The Exercise of Supervisory Power by the Third Circuit Court of Appeals

Murray M. Schwartz
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I. Introduction

During the last decade, the United States Court of Appeals for the Third Circuit (Third Circuit) has dramatically expanded its use of supervisory power as a basis for decision.¹ Courts in general have employed supervisory power in a broad range of cases. For example, the Supreme Court has used its supervisory power over lower federal courts to further the “fair administration of justice” by excluding various types of tainted evidence,² establishing rules for the composition of federal juries,³

† United States District Judge, District of Delaware. B.S. 1952, LL.B. 1955, Univ. of Pennsylvania. LL.M. 1982, Univ. of Virginia. Inasmuch as the principal focus of this paper is the use of supervisory power by the Court of Appeals for the Third Circuit, it must be remembered that the District of Delaware is within the Third Circuit. Moreover, in two of the cases discussed in the text, Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969 (3d Cir. 1981), and Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978), cert. denied, 446 U.S. 923 (1980), the author was the district judge whose decision was under review.

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The views expressed herein (and errors) are individual to me as a student of supervisory power. They do not represent the views of the United States District Court for the District of Delaware, or of myself in any official capacity.

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1. In the United States Supreme Court the current expansion of supervisory power began in 1943 with McNabb v. United States, 318 U.S. 332 (1943). However, prior to 1970, the Third Circuit’s supervisory power was expressly implicated in only three cases—twice in criminal matters arising in the Virgin Islands in the late 1960’s: Government of Virgin Islands v. Bell, 392 F.2d 207 (3d Cir. 1968), and Government of Virgin Islands v. Lovell, 378 F.2d 799 (3d Cir. 1967); and in one civil case: Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414 (3d Cir. 1955), cert. denied, 350 U.S. 971 (1956).


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and overseeing activity of the executive branch. In the Third Circuit, supervisory power has been asserted, if not always exercised, in a wide variety of contexts in both the civil and criminal areas. The nature of supervisory power is amorphous and its doctrinal limitations are ill-defined. In an effort to analyze its explosive growth in recent years, this article will probe the origins and sources of intermediate appellate court supervisory power, survey the extent of the exercise of that power by the Third Circuit, and draw conclusions as to the legitimacy of its exercise.

Defining supervisory power presents an initial problem. The Supreme Court generally refers to its "power of supervision over the administration of justice in the federal courts." This power has included such elements as "the formulation and application of proper standards for the enforcement of the federal criminal law," including the "duty of establishing and maintaining standards of procedure and evidence;" the power to police and make certain that the Federal Rules of Criminal Procedure are honored by federal law enforcement agencies; the power under which evidentiary rules may be devised "governed by 'principles of the common law as they may be interpreted . . . in the light of reason and experience;’" the power to ensure that "the waters of justice are not polluted;" and, finally, the power to further the "'twofold' purpose of deterring illegality and protecting judicial integrity." These phrases indicate the broad nature of the doctrine at the Supreme Court level.


4. See note 2 supra.


9. Mesarosh v. United States, 352 U.S. 1, 14 (1956). The Court articulated this same rationale in Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956), noting that "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." Id. at 124.

This breadth is equally apparent at the intermediate appellate level. Occasionally, members of the Third Circuit have articulated their understanding of supervisory power. One member of the court has simply stated:

Deciding a case in the exercise of a court’s supervisory power means little more than ruling on a basis not specifically set forth in the Constitution, or by statute, procedural rule, or precedent. Although generally associated with the imposition of procedural safeguards for proper judicial administration, exercise of the supervisory power of the Supreme Court or the Court of Appeals is but a legitimate function of a court’s law-making role.\(^\text{11}\)

Another judge has described his perception of supervisory power as enabling appellate courts to impose policy judgments on the lower federal courts, stating that “[a]ppellate courts, it appears, exercise their supervisory power over lower courts to impose procedural requirements that seem wise, but that are not compelled by the Constitution or statute.”\(^\text{12}\) In fact, the court itself has cited with approval a statement by the Supreme Court asserting that “[o]ver federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts.”\(^\text{13}\) These statements indicate an expansive reading of supervisory power by members of the Third Circuit. It appears that supervisory power embraces any decision not based on the Constitution, statutes, procedural rules, or precedent, including decisions based on policy grounds. The lack of clear perimeters often makes it difficult to determine whether the Third Circuit has actually exercised its


supervisory power, or instead has based its decision on an alternative
ground.\(^{14}\)

A brief examination of the Third Circuit cases involving
supervisory power reveals the virtually unlimited scope of the
document. In the criminal area, the Third Circuit has rarely pur-
purposed to exercise supervisory power over the executive branch.\(^{15}\)

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\(^{14}\) See, e.g., Davis v. United States Steel Supply, 26 Fair Empl. Prac. Cas.
(BNA) 1462 (3d Cir.), vacated and set for rehearing en banc. No. 80-2571 (3d
Cir. Nov. 6, 1981); Hoots v. Pennsylvania, 689 F.2d 972 (3d Cir. 1981) (imposi-
tion of deadline for formulation of desegregation decree by district court);
United States v. Carter, 619 F.2d 298 (3d Cir. 1980) (requiring strict compliance
with terms of expanded Rule 11 of Federal Rules of Criminal Procedure);
United States v. Moscow, 588 F.2d 882 (3d Cir. 1978) (approval of expanded use
of conditional guilty pleas); Hargenrader v. Califano, 575 F.2d 494 (3d Cir.
1978) (imposition of requirement of subordinate findings of fact in social se-
curity eligibility hearings); United States v. Garrett, 574 F.2d 778 (3d Cir.), cert.
Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976) (requiring factual
pleading in civil rights cases); Conley v. Dauer, 468 F.2d 68 (3d Cir.), cert. de-

dined, 409 U.S. 1049 (1972) (requiring district court to ensure state court system
adhered to federal precedent on appointment of counsel); United States v.
D'Amato, 436 F.2d 52 (3d Cir. 1970) (first approving use of conditional pleas in
Third Circuit); Government of Virgin Islands v. Bell, 392 F.2d 207 (3d Cir.
1968) (supervisory power mentioned as possible alternative ground for decision).

At other times, the court asserts for the first time in a later case that an
earlier case was predicated on supervisory power. See, e.g., Jacobs v. Redman,
616 F.2d 1251 (3d Cir.), cert. denied, 446 U.S. 944 (1980) (advising that United
States v. Poole, 450 F.2d 1082 (3d Cir. 1971), was decided under its supervisory
power); United States ex rel. Perry v. Mulligan, 544 F.2d 674 (3d Cir. 1976),
LeFevre, 483 F.2d 447 (3d Cir. 1975), had supervisory power underpinnings).

The court on at least one occasion has also asserted that it was relying on
supervisory power when it clearly was not. As noted, in Jacobs v. Redman,
supra, the court characterized an earlier voir dire case, United States v. Poole,
supra, as having been a supervisory power case. This presumably would mean
that other reversals in voir dire cases were also exercises of supervisory power.
See, e.g., United States v. Williams, 612 F.2d 735 (3d Cir. 1979), cert. denied,
445 U.S. 934 (1980); United States v. Napoleone, 349 F.2d 550 (3d Cir. 1965);
Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965). Nevertheless, these cases are
not exercises of supervisory power, but rather represent substantive case law de-
velopment by reversing district courts for abuses of discretion in failing to ask

certain questions of veniremen upon request.

The Third Circuit has also denied using supervisory power on one occasion
when it clearly had done so. See United States v. Mitchell, 540 F.2d 1163
(3d Cir. 1970), cert. denied, 429 U.S. 1099 (1977) (suggesting the desirability
of government notification of the existence of pretrial identification procedures
prior to trial while disclaiming reliance on its supervisory power to adopt a
requirement).

These problems, coupled with the fact that it is not always clear where
the line is drawn between reversal for abuse of discretion and exercise of sup-
ervisory power, mean that this article may not include a discussion of every
exercise of supervisory power by the Third Circuit.

