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## United States v. Payner New Limitations on the Courts Supervisory Power to Exclude Evidence, 14 J. Marshall L. Rev. 569 (1981)

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## CASENOTES

### *UNITED STATES v. PAYNER*\* NEW LIMITATIONS ON THE COURT'S SUPERVISORY POWER TO EXCLUDE EVIDENCE

#### INTRODUCTION

The exclusionary rule is a rule of evidence used by courts to safeguard the right to be secure from unreasonable searches and seizures<sup>1</sup> under the fourth amendment to the United States Constitution.<sup>2</sup> As the name of the rule suggests, it is applied in criminal cases to exclude from trial, evidence which has been obtained in an unlawful search and seizure.<sup>3</sup> The main purpose of

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\* 100 S. Ct. 2439 (1980)

1. *State v. Young*, 234 Ga. 488, 489, 216 S.E.2d 586, 588 (1975) (the exclusionary rule is a judicially created remedy designed to safeguard fourth amendment rights). See generally Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60 (1941).

2. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .").

3. The landmark case in the development of the exclusionary rule is *Weeks v. United States*, 232 U.S. 383 (1914). In *Weeks*, the Court excluded private papers obtained in an illegal search and seizure conducted by federal officers. Subsequently, in *Lustig v. United States*, 338 U.S. 74 (1949), the exclusionary rule was expanded to prevent the admission of evidence obtained by an illegal search and seizure conducted by state and federal officials. In a case decided the same day, *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court excluded evidence from state court which had been obtained in an unlawful search and seizure conducted by state officials. The holdings in *Wolf* and *Lustig* created the "silver platter doctrine." See note 103 and accompanying text *infra*.

The "silver platter doctrine" was repudiated in *Elkins v. United States*, 364 U.S. 206 (1960). In *Elkins*, the Court relied on its supervisory power to abolish the "silver platter doctrine" by using the fourteenth amendment due process clause to incorporate the basic protection of the fourth amendment. The Court took the final step in development of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Mapp*, the Court held that illegally obtained evidence was inadmissible in state or federal court because admission of tainted evidence was violative of a person's due process right. The development of the exclusionary rule, however, has not been without its critics. See *People v. DeFore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Justice, then Judge, Cardozo's oft quoted statement, "[t]he criminal is to go free because the constable has blundered"). See also Gottlieb, *Is the Exclusionary Rule an Albatross Around the Judicial Neck?*, 67 KY. L. REV. 100 (1979); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

the exclusionary rule, protection of criminal defendants' fourth amendment rights, is supported by two underlying policies.<sup>4</sup> First, the exclusionary rule deters law enforcement officers from conducting unconstitutional searches and seizures because exclusion of illegally seized evidence, often essential to the prosecution, usually leads to acquittal of the defendant.<sup>5</sup> Second, the exclusionary rule is used by the court as a means of protecting the integrity of the judicial process by suppressing tainted evidence, thereby preventing the court from becoming an accomplice to the illegal activities of the law enforcement agents.<sup>6</sup>

The application of the exclusionary rule is limited to situations meeting three requirements.<sup>7</sup> First, the evidence must be the product of an unconstitutional search and seizure.<sup>8</sup> Second, the unconstitutional search and seizure must have been conducted by agents or officers of the government.<sup>9</sup> Finally, the evidence must have been seized from a party who has standing to allege that his fourth amendment rights have been violated.<sup>10</sup> The courts have generally relied upon these requirements as the basis for invoking the exclusionary rule,<sup>11</sup> but in some cases

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4. See generally Wilkey, *Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 214 (1978) (contains a good analysis of the exclusionary rule's validity as protecting fourth amendment rights).

5. *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.").

6. See *Miller v. United States*, 357 U.S. 301, 313 (1958) ("However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."); *Malinski v. New York*, 324 U.S. 401 (1945) (exclusion of a coerced confession was required to avoid judicial sanctioning of activity corrupting the trial).

7. See generally Annot., 50 A.L.R.2d 531 (1957) (discussing the rationale in support of the exclusionary rule and the limits upon its application).

8. See, e.g., *Weeks v. United States*, 232 U.S. 383, 391 (1914) (illegally obtained evidence is excluded not for the reason that police forced their way into a person's home, but rather because the police violated that citizen's fourth amendment right to be secure, a right which is not forfeited when a person becomes a defendant in a criminal trial).

9. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921) (the fourth amendment protects citizens only against unlawful searches and seizures made by government authorities).

10. See, e.g., *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (a person has standing to invoke the exclusionary rule only when he has a reasonable expectation of privacy in the area or object unlawfully seized).

11. Compare *Combs v. United States*, 408 U.S. 224, 227 (1972) (petitioner required to establish his standing to exclude evidence obtained in an unconstitutional search conducted by federal officers) with *People v. Adams*, 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd sub nom. Adams v. New York*, 192 U.S. 585 (1904) (testimony of a private individual about facts observed during a

they have used their supervisory power to bring about the result effected by the exclusionary rule.<sup>12</sup>

Although no clear definition of the court's supervisory power has been enunciated,<sup>13</sup> courts have generally relied on the power as a method of maintaining and effectuating civilized standards for the judiciary.<sup>14</sup> The evolution of the supervisory power is not clear, though several theories have been posited as to its origin. According to some commentators, the power is an extension of the rulemaking activities of the English courts.<sup>15</sup> Others have asserted that courts have inherent supervisory power under Article III of the United States Constitution.<sup>16</sup> The practical purpose of the supervisory power has varied. For example, the United States Supreme Court has exercised the power to impose rules of evidence<sup>17</sup> and procedure<sup>18</sup> on the

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trespass was not excludable as violating defendant's fourth amendment rights).

12. *Upshaw v. United States*, 335 U.S. 410 (1948) (supervisory power was exercised by the court to exclude evidence obtained through a forced confession and improper detainment of the defendant). *See also* *Michigan v. Tucker*, 417 U.S. 433 (1974) (confession extracted from defendant accused of rape who was not advised of his right to court appointed attorney was excluded pursuant to the supervisory power); *Mallory v. United States*, 354 U.S. 449 (1957) (violation of a federal statute by not taking criminal defendant to magistrate immediately required the suppression of confession obtained during delay).

