Court Sanctioned Circumvention of the Fourth Amendment - United States v. Payner

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COURT SANCTIONED CIRCUMVENTION
OF THE FOURTH AMENDMENT—
UNITED STATES V. PAYNER

The exclusionary rule provides that evidence seized by governmental officials in violation of a person's fourth amendment rights is inadmissible against that person in a criminal trial. To ameliorate the harsh consequences imposed upon society by application of the exclusionary rule, the Supreme Court has limited the rule's availability to individuals who possess standing to challenge the admissibility of the evidence. Administration of the standing doctrine, however, has posed difficult problems for the Court when faced with the competing interests of deterring unlawful police conduct and of prosecuting known criminals. When confronted with the dilemma of a remediless defendant clearly victimized by reprehensible police

1. The fourth amendment provides:
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.

2. The exclusionary rule, as formulated in Weeks v. United States, 232 U.S. 383, 392-93 (1914), provided that any evidence seized by federal officials in violation of a person's fourth amendment rights could not be admitted against that person in a federal court. The Supreme Court extended the application of the exclusionary rule to state prosecutions in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

3. The standing doctrine was initially formulated in Rule 41(e) of the Federal Rules of Criminal Procedure which provided in pertinent part:
   A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed . . . .
Fed. R. Crim. P. 41(e) (amended 1972). The Supreme Court has directed the development of the standing doctrine by defining a "person aggrieved." See Jones v. United States, 362 U.S. 257, 261 (1960). In determining whether Jones had standing, the Court stated that a "person aggrieved is a victim of the search or seizure, one against whom the search was directed." See also text accompanying notes 11-14 infra.

4. See, e.g., Alderman v. United States, 394 U.S. 165 (1969). The Alderman Court stated:
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.
Id. at 174-75.
conduct, the Supreme Court has invoked its supervisory power to suppress the contested evidence.⁵

Recently, this dilemma was again presented to the Court in *United States v. Payner*.⁶ Payner was indicted on the basis of evidence illegally seized by Internal Revenue Service (IRS) agents executing a scheme involving the theft of a bank executive's briefcase. A divided Court⁷ held that Payner lacked standing to challenge the admissibility of the evidence because he had no privacy interest in the documents seized from the bank official.⁸ Additionally, the Court held that the supervisory power was not applicable to suppress the illegally seized evidence admitted at trial against Payner.⁹ In effect, the Court has sanctioned police circumvention of the fourth amendment through manipulation of the standing doctrine.

**Background Law**

*Development of the Standing Doctrine*

In 1960, the Supreme Court squarely addressed the issue of standing¹⁰ and held in *Jones v. United States*¹¹ that one seeking to challenge the lawfulness

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⁵ See, e.g., Elkins v. United States, 364 U.S. 206 (1960). In *Elkins*, state officers obtained a warrant to search a co-defendant's house for obscene materials. In executing the warrant, the police found no obscene materials but nevertheless seized items thought to have been used in manufacturing wiretaps. Two Oregon courts held that the search and seizure were unlawful. Federal officials later obtained the seized articles and prosecuted the petitioners for intercepting and divulging telephone communications. The defendants were unable to contest the admissibility of the evidence in federal court because the items were not seized by federal officers. They were convicted in federal district court and the court of appeals affirmed. *Elkins v. United States*, 266 F.2d 588, 596 (9th Cir. 1959). The Supreme Court, exercising its supervisory power, suppressed the evidence because of the interests in deterring fourth amendment violations and protecting the integrity of the judicial system. 364 U.S. at 222-23.


⁷ *Payner* was a 6-3 decision, with a concurring opinion written by Chief Justice Burger. *Id.* at 737. Justices Brennan and Blackmun joined in the dissent written by Justice Marshall. *Id.* at 738.

⁸ *Id.* at 731.

⁹ *Id.* at 735.

¹⁰ Previously, the Court had addressed standing but only as incidental to the substantive fourth amendment claim. See, e.g., *United States v. Jeffers*, 342 U.S. 48 (1951). In *Jeffers*, narcotics owned by the defendant were illegally seized from a hotel room occupied by the defendant's aunts. The Court stated that the defendant had standing to contest the search and seizure because he had a property interest in the narcotics. *Id.* at 52. Similarly, in *McDonald v. United States*, 335 U.S. 451 (1948), police officers illegally entered the landlord's apartment and thereafter gained access to the entire rooming house in which the defendant lived. Once inside, the officers were able to view the defendants operating an illegal lottery in their rented room. *Id.* at 453. The government maintained that the defendant lacked standing to contest the search because only the landlord suffered a trespass which violated the fourth amendment. *Id.* at 454. The Court analyzed the search itself and held that the defendant's motion to suppress the tainted evidence should have been granted. *Id.* at 456. For an exhaustive treatment of the historical fourth amendment standing analysis, see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. Rev. 471 (1952).

of a search and seizure must initially establish standing. The Jones Court recognized three ways to satisfy the standing requirement: (1) by being legitimately on the premises at the time of the contested search and seizure; (2) by having a property interest in the searched premises; or (3) by being charged with an offense that included possession of the seized evidence as an essential element of that offense. Under the two-tier analysis of Jones, a court first decides whether the defendant has demonstrated standing to contest the search in question. If so, the court proceeds to examine the substantive fourth amendment claim.

