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Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution that Might Have Been

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FEDERAL COURTS' SUPERVISORY AUTHORITY IN FEDERAL CRIMINAL CASES: THE WARREN COURT REVOLUTION THAT MIGHT HAVE BEEN

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I. INTRODUCTION

The Warren Court is said to have launched a criminal procedure "revolution" with its decision in *Mapp v. Ohio*,[1] extending the Fourth Amendment's exclusionary rule to state court proceedings.[2] Thereafter, the Warren Court continued to interpret the Bill of Rights provisions expansively to protect individual rights and promote fair process in both state and federal criminal cases. Considerable writing has been devoted to the Warren Court's constitutional criminal procedure decisions both individually and collectively. Scholars debate both the motivation behind these decisions[3] and the significance of their impact, given how inhospitable many of the later Court's decisions have been toward criminal defendants' rights and Warren Court precedent.[4]

This Article examines the significance of a non-constitutional criminal procedure decision from the Warren Court's pre-revolutionary

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1. 367 U.S. 643 (1961).

2. *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. REV. 1, 1–2 & n.3 (1995); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12 (1988).

3. *See, e.g.*, Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1364 (2004) (challenging "whether the Warren Court's criminal procedure decisions were truly the bastion of countermajoritarian decision making they have been made out to be"); Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010) (challenging the "standard story" that the Court was "motivated by an emphasis on political, social, and economic equality for racial minorities" until it became "[f]rightened . . . by the popular backlash against high crime rates").

4. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (discussing debate).

period. It looks back at *Offutt v. United States*,[5] a relatively obscure case decided by the Warren Court in 1954, seven years before *Mapp*.

Offutt reviewed a criminal defense lawyer's criminal conviction. The federal district judge presiding over a criminal trial was offended by Offutt's defense tactics and, at the close of the trial, punished Offutt summarily for contempt of court.[6] In overturning Offutt's conviction because of the district judge's lack of impartiality, the Court invoked "th[e] Court's 'supervisory authority over the administration of criminal justice in the federal courts,'"[7] not constitutional due process, on which the Court relied two decades later when it set aside a contempt conviction imposed by a state trial judge in similar circumstances.[8] In subsequent decisions into the early 1960s, the Court continued to express its conception of fair process by invoking its supervisory authority in federal criminal cases. However, beginning with *Mapp*, the Court set its sights on state criminal process, issuing the expansive constitutional rulings for which the Warren Court is better remembered.

This Article traces the Supreme Court's expansion and contraction of supervisory authority in federal criminal cases. It briefly describes the Court's "supervisory authority" decisions leading up to *Offutt* in Part II, and discusses *Offutt* in Part III. Then the Article turns to *Offutt*'s aftermath. Part IV describes the initial significance of supervisory authority following *Offutt*, while Part V discusses the declining role of supervisory authority once the Warren Court turned its attention to the Bill of Rights provisions, and Part VI describes the erosion of supervisory authority by later Courts. The Article concludes in Part VII by asking whether supervisory authority might have sustained a more important role in federal criminal procedure if it had been more firmly entrenched during the Warren Court era.

II. SUPERVISORY AUTHORITY PRIOR TO OFFUTT

The Supreme Court's 1943 decision in *McNabb v. United States*[9] is said to mark the Court's earliest invocation of "supervisory authority" over the administration of criminal justice.[10] In *McNabb*, the Court held

5. 348 U.S. 11 (1954).
6. *Id.* at 12.
7. *Id.* at 13 (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)).
8. Taylor v. Hayes, 418 U.S. 488, 500 (1974).
9. 318 U.S. 332 (1943).
10. *See, e.g.*, Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 328–29 (2006); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433,

that federal defendants' confessions had been improperly admitted against them because the defendants had been held in custody at length for questioning rather than being brought to court promptly as required by federal statutes.[11] The defendants cited earlier decisions holding coerced confessions to be inadmissible as a matter of due process. But Justice Frankfurter's opinion explained that the Court did not have to decide the constitutionality of the interrogations, because it could independently set standards of fair criminal process in federal cases:

> [W]hile the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal

1435 (1984); Dep't of Justice, Office of Legal Policy, *Report to the Attorney General on the Judiciary's Use of Supervisory Power to Control Federal Law Enforcement Activity*, 22 U. MICH. J.L. REFORM 773, 775 (1989); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193 (1969). Federal courts' supervisory authority over the criminal justice process can be distinguished from other sources of federal judicial regulatory authority, such as their "inherent authority . . . to protect their own jurisdiction" and their authority to regulate lawyers. Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory?*, 56 VAND. L. REV. 1303, 1311 (2003).

11. *McNabb*, 318 U.S. at 344–47. In a companion case, *Anderson v. United States*, the Court suppressed confessions based on the same considerations governing the *McNabb* decision. 318 U.S. 350, 355 (1943).

> 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.[12]

As precedent for this exercise of judicial authority, the Court cited decisions going back to the early 1800s in which the Court ruled on the admissibility of evidence in federal criminal cases.[13]

Over the ensuing decade, the Vinson Court adhered to the *McNabb* decision, which it rationalized as "an exercise of [the Court's] duty to formulate policy appropriate for criminal trials in the federal courts."[14] In a 1948 decision, the Vinson Court divided over its understanding of *McNabb*'s implications for the admissibility of confessions,[15] with the majority holding a confession inadmissible because of a statutorily excessive delay in bringing the arrested defendant before a judicial officer.[16] But even the dissent acknowledged that "[w]hen not inconsistent with a statute, or the Constitution, there is no doubt of the power of this Court to institute, on its own initiative, reforms in the federal practice as to the admissibility of evidence in criminal trials in federal courts."[17]

The Vinson Court made stingy use of its supervisory authority, however. The only other examples were a pair of 1946 decisions condemning wholesale exclusions of groups from juries: *Thiel v. Southern Pacific Co.*,[18] overturning a civil judgment where wage earners had been systematically excluded from the jury panel,[19] followed by

12. *McNabb*, 318 U.S. at 340–41 (citations omitted).

13. *Id.* at 341 (citations omitted). Professor Pushaw has observed that two of the eight decisions cited by the Court "stand for the opposite principle" and that "[t]he other six were inapposite," and "[t]he Court effectively adopted the rationale for general supervisory power that Justice Brandeis had advocated in a series of dissents in the 1920s: that the judiciary had independent authority to develop adjective law to preserve its integrity, quite apart from its duty to enforce the Constitution and federal statutes." Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 780–81 (2001). For other discussions of *McNabb* and its historical background, see Barrett, *supra* note 10, at 373–76; Beale, *supra* note 10, at 1435–48.

14. United States v. Mitchell, 322 U.S. 65, 68 (1944). In *Mitchell*, the Court found *McNabb* inapplicable because the defendant made his admissions before being held for an inordinate length of time. The Court also declined to extend *McNabb* in *United States v. Bayer*, where the trial court excluded a custodial confession obtained in violation of *McNabb* but admitted one voluntarily given by the defendant six months later. 331 U.S. 532, 540–41 (1947).