13. BLACK'S LAW DICTIONARY 1290 (5th ed. 1979) ("Supervisory control: Control exercised by the courts to compel inferior tribunals to act within their jurisdiction, to prohibit them from acting outside their jurisdiction, and to reverse their extrajudicial acts."); BALLANTINE'S LAW DICTIONARY 1241 (3d ed. 1969): supervisory jurisdiction:

A kind of original jurisdiction frequently conferred upon appellate courts, especially the highest court of the jurisdiction, in the nature of superintending control over inferior courts, exercised sometimes by making rules for inferior courts and enforcing those rules. . . . The control exercised in some jurisdictions by a court over executive or administrative officers and boards who exercise judicial functions incidentally.

14. *E.g.*, *McNabb v. United States*, 318 U.S. 332, 341 (1943) (supervisory power exercised to govern administration of justice in federal courts). *See also* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963) (an analysis of the applications of the supervisory power).

15. *See* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1053 (1965) (discusses the historical development of the supervisory power).

16. *See* Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts*, 72 NW. L. REV. 595, 615 (1977) [hereinafter cited as *Judicially Required Rulemaking*] (indicating the supervisory powers arise out of the Court's Article III powers).

17. *E.g.*, *Jackson v. Denno*, 378 U.S. 368 (1964) (the Court exercised its supervisory powers to order a hearing to determine the voluntariness of the defendant's confession by a panel other than those who would determine the defendant's guilt); *Mesarosh v. United States*, 352 U.S. 1 (1957) (retrial granted to a defendant through the exercise of the court's supervisory power because a witness for the prosecution was discredited).

lower courts. The Court has also invoked the supervisory power to correct improper action taken by administrative agencies.<sup>19</sup>

Traditionally, the supervisory power has been utilized in three types of cases.<sup>20</sup> The first category illustrates the court's effort to protect the integrity of the judiciary.<sup>21</sup> In these cases, the supervisory power is exercised to improve the quality of the judicial process or to maintain a high standard of respect for the judicial system.<sup>22</sup> The second category consists of cases where the supervisory power has been used to enforce federal regulations which have been violated by federal officers.<sup>23</sup> Exercise of the supervisory power in these cases is not grounded on the concept of protecting judicial integrity, but rather focuses on deterring undesirable conduct of federal officers.<sup>24</sup> The last category includes cases where a criminal defendant requests the suppression of evidence alleged to have been improperly obtained by federal officers.<sup>25</sup> Thus far, the courts have been reluctant to exclude improperly obtained evidence where the conduct of the

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18. See *Branzburg v. Hayes*, 408 U.S. 665 (1972) (supervisory powers used to govern grand jury proceeding); *Thiel v. South Pac. Co.*, 328 U.S. 217 (1946) (the supervisory powers were exercised to grant a new trial on the basis that jury selection was improper in the prior trial).

19. *E.g.*, *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276 (1966) (supervisory power used to impose upon the Immigration Service the burden of proving by clear, unequivocal evidence, grounds for deporting the defendant).

20. See generally Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969) [hereinafter cited as Hill] (The author lists three categories of cases where the supervisory power has been applied; (1) to protect or improve the quality of the judicial system, (2) to address statutory violations raising judicial questions, and (3) to oversee conduct of officials which is wrongful according to the court). See also *Judicially Required Rulemaking*, *supra* note 16, at 617-22.

21. See, *e.g.*, *Marshall v. United States*, 360 U.S. 310, 313 (1959) (supervisory power exercised to order new trial because information publicized in local papers was deemed to be prejudicial to defendant's case though jurors denied having been influenced by the stories); *Jencks v. United States*, 353 U.S. 657 (1957) (the court allowed the defendant to examine pre-trial reports of an informer to be used by the prosecution).

22. *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

23. See, *e.g.*, *Mallory v. United States*, 354 U.S. 449 (1957) (supervisory power exercised by the Court to order a new trial where police violated FED. R. CRIM. P. 5(a) requiring that an arrested person be taken before a magistrate without unnecessary delay); *Nardone v. United States*, 308 U.S. 338 (1939) (the Court held that disclosure of wiretap information by a witness violated the federal wiretapping statute).

24. *Elkins v. United States*, 364 U.S. 206, 217 (1960) (exclusion of evidence pursuant to the Court's supervisory power intended to deter fourth amendment violations).

25. See *Rea v. United States*, 350 U.S. 214 (1956) (supervisory power used by the Court to suppress evidence seized under an invalid search war-

law enforcement officers has not violated either a federal statute or the Constitution.<sup>26</sup>

In *United States v. Payner*,<sup>27</sup> the Supreme Court considered whether a court may exclude evidence unlawfully obtained from a non-party to the action at bar.<sup>28</sup> This deliberation involved three major issues. The first was whether the defendant had standing to invoke the exclusionary rule.<sup>29</sup> Second, whether the due process clause of the fifth amendment mandated exclusion of the evidence.<sup>30</sup> Finally, whether the Court's supervisory power could be exercised to exclude the evidence where the defendant lacked standing to formally invoke the exclusionary rule.<sup>31</sup>

#### FACTS AND LOWER COURT HOLDINGS

The evidence in *Payner* was seized during an Internal Revenue Service (IRS) investigation.<sup>32</sup> The IRS engaged a private investigator, Norman Casper, to obtain information concerning the financial activities of American citizens in the Bahamas.<sup>33</sup> The defendant Payner, already under investigation for income tax evasion, was one of the target individuals in this operation.<sup>34</sup> As part of his plan, Casper developed a friendship with Michael

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rant); *McNabb v. United States*, 318 U.S. 332 (1943) (supervisory power exercised to exclude a coerced confession).

26. See *Olmstead v. United States*, 227 U.S. 438 (1928) (the supervisory power is not applicable to exclude evidence obtained in a manner that technically does not violate a person's fourth amendment rights). See also *Simmons v. United States*, 390 U.S. 377 (1968) (pretrial identification procedures were not violative of defendant's due process rights in light of surrounding circumstances and thus did not merit suppression under the Court's supervisory powers); *On Lee v. United States*, 343 U.S. 747 (1952) (where wiretap did not violate fourth amendment or federal statute, the Court refused to apply its supervisory powers to exclude evidence obtained through use of the wiretap).