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\(^{15}\) Although the court has yet to reverse a conviction through the exercise
of its supervisory power over the executive branch, it has twice remanded cases
to the district court on that basis. See United States v. Serubo, 604 F.2d 807
(3d Cir. 1979) (misuse of IRS subpoenas); In re Grand Jury Proceedings
(Schofeld I), 486 F.2d 84 (3d Cir. 1973) (governmental misconduct before grand
In contrast, in cases involving the judicial branch, the Third Circuit has actively used its supervisory power, either to engage in judicial procedural rulemaking, or to formulate or approve procedural innovations. Among the procedural matters affected by its exercise of supervisory power are the litany required under Rule 11, conditional plea agreements, enforcement of grand jury subpoenas, and other grand jury procedures, and enforcement of Internal Revenue Service summons. Other directives have addressed the procedure to be employed in asking voir dire questions when there is a possibility of prejudicial pretrial publicity, the requirement of notice by the government of prior identification procedures, and the procedure to be followed in issuing gag orders. Third Circuit supervision of criminal justice has not

The court has addressed the issue of supervisory power in a number of cases involving the executive branch. See United States v. Birdman, 602 F.2d 547 (3d Cir. 1979); cert. denied, 444 U.S. 1032 (1980) (governmental misconduct before grand jury); United States v. Herman, 589 F.2d 1191 (3d Cir. 1978) (federal immunity statute); United States v. Tonelli, 577 F.2d 194 (3d Cir. 1978) (governmental misconduct before grand jury); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976) (misuse of grand jury subpoenas); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975) (governmental misconduct before grand jury); United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974) (failure of prosecutor to warn witness before grand jury of recantation provision of perjury statute); United States v. Crutchley, 502 F.2d 1195 (3d Cir. 1974) (government's obligation to record all grand jury testimony, if any such testimony is to be recorded); United States v. LeFevre, 483 F.2d 477 (3d Cir. 1973) (district court's obligation to correct prosecutorial misconduct at trial).

16. Judicial procedural rulemaking is distinguishable from procedural innovation in that in the former supervisory power is used to alter existing federal court rules whereas in the latter the power is used to create a rule to govern an area not covered by existing rules. As formal federal court rules are amended over time, it is possible for what was once procedural innovation to become judicial procedural rulemaking.


been confined to matters of procedure. The court has used supervisory power to require certain jury instructions with prospective application only,\(^{25}\) as well as other substantive matters.\(^{26}\)

The Third Circuit has employed supervisory power in civil cases as well.\(^{27}\) Unlike criminal cases, where supervisory power is most frequently used to develop prospective rules, supervisory power holdings in the civil context are generally case-specific. There is a further difference between civil and criminal cases. In civil cases, with few exceptions,\(^{28}\) the court either openly acknowledges that it relies on supervisory power,\(^{29}\) or a dissenting opinion


\(^{28}\) The court has consistently failed to acknowledge its reliance on supervisory power in those cases in which it has created a requirement that civil rights complaints, especially those drafted by experienced counsel, must set forth with specificity the acts of each defendant that are alleged to have violated the plaintiff's civil rights. See Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978); Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); Robinson v. McCorkle, 462 F.2d 111 (3d Cir.), cert. denied, 409 U.S. 1040 (1972); Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970); Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967).

The court has failed on occasion to articulate its reliance on supervisory power in other contexts as well. See, e.g., Hoots v. Pennsylvania, 639 F.2d 972 (3d Cir. 1981); Hargenrader v. Califano, 575 F.2d 434 (3d Cir. 1978).

\(^{29}\) See, e.g., United States v. Criden, Nos. 80-2309 & 80-2482 (3d Cir., Mar. 26, 1982); Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969
is quick to point out that fact.\textsuperscript{30} As a consequence, in civil cases there is far less uncertainty as to whether a particular case has been decided under the Third Circuit’s supervisory power.

Nonetheless, the rationale for these exercises of supervisory power has not always been articulated. The Third Circuit has explained its use of supervisory power to “regulate certain procedural matters of significance,”\textsuperscript{31} or to “promote the administration of justice.”\textsuperscript{32} It has cited such varying concerns as “fairness and rationality,”\textsuperscript{33} protection of citizens against an arbitrary prosecutor,\textsuperscript{34} “congested criminal trial calendars,”\textsuperscript{35} and reduction of the volume of appeals over the same issue.\textsuperscript{36} These concerns may explain, but cannot justify, the Third Circuit’s willingness to employ what seems to be a nearly limitless power.

This article examines the nature of supervisory power as exercised by one intermediate appellate court—the Third Circuit. The purpose of this study is to determine the source of this power and whether it truly is nothing more than “standardless discretion.”\textsuperscript{37} The fact that no panel of the Third Circuit has articulated a persuasive theoretical framework to determine where the power comes from and when it should be exercised raises grave questions about the legitimacy of any exercise of supervisory power.\textsuperscript{38} With-


\textsuperscript{31} Johnson v. Trueblood, 629 F.2d 302, 303 (3d Cir. 1980).

\textsuperscript{32} United States v. Waltman, 525 F.2d 371, 374 (3d Cir. 1975); United States v. Zudick, 523 F.2d 848, 852 (3d Cir. 1975).


\textsuperscript{34} \textit{In re Grand Jury Proceedings} (Schofield I), 486 F.2d 85, 94 (3d Cir. 1973) (Seitz, C.J., concurring).

\textsuperscript{35} United States v. Moskov, 588 F.2d 882, 887 (3d Cir. 1978).

\textsuperscript{36} United States v. Carter, 619 F.2d 293, 299 & n.18 (3d Cir. 1980).


\textsuperscript{38} In at least three cases, vigorous unanswered dissents questioned the existence of the supervisory power upon which the majority relied and acted. Hoots v. Pennsylvania, 639 F.2d 972, 989 (3d Cir. 1981) (Garth, J., dissenting); Hargenrader v. Califano, 575 F.2d 434, 438 (3d Cir. 1978) (Aldisert, J., dissent-
out a sound doctrinal basis, exercise of supervisory power can become little more than a device to enable a court of appeals to impose its policy judgments upon the district courts.

The first area of inquiry is the source of intermediate appellate court supervisory power within the federal system. Various sources,—the Constitution, congressional enactment, and Supreme Court precedent—will be examined in order to determine whether they provide a basis for intermediate appellate exercise of supervisory power. That examination will show that although the Constitution provides no basis for supervisory power, both the statute creating the courts of appeals and certain statements by the Supreme Court may support its existence. However, a careful reading of these sources reveals that they are not broad enough to support all of the exercises of supervisory power by the Third Circuit. These sources limit the exercise of supervisory power to those situations which involve matters within the traditional competence of the courts or which aid the appellate court in carrying out its traditional functions.

The article then examines various other limitations which the Third Circuit has recognized as restraining its use of supervisory power. The doctrine of separation of powers precludes the exercise of supervisory power when it would interfere with activities of the legislative or executive branches. Concepts of federalism have been acknowledged to limit the applicability of supervisory power to state proceedings. Finally, both congressional enactment and Supreme Court precedent can prevent a court of appeals from exercising supervisory power. Thus, the "standardless discretion" of supervisory power is limited by a number of forces.

An examination of the cases in light of this analysis will demonstrate that the exercise of supervisory power by the Third Circuit often lacks a principled basis. As to one area of frequent exercise, the establishment of procedural rules, the article concludes that it is possible to classify such exercise into three categories and proposes an analytic framework for determining the validity of exercise within each category. The first category encompasses situations in which Congress has developed a specific process for rulemaking, and that process has resulted in a formal rule. In these situations, any exercise of supervisory power by a court of appeals to establish contrary procedural rules is illegitimate. The second category contains instances in which a rulemaking mechanism has

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been created and a rule promulgated, but there is a perceived need to supplement the rule. Such supplementation, which goes beyond filling interstitial gaps through judicial construction, even if desirable, is illegitimate. The third category is comprised of situations in which there is a rulemaking mechanism in place, but no rule has been promulgated. In such cases, the courts of appeals must exercise supervisory power to fill the void created by the default. If such exercises are within the traditional competence of the courts or essential to the discharge of the appellate function, then the courts may exercise supervisory power. Third Circuit cases in which supervisory power was exercised to establish procedural rules are then analyzed within this framework to determine whether, on balance, the court has properly restrained itself in its use of supervisory power. For those cases in which the court’s action is invalid, a mechanism will be proposed to legitimize the exercise of supervisory power.

II. SOURCES OF SUPERVISORY POWER

The Third Circuit rarely sets forth the source of its authority to exercise supervisory power. An independent examination must therefore be undertaken in order to discover a principled basis for its exercise. Three sources suggest themselves—the Constitution, congressional statute, and Supreme Court pronouncement.39

A. The Constitution as a Source of Supervisory Power

The Constitution provides little support for the exercise of supervisory power by the courts of appeals. Article III does not itself create lower federal courts; it merely vests federal judicial power “in such inferior Courts as the Congress may from time to time ordain and establish.”40 Nothing in article III empowers any federal court to exercise power which is not grounded in the Constitution, statute, rule, or precedent. It might be argued that although Congress need not establish lower federal courts, once


they are created under article III those courts have all the inherent powers that courts have historically possessed in Anglo-American jurisprudence. However, this argument does not advance the inquiry, for nowhere in the Constitution are these inherent powers defined. Moreover, beginning with the Process Act in 1789, Congress has explicitly governed matters traditionally regarded as being within the competence of the courts, in particular the procedures by which cases in law and equity should be tried. Thus, the mere assertion that a court created under article III has certain inherent powers cannot rise to the level of a constitutional justification for an exercise of supervisory power by a court of appeals.