Seven years later, the two-tier approach was called into question by Katz v. United States when the Court failed to address the threshold standing issue but nevertheless proceeded to decide the substantive fourth amendment question. The Court held that a person's reasonable expectation of privacy in the searched area was sufficient to invoke fourth amendment protection. In deciding that Katz had a reasonable expectation of privacy in a public telephone booth, the Court focused on whether the defendant exhibited a subjective expectation of privacy in the area searched and whether that expectation was objectively reasonable. By enunciating the reasonable expectation of privacy test, the Court appeared to discard traditional property concepts to decide substantive fourth amendment issues, a trend initiated in Jones. In Jones, however, the Court broadened the standing doctrine to dilute the weight of a property interest in the searched premises; Katz apparently eliminated that consideration entirely.

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12. Id. at 261.
15. Katz was convicted on the basis of evidence obtained by agents who had attached an electronic recording device to the outside of the public telephone booth that he was occupying. Id. at 348-49.
16. The subjective-objective requirement was not articulated in the majority opinion. Rather, Justice Harlan formulated the test in his concurring opinion based upon his interpretation of the rule. Id. at 361 (Harlan, J., concurring). For a detailed examination of the interests protected under Katz, see 1 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment 221 (1978).
17. The Jones adoption of the "legitimately on the premises" test was a major step in fourth amendment development because it allowed not only the owner or the one in possession of the searched premises to contest the search, but also anyone present with the owner's permission. For more extensive discussions of Jones and its impact, see Comment, Rakas v. Illinois: The End of Fourth Amendment Standing But Not of Fourth Amendment Confusion, 46 Brooklyn L. Rev. 123 (1979) [hereinafter cited as Fourth Amendment Confusion]; Comment, Constitutional Law: Legitimate Expectations of Privacy Necessary to Invoke Fourth Amendment Protections, 19 Washburn L.J. 154 (1979) [hereinafter cited as Fourth Amendment Protections]; Note, Supreme Court Holds Standing to Assert Fourth Amendment Rights Requires Possessory Interest—Rakas v. Illinois, 13 Creighton L. Rev. 653 (1979) [hereinafter cited as Fourth Amendment Rights]; Note, Standing to Raise Fourth Amendment Guarantees Against Unreasonable Searches and Seizures: Rakas v. Illinois, 15 Tulsa L.J. 85 (1979) [hereinafter cited as Fourth Amendment Guarantees].
Although Katz made it clear that substantive fourth amendment rights were to be determined on the basis of reasonable expectations of privacy, the Court's failure in Katz to discuss standing created problems for the lower courts. In the wake of Katz, it was unclear whether Jones was controlling when determining standing or whether a standing determination even was required prior to examination of the substantive fourth amendment claim.

The confusion surrounding the relationship between Jones and Katz was settled in Rakas v. Illinois. The Court held that an independent standing inquiry was no longer required because standing and the substantive fourth amendment claim are "invariably intertwined." In addition, Justice Rehnquist stated for the majority that the Jones "legitimately on the premises" test created "too broad a gauge for measurement of Fourth Amendment rights" and therefore was not controlling. Thus, in light of Rakas, the Katz "legitimate expectation of privacy" test remains as the only standard for determining not only whether a defendant is entitled to contest the admission of evidence, but also whether the evidence was unlawfully seized.

Several commentators have argued that Rakas completed the circle in the development of the fourth amendment in general and standing in particu-

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18. The lower courts for the most part avoided the differences between Katz and Jones and continued to rely upon Jones. See, e.g., United States v. Nunn, 525 F.2d 958 (5th Cir. 1976); Mabra v. Gray, 518 F.2d 512 (7th Cir.), cert. denied, 423 U.S. 1023 (1975); United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 402 U.S. 974 (1975); United States v. Hunt, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); United States v. Cobb, 432 F.2d 716 (4th Cir. 1970).

19. There were three possible ways to view the Katz-Jones relationship. The Katz test could have been viewed as a broad substantive standard, leaving the Jones test valid for the initial standing determination. Or, the Jones "legitimately on the premises" test could have been viewed as subordinate to the Katz "legitimate expectation of privacy" test. Finally, Katz could have been interpreted as indicative of the Supreme Court's desire to abandon a separate inquiry into standing and substitute the Katz substantive approach as the only test to be applied when reviewing a fourth amendment claim. See Fourth Amendment Confusion, supra note 16, at 131-32.


21. Id. at 139. The Court reasoned that the ultimate inquiry is whether the contested search and seizure violated the defendant's fourth amendment rights. That issue requires a determination of whether the search and seizure infringed upon an interest of the defendant which is protected by the fourth amendment. Id. at 140. The Court recognized that dispensing with the independent standing determination would not necessarily make the determination of the defendant's motion to suppress any easier. However, by focusing on the single substantive fourth amendment issue, the Court reasoned that the determination of the motion to suppress will rest on "sounder logical footing." Id.

22. Id. at 142. The Court stated that the Jones "legitimately on the premises" test cannot be extended beyond the Jones facts. Id. at 143. The search in Rakas occurred when the police stopped a car thought to have been used in a robbery. The car, driven by its owner, was occupied by several passengers, one of whom was the defendant. Upon searching the car, the police seized a box of rifle shells from the locked glove compartment and a sawed-off rifle from under the front passenger seat. The passenger-defendants sought to exclude the evidence. The Supreme Court denied the defendants standing because they failed to assert a property or possessory interest in either the automobile or the seized evidence. Id. at 148.
lar. Jones and Katz expanded the narrow proprietary interest reading of the fourth amendment by allowing defendants greater flexibility to assert search and seizure violations. Rakas retained the language of the Katz reasonable expectation of privacy test but returned to discredited property concepts in determining if the test is satisfied. The circle is complete because, as Rakas and its progeny indicate, it is difficult to establish a reasonable expectation of privacy without establishing a property interest in the searched premises. Even if a defendant fails to demonstrate that his or

23. The circle is formed by (1) the pre-Jones emphasis on property distinctions to determine standing and fourth amendment protection, (2) the Jones standard which expanded the scope of the fourth amendment arguably to protect targets of searches and seizures and those legitimately on the premises, (3) the Katz test which extended substantive fourth amendment protection to those areas in which the petitioner has a legitimate expectation of privacy, and (4) Rakas, which completes the circle by affording fourth amendment protection only to those with a property or possessory interest in the searched premises or the seized evidence. See Fourth Amendment Confusion, supra note 15, at 144; Fourth Amendment Rights, supra note 15, at 653; Fourth Amendment Guarantees, supra note 15, at 107; Fourth Amendment Protections, supra note 15, at 158.