27. 100 S. Ct. 2439 (1980).

28. *Id.* at 2444-45.

29. *Id.* at 2444.

30. *Id.* at 2447 n.9 (the defendant's lack of standing to allege that his fourth amendment rights were violated prevents him from asserting that he was denied due process).

31. *Id.* at 2446 (the supervisory power is not available as a method to exclude evidence where the defendant did not suffer a violation of his constitutional rights).

32. *Id.* at 2443.

33. *Id.* An investigation into U.S. citizens' financial dealings outside the United States was conducted by the Internal Revenue Service (IRS). This operation was referred to as "Operation Tradewinds" and was headquartered in Jacksonville, Florida. Attention was focused on the Castle Bank, Bahamas, based on information received by the IRS that a suspected narcotics dealer had an account in that bank.

34. *Id.* at 2444-45.

Wolstencroft, Vice-President of the Castle Bank in the Bahamas.<sup>35</sup> Casper introduced him to Sybil Kennedy,<sup>36</sup> a former employee of Casper.

While in Florida, Wolstencroft stayed at Kennedy's apartment.<sup>37</sup> One evening while Wolstencroft and Kennedy were out, Casper entered Kennedy's apartment and removed Wolstencroft's briefcase.<sup>38</sup> The briefcase was then taken to a nearby home, opened, and the contents photographed.<sup>39</sup> The evidence obtained in this manner lead to the discovery of a loan guarantee made by Payner.<sup>40</sup> This loan agreement was the principal piece of evidence in the government's subsequent prosecution of Payner for income tax evasion.<sup>41</sup>

The District Court for the Northern District of Ohio found that Payner lacked standing to assert a violation of his fourth amendment rights, thereby precluding the court from applying the exclusionary rule.<sup>42</sup> However, according to the court, admission of the illegally seized evidence violated Payner's fifth amendment rights and thus was excluded.<sup>43</sup> Pursuant to its supervisory power, the district court suppressed the evidence and Payner was subsequently acquitted.<sup>44</sup> In a brief order, the Sixth Circuit Court of Appeals affirmed the lower court's use of its supervisory powers.<sup>45</sup> Two years later, the United States Supreme

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35. *Id.* at 2443.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 2442.

40. *Id.* The photographed documents disclosed a working relationship between the Castle Bank, Bahamas and the Bank of Perrine, Florida. Subpoenas were issued to the Bank of Perrine which ultimately uncovered an unreported loan agreement made by Payner to the Castle Bank as guarantee of a loan made to Conel Development, Inc.

41. *Id.*

42. *United States v. Payner*, 434 F. Supp. 113, 126 (N.D. Ohio 1977) (defendant does not have a right to seek exclusion of evidence obtained in a manner which violated another person's fourth amendment rights).

43. *Id.* at 133:

Such governmental conduct compels the conclusion that Jaffe and Casper transacted the "briefcase caper" with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner. That outrageous behavior on the part of the Government infringes Payner's Due Process rights, and can only be deterred by granting Payner's motion to suppress.

44. *Id.* at 135 (because of the outrageous conduct of the government the evidence so obtained was excluded under the Court's supervisory powers to protect the integrity of the judicial system).

45. *United States v. Payner*, 590 F.2d 206 (6th Cir. 1977) (*per curiam*) (the appellate court agreed with the district court's exclusion of the evidence pursuant to its supervisory powers, and found it unnecessary to reach the constitutional questions involved).

Court granted certiorari.<sup>46</sup>

#### SUPREME COURT OPINION

The United States Supreme Court, in an opinion written by Justice Powell, reversed the holdings of the appellate and district courts.<sup>47</sup> According to the Court, use of the supervisory power to exclude evidence under the facts in *Payner* would contravene the standing requirements of the fourth and fifth amendments.<sup>48</sup> The Court held that an exercise of the supervisory power to exclude evidence under these circumstances would be a clear departure from precedent,<sup>49</sup> and would amount to an unfettered discretion to oversee the activity of law enforcement agencies.<sup>50</sup>

In a concurring opinion, Chief Justice Burger expressly affirmed the rationale posited by the majority.<sup>51</sup> While refusing to condone the illegal activity of the IRS, the Chief Justice nevertheless stated that exclusion of the evidence would amount to supervision of the executive branch in violation of the separation of powers doctrine.<sup>52</sup> Justices Marshall, Brennan, and Blackmun joined in a dissenting opinion<sup>53</sup> and urged that the majority had ignored the underlying purposes of the exclusionary rule and supervisory power in an effort to limit their legitimate use.<sup>54</sup>

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46. United States v. Payner, 444 U.S. 822 (1979).

47. United States v. Payner, 100 S. Ct. 2439 (1980).

48. *Id.* at 2446:

We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions. . . [do] not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices.

49. *Id.* at 2446 n.7 ("This Court has never held, however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute or rule.")

50. *Id.* at 2445. "In the Government's view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule. . . . We agree with the Government."

51. *Id.* at 2447 (Burger, C.J., concurring).

52. *Id.* at 2447. "[T]his court has no general supervisory authority over operations of the Executive Branch. . . . [T]he Exclusionary Rule is inapplicable to a case of this kind, but that should not be read as condoning the conduct of the IRS. . . ."

53. *Id.* at 2447 (Marshall, Brennan, and Blackmun, JJ., dissenting).

54. *Id.* at 2453. "The Court's decision to engraft the standing limitations of the Fourth Amendment onto the exercise of supervisory powers is puzzling not only because it runs contrary to the major purpose behind the exercise of the supervisory powers . . . but also because it appears to render the supervisory powers superfluous." See also *id.* at 2451 n.10.