15. Upshaw v. United States, 335 U.S. 410 (1948).

16. *Id.* at 412–14. The Court applied the *McNabb* rule again in *United States v. Carignan*, another case involving a confession obtained after inordinate delay in bringing the defendant to court. 342 U.S. 36, 41 (1951).

17. *Upshaw*, 335 U.S. at 414–15.

18. 328 U.S. 217 (1946).

19. *Id.* at 223–24.

Ballard v. United States,[20] overturning a criminal conviction where women had been systemically excluded from the grand and petit juries.[21] Notably, this pair of decisions went beyond questions of evidentiary admissibility in regulating federal practice.

More often, the Vinson Court declined to employ its supervisory authority, although it accepted the legitimacy of this power. In *Fisher v. United States*,[22] decided in 1946, the Court upheld a capital murder conviction where the District of Columbia trial judge refused to instruct the jury that it could take account of the defendant's diminished mental capacity.[23] Apparently regarding the District of Columbia as the equivalent of a state, the majority found supervisory authority inapplicable, observing, "[t]he administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern."[24] In *Pinkerton v. United States*,[25] decided soon after, the Court essentially ignored the dissent's argument that, as a matter of supervisory authority, the Court should not allow a federal defendant to be sentenced both for conspiracy and for substantive offenses for which he was convicted only by virtue of his participation in the underlying conspiracy.[26]

In its 1952 decision in *On Lee v. United States*,[27] the Court similarly declined the dissent's invitation to invoke supervisory authority. There, the Court held that an undercover investigator's secret recording of his conversations with the defendant was admissible. After concluding that the recording did not violate the Fourth Amendment or the relevant federal statute, the Court refused to exclude the recording based on its supervisory authority.[28] Four dissenting Justices regarded the investigator's conduct as so distasteful—"'dirty business,'" Justice Frankfurter called it[29]—that the prosecution should be barred from exploiting it, but the majority concluded that the Court's "disapproval must not be thought to justify a social policy of the magnitude necessary to arbitrarily exclude otherwise relevant evidence."[30]

20. 329 U.S. 187 (1946).
21. *Id.* at 195–96.
22. 328 U.S. 463 (1946).
23. *Id.* at 464, 470.
24. *Id.* at 476. *See also* Eagles v. United States, 329 U.S. 304, 315 (1946) (stating that supervisory authority did not apply in the habeas context).
25. 328 U.S. 640 (1946).
26. *See id.* at 650–54 (Rutledge, J., dissenting in part).
27. 343 U.S. 747 (1952).
28. *Id.* at 754–58.
29. *Id.* at 760 (Frankfurter, J., dissenting).
30. *Id.* at 757.

III. THE EARLY WARREN COURT'S OFFUTT *DECISION*

Earl Warren became Chief Justice in 1953.[31] The following year, starting with *United States v. Offutt*,[32] the Warren Court began to employ supervisory authority more robustly to rectify perceived procedural injustices in federal criminal cases, often in a manner that expanded procedural protections for federal criminal defendants generally.[33]

Offutt defended a doctor accused of performing an abortion in the District of Columbia.[34] Throughout the fourteen day trial, Offutt clashed with the federal district judge, and "with increasing personal overtones," the judge admonished Offutt and threatened to hold him in contempt for disobeying the court's rulings and for overly aggressive advocacy.[35] In Justice Frankfurter's description, "these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor."[36] After the jury began deliberating, the judge initiated summary criminal contempt proceedings.[37]

Without specifying the charges against Offutt or providing an evidentiary hearing, the judge made twelve findings of contempt and sentenced Offutt to ten days' imprisonment.[38] On appeal, the court of appeals sustained four of the twelve findings and reduced Offutt's sentence to two days' imprisonment, while reversing the doctor's criminal conviction in a separate opinion because the judge's antagonistic behavior made the doctor's trial unfair.[39]

Justice Frankfurter's majority opinion signaled that the Court was revitalizing its supervisory authority. Quoting *McNabb*, he explained that the Court had decided to review Offutt's conviction "[i]n view of this Court's 'supervisory authority over the administration of criminal justice in the federal courts,' and the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt."[40] This explanation is somewhat suspect, given that

31. Archibald Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1, 2 (1969).
32. 348 U.S. 11 (1954).
33. *See generally* Beale, *supra* note 10, at 1448–55 (describing how supervisory power has expanded the general rules of procedure and evidence, creating more fairness and reliable criminal proceedings).
34. *Offutt*, 348 U.S. at 12.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 12–13.
40. *Id.* at 13 (citing McNabb v. United States, 318 U.S. 332, 341 (1943)). Justice Frankfurter was well aware that in reviewing a federal criminal contempt conviction, the Court had no need to rely

neither Offutt's petition for certiorari nor the Government's opposition cited *McNabb*—nor, for that matter, did the parties' briefs on the merits.[41] Moreover, the Court had ample authority to review the process leading to Offutt's conviction without reference to either constitutional limits or supervisory authority. As it did in prior federal criminal contempt cases both predating and postdating *McNabb*, the Court could simply have analyzed whether the trial court exceeded its inherent authority, or its authority under Rule 42 of the Federal Rules of Criminal Procedure, to punish criminal contempt summarily.[42]

The Court did not question whether Offutt's conduct was sanctionable but focused on the fairness of the process by which he was punished.[43] "The vital point," Justice Frankfurter observed, "is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."[44] The opinion concluded that the contempt proceedings should have been conducted by a different judge, because "instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner," and therefore he could not be counted on to preside impartially.[45]

IV. THE RISE OF SUPERVISORY AUTHORITY IN THE EARLY WARREN COURT

From a constitutional perspective, the Court's *Offutt* opinion was an exercise of restraint.[46] Offutt argued that he had been denied the Fifth Amendment due process right to an impartial judge, to notice, and to a

on the supervisory authority that he had previously discussed in *McNabb*. His scholarship, while teaching at Harvard Law School, included an article deeply exploring the history bearing on federal courts' authority, under federal law, to punish criminal contempt, and exposing the Court's mischaracterization of the federal law in *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). *See* Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1029–38 (1924). In *Nye v. United States*, the Court accepted the article's account and corrected its earlier error. 313 U.S. 33, 47–48 (1941).

41. *See generally* Brief for the United States, *Offutt v. United States,* 348 U.S. 11 (1954) (No. 27); Reply Brief for Petitioner, *Offutt v. United States*, 348 U.S. 11 (1954) (No. 27) [hereinafter Pet'r's Reply Br.] (neither referring to *McNabb* at all).

42. *See, e.g.*, Sacher v. United States, 343 U.S. 1 (1952); *In re* Michael, 326 U.S. 224 (1945).

43. *Offutt*, 348 U.S. at 17.

44. *Id.* at 14.

45. *Id.* at 17.

46. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

hearing.[47] Had the Court agreed, its decision would have applied directly to state criminal cases, since the Fourteenth Amendment Due Process Clause, applicable to the states, presumably required the same elements of fair process as Fifth Amendment due process.[48] Instead, although state courts might find the opinion to be persuasive, the Court's ruling applied only in federal cases.

At the same time, *Offutt*'s references to *McNabb* and to the Court's "supervisory authority" gave the decision a potential significance beyond the criminal contempt context governed by Rule 42. As Justice Frankfurter explained in *McNabb*, in supervising federal proceedings, the Court was not limited by the Constitution's "minimal historic safeguards for securing trial by reason."[49] *Offutt* might have been read as the rebirth of supervisory authority, encouraging the Supreme Court in future federal criminal cases to express "what constitutes justice" and inviting federal courts of appeals to do the same, using "the appearance of justice"—that is, the Justices' own sense of procedural fairness and wise criminal justice policy—as the lodestar.

Before it decided *Mapp v. Ohio*[50] in 1961, the Court reviewed over a dozen other cases implicating its supervisory authority. The Warren Court used this power more generously than the Vinson Court. For example, in *Roviaro v. United States*,[51] the Court rejected the government's asserted right to withhold its informer's identity, holding that the defendant was entitled on cross-examination to elicit the identity of an informer who was the only other participant in the alleged narcotics transaction.[52] In *Grunewald v. United States*,[53] while overturning all three defendants' tax fraud conspiracy convictions on other grounds,[54] the Court also invoked supervisory authority to hold it improper for the prosecution to cross-examine one of the defendants based on his invocation of the Fifth Amendment right against self-incrimination.[55]

47. *See* Pet'r's Reply Br., *supra* note 41, at 2.

48. James W. Ely, Jr., *Due Process Clause*, THE HERITAGE GUIDE TO THE CONST., https://www.heritage.org/constitution/amendments/14/essays/170/due-process-clause (last visited Nov. 9, 2019) ("Modern lawn interprets the Fifth and Fourteenth Amendments to impose the same substantive due process and procedural due process requirements on the federal and state governments.").

49. McNabb v. United States, 318 U.S. 332, 340 (1943).

50. 367 U.S. 643 (1961).

51. 353 U.S. 53 (1957).

52. *Id.* at 65.

53. 353 U.S. 391 (1957).

54. *Id.* at 424.

55. *Id.* at 423–24. The Court explained its decision to address the question as follows:

The Court later described *Roviaro* as an exercise of its traditional "power to formulate evidentiary rules for federal criminal cases,"[56] and the same might be said of *Grunewald*. But other decisions expressed the Court's willingness to establish other kinds of procedural safeguards in federal criminal cases. In a tax prosecution, the Court invoked supervisory power in ruling, in passing, that prosecutors must investigate defendants' innocent explanations for unexplained increases in net worth that were alleged to be taxable income.[57] In another case, the Court used its supervisory power to set aside a drug distribution conviction where the jury had read news accounts referring to the defendant's prior convictions which had been ruled inadmissible.[58] And in a particularly expansive exercise of supervisory authority, the Court barred a federal investigator from testifying in a state criminal proceeding about evidence that had been illegally obtained and suppressed in a federal criminal proceeding.[59] This was before the Court held in *Mapp* that the Fourth Amendment applied to the states. Although the Court's supervisory authority did not extend to state court proceedings, the Court thought it had authority to police the conduct of federal criminal agents.

A high water mark for the Court's supervisory power was *Elkins v. United States*,[60] decided just one year before *Mapp*. Setting aside decades of decisions applying the so-called "silver platter" doctrine, the Court held that evidence obtained by state authorities is inadmissible in federal criminal proceedings if obtained in contravention of the restrictions that the Fourth Amendment imposes on federal investigators.[61] The Court relied heavily on Justice Frankfurter's

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> We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question.

Id. Grunewald anticipated the Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), which held that commenting on the defendant's silence violates the Fifth Amendment right against self-incrimination. *Id.* at 615.

56. McCray v. Illinois, 386 U.S. 300, 312 (1967) (discussing *Roviaro*).

57. Holland v. United States, 348 U.S. 121, 135–36 & n.7 (1954).

58. Marshall v. United States, 360 U.S. 310, 313 (1959).

59. Rea v. United States, 350 U.S. 214, 217 (1956). The Court distinguished *Rea* in *Wilson v. Schnettler*, and then again in *Clear v. Bolger*, finding in both cases that federal courts could not exercise supervisory authority to enjoin federal agents from testifying in state cases about their acquisition of evidence. 365 U.S. 381, 386 (1961); 371 U.S. 392, 398–99 (1963).

60. 364 U.S. 206 (1960).

61. *Id.* at 223–24.

majority opinion in *Wolf v. Colorado*,[62] holding that the core of the Fourth Amendment's freedom from arbitrary police intrusions on privacy applies to the states by virtue of the Due Process Clause,[63] even though the exclusionary rule does not.[64] The Court thought that *Wolf* undercut the rationale of the earlier "silver platter" opinions,[65] although Justice Frankfurter, who had authored the Court's opinion in *Wolf*, disagreed and dissented in *Elkins*.[66] The majority's ruling in *Elkins*, excluding the evidence illegally obtained by the state, did not rest on the Fourth Amendment exclusionary rule—it relied on the Court's supervisory power, as recognized in *McNabb*.[67]

This is not to say that the Court employed its supervisory authority at every opportunity.[68] It declined to use supervisory authority to allow a court to dismiss an indictment not supported by competent evidence.[69] In another case, it declined the suggestion in a concurring opinion that it expand the entrapment defense as an exercise of supervisory authority.[70] In another, it overturned a conviction on other grounds and therefore did not consider the dissent's argument that it should do so as

62. 338 U.S. 25 (1949).
63. *Id.* at 27–28.
64. *Id.* at 33.
65. *Elkins*, 364 U.S. at 213–14.
66. *Id.* at 237–41 (Frankfurter, J., with Clark, Harlan, and Whittaker, JJ., dissenting).
67. *Id.* at 216 (majority opinion) ("What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecution.'") (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)). Another search-and-seizure case evidently relying on supervisory authority was *Giordenello v. United States*, 357 U.S. 480 (1958). There, the Court found that an arrest was invalid where the application did not set forth probable cause as required by the Federal Rules of Criminal Procedure. *Id.* at 485–87. The Court held that evidence seized pursuant to the arrest was inadmissible. *Id.* at 488. Although the decision did not refer to supervisory authority or *McNabb*, the opinion might be read, like *McNabb*, to require evidentiary suppression as a remedy for a violation of a procedural rule that does not explicitly provide for such a remedy. *Giordenello* was later identified as a supervisory powers decision. *See* Aguilar v. Texas, 378 U.S. 108, 118 (1964) (Clark, J., with Black, and Stewart, JJ., dissenting).
68. It is unclear whether the Court exercised its supervisory authority in *Green v. United States* to establish a rule for federal court judges. 365 U.S. 301 (1961) (plurality). The question was whether the district judge had provided the defendant an opportunity to speak on his own behalf regarding the sentence to be imposed, as required by a Federal Rule of Criminal Procedure. *Id.* at 303–04. To avoid future ambiguities, Justice Frankfurter wrote in a plurality opinion: "Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." *Id.* at 305. Justice Stewart added in a concurrence: "I do think the better practice in sentencing is to assure the defendant an express opportunity to speak for himself, in addition to anything that his lawyer may have to say. I would apply such a rule prospectively, in the exercise of our supervisory capacity." *Id.* at 306 (Stewart, J., concurring). In context, it appears that Justice Frankfurter's pronouncement regarding what district judges "should" do rather than "must" do was slightly more precatory than an exercise of supervisory power.
69. Costello v. United States, 350 U.S. 359, 363–64 (1956).
70. Sherman v. United States, 356 U.S. 369, 376 (1958).