25. The Rakas Court, after addressing the target theory, expressly rejected it. Target standing would allow any defendant who was the target of a search to contest that search even though his property was neither invaded by the search nor seized. The Rakas Court reasoned: [c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a much broader invocation of the exclusionary rule during criminal trials. . . . Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. 439 U.S. at 137.

The Rakas holding was the culmination of increasing concern expressed by different Justices about unwarranted applications of the exclusionary rule. In Stone v. Powell, 428 U.S. 465 (1976), Justice White argued that the exclusionary rule should be modified to prevent the suppression of evidence seized by an officer acting reasonably and in good faith. Id. at 538 (White, J., dissenting). In addition, he maintained that evidence is often excluded, without any expectation that the exclusion of the evidence will further the deterrent purpose of the rule, and as a result, the prosecution is hindered. Id. Similarly, in Brown v. Illinois, 422 U.S. 590 (1975), the police illegally arrested the defendant. While in custody, the defendant made incriminating statements which provided the basis for his conviction. The statements were excluded because they were the product of an illegal detention. Justice Powell asserted that the application of the exclusionary rule in Brown was unwarranted because it did little to further the deterrent purpose of the rule. Id. at 610 (Powell, J., concurring in part). He noted that police generally will not illegally arrest a suspect to obtain incriminating statements. Id. Finally, in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), Chief Justice Burger expressed his aversion to the exclusionary rule by describing it as "conceptually sterile" and "practically ineffective" in accomplishing its deterrent purpose. Id. at 415 (Burger, C.J., dissenting). See generally Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

26. In Rakas v. Illinois, 437 U.S. 128 (1978), Justice White criticized the Rakas majority's holding because it denied a legitimate occupant of an automobile, which was subjected to an
her reasonable expectation of privacy was violated, he or she will prevail if the court invokes its supervisory power to suppress the challenged evidence.

**History of the Supervisory Power**

The supervisory power is the inherent authority possessed by the federal courts to oversee the federal judicial system. Although the Supreme Court and the lower federal courts have exercised this authority for over thirty-five years, commentators agree that its scope and application are uncertain. The only discernible reason for invoking the supervisory power has been to enforce a judicial standard of fairness more rigorous than that manifested in the Constitution.

The supervisory power was first utilized as an independent basis for a decision in *McNabb v. United States.* The defendant in *McNabb* confessed illegal search and seizure, the benefits of the exclusionary rule because the occupant failed to establish an ownership or possessory interest in the automobile. *Id.* at 156 (White, J., dissenting). In *United States v. Salvucci*, 448 U.S. 83 (1980), the defendants were charged with unlawful possession of stolen mail. The evidence was seized by police officers executing a search warrant in an apartment rented by one defendant's mother. Salvucci sought to contest the search on the ground that the affidavit supporting the warrant failed to establish probable cause. Since the defendants were charged with crimes of possession, the two lower courts, relying upon the "automatic standing" rule of *Jones*, granted the defendants standing. The Supreme Court overruled the automatic standing rule established in *Jones*, and denied the defendants standing because they failed to demonstrate that they had a legitimate expectation of privacy in the apartment of the defendant's mother. *Id.* at 95. In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), narcotics were illegally seized from a third person's purse and used as evidence against the defendant. Despite the fact that the defendant claimed ownership of the seized narcotics, the majority denied him standing because he failed to demonstrate the required privacy interest in the third party's purse. *Id.* at 120.


28. See note 31 and accompanying text infra.


30. See *Rulemaking, supra* note 27, at 629; *Judge-Made Supervisory Power, supra* note 27, at 1050; *Supervisory Power, supra* note 27, at 1664.

Because of the nature of the supervisory power, analysis of its historical applications does not lend itself to a progressive development. A discussion of the significant cases in which it has been invoked, along with an analysis of the rationales provided, illustrates a common objective. See notes 31-58 and accompanying text infra.

31. 318 U.S. 332 (1943). Speaking for the Court, Justice Frankfurter stated:

The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . 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. *Id.* at 341. See also *Judge-Made Supervisory Power, supra* note 27, at 1050.
to the offense charged after having been detained and interrogated for two
days prior to being provided the statutorily required appearance before a
federal judicial officer.\textsuperscript{32} The statute in question, however, did not provide
for the exclusion of evidence seized in violation of its command.\textsuperscript{33} Nevertheless, the Court invoked its supervisory power to suppress the confession,\textsuperscript{34} reasoning that if it allowed such tainted evidence to form the basis of a
conviction courts would become “accomplices in willful disobedience of
law.”\textsuperscript{35} The \textit{McNabb} decision has been interpreted as authorizing the
suppression of evidence when necessary to deter illegal police conduct and to
protect the integrity of the federal courts.\textsuperscript{36}