## ANALYSIS

The Supreme Court's refusal to allow the exclusion of unlawfully obtained evidence in *United States v. Payner*<sup>55</sup> was based on three major premises. The first factor in the Court's holding involved the availability of the exclusionary rule to exclude evidence unlawfully obtained from a non-party to the action.<sup>56</sup> The exclusionary rule can only be invoked once a defendant has shown that *his* fourth amendment rights were violated.<sup>57</sup> Payner failed to establish standing since he had no expectation of privacy in the evidence stolen from an agent of the bank.<sup>58</sup> Thus, the Court ruled that the exclusionary rule was unavailable.<sup>59</sup> So holding, the Court then considered the possibility of excluding the evidence on fifth amendment grounds, or in the alternative, pursuant to the court's supervisory powers.<sup>60</sup>

*Fifth Amendment Due Process*

The protection of defendants' fifth amendment rights has long been recognized as a basis for excluding unlawfully obtained evidence.<sup>61</sup> Exclusion of such evidence prevents abuse of

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55. 100 S. Ct. 2439, 2444 (1980) (exclusionary rule not applied unless defendant's own rights were violated by an unconstitutional search and seizure).

56. *Id.* at 2444. The Court relied heavily on its decision in *Rakas v. Illinois*, 439 U.S. 128, 138 (1978), which held that a court could not exclude evidence unless the evidence was obtained in a search and seizure that violated the defendant's own fourth amendment rights.

57. *E.g.*, *Zimmerman v. Wilson*, 105 F.2d 583 (3d Cir. 1939) (right to complain of violation of fourth amendment rights is personal). *Cf.* *Goldstein v. United States*, 316 U.S. 114 (1942) (a person who is not the victim of an unconstitutional search and seizure cannot object to introduction in evidence of what was seized). *See generally* Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975).

58. *See, e.g.*, *United States v. Miller*, 425 U.S. 435 (1976) (depositor has no privacy interest in his records of accounts within custody of a bank). *Cf.* *Simmons v. United States*, 390 U.S. 377 (1968) (protection of the fourth amendment extends only to those who have a legitimate expectation of privacy).

59. *United States v. Payner*, 100 S. Ct. 2439, 2444 (1980).

60. *Id.* at 2444. The Court considered whether the supervisory power was applicable as a means of excluding the evidence in *Payner*. The Court further discussed the district court's decision that the fifth amendment mandated exclusion of the evidence in *Payner*. *Id.* at 2446. The Court held that neither ground was sufficient to merit suppression of the loan agreement.

61. *Cf.* *Boyd v. United States*, 116 U.S. 616 (1886) (use at trial of a person's private papers which were illegally seized was held to compel a person to be a witness against himself in violation of the fifth amendment). *But cf.* *Schenk v. United States*, 249 U.S. 47 (1919) (protection afforded by the fifth amendment does not exclude, in all cases, evidence which directly proceeds from the defendant in criminal proceedings).

the judicial process, and insures a fair trial<sup>62</sup> which is the principal guarantee of the due process clause of the fifth amendment.<sup>63</sup> Fifth amendment due process is a flexible and sometimes elusive concept.<sup>64</sup> Protection from government action which is shocking to our sense of fair play and justice is the central idea behind due process.<sup>65</sup> To determine whether the government's conduct is violative of due process limitations, the courts have developed a balancing test.<sup>66</sup> This procedure requires that the court weigh society's interest in admitting all probative evidence<sup>67</sup> against the right to a fair trial guaranteed to all those accused of crimes.<sup>68</sup>

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62. See, e.g., *Spano v. New York*, 360 U.S. 315, 320-21 (1959), where the Court excluded a coerced confession on the ground that it violated the defendant's right to due process and stated: "[I]n the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." See also *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher. . . . If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to be a law unto himself; it invites anarchy.")

63. U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (The Constitution recognizes and prohibits the evils which occurred during the period of the Star Chamber and the Inquisition).

64. *Jackson v. Denno*, 378 U.S. 368 (1964) (the Court recognized that unlawful police conduct has evolved from brutal acts to subtle intrusions and thus requires the use of a flexible standard in determining what evidence should be excluded at trial); *Rochin v. California*, 342 U.S. 165, 173 (1952) (police officers forced defendant to have his stomach pumped to produce evidence used at his trial on narcotics charges; held to violate the defendant's right to due process) ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'").

65. See *Kinsella v. United States*, 361 U.S. 234 (1960) (due process has to do with denial of fundamental fairness, shocking to our universal sense of justice); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon"); 1 ANNALS OF CONG. (1789) (remarks of James Madison) ("The Courts will be an impenetrable bulwark against every assumption of power in the legislature or Executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights").

66. *United States v. Janis*, 428 U.S. 433, 453-60 (1976). The Court developed a balancing test involving two factors to be weighed by the Court in determining whether due process requires exclusion of evidence. This test involves a judicial weighing of (1) the need to provide the jury with all the probative evidence for effective enforcement of law, against (2) the need to protect the right to due process of all individuals. See generally Note, *Constitutional Criminal Procedure — Applicability of Exclusionary Rule to Intersovereign Civil Suits*, 51 TUL. L. REV. 717 (1977) (discussion of the *Janis* balance of interests test).

67. Cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting) (discussing the cost to society of excluding probative evidence in a criminal proceeding).

68. See note 66 *supra*.

To succeed on a due process claim a defendant must prove two facts.<sup>69</sup> First, he must show that a liberty or property interest was infringed by the government. Second, he must show that the government's justification for such an invasion is at least arguably unfounded. Under the balance of interests test,<sup>70</sup> the need to admit all probative evidence was subverted by the *Payner* court's duty to impose constitutional restrictions on official misconduct which reflects a bad faith hostility toward personal freedoms.<sup>71</sup> According to the District Court in *Payner*, the due process rights of the defendant were violated by the "shocking" conduct of the government in obtaining the evidence admitted at trial.<sup>72</sup> Therefore, the district court excluded the evidence on the ground that it was acquired in an improper fashion, and that its admission at trial would contravene *Payner's* right to due process.<sup>73</sup>

Despite a fully developed analysis in the district court opinion, the Supreme Court virtually ignored the due process issue and summarily disposed of it in a footnote.<sup>74</sup> The focus of the Court's attention dealt with the fact that *Payner* was not the victim of the search that rendered the evidence tainted.<sup>75</sup> The Court stated that a defendant could only assert violations of his own due process and could not allege governmental infringement of another's rights.<sup>76</sup> Since *Payner* was not the victim of the unlawful search, the Court held that he lacked the requisite

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69. *Jacobsen v. Tahoe Reg. Planning Agency*, 558 F.2d 928, 936 (9th Cir. 1977), *aff'd in part, rev'd in part*, 440 U.S. 391 (1979) (sets out prima facie case which must be proved for a defendant to succeed on a due process claim: "(1) that their liberty or property interests have been invaded by the government without an opportunity to challenge that invasion, and (2) that the purported justification for the invasion [by the government] is at least plausibly disputable. . . .").