B. Statutory Enactments as a Source of Supervisory Power

Statutes as a source of supervisory power must be approached more cautiously. Certain statutes, by definition, do not confer the type of supervisory power under discussion. A substantive statute placing some element of supervision in a federal court cannot be the source of supervisory power, because by definition the exercise of power under a statute is not a use of supervisory power. Similarly, the All Writs Act, the successor to statutory authorization

41. One can persuasively argue that history, not the Constitution, defines the powers. Unhappily, history provides no answers. As one commentator has noted:

[What has been referred to in the modern case law as the supervisory power has indefinite constitutional moorings. Commentators have recognized its similarity to the exercise of prerogative writs by the Court of the King's Bench. Lord Coke described the scope of this common law judicial power:

[T]his court hath not onely jurisdiction to correct errors in judicall proceeding, but other errors and misdemeanors extrajudicall tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due process of law.

The extent to which this history is relevant to the American constitutional system, with its distinctive view of the separation of powers, is not clear.

Comment, supra note 39, at 615 (footnotes omitted).

42. Process Act of 1789, 1 Stat. 98, 94 (1789).

43. For a brief criticism of such congressional action as unconstitutional, see Note, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928), where Professor Wigmore asserts that the judicial power as defined in article III encompasses the power of courts to regulate their own procedure.

44. 28 U.S.C. § 1651(a) (1976). This statute authorizes "[t]he Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id.
for writs of mandamus and prohibition,\(^45\) simply provides a means of supervising lower courts under certain circumstances, but cannot be the source of the broad supervisory power under consideration.\(^46\) Likewise, legislation empowering judicial councils to supervise a specific aspect of judicial administration, such as the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,\(^47\) cannot be the source of unlimited supervisory power.

\(^45\) The writs of mandamus and prohibition originated in England as prerogative writs. They could be issued only by the Court of King's Bench which had general supervisory power over all inferior officers and jurisdictions by virtue of the fact that the King had originally sat there in person and aided in the administration of justice. See Kendall v. United States, 37 U.S. (12 Pet.) 364, 433 (1838); King v. Barker, 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762). Section 13 of the Judiciary Act of 1789 empowered the Supreme Court to issue "writs of mandamus in cases warranted by the principles and usages of laws to any courts appointed, or persons holding office under the authority of the United States." Judiciary Act of 1789, § 13, 1 Stat. 81 (1789). The authority of the circuit courts (precursors to the courts of appeals) to issue the writs was included in § 14's general authorization "to issue all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Id. § 14. The courts soon recognized that the writs authorized by these statutes were not the prerogative writs of the King's Bench. See Kendall v. United States, 37 U.S. (12 Pet.) at 434; Marbury v. Madison, 5 U.S. (1 Cranch) 87, 106-07 (1803); In re Josephson, 218 F.2d 174, 177-79 (1st Cir. 1954). Rather than telling the inferior courts how to rule, the American writs simply directed them to proceed, according to their own judgment, so that the case could be reviewed by the appellate court. Kendall v. United States, 37 U.S. (12 Pet.) at 434.

The Supreme Court's authority under § 13 was broader than that of the circuit and district courts under § 14. The former section authorized the Court to exercise a general "supervisory power" over the lower courts whether or not it had been given statutory appellate jurisdiction or potential appellate jurisdiction. See Chandler v. Judicial Council, 398 U.S. 74, 117 n.15 (1970) (Harlan, J., concurring); In re Josephson, 218 F.2d at 177-79. In contrast, the latter section granted only an auxiliary power, which could be used only if another statute conferred appellate jurisdiction. Id.; see McIntire v. Wood, 11 U.S. (7 Cranch) 503 (1813); United States v. Christian, 660 F.2d 892, 894 (3d Cir. 1981). The courts' current authority to issue the writs is contained in 28 U.S.C. § 1651(a) (1976). For the relevant text of § 1651(a) see note 44 supra.

\(^46\) There may be some doubt as to the effect of the All Writs Act on the broader powers of the Supreme Court. See generally Chandler v. Judicial Council, 398 U.S. 74 (1970). Nevertheless, courts of appeals are unquestionably limited in their use of the writs to confining the district courts to the lawful exercise of their prescribed jurisdiction. See Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976). The writs' function is to prevent a district court from rendering an appeal impossible or otherwise frustrating or impeding the ultimate exercise of appellate jurisdiction. See La Buy v. Howes Leather Co., 352 U.S. 249, 255, 259-60 (1957). Thus, a writ may issue to compel a district court to entertain diversity actions improperly remanded to state court, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. at 352; to empanel an investigatory grand jury, United States v. Christian, 660 F.2d 892, 896 (3d Cir. 1981) (denying writ on substantive grounds), or to prevent the improper transfer of a suit to another district, In re Josephson, 218 F.2d 174 (1st Cir. 1954) (denying writ on substantive grounds).

1. The Court of Appeals Act

The Third Circuit has never attempted to justify its exercises of supervisory power on statutory grounds. Nevertheless, if supervisory power can be attributable to statute at all, it must stem from legislation establishing the intermediate appellate court system, and the function assigned to that system by Congress. Congress established the courts of appeals in 1891, providing that the courts were to be "of record with appellate jurisdiction as hereinafter limited and established." 48 The rather unsurprising conclusion to be drawn from the legislative history of the Court of Appeals Act is that the intended function of the courts of appeals was twofold: to lessen the burden on the Supreme Court, and to provide a forum to review the bulk of previously unreviewable trial court judgments. 49

48. Circuit Court of Appeals Act, ch. 517, § 2, 26 Stat. 826 (1891). Although the current version of the statute omits the reference to appellate jurisdiction, the reviser's note explains that similar provisions are currently found in the separate jurisdictional sections. See 28 U.S.C. §§ 43(a), 1291 (1976).

49. Prior to the creation of the courts of appeals, the federal court system consisted of the district courts, the circuit courts, and the Supreme Court. The circuit courts had significant original jurisdiction as well as the authority to review on writ of error the final decisions of district courts in most civil cases. Review by writ of error could be sought in the Supreme Court in any civil case in which the matter in dispute exceeded two thousand dollars exclusive of costs. An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1879). That amount was raised to five thousand dollars in 1875. Act of Feb. 16, 1875, § 3, 18 Stat. 315 (1875). Although several attempts were made to alleviate the strain during the next hundred years, by 1891 the burden this system placed on the Supreme Court was thought to be intolerable. See generally 22 Cong. Rec. 3864 (1891) (remarks of Rep. Rogers); P. Bator, P. Mishkin, P. Shapiro, H. Wechsler, The Federal Court and the Federal System 22-41 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 86-88 (1928) [hereinafter cited as F. Frankfurter & J. Landis].

The establishment of intermediate appellate courts was part of a larger scheme designed to relieve that burden. For purposes of the present discussion only a few elements of that scheme need be examined. The Circuit Court of Appeals Act abolished three-judge courts of appeals in each of the nine existing circuits. The circuit courts' appellate jurisdiction over the district courts was abolished, although the circuit courts themselves were not abolished until 1911. Act of March 3, 1911, 36 Stat. 1087 (1911). Certain decisions of the trial courts remained subject to direct review by the Supreme Court. The decisions of the courts of appeals were declared to be "final" in diversity cases, suits brought under the revenue and patent laws, criminal prosecutions, and admiralty suits, but Supreme Court review in those cases was available through issuance of the newly authorized writ of certiorari. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891). See Hart & Wechsler, supra, at 41.

Although Congress' primary concern was with the state of the Supreme Court's docket, the courts of appeals were also intended to destroy the opportunity for circuit and district judges to play the role of the despot or tyrant in nonappealable cases. . . . 22 Cong. Rec. 3885 (1891) (remarks of Rep. Culberson); 21 Cong. Rec. 3403 (1891) (remarks of Rep. Culberson). This is in reference to the fact that a decision by a one-judge circuit court had been final in all cases involving less than the jurisdictional amount. In addition, since the circuit courts exercised some appellate jurisdiction, it frequently happened
Traditionally, the primary function of an intermediate appellate court is to correct trial court errors of law and set aside the court's findings of fact if clearly erroneous. The Supreme Court has also delineated the function of a court of appeals in similar terms:

On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

Those exercises of supervisory power which aid a court of appeals in carrying out its traditional functions can be legitimized by reference to the Court of Appeals Act. In addition, exercises of supervisory power which further such traditional judicial functions as the regulation and improvement of the quality of the judicial process are within the courts' traditional sphere of competence, and can therefore be legitimized by reference to the congressional intent underlying the creation of the intermediate appellate courts. In exercising its constitutional power-and the Third Circuit has concurred in this formulation of its function, albeit in a different context: "An appellate court's role in reviewing jury instructions is to examine the entire charge in order to determine whether the district judge properly performed his function. The district judge is responsible for giving the jury the guidance by which it can make appropriate conclusions from the testimony." United States v. Garrett, 574 F.2d 778, 781-82 (3d Cir.), cert. denied, 436 U.S. 919 (1978) (citation omitted).