This dual purpose was reiterated in \textit{Rea v. United States}\textsuperscript{37} where federal
officials attempted to introduce illegally seized evidence at the defendant’s
trial in federal court.\textsuperscript{38} Although the district court properly excluded the
evidence,\textsuperscript{39} the defendant was subsequently charged in state court on the
basis of the illegally seized evidence coupled with the relevant testimony of a
federal agent. In the state court, Rea was without a constitutional remedy
because the exclusionary rule had not yet been applied to the states.\textsuperscript{40} On
appeal, however, the Supreme Court exercised its supervisory power to
suppress the tainted evidence and to enjoin the federal agent from testifying
in the state court.\textsuperscript{41} In support of its action, the Court stated that the policy
requiring strict adherence to the standards for searches and seizures is “de-
feated if the federal agent can flout them” by having the tainted fruits
admitted in either federal or state proceedings.\textsuperscript{42}

Once again, in \textit{Elkins v. United States},\textsuperscript{43} the Court was confronted with a
remediless defendant, victimized by illegal police conduct. State officers had

\begin{footnotes}
\footnotetext{32}{318 U.S. at 333-38.}
\footnotetext{33}{The statute, in effect at the time, required the marshal, his deputy, or any other officer
to take all arrested persons before the nearest United States commissioner or judicial officer for a
hearing, commitment, or setting bail for trial. \textit{Id.} at 342.}
\footnotetext{34}{\textit{Id.} at 341.}
\footnotetext{35}{\textit{Id.} at 345.}
\footnotetext{36}{See, e.g., \textit{Elkins v. United States}, 364 U.S. 206, 223 (1960).}
\footnotetext{37}{350 U.S. 214 (1956).}
\footnotetext{38}{\textit{Id.} at 214-15.}
\footnotetext{39}{The defendant, pursuant to the prior version of Rule 41(e), moved to suppress the
evidence on the ground that the search warrant was improperly issued because it was insufficient
on its face, no probable cause existed, and the affidavit was based on unsworn statements. The
district court granted the motion to suppress and dismissed the indictment. \textit{Id.} at 215. See note 3
\textit{supra}.}
\footnotetext{40}{At the time of the \textit{Rea} decision, the Supreme Court had held that the fourth amendment
precluded the use of illegally seized evidence in the federal courts. \textit{Weeks v. United States}, 232
the Court held that the fourteenth amendment did not prohibit the use of illegally seized
evidence in a state prosecution for a state crime. \textit{Id.} at 33. In light of \textit{Weeks} and \textit{Wolf}, the state
of New Mexico argued that the evidence against Rea was admissible. 350 U.S. at 216.}
\footnotetext{41}{\textit{Id.} at 217.}
\footnotetext{42}{\textit{Id.} at 218.}
\footnotetext{43}{364 U.S. 206 (1960).}
\end{footnotes}
illegally seized evidence damaging to Elkins from a co-defendant's home, and federal officials obtained the evidence and prosecuted Elkins in federal court. Elkins was unable to assert the exclusionary rule because the evidence was not seized by federal officers. Utilizing its supervisory power, the Court excluded the evidence, stating that it could not approve the police conduct without tacitly encouraging state officers to disregard a constitutionally protected freedom. Additionally, the Court stressed that federal courts should refrain from becoming accomplices in the "willful disobedience of a Constitution they are sworn to uphold."

The Elkins decision, as well as McNabb and Rea, illustrate the Court's refusal to allow governmental manipulation of legal doctrines to shield illegal activities. Through the exercise of its supervisory power, the Court has suppressed evidence obtained by illegal methods when no other applicable doctrines required exclusion. Indeed, one of the most valuable characteristics of the supervisory power is its versatility. Most notably, the Court has exercised its supervisory power to decide cases on their peculiar facts, thus correcting injustice in particular instances while avoiding constitutional implications.

44. See note 5 supra.
45. The district judge, reviewing the motion to suppress, assumed that the evidence had been seized as a result of an unreasonable search and seizure, but denied the motion because there was no evidence that any federal agent had knowledge or information concerning the search. 364 U.S. at 207.
46. The Elkins Court stated that it approved of cooperation between state and federal law enforcement officers; however, it could no longer countenance the "silver-platter doctrine." Id. at 221-22.
47. Id. at 223.
48. The supervisory power has been used in numerous decisions. See, e.g., Mallory v. United States, 354 U.S. 449, 452 (1957) (conviction based on suspect's confession reversed due to same statutory violation found in McNabb); Foster v. United States, 281 F.2d 310, 312 (8th Cir. 1960) (citing Elkins as authority, court excluded evidence illegally seized by city police officers and turned over to federal agents).
49. The importance of a versatile supervisory power has been stressed by commentators. One author notes that the supervisory power can be applied to new problems on a case-by-case basis and can correct injustice when existing legal doctrines do not provide a remedy. Thus, the flexibility of the supervisory power allows it to serve as a safety valve in that traditional legal principles need not be distorted in order to avoid an unjust result. Judge-Made Supervisory Power, supra note 27, at 1078. Another commentator extols the unique contribution of the supervisory power because it allows courts to raise the standards of fairness in the federal judicial system in advance of the relatively slow process of constitutional development. Supervisory Power, supra note 27, at 1666-67. Similarly, another author notes that the supervisory power formulates judicial remedies based on practical circumstances rather than constitutional grounds. Accordingly, invocation of the supervisory power does not create "sweeping constitutional precedent." Rulemaking, supra note 27, at 629.
50. See, e.g., Mesarosh v. United States, 352 U.S. 1 (1956). In Mesarosh, the government received information casting doubt on the credibility of a government witness who testified at the defendant's trial while review of the defendant's conviction was pending in the Supreme Court. Recognizing that the defendant was unable to move for a new trial, the Court invoked its supervisory power to reverse the conviction and grant a new trial. In support of its ruling, the Court stated that the "dignity of the United States Government" does not allow a conviction to
The supervisory power has also been applied by lower federal courts because its dual purpose involves not only the deterrence of illegal governmental conduct but also the protection of the integrity of the entire federal judicial system. Thus, lower federal courts have properly exercised this discretionary authority in a wide variety of both civil and criminal cases. In a very recent case, United States v. Cortina, the United States Court of Appeals for the Seventh Circuit exercised its supervisory power to suppress evidence seized from two corporate offices. Although the evidence was seized pursuant to a search warrant, it later was discovered that the affidavit supporting the warrant was based upon deliberate misrepresentations by federal agents. Cortina, however, lacked standing to challenge the validity of the search warrant. The court, nevertheless, invoked its supervisory power, “to see that the waters of justice are not polluted.” Id. at 14.