70. *United States v. Janis*, 428 U.S. 433, 453-60 (1976). See note 67 *supra*.

71. *United States v. Payner*, 434 F. Supp. 113, 129 (N.D. Ohio 1977) ("[U]nder the *Janis* balance of interests test, society's interest in deterring due process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates a bad faith hostility to the strictures imposed on him by the Constitution.").

72. *Id.* at 133.

73. *Id.* "The evidence against *Payner*, which is the fruit of the outrageously illegal seizure. . . must be suppressed under the Due Process Clause of the Fifth Amendment. . . ."

74. See *United States v. Payner*, 100 S. Ct. 2439, 2447 n.9 (1980).

75. The defendant lacked standing to assert a violation of his fourth or fifth amendment rights because he was not the victim of the illegal search.

76. *Id.*, citing *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion) (limitations of fifth amendment arise only after the government has violated a protected right of the defendant).

standing to allege a fifth amendment violation.<sup>77</sup> The Supreme Court's emphasis on the fact that Payner was not the victim of the unconstitutional search is subject to question.

The *Payner* majority devoted their exclusive attention to the illegal seizure perpetrated by the IRS, and failed to consider the effects of admitting the tainted evidence at Payner's trial. Traditionally, the Supreme Court has strictly scrutinized those official actions which may jeopardize a defendant's right to a fair and constitutionally sound trial.<sup>78</sup> For example, the Court has held that prejudicial remarks made by the judge or prosecutor during trial may impinge on the defendant's right to a fair trial.<sup>79</sup> Under these circumstances, the due process violation arises from the improper nature of the "evidence" and its impact on the jury.<sup>80</sup> The common denominator which underlies these cases relates to the proposition that a criminal defendant should not risk conviction on the basis of improper actions at trial.<sup>81</sup>

77. *United States v. Payner*, 100 S. Ct. 2439, 2447 n.9 (1980).

78. *E.g.*, *Rochin v. California*, 342 U.S. 165, 169 (1952), where the Court stated:

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ."

*See generally McCormack, Purpose of Due Process: Fair Hearing a Vehicle for Judicial Review?*, 52 TEX. L. REV. 1257 (1974); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968). *Cf.* *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (pretrial publicity was so extensive and sensational that it prevented defendant from receiving a fair trial); *Estes v. Texas*, 381 U.S. 532 (1965) (high degree of publicity given pretrial hearing held to prejudice defendant's ability to receive a fair trial); *United States v. Shoupe*, 548 F.2d 636 (6th Cir. 1977) (reading of unsworn testimony of defendant at trial which may have influenced jurors held to violate defendant's due process rights); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (jury falsely assured that witness was testifying of his own will, where in fact the Government had attempted to coerce his testimony and thus violated the due process rights of the defendant); *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974) (failure to instruct jury of a lesser included offense violated the defendant's right to a fair trial).

79. *Webb v. Texas*, 409 U.S. 95 (1972) (judge's act of singling out one of defendant's witnesses and warning him of the severe consequences of perjury effectively drove the witness from the stand and deprived the defendant of his right to a fair trial); *Griffin v. California*, 380 U.S. 609 (1965) (prosecutor's remarks stating that the defendant's failure to testify indicated the truth of the charges against him deprived the defendant of a fair trial).

80. *See, e.g.*, *Griffin v. California*, 380 U.S. 609, 613 (1965) ("No formal offer of proof is made as in other situations; but the prosecutor's comment and the Court's acquiescence are the equivalent of evidence and its acceptance.") The Court held "the fifth amendment, in its direct application to the federal government, . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.*

81. *Cf. Silverman v. United States*, 556 F.2d 655 (2d Cir. 1977) (a person's

Arguably, the Court's admission of illegally seized evidence is a violation of the accused's right to a fair trial guaranteed by the fifth amendment.

In *Payner*, the government conceded that the search and seizure conducted by the IRS violated Wolstencroft's fourth amendment rights.<sup>82</sup> The Court seems to imply, however, that the evidence is somehow less tainted by the fact that it is admitted at the trial of a third party to the illegal search. Rather than focus on the impropriety of admitting the evidence at trial, the Court uses lack of standing as a means of avoiding the defendant's due process allegations.<sup>83</sup> It is the trial court's admission of the unlawfully seized evidence, and not the illegal means of obtaining it, that violates the defendant's right to a fair trial.<sup>84</sup> By failing to address the due process aspects of *Payner*, the Supreme Court may have set the stage for important fifth amendment litigation.

#### *Exclusion of Evidence through the Supervisory Power*

Although the *Payner* Court refused to exclude the illegally obtained bank records on fourth or fifth amendment grounds,<sup>85</sup> it seized the opportunity to comment on the district court's use of its supervisory powers.<sup>86</sup> The supervisory power is exercised to promote the appearance of fair trial proceedings referred to by the courts as "judicial integrity."<sup>87</sup> One method used by the courts to protect judicial integrity is to exclude illegally obtained

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right to due process is violated when convicted on the basis of evidence known by the Government to be perjured). "We recognize the cardinal importance that no person should be convicted on the basis of perjury. We wholeheartedly support the rule that it is a denial of the due process guaranteed by the fifth amendment for a person to be convicted on the basis of testimony known to the Government to be perjurious." *Id.* at 659.

82. *See, e.g.*, *United States v. Payner*, 100 S. Ct. 2439, 2445 (1980) ("No Court should condone the unconstitutional and possibly criminal behaviour of those who planned and executed this 'briefcase caper.'").

83. *Id.* at 2453 n.15 (Marshall, Brennan, and Blackmun, JJ., dissenting).

84. *E.g.*, *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (in testing whether "due process of law is satisfied," concern is only with constitutional violations which have a prejudicial effect upon the guilt determining process at the trial).

85. *United States v. Payner*, 100 S. Ct. 2439, 2447 n.9 (1980). *See* note 59 *supra*.

86. *Id.* at 2446.