50. The Third Circuit has concurred in this formulation of its function, albeit in a different context: "An appellate court's role in reviewing jury instructions is to examine the entire charge in order to determine whether the district judge properly performed his function. The district judge is responsible for giving the jury the guidance by which it can make appropriate conclusions from the testimony." United States v. Garrett, 574 F.2d 778, 781-82 (3d Cir.), cert. denied, 436 U.S. 919 (1978) (citation omitted).


52. See generally Hill, supra note 39, at 194. Professor Hill intimates that there could well be a theoretical difference between supervisory power emanating from legislative enactment—inherent power—and "the necessary implication of [legislation which by its silence constitutes] general grants of jurisdiction and remedial authority. . . . " Id. It is not necessary to determine whether the concept of inherent power is severable from implied power because for purposes of legitimizing an exercise of supervisory power it makes no difference.

53. It should be emphasized that in acknowledging the legitimacy of exercises of supervisory power in aid of "traditional judicial functions," this article does not intend to argue for the acceptance of all exercises which plausibly could be considered to advance such concepts as equity or justice. Rather, the
authority to create inferior federal courts, Congress did not act in a vacuum. By providing that the courts of appeals should be "courts of record," Congress bestowed a certain amount of that amorphous baggage known as the inherent power of the courts upon the new appellate courts. Supervisory power grounded in such an elusive, ill-defined concept is a fragile creature at best. It must give way to congressional act, court rule, and all other doctrinal limitations and principles which, in the ordinary course of events, would obviate the power. However, given the narrowness of its statutory justifications, the inherent power of an appellate court cannot be employed to regulate the conduct of another branch of government, or, for that matter, since United States v. Payner,64 solely to protect the integrity of the court. Neither action is part of the traditional function of an appellate court.

Without expressly relying on the Court of Appeals Act, the Third Circuit has on several occasions employed supervisory power to further its appellate function. Thus, for example, the Third Circuit has relied on its supervisory power to prospectively require65 or approve66 jury charges. It has also ordered a new trial when a criminal defendant was convicted by a jury which included a juror who would have been excused for cause but for his failure to respond to questioning during voir dire.67 In each of these instances, the Third Circuit performed its proper function of correcting and preventing lower court error.

At times, however, the Third Circuit has strayed from its designated role and exercised its supervisory power in such a manner as to usurp functions of the district courts. Perhaps the most striking example of such an improper exercise is Hoots v. Pennsylvania.68 In Hoots, the Third Circuit, impatient with the vagaries of litigation which had held up resolution of the remedial

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58. 639 F.2d 972 (3d Cir. 1981).
phase of a complex school desegregation case, ordered the district judge to complete all hearings and proceedings on the merits and issue a desegregation decree within ninety days.\textsuperscript{59} The decision is especially noteworthy because formulation of a desegregation decree is a discretionary function placed in the first instance in the district court.\textsuperscript{60} The dissent sharply questioned whether an appellate court had the power to enter such an order and noted the enormous difficulties created by the Third Circuit's action:

\begin{quote}
[W]e have neither the right nor any power to order [a district judge] to complete his processing of this case within a time limit of 90 days. If there is such a right or power, I do not know from whence it stems, and absent such a power, there is no reason for a federal judge to give heed to our mandate.
\end{quote}

\ldots

\begin{quote}
[If] he cannot, or does not, do we hold him in contempt? Do we subject him to some form of disciplinary proceeding? Do we remove his caseload? Do we hold a hearing and ask him to show cause why he has violated the 90 day mandate? What action can we take?\textsuperscript{61}
\end{quote}

Although \textit{Hoots} is by far the most dramatic example of a Third Circuit exercise of supervisory power in excess of its function, it is not a lone aberration. On three other occasions the court asserted its authority to remove district judges from further participation in particular cases. In \textit{Johnson v. Trueblood},\textsuperscript{62} the

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 980-81.
\item \textsuperscript{60} The timing of the performance of a discretionary function at the district court level can, in rare instances, be subject to intermediate appellate court control, but not as an exercise of its supervisory power. If, for example, a district court rules in a manner to avoid adjudication and thus frustrate an appeal, mandamus is an appropriate remedy. \textit{See} Hermansdorfer, 423 U.S. 396 (1976). Presumably, mandamus would also be available where the district judge persists over time in refusing to rule or issue an appealable order. The mandamus writ is invariably obeyed out of recognition that if it were not, "anarchy . . . [would] prevail in the federal judicial system." \textit{See} Hutto v. Davis, 50 U.S.L.W. 3540 (U.S. Jan. 11, 1982). An intermediate appellate court can also control the timing of a discretionary order at the district court level if that power is specifically vested in the appellate court by the Supreme Court. \textit{See} Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam) (power placed in United States Court of Appeals for Fifth Circuit to expedite school desegregation); United States v. Hinds County School Bd., 423 F.2d 1264 (5th Cir. 1969) (per curiam), \textit{cert. denied}, 396 U.S. 1092 (1970) (power exercised by appellate court as set forth in Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969)); \textit{See also} Singleton v. Jackson Mun. Separate School Dist., 426 F.2d 1364 (5th Cir. 1970), \textit{cert. denied}, 402 U.S. 944 (1971).
\item \textsuperscript{61} 639 F.2d at 996 (Garth, J., dissenting) (footnote omitted).
\item \textsuperscript{62} 629 F.2d 302 (3d Cir. 1980).
\end{itemize}
court vacated the district court's retroactive revocation of an attorney's pro hac vice status and exercised its supervisory power to impose a pre-revocation notice and comment requirement in such cases.\textsuperscript{63} The court concluded on the facts presented that if the revocation were pursued further, the case should be assigned to a different judge.\textsuperscript{64} Although on the facts such reassignment may well have been warranted, the court did not hold that the judge's refusal to recuse himself would have been an abuse of discretion. From the opinion it appears the court simply decided that it would rather not have him hear the case. Indeed, the earlier case of \textit{Poteet v. Fauver} \textsuperscript{65} makes it clear that \textit{Trueblood} was an exercise of supervisory power, rather than a holding based upon an abuse of discretion by the district court. In \textit{Poteet}, a state prisoner petitioned for a writ of habeas corpus, challenging the state trial judge's action in increasing his sentence because he persisted in asserting his innocence after a guilty verdict was entered.\textsuperscript{66} In the course of ordering that the writ issue unless state authorities resentenced the petitioner, the court stated:

\begin{quote}
We will reverse the judgment of the district court and remand these proceedings with a specific direction. The district court will issue a writ of habeas corpus unless [state] authorities agree to vacate the sentence heretofore imposed and accord appellant a new opportunity for sentencing. Were the trial court in the federal system we would exercise our supervisory power and direct that another judge be assigned for resentencing.\textsuperscript{67}
\end{quote}

Finally, in \textit{Lewis v. Curtis},\textsuperscript{68} the court reversed the district court's final order dismissing the plaintiff's complaint and denying his motion for leave to amend, and ordered that the case be assigned to a different judge on remand.\textsuperscript{69} The Third Circuit justified its action by stating:

\begin{quote}
Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. . . . Without pausing to consider whether
\end{quote}

\textsuperscript{63.} \textit{Id.} at 304.
\textsuperscript{64.} \textit{Id.}
\textsuperscript{65.} 517 F.2d 393 (3d Cir. 1975).
\textsuperscript{66.} \textit{Id.} at 394.
\textsuperscript{67.} \textit{Id.} at 398.
\textsuperscript{68.} No. 81-2055 (3d Cir. Mar. 3, 1982).
\textsuperscript{69.} \textit{Id.}, slip op. at 19-20.
there is a basis for legal disqualification, we conclude that the undisputed facts dictate that the appearance of justice will be served only if the assignment to another judge is made, and we will, pursuant to our supervisory power, so direct.\textsuperscript{70}

Another example is \textit{DeMasi v. Weiss},\textsuperscript{71} where the Third Circuit ordered a district court to stay a discovery order until the liability phase of the trial had concluded in order to avoid deciding a difficult discovery issue. A consideration of the above cases leads to the inescapable conclusion that the Third Circuit is asserting a broad power over the day-to-day management of the district court workload. The source for this power cannot be found in the statutory framework which established the courts of appeals.