Likewise in Grunewald v. United States, 353 U.S. 391 (1957), a co-conspirator refused to answer certain questions during grand jury proceedings, asserting his fifth amendment privilege against self-incrimination. At trial, he was asked the same questions on cross-examination, and answered each “in a way consistent with innocence.” Id. at 416-17. The government then apprised the jury of the defendant’s invocation of his privilege when previously asked the same questions. The defendant was remediless because this governmental strategy is legitimate if the trial judge finds that the prior statements were inconsistent. Id. at 418. Utilizing its supervisory power, the Court reversed the judgment stating that in the circumstances presented, the defendant was unduly prejudiced. Id. at 420-21.

Mesarosh and Grunewald illustrate the Court’s emphasis on protecting the integrity of the federal courts through enforcement of proper standards. In both cases, the Supreme Court decided in favor of the defendant despite the lower court’s finding that the defendant suffered no prejudice. This action indicates that the ruling in favor of the defendant is incidental to the more worthy goal of maintaining an untarnished image of the federal courts. “So long as the error violates the Court’s standards for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or nonexistent.” Supervisory Power, supra note 27, at 1657.

51. See, e.g., Burton v. United States, 483 F.2d 1182 (9th Cir. 1973) (to inquire into the voluntariness of a guilty plea); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (to vacate an improper sentence); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959) (per curiam) (to order new trial before a new judge), cert. denied, 362 U.S. 950 (1960); Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (to apply the clergyman-penitent privilege); Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952) (to formulate rules of evidence in the trials of sex offenders).

52. 630 F.2d 1207 (7th Cir. 1980).

53. Twelve individuals and two corporate defendants were indicted for racketeering, extortion, and illegal gambling in connection with two race track messenger services. An FBI agent presented a magistrate with an affidavit in support of a warrant to search two messenger service offices. The warrant was executed, resulting in the seizure of hundreds of boxes of items and papers and thousands of dollars. The district court determined that the search warrant lacked probable cause without the false statements in the affidavit. Id. at 1212.

54. The FBI agent swore to a list of allegations in the affidavit. The allegations were allegedly supported by information the agent received from various confidential sources. It was later determined that the statements contained numerous inconsistencies. Id. at 1210. Ultimately, the agent admitted that several of the allegations were indeed false. Id. at 1211-12.

55. The government asserted that only the corporations had standing because the challenged evidence was taken only from the two offices. The Seventh Circuit did not dispute the government’s assertion that the individual defendants lacked standing. Id. at 1215-16.
power to suppress the evidence declaring that federal agents cannot be permitted to "manipulate the judicial system to circumvent constitutional requirements." 56

Although by no means exhaustive, these cases represent situations in which the supervisory power has been applied and each supports a consistent rationale. 57 Whether promulgating a rule of procedure or remedying injustice in a particular case, the common denominator in the supervisory power cases is a desire to improve the quality of the federal judicial process. 58

**FACTUAL BACKGROUND**

Jack Payner was indicted for knowingly falsifying his 1972 federal income tax return. 59 The evidence against Payner was obtained by IRS agents conducting an intensive eight-year investigation known as "Operation Trade Winds," probing the financial activities of American citizens in the Bahamas. When the Castle Bank and Trust Company of Nassau, Bahama Islands became a target of the investigation, 60 Special Agent Richard Jaffe, the supervisor of Operation Trade Winds, contacted Norman Casper, a private investigator, and asked him to ascertain the names and addresses of the bank's depositors. 61

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56. *Id.* at 1214-15. The Seventh Circuit cited *McNabb*, *Rea*, and *Elkins* in support of its exercise of the supervisory power. Emphasizing the importance of protecting the integrity of the judicial system, the court stated that, "a judicial system, which condones fraud will be of little value to the individuals whose rights it is sworn to protect." *Id.* at 1214.

57. For a more extensive examination of the supervisory power cases, see *Judge-Made Supervisory Power*, supra note 27.

58. See *McNabb* v. United States, 318 U.S. 332 (1943). The *McNabb* Court stated:

> 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'.

*Id.* at 340. See also *Judge-Made Supervisory Power*, supra note 27, at 1050.

59. Payner falsely stated on his income tax return that he did not have a foreign bank account. *United States v. Payner*, 434 F. Supp. 113, 117 (N.D. Ohio 1977). The statute under which Payner was convicted provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.


60. The suspicion involving the Castle Bank and Trust Company was based on information that the IRS obtained indicating that a California narcotics dealer deposited a check in his California bank which was drawn on Castle Bank. It was later discovered that the Castle Bank had an account with the Bank of Perrine in Florida and that the narcotics dealer opened his Castle Bank account with the assistance of the Bank of Perrine. 434 U.S. at 118.