87. *E.g.*, *Malinski v. New York*, 324 U.S. 401, 410 (1945) (admitting a coerced confession would corrupt the trial); *McNabb v. United States*, 318 U.S. 332, 347 (1943) (the courts are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (the supervisory power was used to reverse a mail fraud case because of improper impanelling of jury) ("[t]he injury is not limited to the defendant — there is injury to the jury system. . .").

evidence pursuant to its supervisory power.<sup>88</sup> Exclusion of illegally obtained evidence prevents the court from becoming an accomplice to the illegal conduct of police officers.<sup>89</sup> Thus far, application of the supervisory power to exclude evidence has been limited to situations where a constitutional violation has occurred.<sup>90</sup>

A basic premise of the *Payner* holding is that no constitutional violation had occurred, thus rendering the supervisory power inapplicable.<sup>91</sup> The defendant lacked standing to assert alleged violations of his fourth and fifth amendment rights<sup>92</sup> which meant that technically his constitutional rights were not violated. Payner could not demand suppression of the evidence since, under the Court's interpretation of prior decisions, he had not established a violation of his own constitutional rights.<sup>93</sup> *Payner* thus requires that a defendant prove that his constitutional rights were violated by an unlawful search and seizure before the court will apply its supervisory power to exclude allegedly tainted evidence.<sup>94</sup>

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88. See *Mesarosh v. United States*, 352 U.S. 1, 14 (1957) (supervisory power used to exclude testimony of witness who was disqualified); *Rea v. United States*, 350 U.S. 214, 217 (1956) (supervisory power used to suppress evidence obtained in manner which violated the federal rules governing searches and seizures).

89. See *Ballard v. United States*, 329 U.S. 187, 195 (1946). See also *Hill*, *supra* note 20, at 194 (the author discusses the Court's use of the supervisory power to protect the quality and integrity of the judicial process).

90. *Simmons v. United States*, 390 U.S. 377 (1968) (the supervisory power is not to be used to exclude identification made by photographs of robbery suspects which were not violative of the defendant's rights); *On Lee v. United States*, 343 U.S. 747 (1952) (the supervisory power is not broad enough to exclude evidence of incriminating statements made to narcotics agent which were transmitted by radio); *Olmstead v. United States*, 277 U.S. 438 (1928) (the supervisory power is not applicable to exclude wiretap evidence which was obtained without violating the law).

91. *United States v. Payner*, 100 S. Ct. 2439, 2446 (1980) (interests of parties do not change when analyzed under the supervisory power rather than the fourth amendment, and the supervisory power does not extend so far as to protect the rights of one not before the court).

92. *E.g.*, *United States v. Miller*, 425 U.S. 435 (1976) (depositor has no privacy interest in his bank records or accounts, and seizure of these records does not violate depositor's fourth amendment rights); *California Banker's Ass'n v. Schultz*, 416 U.S. 21 (1974).

93. *United States v. Payner*, 100 S. Ct. 2439, 2444 (1980) ("The foregoing authorities establish. . . that the respondent lacks standing under the Fourth Amendment to suppress the documents illegally seized. . .").

94. See *United States v. Payner*, 100 S. Ct. 2439, 2446 (1980). The focus of the Court's opinion and the cases cited for support center on the defendant's lack of standing. The logical inference drawn from the Court's opinion is that had the defendant been able to show standing, the court could have excluded the evidence under the supervisory power or the exclusionary rule. The Court stated, "We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a party not before the court."

The requirement that a defendant must prove that his rights were violated effectively attaches a standing requirement to the exercise of the court's supervisory powers.<sup>95</sup> Similarly, as the Court pointed out, a defendant must show that his fourth or fifth amendment rights were violated before the court can suppress evidence through use of the exclusionary rule.<sup>96</sup> Thus, both the supervisory power under *Payner* and the exclusionary rule require the showing of a violation of the defendant's constitutional rights before they are applicable.<sup>97</sup> Consequently, the Court's holding in *Payner* renders the supervisory power superfluous, since it is inapplicable except under circumstances where the exclusionary rule is already available.<sup>98</sup>

The exclusionary rule functions primarily as a safeguard of an accused's constitutional rights by excluding from trial, evidence which is obtained through an unlawful search of the defendant's premises.<sup>99</sup> By contrast, evidence obtained from a "target person" not intended to be prosecuted is admissible at the trial of another.<sup>100</sup> The introduction of that illegally seized evidence is no less violative of the Constitution simply because it was obtained from someone other than the actual party being

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95. *Id.* at 2453 (Marshall, Brennan, and Blackmun, JJ., dissenting) ("In order to establish that suppression of evidence under the supervisory power would be proper, the Court would require *Payner* to establish a violation of his fourth or fifth amendment rights. . ."). See also note 54 and accompanying text *supra*.

96. *Id.* at 2447. *E.g.*, *Alderman v. United States*, 394 U.S. 165 (1969) (the exclusionary rule is only available to persons whose privacy interests have been invaded); *Ravalette v. Smith*, 300 F.2d 854 (7th Cir. 1962) (a defendant cannot vicariously assert the fourth amendment rights of others).

97. See *United States v. Payner*, 100 S. Ct. 2439, 2446 n.8 (1980).

98. *Id.* at 2453 (Marshall, Brennan, and Blackmun, JJ., dissenting).

99. See *United States v. Payner*, 100 S. Ct. 2439, 2453 (1980) (exclusionary rule is not available to a defendant when the defendant was not the victim of the illegal search and seizure). *Cf.* *Brown v. United States*, 411 U.S. 223 (1973) (exclusionary rule not available to a defendant whose fourth amendment rights were not violated); *On Lee v. United States* 343 U.S. 747 (1952) (information voluntarily given to an undercover agent which was transmitted by radio and later proved to be incriminating was not excludable under the supervisory powers).

100. *United States v. Payner*, 100 S. Ct. 2439 (1980). Under *Payner*, the supervisory power is likewise not available to those defendants who are not victims of illegal searches and seizures. Thus, the evidence illegally obtained from a third party to be used against a defendant will be admitted at trial. The district court and dissenting Supreme Court justices were concerned about this unavailability of a remedy because the IRS testified that this is the type of conduct used by them to obtain information in similar situations. See also Thibodeau, *Supreme Court in Payner Admits Stolen Third Party Evidence in Tax Prosecution*, 53 J. TAX. 152, 154 (1980) (the author expresses concern for the effect of the decision in *Payner*, allowing evidence taken illegally from third parties to be used at the trial of another).

prosecuted.<sup>101</sup> Therefore, refusing to exclude evidence based upon such a distinction is logically inconsistent.