In contrast, the court has, on at least one occasion, declined to exercise supervisory power, and in so doing effectively disabled itself from performing its functions. In \textit{Wood v. Zapata Corp.},\textsuperscript{72} petitioner sought a writ of mandamus and/or prohibition directed to a district court which had ordered an action transferred pursuant to 28 U.S.C. § 1404(a).\textsuperscript{73} Petitioner alleged that the order should have been vacated because the district court had relied on an untranscribed conference.\textsuperscript{74} Noting that there was no requirement that conferences in chambers be transcribed, the court denied the petition.\textsuperscript{75} The problem with this holding was noted by both the concurring and dissenting judges: without a record it is impossible for an appellate court to review the district court's decisions for errors of law or fact.\textsuperscript{76}

2. The "Trickle-Up" Theory

Although the Third Circuit has not attempted to justify its exercise of supervisory power by relying upon the statutory enactment which created the courts of appeals, it has occasionally pointed to a different statutory basis to support certain exercises of supervisory power. At times, the Third Circuit has asserted that stat-

\textsuperscript{70} Id. (emphasis added).
\textsuperscript{71} Nos. 81-271 & 81-2192 (3d Cir. Jan. 8, 1982).
\textsuperscript{72} 482 F.2d 350 (3d Cir. 1973).
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 351.
\textsuperscript{75} Id. at 356.
\textsuperscript{76} Id. at 357 (Adams, J., concurring); id. at 358 (Biggs, J., dissenting).
The Exercise of Supervisory Power

Utory grants of power to district courts carry with them a related supervisory power vested in the courts of appeals. This “trickle-up” theory for the exercise of supervisory power was relied on in *In re Grand Jury Proceedings (Schofield I)* where, in establishing flexible procedural requirements for contesting enforcement of a grand jury subpoena, the court stated that “[W]e impose this requirement both pursuant to the federal courts’ supervisory power over grand juries and pursuant to our supervisory power over civil proceedings brought in the district court pursuant to 28 U.S.C. § 1826(a).” The court dispelled any latent ambiguity as to the source of the power relied upon when it later repeated and amplified its prior position in affirming a finding of contempt:

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

But under our supervisory power over the grand jury and over the district court’s enforcement of subpoenas, we feel empowered to specify the particular way in which relevancy and proper purpose of a grand jury investigation shall be shown in this Circuit.

The Third Circuit thus transformed statutory and rule power vested in the district court into supervisory power at the appellate level. Inasmuch as these cases involve powers specifically allocated by Congress to the district courts, not the courts of appeals, the function of the appellate courts should be limited to a determination of whether the district court committed error. Although every grant of power to a district court carries with it a concomitant appellate court power to define its limit, the statutory power remains in the district court. In short, the court of appeals has no “supervisory power over the grand jury.” The Third Circuit’s reliance on the “trickle-up” theory to legitimize exercises of supervisory power is misplaced.

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77. 486 F.2d 85 (3d Cir. 1977).
78. Id. at 93.
C. Supreme Court Pronouncements as a Source of Supervisory Power

The Supreme Court provides an additional potential source of intermediate appellate court supervisory power. The Supreme Court may be a source for this power either through a “trickle-down” theory, or by express statement. The “trickle-down” theory provides that if the Supreme Court has supervisory power over all lower federal courts, then the courts of appeals have supervisory power over the district courts. Although the Third Circuit has never expressly articulated this theory, on occasion it has cited cases in which the Supreme Court relied on its supervisory power to support its own assertions of supervisory power.80 However, the mere fact that the Supreme Court exercises supervisory power, of whatever legitimacy,81 over the federal court system as a whole cannot in and of itself justify even the more limited exercises by an intermediate appellate court. Moreover, given the structure of the federal court system, it is by no means self-evident that the existence of such a power in the Supreme Court, which is capable of imposing uniform, systemwide standards, implies the existence of analogous powers in regional intermediate appellate courts. Thus, the citation of cases involving Supreme Court exercises of supervisory power cannot, without more, legitimize the Third Circuit’s exercise of similar powers.

Supreme Court statements provide a stronger basis for asserting the existence of supervisory power in the courts of appeals. Although some have questioned the very existence of such power,82 Supreme Court pronouncement leaves no doubt that the power does exist.83 Unfortunately, although Supreme Court statements

81. See note 39 supra.
82. See Burton v. United States, 483 F.2d 1182, 1189-90 (9th Cir.), rev’d on rehearing, 483 F.2d 1190 (9th Cir. 1973) (Byrne, J., dissenting); Note, Supervisory Power in the United States Courts of Appeals, supra note 39, at 661-62.
83. See, e.g., United States v. Payner, 447 U.S. 727 (1980); Ehrlichman v. Sirica, 419 U.S. 1310 (Burger, Circuit Judge 1974); Cupp v. Naughten, 414 U.S. 141 (1973); Bartone v. United States, 375 U.S. 52 (1963); Rea v. United States, 350 U.S. 214 (1956). The intriguing question of whether the Supreme Court can in fact legitimize the exercise of such power by the courts of appeals is beyond the scope of this article, which focuses merely on the legitimacy of those exercises within the judicial framework.
may establish the existence of intermediate appellate court supervisory power, they do not advance the inquiry as to whether any particular exercise of supervisory power is legitimate. This difficulty is compounded by the fact that the Supreme Court has never explained the basis for its assertion that the courts of appeals have supervisory power. The most recent Supreme Court case simply assumes the existence of supervisory power in the intermediate courts of appeal, and addresses instead the issue of whether the power was properly exercised.84

III. LIMITATIONS ON THE EXERCISE OF SUPERVISORY POWER

The exercise of supervisory power is constrained not only by the requirement that it be limited to the furtherance of the appellate function and matters traditionally within the special competence of appellate courts to improve the judicial process, but by other doctrines as well. The definition of supervisory power is itself a limitation on its exercise. In addition, the doctrines of separation of powers and federalism both preclude certain exercises of supervisory power. Finally, both congressional action and Supreme Court precedent may act to bar a court of appeals from using supervisory power. Each of these limitations will be examined in turn.

84. See Rosales-Lopez v. United States, 451 U.S. 182 (1981); United States v. Payner, 447 U.S. 727 (1980). The second of these two recent Supreme Court cases portends what may be a dramatic shift in the Court's treatment of the doctrine. In Payner, the Supreme Court reversed a district court's exercise of supervisory power in suppressing evidence introduced against the defendant which was illegally obtained from a third party. 447 U.S. at 731. Writing for the six-member majority, Justice Powell asserted that supervisory power does not enable federal courts to exclude evidence when the party against whom the illegal search was conducted had no standing to challenge the search under well-established constitutional doctrine. Id. at 735-36. Payner, of course, may be read narrowly as simply another attempt by the Court to limit the applicability of the fourth amendment exclusionary rule by contracting the scope of standing. Read broadly, however, Payner reflects a significant change in the way the Supreme Court views the nature of supervisory power.

In Payner, for the first time, the Court characterized the use of supervisory power to suppress evidence based on gross illegalities as "superfluous." Id. at 733. The Court asserted that the exercise of supervisory power in this context must be limited by the constitutional constraints of the exclusionary rule—in this case, the standing doctrine—noting that otherwise it "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." Id. at 737. However, the Court insisted that its "decision [did] not limit the traditional scope of the supervisory power in any way; nor does it render the power 'superfluous.'" Id. at 735-36 n.8. Despite this language, the opinion seems to indicate that what appeared in the earlier cases to be virtually limitless power will henceforth be subject to the imposition of standards to ensure its proper application.
A. The Definition of Supervisory Power as a Limitation

Although broad, the definition of supervisory power as embracing any decision not based on the Constitution, statutes, procedural rules, or precedent does serve to circumscribe its exercise. When the Supreme Court renders a decision under its own supervisory power, that holding is binding precedent on the federal court system. Thus, subsequent action by the Third Circuit based on such a decision is not an exercise of the Third Circuit’s supervisory power. Moreover, if the court can base its decision on the Constitution, statute, rule, or precedent, it should not exercise supervisory power.

The Third Circuit has on occasion ignored this second fundamental limitation. For example, in Bennerson v. Joseph, the court, having ordered a remand on other grounds, expressly noted that the district judge’s prior reference to a master violated Rule 53(b) of the Federal Rules of Civil Procedure. Instead of relying upon its interpretation of Rule 53(b) to require the district judge to try the case, the court invoked its supervisory power to achieve the same end. Similarly, in Evans v. Buchanan, the court invoked its supervisory power to issue a writ of mandamus, setting aside an erroneous order of a district judge relating to tax rates in a school desegregation case. Inasmuch as the court’s authority to issue the writ is statutorily based, the court’s reliance on its supervisory power was meaningless at best.

The Third Circuit has also invoked its supervisory power unnecessarily in cases in which it simply had to pronounce the correct

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85. The Third Circuit has noted in one case:
   We are not here concerned with the question whether the rule stated . . . is one of constitutional dimension and, therefore, applicable to state as well as federal courts . . . . For it is, at the least, a rule adopted by the Supreme Court under its supervisory power over the courts of the United States and, thus, applicable in the courts of the Third Federal Judicial Circuit. . . .