61. *Id.*
Casper developed a scheme whereby he would obtain the bank records from Michael Wolstencroft, Vice-President and Trust Officer of the Castle Bank, while Wolstencroft was visiting in the United States. Casper, an acquaintance of Wolstencroft, introduced Wolstencroft to Sybol Kennedy, a private investigator employed by Casper. Pursuant to the plan, Kennedy entertained Wolstencroft at her apartment upon his arrival in Florida on January 15, 1973. When Wolstencroft and Kennedy departed from Kennedy's apartment to dine, Casper entered Kennedy's apartment and "stole" Wolstencroft's briefcase. Casper then met with a locksmith, recommended by the IRS, who made a key for the briefcase. Casper took the briefcase to the home of an IRS agent where over four hundred documents were removed from the briefcase and photographed in Jaffe's presence. Casper then replaced the briefcase in Kennedy's apartment before she and Wolstencroft returned from the restaurant.

Casper discussed the "briefcase caper" with Jaffe on numerous occasions before its execution. After clearing the operation with his superiors, Jaffe instructed Casper to proceed with the plan. In addition to providing the locksmith, the IRS also supplied the photographic services. The IRS paid Casper $8,000 for obtaining the information concerning Castle Bank.

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62. *Id.* at 119.
63. The events occurring in Kennedy's apartment were not raised at trial. Because the government had the authority to subpoena her, the court inferred from her "unexplained failure to testify" that her testimony would have been "unfavorable to the government by further delineating the improprieties of the . . . 'briefcase caper.'" *Id.* at 119 n.22.
64. 447 U.S. at 740 (Marshall, J., dissenting). The use of the word "stole" in the dissent is accurate because the district court found that the seizure of the bank records satisfied "a prima facie case of criminal larceny under Florida law." 434 F. Supp. at 130 n.66.
66. The agent's home was located eight blocks from the parking lot where Casper met the locksmith. The home was selected because of its close proximity to the apartment from which the documents were stolen, allowing for a quick return of the briefcase and documents. *Id.* at 120 n.25.
67. Jaffe, Casper, and an IRS photography expert used a microfilm camera to photograph the documents because it was faster, again, allowing for a quick return of the briefcase. *Id.* at 120.
68. Casper knew that it was safe to return the briefcase because he received a telephone call, at the agent's home, from his "lookout" informing him that Wolstencroft and Kennedy had just completed dinner. *Id.*
69. *Id.* at 119.
70. Casper admitted that he specifically requested a locksmith who could be "trusted" because he (Casper) knew that he was committing an illegal act and wanted someone who would be silent. *Id.* at 119 n.20.
71. *Id.* at 120.
72. *Id.* Casper paid Kennedy $1000 for her services in implementing the scheme. Within two weeks of the briefcase caper, Jaffe informed Casper that additional information was needed concerning Castle Bank's depositors. Casper complied by sending Kennedy to the Bahamas with instructions to steal a rolodex file from Wolstencroft's office. The rolodex file contained the name and address of Payner, but it was not admitted as evidence at the trial. *Id.* at 120-21.
Access to the illegally seized information allowed the IRS to discover that contrary to what Payner stated in his 1972 federal income tax return, he had in fact maintained a foreign bank account containing in excess of $100,000.73

PROCEEDURAL HISTORY

At trial, Payner moved to suppress the evidence on the ground that the seizure of the briefcase was illegal and that, consequently, any evidence produced by that seizure should have been excluded.74 The district court analyzed the Payner facts relying upon the three legal theories under which evidence may be excluded.75 The court first rejected the fourth amendment argument because Payner lacked standing to challenge the admissibility of the evidence seized from the bank officer.76 Next, the court ruled that the tainted evidence should be suppressed under the due process clause of the fifth amendment because of the "grossly improper" method the Government employed in obtaining the evidence.77 Finally, the court invoked its supervisory power to suppress the challenged evidence, stating that the governmental conduct was "purposefully illegal" and demonstrated an "intentional bad faith hostility to a constitutional right."78 The United States Court of Ap-

73. The documents taken from Wolstencroft's briefcase indicated that Payner held a bank account with the Castle Bank and Trust Company. Through further investigation, the IRS obtained a loan guarantee agreement which pledged money in a Castle Bank account held by Payner as security for a $100,000 loan. Upon receipt of the agreement, the IRS instituted an investigation of Payner's 1972 federal income tax return. That investigation led to Payner's indictment. Id. at 122.

74. Id. at 118.

75. Before analyzing the three legal theories, the court stated the two reasons that justify exclusion of evidence. First, exclusion is necessary to deter governmental use of "illegal and unconstitutional procedures to obtain evidence of crime." Second, the exclusion of illegally seized evidence "maintains the integrity of the judicial process." Id. at 123-24.

76. Id. at 126. The government conceded that the search and seizure of the briefcase violated Wolstencroft's fourth amendment rights. In addition, the district court found that the search was conducted at the request of the government and with its cooperation. Payner, however, lacked the requisite privacy interest in the bank documents to raise the illegality of the seizure of Wolstencroft's briefcase. Id.

77. The district court defined grossly improper methods as unlawful conduct which "exhibits the government's knowing and purposeful bad faith hostility to any person's fundamental constitutional rights." Id. at 129. (emphasis in original). See Rochin v. California, 342 U.S. 165 (1952). In Rochin, the bad faith act was introduction of an emetic solution through a tube into the defendant's stomach to recover two morphine capsules which he had swallowed. The capsules were admitted as evidence at trial. The Supreme Court reversed the conviction under the due process clause because the governmental conduct was found to "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples," to "shock the conscience," and to "offend a 'sense of justice.'" Id. at 169, 172-73.