an exercise of supervisory authority.[71] And in a criminal contempt case, the Court ignored the dissent's argument for overturning the conviction as an exercise of supervisory authority.[72]

However, none of the decisions suggested that the Court had any skepticism or discomfort regarding federal courts' supervisory power. On the contrary, the Court extolled its supervisory authority in two decisions overturning judgments predicated on the testimony of government informants who were later revealed to have testified falsely elsewhere on similar subjects.[73] In the first, citing *McNabb*, Justice Frankfurter wrote:

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.[74]

The Court quoted this encomium in the second case, setting aside a criminal conviction on essentially the same ground.[75]

The Court continued to apply supervisory authority, as in *McNabb*, when a confession was obtained in violation of federal law requiring agents to bring an arrested defendant to court promptly.[76] But the Court plainly did not think its power was limited to remedying violations of federal statutes, was confined to deciding questions of evidence in federal court, or was otherwise restrained when it came to questions of federal criminal process in or out of court. The Court assumed that it

71. Smith v. United States, 360 U.S. 1, 10 (1959); *see id.* at 17–18 (Clark, J., with Harlan, and Stewart, JJ., concurring in part and dissenting in part).

72. Brown v. United States, 359 U.S. 41, 42 (1959); *see id.* at 61–62 (Warren, C.J., with Black, Douglas, and Brennan, JJ., dissenting).

73. Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 125 (1956) (overturning an administrative board's determination that the Communist Party of the United States had to register as a communist organization); Mesaroch v. United States, 352 U.S. 1, 14 (1956) (overturning a conviction for conspiring to advocate the overthrow of the government, because the government acknowledged that an informant who testified at the trial about his infiltration of the Communist Party had testified falsely in several other contemporaneous proceedings regarding the same subject). *See also* United States v. Shotwell, 355 U.S. 233, 242 (1957) (vacating the court of appeals decision and remanding criminal case to the district court where, post-appeal, the Government submitted affidavits indicating that the defendants were relying on false testimony).

74. *Communist Party*, 351 U.S. at 124 (citations omitted).

75. *Mesaroch*, 352 U.S. at 14 (quoting *Communist Party*, 351 U.S. at 124).

76. Mallory v. United States, 354 U.S. 449, 451–53, 455 (1957).

could independently assess the propriety of federal investigative conduct to ensure, in the language of *Offutt*, that justice "satisf[ies] the appearance of justice."[77] In a state case upholding the constitutionality of a custodial interrogation although the defendant and his lawyer were denied access to each other, the Court observed that, in a federal case, it would surely have used its supervisory power to suppress the defendant's confession based on its supervisory authority:

> We share the strong distaste expressed by the two lower courts over the episode disclosed by this record. Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. But to hold that what happened here violated the Constitution of the United States is quite another matter.[78]

If, as scholars later observed, the early Warren Court was vague about the source and parameters of its supervisory authority,[79] it was nonetheless confident in its possession of this power, in the breadth of this power, and in the obligation to employ it.

V. THE WANING OF SUPERVISORY AUTHORITY IN THE LATER WARREN COURT

It is generally agreed that the Warren Court's criminal procedure "revolution" began with its 1961 decision in *Mapp*, holding states subject to the Fourth Amendment's exclusionary rule.[80] The Court took its

77. Offutt v. United States, 348 U.S. 11, 14 (1954).

78. Cicenia v. La Gay, 357 U.S. 504, 508–09 (1958) (citations omitted). *See also* Crooker v. California, 357 U.S. 433, 439 n.4 (1958).

> At times petitioner appears to urge "a rule" barring use of a voluntary confession obtained after state denial of a request to contact counsel regardless of whether any violation of a due process right to counsel occurred. That contention is simply an appeal to the supervisory power of this Court over the administration of justice in the federal courts. The short answer to such a contention here is that this conviction was had in a state, not a federal, court.

Id. (citations omitted).

79. *See, e.g.*, Barrett, *supra* note 10, at 329, 333. Scholars have considered or challenged various rationales for the Court's exercise of this authority. *See, e.g.*, *id.* at 387 (concluding that "the Constitution's structure cuts against, and history rules out, the proposition that the Supreme Court possesses inherent supervisory power over inferior court procedure"); Beale, *supra* note 10, at 1520–21 (concluding that "[t]he supervisory power label has been used to describe the exercise of several different forms of judicial power" and that none of them justifies "decisions that cannot be characterized as procedural or remedial in nature. . . . The exclusion of evidence or the dismissal of a prosecution because of constitutionally and statutorily permissible conduct by government investigators and prosecutors violates the separation of powers . . . .").

80. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

earliest opportunity thereafter, in *Ker v. California*,[81] to offer reassurance that the expectations of reasonableness under the Fourth Amendment "are not susceptible of Procrustean application"[82] and that "*Mapp* sounded no death knell for our federalism."[83] The opinion acknowledged that the Court had previously invoked its supervisory authority to establish rules for federal cases on the admissibility of evidence obtained by investigative agents, but promised that *Mapp* "established no assumption by this Court of supervisory authority over state courts, and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."[84]

Notwithstanding this nod to states' interest in regulating their own criminal procedure, the Warren Court expanded its docket of state criminal cases, applying the Fourth, Fifth, and Sixth Amendments to the states in essentially the same way as to the federal government and interpreting these provisions more expansively than in the past. *Gideon v. Wainwright*,[85] establishing indigent defendants' right to appointed counsel in felony cases,[86] became the foundation of a host of other subsequent right-to-counsel decisions.[87] *Miranda v. Arizona*,[88] famously requiring police to warn arrested defendants of their rights before questioning them,[89] entered the national vocabulary. These and other decisions fundamentally altered national criminal practices.

Even when reviewing federal criminal cases, the Court did not hesitate to decide on constitutional grounds, giving its opinions a precedential impact in state cases as well. For example, in *Katz v. United*

81. 374 U.S. 23 (1963).
82. *Id.* at 33.
83. *Id.* at 31.
84. *Id.* (citations omitted).
85. 372 U.S. 335 (1963).
86. *Id.* at 338–39.
87. *See* Bruce A. Green, Gideon*'s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2338–39 (2013).