86. 583 F.2d 633 (3d Cir. 1978).
87. Id. at 641-42.
88. Id. at 642.
90. 582 F.2d at 776-77.
91. See 28 U.S.C. § 1651(a) (1966). For the text of § 1651(a) see note 44 supra.
rule of law. In Government of Virgin Islands v. Bell,\textsuperscript{92} the court invoked its supervisory power as an alternative basis for decision when the trial judge erroneously commented on the failure of a criminal defendant to take the witness stand.\textsuperscript{93} The court relied on its supervisory power, although it was doing no more than correcting a trial court's error of law. The mere fact that in so doing the court announced a rule of general application for the circuit did not require reliance on the court's supervisory power.

In each of these cases the Third Circuit either exercised or intimated that it might exercise its supervisory power, when in fact there was available a constitutional, statutory, or precedential ground upon which the case could have been resolved.\textsuperscript{94} The problem created by these cases is not merely one of semantics. The judicial process is based upon decisions distilled from authority, whether it be statutory or case precedent. The unnecessary exercise of supervisory power therefore threatens the integrity of the judicial process.

### B. Separation of Powers

Although the Third Circuit has rarely articulated the separation of powers doctrine as a limitation on its supervisory power, the doctrine nevertheless plays an important role in restraining the exercise of that power. The issue arises most frequently when the court of appeals is confronted with misconduct by the executive branch. The issue presented in such cases is whether a federal appellate court has any supervisory authority over officers of the executive branch. In theory, it has no such power; each branch operates autonomously, controlling its own internal affairs. In practice, however, the line between the two branches blurs whenever the executive branch must utilize the judiciary for enforcement purposes. It is these cases, involving judicial attempts to deter executive branch misconduct because they allegedly threaten

\textsuperscript{92} 392 F.2d 207 (3d Cir. 1968).

\textsuperscript{93} Id. at 209. The court's language is instructive. It stated:

Moreover, without further extending this opinion, we see no reason for permitting a different standard to apply to proceedings in the Virgin Islands than applies to those in other Federal and state courts, and were it necessary to do so, we would exercise our supervisory power to forbid such comment.

\textsuperscript{94} In yet another case, United States v. Lardieri, 506 F.2d 319 (3d Cir. 1974), the dissent urged the court to exercise its supervisory power to dismiss an indictment when the issue was simply one of statutory interpretation. Specifically, the court had to determine whether 18 U.S.C. § 1623(d) (1966) required notification of the opportunity to recant either generally or based upon the facts of the case. 506 F.2d at 325 (Weis, J., dissenting).

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judicial integrity, which raise difficult separation of powers questions.

The Supreme Court has frequently relied upon its obligation to protect the integrity of judicial processes to justify what otherwise would be impermissible intrusions upon the executive branch. In *McNabb v. United States*, the case which first articulated the modern version of the supervisory power doctrine, the Court reversed a conviction which rested on a "flagrant disregard" of federal law by federal officers, noting that such a conviction could not stand "without making the courts themselves accomplices in willful disobedience of law." The Court explained that it was "not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement."

The Third Circuit has confronted this problem most frequently in the context of grand jury proceedings. Although technically a creature of the judicial branch, the grand jury is for all practical purposes under the control of the United States Attorney. It is precisely the prosecutor's virtually unfettered control over what is nominally an arm of the judicial branch which has forced the Third Circuit to focus its attention, if only implicitly, on the relationship of the separation of powers doctrine to the exercise of supervisory power. The Third Circuit has held that the dismissal of an indictment may be an appropriate remedy for prosecutorial misconduct before a grand jury if a defendant

95. 318 U.S. 322 (1943).
96. *Id.* at 345.
97. *Id.* at 347. The Court expanded its use of supervisory power in subsequent cases, asserting an increasing amount of control over federal law enforcement. *See Rea v. United States*, 350 U.S. 214, 216-17 (1956) (reversing conviction based on the Court's "supervisory powers over federal law enforcement agencies"). Although in its more recent opinions the Court seems to be retreating from its expansive reliance on supervisory power, the "protection of judicial integrity" rationale relied on in *McNabb* has not been wholly discarded. For example, in *United States v. Payner*, 447 U.S. 727 (1980), the Court affirmed that supervisory power may be used in furthering the dual purpose of "deterring illegality and protecting judicial integrity." *Id.* at 735 n.8. Chief Justice Burger filed a concurring opinion disclaiming such broad supervisory power. *Id.* at 737 (Burger, C.J., concurring). Despite the Chief Justice's disclaimer, these interests might well be served when the Court exercises supervisory power over official misconduct which jeopardizes judicial integrity.

98. The grand jury is called into existence by the district court. *See 18 U.S.C. § 3331* (1969). The district court also controls the grand jury's issuance of process.
100. *See United States v. Scrubo*, 604 F.2d 807 (3d Cir. 1979). The court there noted: "[F]ederal courts have an institutional interest, independent of their concern for the rights of the particular defendant in preserving and pro-
suffers prejudice or can demonstrate a history of flagrant and persistent abuse of grand jury process by the executive branch. Notwithstanding its interest in protecting the sanctity of the grand jury, its frustration with ineffectual judicial admonishment, and its conviction that dismissal is the only means to achieve acceptable prosecutorial conduct before the grand jury, the Third Circuit has never dismissed an indictment on the basis of supervisory power.

The Third Circuit has recognized that the separation of powers doctrine cannot justify a complete prohibition of judicial control over judicial proceedings involving the executive branch. On a number of occasions it has reacted to perceived prosecutorial abuse by imposing controls on grand jury proceedings. It would be ignoring reality to deny that these controls are directed to the executive branch in the form of the United States Attorney. It appears that the Third Circuit has steered a middle course, attempting to protect the integrity of the grand jury while at the same time respecting the autonomy of the executive branch. Thus, despite its consistent refusal to dismiss indictments for prosecutorial misconduct, it has imposed a requirement that:

[i]f the testimony of any grand jury witness or witnesses is to be recorded, . . . all such testimony should be recorded so that the defense and the Government will both have available all portions of the grand jury testimony . . . [in


104. It has, however, remanded two cases for further proceedings. See United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973). When, in the context of law enforcement interference with a defendant's sixth amendment right to counsel, the Third Circuit did dismiss an indictment where there was no prejudice, the dismissal was promptly reversed by a unanimous Supreme Court. See United States v. Morrison, 602 F.2d 529 (3d Cir. 1979) (Garth, Rosenn, & Adams, JJ., dissenting from order denying petition for rehearing), rev'd, 449 U.S. 361 (1981).
order to] prevent the recording of only those portions of
grand jury testimony helpful to the Government. 106

Similarly, the court has exercised its supervisory power to specify
the particular manner in which the relevancy and proper purpose
of a grand jury investigation shall be shown on a motion for
enforcement of a grand jury subpoena. 106

The court's sensitivity to the interplay of these competing con-
siderations has manifested itself in other contexts. For example,
the court has refused to interfere with the United States Attorney's
exercise of discretion by second-guessing his decision not to grant
statutory immunity to a defense witness. 107 In contrast, the court
has not hesitated to exercise control over executive branch officials
operating within the exclusive province of the judiciary. Thus the
Third Circuit has directed district judges to intervene without
awaiting defense objection when the prosecutor engages in im-
proper summation. 108

Despite its general sensitivity to the issue, the Third Circuit
has occasionally overstepped the limits imposed by the separation
of powers doctrine. For example, in United States v. Premises
Known as 608 Taylor Ave., 109 the court reversed the district court's
denial of a motion for the return of legally seized property. 110
The court declined to decide whether the Government's continued
retention of the property denied the petitioner due process, but
nonetheless held "that the district court under its powers to super-
vise the law enforcement officials and the United States Attorney
within its jurisdiction may require the return of property held
solely as evidence if the government has unreasonably delayed in
bringing a prosecution." 111 Nowhere in its opinion did the court
cite authority for the existence of the asserted power to supervise
law enforcement officials and the United States Attorney.