78. 434 F. Supp. at 134-35 (footnotes omitted). In exercising the supervisory power, the district court primarily relied on two authorities. The first was the Supreme Court's specific language in McNabb v. United States, 318 U.S. 332 (1943). See note 58 supra. The second was the balancing test provided in United States v. Janis, 428 U.S. 433 (1976). The Janis test required a court, when determining whether to exclude evidence under the supervisory power, to balance
peals for the Sixth Circuit affirmed, stating that the lower court’s exercise of the supervisory power was both justified and proper.

**The Payner Decision and Rationale**

In *Payner*, the Supreme Court affirmed the court of appeals on the issue of standing. The Court held that the fourth amendment does not require the exclusion of evidence unless the “unlawful search and seizure violated the defendant’s own constitutional rights.” In short, the unlawful behavior must invade the defendant’s legitimate expectation of privacy “rather than that of a third party.”

The Court, however, disapproved of the district court’s exercise of the supervisory power to suppress the evidence illegally seized. Although the Court acknowledged that the supervisory power is a valid means to exclude evidence in federal court, it stated that the supervisory power does not extend to the suppression of “otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.” The Court feared that if it applied the supervisory power in *Payner*, it might permit the federal courts to “exercise a standardless discretion” in effectuating the exclusionary rule. Justice Powell, writing for the majority, expressed concern that “unbending application” of the exclusionary rule to encourage society’s interest in deterring illegal police conduct against society’s interest in providing the trier of fact with all relevant evidence.

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79. United States v. Payner, 572 F.2d 144 (6th Cir. 1978). By agreement of the parties, the district court reviewed the motion to suppress while adjudicating the case on the merits. 434 F. Supp. at 118. The court, however, granted the motion to suppress but rendered no decision on the merits. The government appealed, but the Sixth Circuit, pursuant to 18 U.S.C. § 3731 (1976), dismissed the appeal for lack of jurisdiction because no verdict was pronounced on the indictment. 572 F.2d at 146. Subsequently, the district court requested that its suppression order be vacated and entered a verdict of guilty. The district court later reinstated its suppression order and set aside the verdict. The government again appealed from the suppression order. The court of appeals affirmed the lower court’s exercise of the supervisory power. United States v. Payner, 590 F.2d 205, 207 (6th Cir. 1979) (per curiam).

80. 590 F.2d at 207. The Sixth Circuit issued an opinion based solely upon the district court’s exercise of the supervisory power. The due process question raised on appeal was not reached. *Id.*

81. 447 U.S. at 731.


83. 447 U.S. at 731.

84. *Id.* at 737.

85. Quoting from McNabb v. United States, 318 U.S. 332, 345 (1943), the Court stated that the supervisory power may still be used to exclude evidence seized from the “defendant by willful disobedience of law.” 447 U.S. at 735 n.7.

86. *Id.* at 735. The Court stated that the deterrent purpose of the exclusionary rule does not justify the exclusion of illegally obtained evidence upon the motion of a third party. *Id.*

87. *Id.* at 733.

88. *Id.* at 734.
more respectable police conduct would impede society's interest in prosecuting criminals. The majority opinion made it clear that the exclusion of unlawfully seized evidence, whether under the fourth amendment or the supervisory power, must be based on a violation of the defendant's own constitutional rights.

Justice Marshall, in dissent, persuasively criticized the majority's refusal to exercise the supervisory power. Reiterating the two-fold rationale for exercising the supervisory power, the dissent noted that in previous cases, the Court had specifically emphasized the importance of using its supervisory power to protect the integrity of the federal courts. "The reason for this emphasis," Justice Marshall asserted, "can be derived from the factual contexts in which supervisory powers have been exercised." Historically, the supervisory power cases have involved intentional governmental violations of the law to obtain evidence. The dissent's primary contention was that the majority ignored the two reasons for invoking its supervisory power when it gave "full effect" to the illegal governmental conduct and when it sacrificed the Court's integrity by becoming an "accomplice of the government lawbreaker."

**Analysis of the Decision**

Although the Payner Court determined that the present law of standing precluded application of the exclusionary rule, the case presented govern-

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89. *Id.* at 733-36. Under the fourth amendment, evidence is to be excluded only if the defendant suffers a violation of his legitimate expectation of privacy. *Id.* at 731. The Court stated that the supervisory power may be used to exclude evidence seized from the "defendant by 'willful disobedience of law.'" *Id.* at 735 n.7. If evidence is seized from the defendant by "willful disobedience of law," however, that conduct would either constitute a violation of the defendant's fourth amendment rights or his fifth amendment due process rights. See note 77 *supra* and notes 90-96 and accompanying text *infra*.

90. *Id.* at 738-51 (Marshall, J., dissenting). Justice Marshall did not state that he disagreed with the Court's finding that Payner lacked standing under the fourth amendment to challenge the seizure of the bank records from Wolstencroft's briefcase.

91. The rationale is "to deter illegal conduct by government officials, and to protect the integrity of the federal courts." *Id.* at 744.

92. *Id.* Justice Marshall cited McNabb v. United States, 318 U.S. 332, 345 (1943) ("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."); *See also* Mesarosh v. United States, 352 U.S. 1, 14 (1956) ("The Court should use its supervisory powers in federal criminal cases 'to see that the waters of justice are not polluted.'"); Elkins v. United States, 364 U.S. 206, 223 (1960) ("federal courts should not be 'accomplices in the willful disobedience of a Constitution they are sworn to uphold'.")

93. 446 U.S. at 746 (Marshall, J., dissenting).

94. *Id.*

95. *Id.* at 748.