> *Gideon* leads to a right to assigned counsel for misdemeanor defendants facing imprisonment, and eventually to lawsuits challenging the adequacy of state funding for indigent criminal defense. The decision becomes the foundation for the right to competent and conflict-free counsel; protection from state and judicial interference with the lawyer-client relationship and with one's choice of counsel; and limits on police interrogations after formal charges are initiated. At least indirectly, *Gideon* opens the door to other procedural protections, both within and outside the criminal context, including a right to appointed counsel in some civil cases.

Id.

88. 384 U.S. 436 (1966).
89. *Id.* at 471–72.

States,[90] rather than relying on supervisory authority, the Court held warrantless electronic eavesdropping to be unconstitutional under the Fourth Amendment.[91] Likewise, in *Massiah v. United States*,[92] the Court relied on the Sixth Amendment in holding that investigators and their informants could not secretly question indicted defendants.[93] And in *United States v. Wade*,[94] the Court extended the Sixth Amendment right to counsel to post-indictment line-ups,[95] over a dissent that suggested that the ruling was questionable even as an exercise of supervisory authority.[96]

The Court was mindful that it could not be as protective of fair process and individual interests when engaging in constitutional interpretation as when invoking its supervisory authority. For example, on the same day it decided *Mapp*, the Court held that, although it continued to adhere to *McNabb*, it was not extending *McNabb* to state courts as a matter of constitutional due process.[97] Conversely, the Justices recognized that supervisory authority gave them more leeway to right wrongs.[98]

But even so, the Court did not gravitate toward supervisory authority in federal cases as an exercise of constitutional restraint. When there were five votes for an expansive constitutional decision in a federal criminal case, the Court reached the constitutional question. For example, the Court held in *Murphy v. Waterfront Commission of New York Harbor*[99] that the right against self-incrimination precluded the state from compelling a witness to incriminate himself under federal law and

90. 389 U.S. 347 (1967).
91. *Id.* at 353.
92. 377 U.S. 201 (1964).
93. *Id.* at 205–06.
94. 388 U.S. 218 (1967).
95. *Id.* at 236–37.
96. *Id.* at 259 (White, J., with Harlan and Stewart, JJ., dissenting in part and concurring in part).
97. Culombe v. Connecticut, 367 U.S. 568, 600–01 (1961).

> The *McNabb* case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to *McNabb* for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment.

Id.

98. For example, in *Rideau v. Louisiana*, Justice Clark disagreed with the Court's conclusion that the defendant had been denied due process by being tried in a venue where his prison interrogation, in which he made incriminating admissions, had been televised. 373 U.S. 723, 729 (1963) (Clark, J., with Harlan, J., dissenting). But he noted that in a federal case raising the same facts, he would have overturned the defendant's conviction as an exercise of supervisory authority. *Id.* at 728–29.
99. 378 U.S. 52 (1964).

that, having done so, the witness' testimony could not be used against him in federal court.[100] In his concurrence, Justice Harlan read the Fifth Amendment right more narrowly but would have excluded the witness' statements in federal proceedings as an exercise of supervisory authority.[101] The Court turned down the opportunity to capture an additional Justice's vote by taking the more restrained approach.

With Justice Frankfurter's retirement from the Court in 1962,[102] the Court lost its most ardent proponent of supervisory power, the author of *McNabb*, *Offutt*, and other supervisory power opinions. The Court took no more cases like *Offutt* where it would claim to have accepted review precisely to consider a question of supervisory authority, and it evinced little interest in making new rules of federal criminal procedure based on supervisory power. Occasionally, dissenting Justices unpersuasively urged the Court to rule for the defendant on supervisory authority grounds.[103] But if a procedure was not unjust enough to violate the Bill of Rights, and was not proscribed by a federal rule or statute, the Court was disinclined to establish or ratify further procedural restraints based on federal courts' supervisory authority.[104] For example, in *Simmons v. United States*,[105] the Court held that a pretrial photo identification was not unnecessarily suggestive and therefore inadmissible either under

100. *Id.* at 77–78.

101. *Id.* at 80–81 (Harlan, J., with Clark, J., concurring).

102. *See* John M. Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 176 HARV. L. REV. 1, 1 (1962) (written "[o]n the occasion of [Justice Frankfurter's] retirement from the Court").

103. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (maintaining the evidence should be suppressed as a matter of supervisory power); Berman v. United States, 378 U.S. 530, 533–34 (1963) (Black, J., with Douglas, C.J., and Goldberg, J., dissenting) (arguing that Court should have exercised its supervisory authority to reinstate the defendant's untimely appeal); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 388–89 (1963) (Black, J., with Warren, C.J., and Douglas, J., dissenting). In ruling for the federal criminal appellant on statutory grounds in *Hardy v. United States*, the Court declined an opportunity to use its supervisory authority to establish a more protective rule for future federal criminal appeals. 375 U.S. 277, 282 (1964). The Court held that an indigent criminal defendant who has a new lawyer on appeal has a statutory right to the full trial transcript, and not only those portions addressing the issues that the defendant, before obtaining appellate counsel, expressed an intent to raise. *Id*. But the Court ignored Justice Goldberg's suggestion that "in the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal criminal cases to defendants who cannot afford to purchase them, whenever they seek to prosecute an appeal." *Id.* (Goldberg, J., with Brennan, C.J., and Stewart, J., concurring).

104. *See, e.g.*, Osborn v. United States, 385 U.S. 323, 326–27 (1966) (rejecting the argument that evidence should be excluded on constitutional grounds or under supervisory authority); Lopez v. United States, 373 U.S. 427, 440 (1963) (rejecting the Fourth Amendment challenge to admission of a consensual recorded conversation and declining to exclude evidence under supervisory authority, explaining: "[T]he court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised"); Cleary v. Bolger, 371 U.S. 392, 398, 400 (1963) (holding that the federal court could not enjoin introduction of evidence in state court).

105. 390 U.S. 377 (1968).

the Due Process Clause or pursuant to supervisory authority.[106] The Court did not put forward a different, and more protective, approach to the admissibility of identification evidence in federal cases.

The Court did invoke supervisory authority in a case of little significance to call for the correction of an obvious sentencing error,[107] and in another to give effect to Rule 11 of the Federal Rules of Criminal Procedure.[108] And, as in *Offutt*, the Court's supervisory authority was the apparent basis for two decisions overturning federal criminal contempt convictions. In one, the Court held that a trial judge employing the summary contempt power may not impose a prison sentence of more than six months.[109] In the other, the Court overturned a summary contempt conviction against a lawyer who, to make a record for appeal, repeatedly asked questions contrary to the judge's instructions to stop the questioning.[110] But it seems fair to say that that the Court let its

106. *Id.* at 381–86. The Court held as a matter of due process "that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

107. Bartone v. United States, 375 U.S. 52, 53–54 (1963). The Court held that the court of appeals should have corrected the error immediately rather than requiring the defendant to file a separate motion after the appeal was decided. It explained that "in federal proceedings, over which both the [c]ourts of [a]ppeals and this Court have broad powers of supervision," the court of appeals, "whenever possible, [should] correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Id.* at 54 (citing McNabb v. United States, 318 U.S. 332 (1943)).