A similar inconsistency, the "silver platter doctrine," existed during the development of the exclusionary rule.<sup>102</sup> Under the silver platter doctrine, evidence obtained through an illegal search conducted by state officers could be given to federal officers and admitted in federal court.<sup>103</sup> In 1960, the Supreme Court upheld the use of the supervisory powers in order to correct the inequities of the silver platter doctrine.<sup>104</sup> In *Payner*, the Court passed on the opportunity to alleviate similar harshness and inequity by failing to recognize the full scope of the judiciary's supervisory power.

### IMPLICATIONS

The practical effect of *Payner* is that evidence obtained in an unlawful search of a "target" person is not excluded from the criminal trial of another person.<sup>105</sup> While there are several rem-

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101. Compare *United States v. Payner*, 100 S. Ct. 2439 (1980) (evidence though obtained illegally is admissible at the trial of the defendant when the victim of the illegal search and seizure was a person other than the defendant) with *Brown v. Illinois*, 422 U.S. 590, 599 (1975) (the exclusionary rule is applied to suppress any tainted evidence obtained in unlawful searches). See also *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting), where the Court noted:

If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. . . .

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. [emphasis added].

102. The silver platter doctrine was created through technical interpretations in two cases involving evidence illegally seized by state officers. In *Lustig v. United States*, 338 U.S. 74 (1949), the Court held that evidence obtained by state officers was inadmissible in federal court because federal officers aided in the unconstitutional search and seizure. In *Wolf v. Colorado*, 338 U.S. 25 (1949), decided the same day as *Lustig*, the Court held that evidence seized in an unlawful search conducted by state officials alone was admissible in state court. See Note, 35 CORNELL L.Q. 625 (1950) (the author asserts that the majority opinion in *Wolf v. Colorado*, is an example of the inconsistencies in the application of the exclusionary rule).

103. Compare *Lustig v. United States*, 338 U.S. 74 (1949) (evidence seized illegally by state officers without the aid of federal officers and then turned over to federal officers is admissible in federal court) with *Weeks v. United States*, 232 U.S. 383 (1914) (evidence illegally seized by federal officers is inadmissible in federal court).

104. *Elkins v. United States*, 364 U.S. 206 (1960) (application of the supervisory power to exclude evidence illegally obtained by state or federal officers from federal courts). See also Eichner, *The "Silver Platter" — No Longer Used For Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311 (1960).

105. "Target person" connotes an individual selected by the Government in the hopes that evidence can be seized from this source to be used in



edies available to redress the victim of the unconstitutional search and seizure,<sup>106</sup> none of these are an effective deterrent to prevent similar conduct in the future.<sup>107</sup> Not only is there no effective deterrent under these circumstances, but the mere fact that evidence can be obtained from target persons without threat of exclusion is an incentive for police officers to engage in "target shopping."<sup>108</sup> Under *Payner*, police can avoid having illegally seized evidence excluded by careful selection of search victims—target shopping. This entails selecting a person not intended to be prosecuted, but who may possess evidence which can be used in the prosecution of some other person. By acquiring evidence in this manner rather than directly from the intended defendant the police encounter less risk of having the evidence excluded at trial. Thus, the decision in *Payner* encourages law enforcement officials to aim warrantless searches and seizures at target persons rather than intended defendants.

#### SUGGESTED REMEDIES

The abuse which was engendered through expansive use of the silver platter doctrine has been corrected by the courts

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the prosecution of another individual. See J. Thibodeau, *Supreme Court in Payner Admits Stolen Third Party Evidence in Tax Prosecution*, 53 TAX. 152, 153 (1980).

106. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (allowing claims against federal officers for damages suffered pursuant to an unconstitutional search and seizure). See generally Note, *Constitutional Law — Damages for Fourth Amendment Violations by Federal Agents*, 21 DE PAUL L. REV. 1135 (1972) (discussion of remedies available for violation of fourth amendment rights which include: (1) criminal prosecution of officers, (2) injunctive relief, (3) exclusion of evidence, and (4) damages); Note, *Actionable Wrongs — Fourth Amendment Held to be Basis of Cause of Action for Damages Against Federal Officers for Illegal Search and Seizure*, 3 LOY. U. L. J. 202 (1972).

107. Cf. *Elkins v. United States*, 364 U.S. 206, 217 (1960). (If evidence is not excluded there is no deterrent to such conduct in the future.) *But cf.* *United States v. Ceccolini*, 435 U.S. 268, 283 (1977) (Burger, C.J., concurring) (excluding tainted evidence actually has no deterrent effect and creates "bizarre" results and thus should be used only in a small and limited category of cases).

108. See *United States v. Payner*, 100 S. Ct. 2439, 2447, 2448 (1980) (Marshall, Brennan, and Blackmun, JJ., dissenting) ("[The] holding effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person."). See also Thibodeau, *Supreme Court in Payner Admits Stolen Third Party Evidence in Tax Prosecution*, 53 J. TAX. 152, 154 (1980)

How can it [the IRS] be expected to comply and put up with the delay and burden incident to the legal niceties and formalities of third party summonses and subpoenas when illegality will achieve the same end, sooner, with less hassle, and with the Supreme Court's blessing?

through use of the supervisory power.<sup>109</sup> Clearly, the decision in *Payner* is likely to produce an abuse similar to that under the silver platter doctrine.<sup>110</sup> Accordingly, future unlawful searches and seizures of target victims can be deterred by excluding evidence so obtained pursuant to the court's supervisory powers.<sup>111</sup>

In *Payner*, the Court refused to exclude the evidence, holding that application of the supervisory power where there had been no constitutional violation would be tantamount to an unfettered power over the executive branch.<sup>112</sup> Assuming *arguendo*, that the Court is correct, this discretion to supervise the executive branch of government could be effectively controlled if application of the supervisory power were limited by judicial standards. These standards would comprise a threshold test which would allow a court to exclude evidence where, as in *Payner*, police conduct is grossly improper. Limiting the court's use of the supervisory power in this manner prevents a breach of the separation of powers since exclusion would not be available in all cases. Use of the supervisory power under this limitation would effectively protect the defendant's right to a fair trial and serve to bolster the appearance of judicial integrity as well.

