exclusionary rule. See note 27 supra. The prosecution asserted in Cortina that because defendants could not demonstrate such an expectation of privacy in the seized corporate records, the trial court erred in excluding the evidence. The Cortina court rejected this argument, and declined to import the fourth amendment requirement to limit the exercise of its supervisory power:
In such contexts, judicial integrity may remain the pri-

The *Payner* decision... did not hold that defendants must establish a legitimate expectation of privacy to invoke the supervisory powers if it is proven that the challenged evidence was seized from defendants. By invoking the doctrine of legitimate expectation of privacy under our circumstances, the government would interpret *Payner* to hold that the scope of the supervisory power is identical to that of the fourth amendment. But had it so held, *Payner* would have rendered the supervisory power superfluous in cases involving searches and seizures, a result the Supreme Court expressly rejected.

**United States v. Cortina**, No. 79-2226 (7th Cir. Sept. 11, 1980).

By refusing to adopt the fourth amendment requirement of "legitimate expectation of privacy," the Seventh Circuit arguably succeeds in making an "end run" around established fourth amendment doctrine. Yet the Seventh Circuit's decision is defensible on other grounds. The *Cortina* court distinguished *Payner* by implicitly adopting a two-tiered analysis of the interests of judicial integrity. On the first tier was the wrongful conduct itself—the burglary in *Payner* and the false statement in *Cortina*. On the second tier was the prosecutor's attempt to admit the tainted evidence. On the second tier, *Payner* and *Cortina* are indistinguishable; the threat to judicial integrity is equally strong in both cases. Thus viewed solely on this level, the *Cortina* decision may appear incongruous. Yet it is on the first tier, the violation of an individual's rights, that the roles of judicial integrity—and thus the two decisions—may be distinguished.

In *Cortina*, the court emphasized that the agent's offense "was committed within the sanctity of the Court itself." United States v. *Cortina*, No. 79-2226 (7th Cir. Sept. 11, 1980). The court sharply focused on the first tier: "[i]t is the ... truth-finding function itself which has been corrupted, not because of suppression, but because of the lies told to the magistrate." Id. The involvement of the judicial machinery in the first-tier violation distinguishes *Cortina* from *Payner*.

Nonetheless, the Seventh Circuit's decision in *Cortina* creates an anomaly. The *Payner* Court would require admission of evidence obtained in violation of a third party's rights. Yet *Cortina* would require suppressing the same evidence if it had been obtained as a result of a fraudulently-obtained search warrant. The message of these cases is that law enforcement officials need only eschew the judicial machinery entirely to obtain admissible evidence if they cannot support the issuance of a warrant with probable cause.

*Payner*’s holding would not extend to the exercise of the supervisory power to exclude evidence obtained in violation of federal statutes. For example, in *McNabb v. United States*, 318 U.S. 332 (1943), revenue agents obtained confessions during prolonged questioning without giving defendants preliminary hearings immediately upon arrest as required by federal statute. *Id.* at 333-38, 342. Although the statute did not explicitly require suppression of evidence in contravention of its provisions, the Court used its supervisory power to exclude the confessions because "[t]he circumstances in which the statements ... were secured reveal plain disregard of the duty enjoined by Congress upon federal law officers." *Id.* at 344. The Court found exclusion essential to avoid making "the courts themselves accomplices in willful disobedience of law." *Id.* at 345. Cf. *United States v. Caceres*, 440 U.S. 741 (1979) (evidence obtained in violation of agency regulation not excluded because neither statute nor constitution mandated regulation); *Ballard v. United States*, 329 U.S. 186 (1956) and *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (verdicts in both cases set aside because wage earners and women had been excluded from juries contrary to federal jury selection laws).

If lower courts ignore the Court's footnote application of fourth amendment limitations to fifth amendment due process as a ground for exercise of the supervisory power, 100 S. Ct. at 2447 n.9 ("[T]he fact remains that 'the limitations of the Due Process...
mary rationale underlying the supervisory power. Even if given an expansive reading, the Payner decision will, at most, cause courts to exercise their supervisory powers cautiously in areas where the Supreme Court has expressed clear policy choices, as it has in its fourth amendment balance.\textsuperscript{91}

Critics may argue that the Payner decision will encourage deliberate unlawful conduct by law enforcement officials by allowing use of evidence resulting from such conduct. The exclusionary rule’s negligible deterrent effect on police conduct,\textsuperscript{92} however, suggests that a decision to admit unlawfully obtained evidence would not appreciably encourage illegal conduct by law enforcement officials.\textsuperscript{93} Moreover, the threat of a Bivens-type damage suit\textsuperscript{94} brought by a third party may counteract any encouragement

\textsuperscript{91} We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. 100 S. Ct. at 2446 (citations omitted) (footnotes omitted).

\textsuperscript{92} See note 79 supra.

\textsuperscript{93} The Court expressly condemned the behavior of the IRS. See note 72 supra. The Court also noted that Congress investigated the IRS’s “improprieties.” 100 S. Ct. at 2445 n.5. See Oversight Hearings into the Operations of the IRS Before a Subcomm. of the House Comm. on Government Operations (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program), 94th Cong., 1st Sess. (1975). The Commissioner of Internal Revenue responded by halting “Operation Trade Winds” and adopting guidelines designed to curb future abuses.

\textsuperscript{94} In Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that a plaintiff was “entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment.” Id. at 397. In his dissent, Chief Justice Burger predicted that this private tort remedy would not deter misconduct because jurors might “refuse to penalize a police officer at the behest of a person they believe to be a ‘criminal.'” Id. at 422. If the plaintiff were a third party, however, he would not face the same obstacle as a defendant in recovering damages.

Burger proposed a statutory remedy in which citizens would sue the federal government, rather than law enforcement officers, in a federal tribunal. Id. at 422-24. For a discussion of the ineffectiveness of the Bivens-type action and other alternatives, see Note, “Damage or Nothing”—The Efficacy of the Bivens-Type Remedy, 64 CORNELL L. REV. 667 (1979).
Payner might give to police lawlessness. Critics may also argue that the decision denigrates judicial integrity by virtually ignoring it as a rationale. Yet because society's confidence in the judicial process contributes to judicial integrity, that integrity may suffer more when a court lets a guilty defendant go free than if it admits tainted evidence, especially when the taint does not stem from a violation of the defendant's rights.

**Conclusion**

Payner presented the Court with a choice between preserving established limits on the fourth amendment exclusionary rule and allowing defendants to circumvent those limits by invoking the federal court's supervisory power to exclude evidence obtained through deliberate governmental misconduct violating the rights of third parties. To maintain those limits, the Court erased the distinction established in prior decisions between the rationales underlying the exclusionary rule and the supervisory power. This doctrinal integration enabled the Court to preserve its established fourth amendment balance between the interests in truth-finding and deterrence of governmental misconduct. Nonetheless, had the Court upheld the use of the supervisory power to exclude illegally obtained evidence, the discretionary nature of the power and the limits imposed by the facts in Payner would have enabled only a few defendants to evade the boundaries of the fourth amendment exclusionary rule. Payner may render the supervisory power superfluous, but only in the context of unconstitutional searches and seizures; its holding need not extend to statutory violations.

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