108. In *McCarthy v. United States*, the Court set aside a guilty plea where the district judge failed to question the defendant as required by Rule 11 of the Federal Rules of Criminal Procedure to ensure that the defendant understood the charges. 394 U.S. 459, 463–64 (1969) ("This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal."). Justice Black filed a short concurrence suggesting that the decision could have been reached based exclusively on Rule 11, without regard to supervisory power. *Id.* at 477 (Black, J., concurring).

109. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (plurality) ("[I]n the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof."). The parties in the case argued the constitutionality of the process, and two justices were prepared to rule on constitutional grounds. *See id.* at 375; *id.* at 384–93 (Douglas, J., with Black, J., dissenting).

110. *In re* McConnell, 370 U.S. 230, 235–36 (1962). The dissent acknowledged the Court's decision to be an exercise of supervisory authority. *Id.* at 237 (Harlan, J., with Stewart, J., dissenting). In a third contempt case, the Court declined to invoke its supervisory authority. In *Piemonte v. United States*, the trial judge summarily held a prison inmate in contempt for refusing, under a grant of immunity, to answer questions about narcotics dealing, on the ground that he and his family would be endangered if he complied. 367 U.S. 556, 558–59 (1961). In his dissenting opinion, Chief Justice Warren maintained that "even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower federal courts to rectify the abuse of the summary contempt power which the record in this case makes manifest." *Id.* at 564 (Warren, C.J., with Douglas, J., dissenting) (citing Offutt v. United States, 348 U.S. 11 (1954)).

supervisory power atrophy.[111] With respect to the exercise of supervisory power, the later Warren Court was almost as stingy as the Vinson Court had been after *McNabb*.

One certainly could not infer that the later Warren Court was hostile to supervisory authority as the means of influencing the development of criminal procedure. That was important because, as Sara Sun Beale described in her seminal 1984 article on supervisory authority, lower federal courts, on the example of the Court's earlier decisions, made robust use of supervisory power into and throughout the 1970s.[112] Nothing in the later Warren Court decisions would have discouraged them from doing so. In its later years, the Warren Court was merely indifferent, having discovered the shiny new power of constitutional interpretation.

But one might have read into the later decisions an implication, no doubt unintended, that supervisory authority had nothing more to say on the subjects, such as searches and seizures and police interrogations, that the constitutional decisions directly addressed. In other words, supervisory power might now be understood as interstitial, potentially superseded not only by legislation but by constitutional decisions of limited reach.[113] In effect, the constitutional case law risked crowding out supervisory power, turning the Constitution into not only a floor but, as far as the Court was concerned, a ceiling, contrary to how the Court had previously articulated the relationship between the constitutional criminal procedure rights and supervisory power.

111. A similar point has been made about the loss of focus on fairness with the Court's abandonment of "due process" in favor of enumerated Bill of Rights provisions. *See* Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 145–46 (2005); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 111–15 (2005); *see also* George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 169–70 (2005).

112. *See* Beale, *supra* note 10, at 1455–64. For example, some federal courts of appeals required district judges to inquire into whether a lawyer representing multiple defendants had a conflict of interest, before a rule of criminal procedure imposed that requirement. *See* Cuyler v. Sullivan, 446 U.S. 335, 346 n.10 (1980) (noting, "we view such an exercise of the supervisory power as a desirable practice"). And at least one court of appeals established a presumption that indicted defendants be tried within six months, otherwise the case would be dismissed. Barker v. Wingo, 407 U.S. 514, 523, 530 n.29 (1972) (noting that the Court's decision cast no doubt on the appellate court's rule).

113. *Cf.* Pushaw, *supra* note 13, at 746–47 ("[T]he Court has confined 'federal common law' to situations of genuine necessity, such as filling gaps in the Constitution or Acts of Congress.").

VI. THE POST-WARREN COURT'S EROSION OF FEDERAL COURTS' SUPERVISORY POWER

The Burger Court started out where the Warren Court left off, somewhat indifferent to supervisory power. The Court acknowledged that federal courts possessed the authority to set standards that were not constitutionally compelled for federal criminal trials.[114] But the Court did not go out of its way to use this authority itself.[115]

In the 1980s, however, the Court turned hostile, issuing opinions cutting back on federal courts' ability to "formulate policy" for federal criminal trials. In the first, *United States v. Payner*,[116] the federal trial judge suppressed financial records that investigators obtained for use against the defendant through a "flagrantly illegal" search of a bank official.[117] The evidence could not be suppressed under the Fourth Amendment, because the defendant had not himself been searched, and therefore he lacked standing to raise the constitutional claim.[118] But the

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114. The Court so recognized in *Cupp v. Naughten*, which concerned a state court's jury instruction that witnesses should be presumed to have testified truthfully. 414 U.S. 141, 149 (1973). The Court noted that the instruction was universally condemned by federal courts of appeals. *Id.* at 143, 146. But the Court characterized the federal court decisions as exercises of supervisory authority, not constitutional interpretation. *Id.* at 145–46.

> A reading of these cases, however, indicates that the courts of appeals were primarily concerned with directing inferior courts within the same jurisdiction to refrain from giving the instruction because it was thought confusing, of little positive value to the jury, or simply undesirable. The appellate courts were, in effect, exercising the so-called supervisory power of an appellate court to review proceedings of trial courts and to reverse judgments of such courts which the appellate court concludes were wrong.

Id. at 145–46. Something more would be required, the Court suggested, to find that the jury instruction violated due process. *Id.* at 146 ("Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."). *See also* Ristaino v. Ross, 424 U.S. 589, 598 n.10 (1976) (analogizing the case to an earlier decision, overturning a conviction because of the trial judge's failure to inquire into the jury venire's racial prejudice, that "should be recognized as an exercise of our supervisory power over federal courts"); Donnelly v. DeChristoforo, 416 U.S. 637, 648 n.23 (1974) ("We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it.").

115. In *United States v. Hale*, the Court invoked supervisory power, not as means of expanding influence over federal criminal process, but as a way to avoid deciding a constitutional question. 422 U.S. 171, 181 (1975). The Court held that the prosecution could not introduce evidence about, and draw incriminating inferences from, the defendant's invocation of the right to remain silent after being arrested. *Id.* The court of appeals had held that using this evidence violated the defendant's *Miranda* right. *Id.* at 173. And in *United States v. Caceres*, the Court declined to exercise supervisory authority to suppress evidence obtained in a tax investigation in violation of a federal tax regulation. 440 U.S. 741, 755–56 & n.22 (1979).

116. 447 U.S. 727 (1980).

117. *Id.* at 729.