106. In re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 966 (3d Cir.),
cert. denied, 421 U.S. 1015 (1975). See also In re Grand Jury Proceed-
ings (Schofield I), 486 F.2d 85 (3d Cir. 1973).
107. United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), cert. denied,
108. United States v. LeFevre, 483 F.2d 477 (3d Cir. 1973). Although the
directive was not expressly predicated upon the Third Circuit's supervisory
power, a subsequent Third Circuit decision makes clear that it was an exercise
of supervisory power. See United States ex rel. Perry v. Mulligan, 544 F.2d
109. 584 F.2d 1297 (3d Cir. 1978).
110. Id. at 1305.
111. Id. at 1302.
Similarly, in *Hargenrader v. Califano,*\(^ {112} \) a case involving a deserving social security disability applicant, the Third Circuit, over a strong dissent, "promulgate[d] procedural rules for the executive branch requiring subordinate factual foundations . . . to support findings of fact."\(^ {113} \) As the dissent pointed out, a persuasive argument could be made that executive branch hearing examiners do not come under the supervisory power of the judicial branch.\(^ {114} \) Moreover, insofar as the Third Circuit engaged in rulemaking for the Social Security Administration, it usurped a power vested in the Secretary of Health and Human Services.\(^ {115} \) Finally, assuming the validity of judicial action, the court's enactment did not conform either to the Judicial Conference, or to statutory requirements for rulemaking by the judicial branch.\(^ {116} \)

Despite these rare deviations, the Third Circuit cases implicating the separation of powers doctrine reflect a consistent effort by the court to maintain the integrity of judicial processes without hampering the operation of the co-equal branches of government. As the following discussion of the doctrine of federalism demonstrates, the court has evidenced a similar concern for impairing upon the prerogatives of state governments.

C. Federalism

Concepts of federalism also limit the permissible exercise of supervisory power by an intermediate appellate court. A federal court may not prescribe procedural rules or make policy judgments for the states.\(^ {117} \) The Third Circuit's respect for the limitation imposed by concepts of federalism can be illustrated by contrasting the court's willingness to direct assignment of another trial judge

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112. 575 F.2d 434 (3d Cir. 1978).
113. *Id.* at 438 (Aldisert, J., dissenting).
114. *Id.* at 438-39 (Aldisert, J., dissenting).
115. 42 U.S.C. § 405(a) (1974) provides:
    The Secretary shall have full power and authority to make rules and regulations and to establish procedures . . . and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

*Id.*

116. See notes 143-53 and accompanying text *infra.*

117. See, *e.g.*, *Barker v. Wingo*, 407 U.S. 514, 528 (1972) ("We do not establish procedural rules for the States, except when mandated by the Constitution.").
in the federal system with its refusal to do so in the context of a state court proceeding. However, the Third Circuit has not always respected this limitation on its exercise of supervisory power. In Conley v. Dauer, the Allegheny County, Pennsylvania court system had failed to provide counsel for indigents at preliminary hearings, although required to do so by the Third Circuit's interpretation of a Supreme Court decision. Frustrated by this recalcitrance, the court directed that the district court, on remand, should fashion remedies to compel the state court system to comply with the Third Circuit's directive. The majority of the court was apparently unconcerned by the spectre of federal court supervision of a state court system.

D. Congressional and Supreme Court Limitations

The exercise of supervisory power by intermediate appellate courts is not only limited by doctrinal considerations. Both Congress and the Supreme Court may take direct action to impose limits on the exercise of supervisory power. Even if a result reached by the courts under supervisory power was not initially precluded by statute, it may be altered by congressional action. By the same token, the Supreme Court may reverse an exercise of supervisory power by a court of appeals. It may also decide a case under its own supervisory power, and thus prevent lower courts from exercising their supervisory power. Finally, the Court may hold certain areas improper for the exercise of supervisory power, as it did in United States v. Payner.


119. Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975). Although Poteet was a case arising under 28 U.S.C. § 2254 (1971), the point at issue is not covered by that statute. The court's reluctance to order reassignment in the state court is traceable, rather, to its recognition of the deference due to an independent court system. See notes 61-67 and accompanying text supra.

120. 463 F.2d 63 (3d Cir.), cert. denied, 409 U.S. 1049 (1972). Judge Aldisert filed a vigorous dissent on the denial of a petition for rehearing en banc. Id. at 67-70 (Aldisert, J., dissenting).


The Third Circuit has expressly recognized that its exercise of supervisory power is subject to limitation by congressional enactments. For example, the court has repeatedly refused to suppress a confession as a remedy for law enforcement abuse because its supervisory powers "are subject to the control of Congress . . . and because . . . Congress [has] provided that '[i]f the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence.'" \(^{125}\) The court has reasoned that "once the issue of voluntariness [is] resolved in the government's favor, the court [lacks] any supervisory authority to suppress a statement." \(^{126}\) In a similar vein, the Third Circuit has held that Congress, by statutorily establishing the competing inducements for truthful testimony—prosecution and recantation—has precluded the court from ordering dismissal of a perjury indictment, pursuant to its supervisory power, because of the failure of the prosecutor to advise a grand jury witness of his statutory right of recantation. \(^{127}\) To do so "would disturb the balance Congress has advertently established between the competing interests of prosecution and recantation." \(^{128}\)

Another excellent example of the Third Circuit's deference to congressionally enacted limitations on its exercise of supervisory power arises in the context of federal habeas corpus review of state court convictions. Federal habeas corpus review of state court convictions is governed by statute. \(^{129}\) The statute provides, in part, that for individuals held in custody pursuant to the judgment of a state, relief may be predicated only on the ground that the prisoner is in custody "in violation of the Constitution, laws, or treaties of

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128. 506 F.2d at 324. The court continued:  
It is the business of the legislative branch, with its superior investigatory facilities, to determine how these competing inducements may best be reconciled to produce the greatest stimulus to truthful testimony. The congressional judgment on this matter is not to be displaced by the judiciary unless there is no reasonable basis for it. Therefore, even if we were to concede that requiring the proposed notice would to some degree increase the incidence of recantation by those who have testified falsely, it would be improper for us, in the exercise of our supervisory powers, to dismiss prosecutions because of the lack of such advice from the prosecutor, thereby endangering the stimulus provided by the threat of criminal sanctions.  

*Id.*

the United States." Thus, a decision on any other basis—such as supervisory power—is precluded.

The Third Circuit has consistently recognized this limitation on its invocation of supervisory power. Comparison of two cases will serve as a graphic example of the court's restraint. In United States v. Poole, a district court had refused a request to inquire into the previous experience of the veniremen on voir dire and the Third Circuit, relying on its supervisory power, reversed the decision. However, in Jacobs v. Redman, identical conduct by a state trial court was held not to warrant habeas corpus relief. Other areas in which the Third Circuit has noted that the exercise of supervisory power enables it to apply different standards in a direct appeal of a federal case from those employed in reviewing state court convictions are the application of the exclusionary rule resulting from illegal detention; the delay between arrest and arraignment which violates a state statute; the propriety of questions on voir dire designed to elicit racial prejudice; and prosecutorial conduct during summation.

130. Id. § 2254(a)(1).
131. 450 F.2d 1082 (3d Cir. 1971).
132. Id. at 1084.
133. 616 F.2d 1251 (3d Cir.), cert. denied, 446 U.S. 944 (1980).
134. 616 F.2d at 1255-57, 1259.

   Russo and Bisignano assert that any confession made during an illegal detention is inadmissible at trial. There is no doubt that the detentions were illegal under New Jersey law, ... and that the Newark police force disregarded the rights secured to an arrested person under the law of New Jersey. The petitioners-appellants press the point that the circumstances under which their confessions were obtained transgressed the rights secured to them by the Fourteenth Amendment and therefore were inadmissible in evidence. While it is the rule in federal prosecutions that confessions obtained in these circumstances must be suppressed, ... this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecutions and does not rise to the dignity of a constitutional prohibition.

   Id. (citations omitted).
138. See United States ex rel. Perry v. Mulligan, 544 F.2d 674 (3d Cir. 1976), cert. denied, 430 U.S. 972 (1977). The Third Circuit in Mulligan noted that in cases arising under 28 U.S.C. § 2254 (1971), "our review of the state court proceedings is narrow for 'not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a failure..."
The Third Circuit has also recognized that as an intermediate appellate court, its ability to exercise supervisory power is limited by Supreme Court precedent. In addressing the defendant's contention that, under the circumstances, law enforcement officials should have employed a line-up instead of a pretrial photographic identification, the court drove the point home, stating: "Conceding that this would have been the ideal procedure, we nevertheless think the Supreme Court has already implied that the substitution of lineups for photographic procedures is neither constitutionally required nor mandated under our supervisory power." 139

IV. ANALYTIC FRAMEWORK

A. Introduction

The preceding discussion of the sources and limits of supervisory power provides some guidance in determining whether a particular exercise of supervisory power is appropriate. Simply stated, an intermediate appellate court may not exceed its particular function in the judicial system of correcting errors of law, reversing erroneous findings of fact, and improving the judicial process. Further, even if a court of appeals is acting within an area of traditional judicial competence or performing its allocated function, any given exercise of supervisory power may be precluded by the limitations discussed above.