A threshold test for application of the supervisory power should consider both the need to protect all citizens' constitutional rights, and the benefit to society of admitting all probative evidence at criminal trials.<sup>113</sup> One factor which could be

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109. See *Elkins v. United States*, 364 U.S. 206 (1960) (supervisory power used to cure the inconsistencies of the silver platter doctrine; Court held that evidence illegally obtained, whether by state or federal officers, was inadmissible in federal court). See also Fichner, *The "Silver Platter" — No Longer Used For Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311 (1960).

110. Under the silver platter doctrine, evidence was admissible in federal court if obtained through illegal conduct of state officers, but not admissible if it was obtained by federal officers. Under *Payner*, evidence is admissible in federal court when illegally obtained from a third party not intended to be prosecuted. But evidence obtained in the same manner is excludable if obtained from the defendant in a subsequent criminal prosecution. In both instances technical distinctions are drawn which disregard the fact that the evidence in either instance is obtained by illegal conduct.

111. *United States v. Payner*, 100 S. Ct. 2439, 2454 (1980) (Marshall, Brennan, and Blackmun, JJ., dissenting) ("That appropriate case has arrived, and the Court should prevent the Government from profiting by use in the federal courts of evidence deliberately obtained by illegal actions taken in bad-faith hostility to constitutional rights.").

112. *United States v. Payner*, 100 S. Ct. 2439 (1980) (refusing to exercise supervisory power to exclude evidence obtained from a third party not before the Court). See also Chief Justice Burger's concurrence: "Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this court has no general supervisory authority over operations of the Executive Branch. . . ." *Id.* at 2447.

113. See *United States v. Payner*, 434 F. Supp. 113, 135 (N.D. Ohio 1977) (applying the balance of interests test formulated by the Court in *United*

weighed by the court is the degree of hostility exhibited by the conduct of the police officers.<sup>114</sup> The court might use this factor to limit exclusion of evidence under the supervisory power to extraordinary instances. This factor also insures that the courts will exclude evidence in situations where it will be most effective as a deterrent. Thus, good faith action taken by police officers will not invoke the supervisory power.

A second element of the test to be considered by the court involves a judicial determination of the necessity of surreptitious conduct by the police officers to obtain valuable evidence.<sup>115</sup> The necessity of improper police activity might be measured in terms of the potential burden on effective law enforcement if police were required to obtain the evidence in another manner. The court should consider the type of evidence involved, how easily it could be legally obtained, and the exigency of the situation. This second element of the test would limit exclusion to instances where the police wrongfully failed to obtain a search warrant or subpoena.

A final consideration which the court should review is the nature of the crime involved.<sup>116</sup> The court should consider the propriety of convicting a person accused of crimes especially harmful to society. This element of the test relates closely to the second element concerning the exigency of the situation. In considering the nature of the crime involved the court must weigh the strength of the public's interest in removing this type of criminal from society.

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*States v. Janis*, to determine whether illegally obtained information should be excluded). See also *Jenkins v. Delaware*, 395 U.S. 213, 221 (1969) (courts must consider society's interest in the effective prosecution of criminals); *Weeks v. United States*, 232 U.S. 383 (1914) (courts must provide an effective sanction for violations of constitutional rights).

114. Cf. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), where in a case involving the inadvertent violation of defendant's *Miranda* rights, the Court stated: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

115. Cf. *Couch v. United States*, 409 U.S. 322, 335 (1973) (The court must consider the nature of the documents seized to determine if there was a legitimate expectation of privacy violated by their seizure. The courts also must recognize that some types of evidence have a high degree of usefulness in criminal prosecutions). There must be a balancing of protection of citizen's rights against the legitimate needs of police in their attempts to enforce the law.

116. Cf. *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968) (courts in applying the balance of interests test should consider the officer's interest in crime prevention, and the safety of the public at large).

This proposed test requires that the court consider three elements before excluding evidence pursuant to its supervisory power. These three elements briefly stated are: (1) the degree of bad faith conduct by the police, (2) the availability of less offensive means of obtaining the needed evidence, and (3) the nature of the crime involved. These elements are drafted to allow the court to protect the constitutional rights of criminal defendants, while abating the fears of the *Payner* Court that standardless application of the power would amount to a breach of the separation of powers.

When the test is applied to the circumstances in *Payner*, exclusion of the evidence would have been proper. The first element of the test supports exclusion because of the hostility of the IRS to Payner's and Wolstencroft's constitutional rights. The second factor also favors exclusion since the situation was not the type where police would require exceptional speed to prevent possible destruction of the evidence. The evidence could have been easily obtained by search warrant or subpoena. In light of the slight harm caused society by tax evasion, the last element would also favor exclusion of the tainted evidence.

#### CONCLUSION

The Supreme Court in *Payner* engaged in a feat of judicial sleight of hand. While the Court reprimanded the IRS for conducting a grossly illegal search and seizure, by denying exclusion of the tainted evidence the Court granted the Government carte blanche to engage in future similar unreasonable searches. The cursory manner in which the Court held that Payner lacked standing to allege a violation of his due process rights creates the possibility of much future litigation on the issue. The Court's holding on the issue of the supervisory power rendered it synonymous with the exclusionary rule, and is certain to raise questions in future cases.

Rather than continue to apply an archaic standing requirement which focuses on the Government's illegal conduct prior to trial, the Court should focus its attention on the use of the fruits of that illegal conduct at trial. Exclusion of evidence illegally seized from a third party effectively protects defendant's due process rights and prevents the Government from using the standing requirement to prejudice defendants. Where technical interpretations of the fourth and fifth amendments prevent the Court from excluding evidence on those grounds, the Court should still exclude the evidence pursuant to its supervisory

power. Application of a tripartite threshold test limits the court's use of the supervisory power to situations where it will be most effective as a deterrent, while least intrusive upon the activity of the executive branch.

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