118. *Id.* at 731–32.

trial court suppressed the evidence as an exercise of its supervisory power.[119] The Court reversed, holding 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."[120] The Court reasoned that the same societal interest in the admission of probative evidence that foreclosed the application of the Fourth Amendment exclusionary rule equally foreclosed this use of supervisory authority.[121] It claimed support for this view from *Elkins v. United States*, which, it said, "called for a restrained application of the supervisory power."[122] The opinion departed from earlier precedent which, as Justice Marshall observed in his dissent, included several cases where, although the Fourth Amendment afforded no remedy, the Court employed supervisory authority to suppress evidence obtained through government misconduct.[123] *Elkins* was among the most notable of those prior cases, making the Court's reliance on *Elkins* particularly confounding.

Then in *United States v. Hasting*,[124] decided three years later, the Court concluded that the harmless error rule limited federal courts' exercise of supervisory power. In *Hasting*, the court of appeals overturned the defendant's conviction because the prosecutor referred in his closing argument to the defendant's failure to present evidence.[125] The appellate court evidently concluded that, like a comment on a defendant's failure to testify, a comment on the absence of contrary evidence violated the defendant's right against self-incrimination.[126] The Court reversed, finding that, even assuming the prosecutor's argument was constitutionally impermissible, it was harmless beyond a reasonable doubt and therefore was not grounds to set aside a criminal

119. *Id.* at 731.
120. *Id.* at 735.
121. *Id.* at 734–35.
122. *Id.* at 735 (citing Elkins v. United States, 364 U.S. 206, 216 (1960)).
123. *Id.* at 744 (Marshall, J., with Brennan, and Blackmun, JJ., dissenting).

> This Court has on several occasions exercised its supervisory powers over the federal judicial system in order to suppress evidence that the Government obtained through misconduct. The rationale for such suppression of evidence is twofold: to deter illegal conduct by Government officials, and to protect the integrity of the federal courts. The Court has particularly stressed the need to use supervisory powers to prevent the federal courts from becoming accomplices to such misconduct.

Id. (citations omitted).
124. 461 U.S. 499 (1983).
125. *Id.* at 504, 512.
126. *Id.* at 503.

conviction.[127] Although the appellate court did not expressly justify its decision based on supervisory authority, Chief Justice Burger's opinion for the Court went out of its way to hold that, because the allegedly improper argument was harmless, the reviewing court likewise could not employ its supervisory authority to set aside the conviction.[128] Along the way, the Court rationalized this authority narrowly: "The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct."[129] This was a far cry from earlier expansive (if under-theorized or unpersuasive) descriptions of supervisory authority, such as Justice Frankfurter's claim in *McNabb* that this authority expressed federal courts' "duty of establishing and maintaining civilized standards of procedure and evidence."[130]

Four Justices declined to join the new Chief Justice's *Hasting* opinion gratuitously eviscerating federal courts' supervisory authority. Justice Blackmun would have remanded for a consideration of whether the perceived constitutional violation was in fact harmless error.[131] Justice Stevens would have found that the prosecutor's comment was constitutionally permissible and not addressed supervisory power.[132] And, joined by Justice Marshall, Justice Brennan took issue with the Court's cramped understanding of supervisory power.[133] While acknowledging that constitutionally impermissible jury arguments are subject to the harmless error rule, he concluded: "[T]he supervisory powers of federal appellate courts provide another possible source of authority, under some carefully confined circumstances, either to forgo a harmless error inquiry or to reverse a conviction even though the error at issue is harmless."[134]

Payner and *Hasting* discouraged federal courts' development of an expansive sub-constitutional jurisprudence of criminal procedure.[135]

127. *Id.* at 507–12.
128. *Id.* at 505–07.
129. *Id.* at 505 (citations omitted).
130. McNabb v. United States, 318 U.S. 332, 340 (1943).
131. *Hasting*, 461 U.S. at 512 (synopsis of Justice Blackmun's position).
132. *Id.* at 512–13 (Stevens, J., concurring).
133. *Id.* at 521–28 (Brennan, J., with Marshall, J., concurring in part and dissenting in part).
134. *Id.* at 525.
135. *See* Beale, *supra* note 10, at 1462 (reading *Payner* and *Hasting* to establish that lower courts' supervisory power is subject to limitations on constitutional remedies). The Court may be more hospitable to supervisory authority when it leads to rules that disfavor criminal defendants. *See* Thomas v. Arn, 474 U.S. 140 (1985) (upholding rule, issued by court of appeals pursuant to

Over the past three decades, while reaffirming federal courts' supervisory authority, the Court has held that authority tightly reined.[136] In the lower federal courts, the robust use of supervisory authority described by Professor Beale seems to have drawn to an end as well, although there certainly continue to be examples of individual federal judges and lower federal courts adopting rules and issuing rulings protective of criminal defendants' procedural rights based on supervisory authority.[137] And, given the increased conservatism of the lower court federal judges, one might doubt whether a significantly more robust set of laws would have developed even if the Supreme Court had not tapped on the brakes.

VII. CONCLUSION: OFFUTT*'S LEGACY*

After *Mapp*, the Warren Court might have continued to invoke its supervisory authority in federal criminal cases, developing a federal criminal procedure jurisprudence running parallel to its expanding state criminal procedure jurisprudence premised on the Bill of Rights provisions. In federal cases, the Court would not have been limited to establishing the constitutional floor; nor would it have been compelled to exercise restraint out of respect for state courts and state processes. To promote the reliability and integrity of federal proceedings, the Court could have asserted its own view of fair process not only in adjudication but in criminal investigations, including with regard to police interrogations and searches and seizures. To be sure, a robust supervisory authority jurisprudence would not have bound state courts, where most criminal cases are brought. But the Warren Court's

supervisory authority, requiring habeas petitioner to object to magistrate's report in order to preserve issues for appeal).

136. *See, e.g.*, Peguero v. United States, 526 U.S. 23, 29–30 (1999) (holding that a district court's failure to advise a convicted defendant of the right to appeal is subject to the harmless error rule); Carlisle v. United States, 517 U.S. 416, 425–28 (1996) (holding district court may not invoke supervisory authority to enter a judgment of acquittal where the defendant has not filed a timely motion); United States v. Williams, 504 U.S. 36 (1992) (finding district court may not use supervisory authority to dismiss indictment where the prosecution failed to introduce substantial exculpatory evidence to the grand jury); Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) (holding that a federal district court may not use supervisory authority to remedy grand jury misconduct that is harmless); *cf.* Dietz v. Bouldin, 136 S. Ct. 1885, 1892 (2016) (addressing limits on federal district courts' supervisory authority in civil cases). In some cases, defendants have benefitted from the Court's restriction on supervisory authority. *See, e.g.*, Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993) (finding appellate court may not exercise supervisory authority to dismiss the appeal of a fugitive defendant who has been recaptured).

137. *See* Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 223–28 (2018) (discussing district courts' adoption of discovery rules and rulings that are more demanding than constitutional case law and statutes).

approach might have influenced state courts in the exercise of their own supervisory authority. State courts might have been hard-pressed to explain why, in supervising state criminal proceedings, they should be less protective or fair than the U.S. Supreme Court and lower federal courts. Further, the Supreme Court's supervisory authority decisions expanding procedural protections in the federal criminal context might have served as intermediate steps toward more protective interpretations of the constitutional provisions. We might then identify *Offutt* as the Warren Court decision that, building on Justice Frankfurter's decision in *McNabb*, launched a criminal procedure revolution. But, of course, none of this occurred.