96. *Id.* The dissent explained that without judicial recognition of the illegally seized evidence, the scheme would have been futile. According to Marshall, admitting this evidence amounted to a "pollution of the federal courts." *Id.* at 747-48.
mental abuses that the Supreme Court historically has corrected through the exercise of its supervisory power. The Court asserted that use of its supervisory power in *Payner* would provide the federal courts with standardless discretion in their application of the exclusionary rule. Nevertheless, both the district court and the court of appeals encountered little difficulty in holding that use of the supervisory power was proper under the standard established in *McNabb v. United States*. *McNabb* held that evidence may be suppressed under the supervisory power when it is necessary to deter unlawful governmental conduct and to protect the integrity of the federal courts. The *McNabb* standard is well defined and was undoubtedly met in *Payner*. The district court specifically found that the IRS instructed its agents that the standing restrictions permitted illegal searches and seizures to obtain evidence against third parties targeted for investigation. Certainly, the integrity of the federal courts is compromised when illegally seized evidence becomes the basis of a conviction.

Although the *Payner* Court cited numerous decisions in which illegal governmental activities have been denounced, it interpreted those cases as not requiring exclusion in every instance. Accordingly, the Court stated that the constitutional interests to be served must be weighed against the disadvantages of "indiscriminate application" of the exclusionary rule. Balancing these competing interests indicates that if the exclusionary rule is to be applied at all, it should have been applied in *Payner*. *Payner* was not a case in which the government had committed a good faith, technical violation of procedure. The IRS knowingly executed a scheme that grossly violated the precepts of the fourth amendment. It is in cases like *Payner* that the exclusionary rule is most "efficaciously served."

Finally, the Supreme Court, in its desire to retain its vast supervisory power, carved out an exception to its use by allowing the unlawfully seized evidence to be used against Payner. The Court stated that the supervisory power may still be used to suppress evidence, but that it could not be used to exclude evidence seized in violation of the constitutional rights of a third party. In support of this exception, the Court argued that the supervisory

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97. See notes 31, 37 & 43 and accompanying text supra.
98. The district court concluded, after reviewing *McNabb* and other supervisory power cases, that the supervisory power "should be invoked to exclude evidence obtained by governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." 434 F. Supp. at 134-35 (footnotes omitted). The court of appeals, in a per curiam opinion, found it necessary to state only that after reviewing the record, suppression of the evidence under the supervisory power was "proper and justified." 590 F.2d at 207.
99. See text accompanying note 36 supra.
100. 434 F. Supp. at 132-33.
101. 447 U.S. at 734.
102. Id.
105. 447 U.S. at 735 & n.7.
power had never been used for this purpose and therefore would be improper here.106 An examination of past supervisory power cases, however, indicates that the absence of precedent has never posed a barrier to exercise of the Court's discretionary authority.107

There are a number of reasons why the majority may have formulated the third-party exception. The Court may have attempted to curtail the discretion previously afforded to federal courts in exercising the supervisory authority. The Court may also have impliedly rejected future application of the supervisory power based on the two justifications articulated in McNabb. The Payner dissent suggested that the Court laid the foundation for limiting future applications of the supervisory power to cases hinging solely on violations of the defendant's constitutional rights. In effect, this would render the Court's supervisory authority "superfluous."108 As the dissent explained, if there were a violation of a constitutional right, suppression would flow directly from the Constitution.109

The Payner decision casts serious doubt on the Supreme Court's commitment to the deterrent purpose of the exclusionary rule. More significantly, the decision raises questions concerning the existence of any limitation on the Court's willingness to receive illegally seized, though technically admissible evidence. The development of the standing doctrine illustrates an attempt, initiated by the present Supreme Court, to protect society by restricting the application of the exclusionary rule.110 Because of this retrenchment, the supervisory power is a necessary device to strike the balance between impeding the prosecution of criminals and permitting governmental disregard of constitutional guarantees.

The future of the supervisory power is uncertain. Payner appeared to be the paradigm of a supervisory power case. The two lower courts determined that the exercise of the supervisory power was fully warranted. Ignoring clear application of its precedent, the Court refused to exercise its supervisory power to exclude the tainted evidence. Application of the supervisory power in Payner would not have provided lower federal courts with "standardless discretion" in effectuating the exclusionary rule, the Court's conten-

106. Id.
107. See notes 31, 37 & 43 and accompanying text supra.
109. Id. See note 89 and accompanying text supra.
110. See United States v. Calandra, 414 U.S. 338 (1976). The Calandra Court held that the exclusionary rule does not apply to grand jury proceedings. Id. at 349-51. In dissent, Justice Brennan stated:

I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not 'significantly' do so.

Id. at 365 (Brennan, J., dissenting). See note 25 supra.
tions notwithstanding. In the final analysis, a standardless discretion is the result of the Court’s refusal to exercise its supervisory power in Payner.

CONCLUSION

The dilemma confronting the Supreme Court in Payner is indicative of the tremendous difficulty the Court has encountered in developing the standing doctrine in fourth amendment cases. Unquestionably, there are valid reasons for limiting the number of defendants who have access to the benefits of the exclusionary rule. Previously, this limitation did not seriously jeopardize society’s protected right of freedom from unreasonable governmental intrusion because the courts had a safety valve—the supervisory power. The Payner Court recognized the vitality of the supervisory power but ignored its historical application by refusing to exercise it in this quintessential case. If the reprehensible governmental conduct in Payner did not warrant application of the supervisory power, then it is frightening to imagine the factual situation that does. In a civilized and sophisticated society, permitting the police to break the law to apprehend lawbreakers should not be tolerated.

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