To the extent that *Offutt* opened the way for the early Warren Court's burst of expansive criminal procedure rulings for federal courts, predicated on its supervisory power, *Offutt*'s legacy is a modest one. By focusing on constitutional interpretation in its later years, to the virtual exclusion of supervisory power, the Warren Court failed to solidify its earlier gains. It never elaborated a persuasive rationale for the expansive uses of this authority and failed to demonstrate how supervisory power could be employed to build on, but go beyond, the constitutional framework. This made it easier for more conservative Courts to cut back on the early Warren Court's supervisory-power decisions, just as they cut back on the later Warren Court's constitutional criminal procedure decisions.

Although it turned out to be *Mapp*, not *Offutt*, that launched the Warren Court's criminal procedure revolution, *Offutt* is not entirely forgotten. It is still occasionally referenced within the narrow confines of contempt-of-court cases. For example, in *Taylor v. Hayes*,[138] the Court found *Offutt* useful in reviewing a state court conviction for constitutional error.[139] In *Taylor*, a criminal defense lawyer in a murder case engaged in a running controversy with the state trial judge, who held the lawyer in criminal contempt after the trial.[140] Relying on *Offutt*, the Court held that in such circumstances, unless summary contempt power is exercised at the time of the contumacious conduct, constitutional due process requires notice and an opportunity to be heard by a disinterested judge.[141]

In reviewing criminal contempt convictions, the Court continues to revert to its supervisory authority. Its most notable contemporary use

138. Taylor v. Hayes, 418 U.S. 488 (1974).
139. *Id.* at 500, 502–03.
140. *Id.* at 489–90.
141. *Id.* at 502–03.

of this power was in *Young v. United States ex rel. Vuitton Et Fils S.A.*,[142] holding that, in a contempt-of-court prosecution for violation of a court order, a trial judge may not appoint the victim's lawyer to prosecute the case, but must appoint a disinterested lawyer.[143] The Court might have gone a different route if five Justices were prepared to hold that there is a due process right to be prosecuted by a disinterested lawyer,[144] as lower courts have done.[145] But, citing *Offutt* and other earlier contempt cases, the Court expressed enthusiasm for supervisory authority in the federal criminal contempt context:

> The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary. We rely today on that authority to hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.[146]

Although arising in a narrow class of criminal cases, contempt-of-court decisions such as *Offutt* and *Young* are important expressions of our ideas and ideals about fair criminal process. The very idea of the summary criminal contempt process, in which the trial judge serves essentially as grand jury, prosecutor, victim, witness, trial judge, and sentencer, challenges ordinary notions of fair process. Where the trial judge is, or regards himself as, the victim of the defendant's contempt, that is a bridge too far, at least, as in *Offutt* and *Taylor*, if the contempt sanction is not issued immediately to preserve order in the courtroom. Likewise, while a judge may initiate contempt proceedings and assign a member of the bar to prosecute them, assigning a lawyer who owes a duty of loyalty to the victim of the contempt, as in *Young*, denies the

142. 481 U.S. 787 (1987) (plurality).

143. *Id.* at 804.

144. One justice took this view. *See id.* at 814–15 (Blackmun, J., concurring).

145. *See* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 488–89 & n.116 (2017) (citing authority); Patricia Moran, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 FORDHAM L. REV. 1141, 1157 n.64 (1986) (citing authority); *see also* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 424 n.39, 439 n.99 (2009); Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 (2005).

146. *Young*, 481 U.S. at 808–09 (citing Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (plurality); Yates v. United States, 356 U.S. 363, 366–67 (1958) (per curiam); and Offutt v. United States, 348 U.S. 11, 17–18 (1954)).

defendant a prosecution by a lawyer who, in exercising discretion, can be expected to adhere to the prosecutorial norm of "seeking justice." It is meaningful for the reviewing Court to use its supervisory power to right procedural wrongs in these federal cases.

In retrospect, however, the criminal contempt decisions recognizing defendants' procedural rights in the federal criminal context can just as easily be read as conservative decisions, restricting federal district courts' authority. Federal district courts' contempt power, although recognized by federal rule, derives from the courts' inherent authority to control their processes. Decisions such as *Offutt* and *Young* restrain district courts' authority, just as *Payton* and *Hasting* do. In that respect, they fit right in with the conservative criminal procedure jurisprudence of the post-Warren Court.

Offutt also survives as a recognition that judges are human, emotional and fallible, and that at times various law and judicial decisions governing the criminal process must take account of the reality of judges' human limitations.[147] Most of the time, judges are trusted—perhaps unrealistically—to overcome self-interest and partisan political preferences, to ignore inadmissible evidence and irrelevant considerations, and to exercise reason rather than emotion. But *Offutt* illustrates that sometimes judges fail to do what the law presumes they will do, cannot reasonably be expected to do what the law expects, or will not reasonably appear capable of doing so. The lines are necessarily imprecise, and the presumption of impartiality is a strong one. But canons of judicial conduct identify circumstances where judges must recuse themselves because their impartiality might reasonably be questioned.[148] With occasional cites to *Offutt*,[149] courts sometimes reassign cases where the assigned judge cannot be trusted to be impartial, or where public confidence in the judge's impartiality is

147. *See generally* Bruce A. Green & Rebecca Roiphe, *Judicial Activism in Trial Courts*, 74 N.Y.U. ANN. SURV. AM. L. 365, 374 (2019) (describing the judge in *Offutt* as one "who takes grievances too personally and strikes back").

148. *See* MODEL CODE OF JUDICIAL CONDUCT: CANON 2: RULE 2.11: DISQUALIFICATION (American Bar Ass'n 2010).

149. *See, e.g.*, United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989).

reasonably diminished.[150] And, in extreme cases, verdicts are overturned because of judicial bias.[151]

And finally, in Justice Frankfurter's injunction that "justice must satisfy the appearance of justice,"[152] *Offutt* provides an anthem for the federal criminal procedure revolution that might have been. This was the revolution that the Warren Court might have launched in tandem with its constitutional criminal procedure revolution. This was the revolution in which federal courts, in common law fashion, developed a jurisprudence of fair process that was not constricted by constitutional provisions establishing the minimally tolerable criminal procedures and that was not constrained by the need to respect individual state variations. This was the revolution that aimed higher for the federal courts, modeling how a civilized society treats some of its most vulnerable citizens.

150. A notable example was *Ligon v. City of New York*, the Second Circuit's removal of the district judge presiding over a challenge to the constitutionality of the New York City police department's stop-and-frisk practices. 538 Fed. App'x 101, 102–03 (2d Cir. 2013). *See* Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177 (2015); Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043 (2014).

151. *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016); Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

152. Offutt v. United States, 348 U.S. 11, 14 (1954).