Assuming that a court has not exceeded these external limitations, the question remains as to when an appellate court can properly exercise supervisory power. In the Third Circuit, this question usually arises when the court engages in procedural rule-making in areas already addressed by congressionally-approved rules, or when the court employs procedural innovation to develop procedural requirements or sanctions in areas not addressed by the federal rules of procedure. 140 Two issues emerge when the court

139. See United States v. Hall, 437 F.2d 248, 249 (3d Cir.), cert. denied, 402 U.S. 976 (1971); see also United States ex rel. Reed v. Anderson, 461 F.2d 799 (3d Cir. 1972). For other examples of Third Circuit recognition that its supervisory power is precluded by the Supreme Court's exercise of supervisory power, binding it as controlling precedent, see Government of Virgin Islands v. Romain, 600 F.2d 435 (3d Cir. 1979); Bennerson v. Joseph, 583 F.2d 633 (3d Cir. 1978).

140. For a further explanation of the terms "procedural rulemaking" and "procedural innovation," see note 16 supra.
acts under these circumstances. First, has the power to make rules in the particular context been allocated to the court of appeals or has it been lodged elsewhere? Second, even if the power does rest with another body, do the circumstances nevertheless require the court of appeals to act?

The first issue is easily answered. Congress has directed that another process or institution formulate procedural rules.\textsuperscript{141} The procedural arena has been preempted, and the power has been allocated to a rulemaker other than a panel of intermediate appellate court judges. It follows that most exercises of supervisory power in matters of procedure are invalid.

Although many of the court's exercises of supervisory power in the procedural context are illegitimate, it does not necessarily mean that the power should never be exercised. There are three categories of cases involving the exercise of supervisory power over procedural matters. First, a court of appeals cannot exercise supervisory power to require anything contrary to the federal rules, no matter how compelling the rationale. Not only has the rulemaking power been placed elsewhere, but the appellate court must conform to the higher authority, and may not do anything inconsistent with that authority.

The second category consists of those cases where the rulemaker has promulgated a rule, but there is a perceived need for supplementation going beyond judicial interpretation. In such circumstances, both the district court and court of appeals are confronted with a dilemma. Presumably, they cannot supplement the rule because the rulemaking power has been allocated to others and a rule, although not completely satisfactory, has been promulgated. Exercises of supervisory power to supplement a rule in such circumstances are clearly invalid. Yet to prohibit supplementation would mean a virtual end to rule experimentation and would ultimately result in stagnation. Procedural rules which are unresponsive to the changing demands of litigation are not attractive alternatives to invalid exercises of supervisory power. On the other hand, rule supplementation through such an invalid exercise can result in unanticipated, and possibly undesirable results which would not have occurred in the absence of tampering with an established rule. On balance, experimental rule supplementation through the exercise of supervisory power would seem preferable. It is essential, however, that a mechanism be developed to legi-

\textsuperscript{141} An explanation of the procedural rulemaking mechanism may be found at notes 143-53 and accompanying text \textit{infra}. 
imize otherwise invalid exercises of supervisory power. Such a mechanism would not only legitimize these exercises to accomplish rule supplementation, but also would provide a mechanism for eliminating undesirable supplements to the rules.

Finally, in the third category are those cases where the rule-maker has failed to promulgate a rule and a procedural void results. Resort to judicial innovation is necessary to cure such a default. Failure to act on the part of the court might deprive litigants of procedural devices which would otherwise enhance the judicial process. In this situation, there seems to be no alternative but for a district judge to formulate a procedural rule which seems appropriate, with review in the court of appeals under its supervisory power. If the district court fails to formulate a satisfactory procedure, the court of appeals, in the course of review, must specify an appropriate procedure. An exercise of supervisory power in this category is legitimate if it involves a matter touching upon the traditional competence of courts or aids the court in the discharge of its appellate function. All other exercises of supervisory power are no more valid than in rule supplementation. The difference between such procedural innovation and rule supplementation is simply a matter of degree. Thus, although such exercises are treated as a separate category, the mechanism proposed to legitimize rule supplementation should also be used to legitimize those exercises within the third category which do not involve matters within the traditional competence of the courts or aid the court in the discharge of its appellate function.

The key assumption underlying the preceding analytic framework is that which underlies this article, specifically that federal courts of appeals may not exercise supervisory power unless there is a grant of authority from some other source. This view is predicated upon the need to identify a legitimizing source for each exercise of supervisory power. As a consequence, in the procedural context, most exercises of supervisory power by the Third Circuit are illegitimate because the power to make these rules has been placed elsewhere, and the court can usually point to no authority which permits it to contravene, supplement, or create federal rules.

There is, however, an alternative analysis to this "narrow" theory of appellate court supervisory power. A broader view of supervisory power would legitimize most, but not all, exercises by the Third Circuit. This "broad" theory does not insist upon a rigid legitimizing source for the exercise of supervisory power. Instead, it assumes the legitimacy of supervisory power by recog-
nizing that courts have long been policy and law makers in the substantive arena, and argues that such functions should apply in the procedural arena as well. In short, the broad theory envisions the use of supervisory power as simply an exercise of common law authority to fill in the interstices of procedural codes, including the ability to formulate a procedural rule where the rulemaker has failed to act.

The unlimited scope of common law authority is a fundamental defect in this broad view of the nature of the supervisory power. The only limitation on the exercise of this power, beyond such external constraints as the concepts of separation of powers and federalism, is found in the requirement that the court show the proper degree of deference to rules established by higher authority. Thus, each exercise of appellate supervisory power would be valid unless Congress or the Supreme Court, through statutes, decisions, or formally promulgated rules, has explicitly or implicitly provided for a contrary result. Stating the proposition exposes its weakness—should intermediate appellate courts have virtually unbridled rulemaking power when Congress has placed that power in other institutions?

Notwithstanding its deficiency, the broad theory of supervisory power is not without its attractions. Its principal advantages are its simplicity, and the fact that it does not require a cumbersome mechanism to legitimize exercises of supervisory power. Under this broad theory, courts of appeals retain a great deal of flexibility in addressing procedural problems arising within their respective circuits. Rather than wait for official rulemaking through the time-consuming and many-tiered system currently in force, the courts can act quickly and fashion specific rules to enhance the administration of justice. The appellate courts are, therefore, free to implement policy decisions which would further the ends desired by the rules.

Applying both theories to the cases serves as a valuable aid to understanding the Third Circuit's approach to supervisory power. Under either theory, Third Circuit exercise of supervisory power is invalid when it requires a result contrary to that contemplated by the federal rules. However, in those situations where the rulemaker has promulgated a rule, but there is a need for supplementation going beyond judicial interpretation, the choice of supervisory power theory controls the legitimacy of the exercise of supervisory power. Under the narrow theory of supervisory power, all such

142. See Hill, supra note 39, at 196.
exercises are invalid because authority to supplement procedural rules has been allocated to another rulemaker, but a legitimizing mechanism is proposed. On the other hand, the broad theory views most, but not all, actual or proposed rule supplementation as valid exercises of supervisory power. Under this approach, unless higher authority dictates otherwise, courts of appeals have carte blanche authority to engraft anything they wish onto existing federal rules as part of their common law function to implement the purpose of any particular rule. Applying the two theories to the third category of cases in which the rulemaker has failed to exercise its power yields mixed consequences. Under the narrow theory, such exercises are invalid unless the subject is within an area of traditional judicial competence or in the discharge of the court's appellate function. Under the broad theory, all such exercises of supervisory power are valid in the absence of higher authority to which deference is required.

B. The Exercise of Supervisory Power in Procedural Contexts

Federal court rules adopted pursuant to statutorily authorized processes are the means used to govern procedure in the federal judicial system. It is in this area of procedure that the most subtle supervisory power questions surface. The Third Circuit's exercise of supervisory power in areas reserved to the statutory process has created significant problems of legitimacy.

The process by which rules are adopted is a cumbersome one. The responsibility for initiating such rules rests primarily with the Judicial Conference of the United States.143 Congress has expressly required that the Conference "carry on a continuous study of the operation and effect of the general rules of practice and procedure" of the federal courts, and recommend to the Supreme Court such changes "as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustified expense and delay."144 Within the Judicial Conference, federal court rulemaking is generally initiated by the appropriate Judicial Conference Advisory Committee, assisted by a reporter.145

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143. See 28 U.S.C. § 331 (1976). The Judicial Conference of the United States is chaired by the Chief Justice of the Supreme Court and consists of the chief judges of the twelve circuits, the chief judges of the Court of Claims and the Court of Customs and Patent Appeals, and eleven district judges. Id.

144. Id.

145. See W. Brown, Federal Rulemaking: Problems & Possibilities 9-11 (Federal Judicial Center 1981). Advisory committees have been established for civil, criminal, appellate, and bankruptcy rules.
mittee considers the reporter's proposals and eventually circulates a committee draft for public comment and possible hearings. The process may be repeated until the Committee is satisfied with its product. The Advisory Committee then refers the proposed amendments to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. That Committee may accept the proposed rule amendments as presented, may make technical changes in the rule, or may refer it back to the Advisory Committee for further study. Ultimately, the Standing Committee determines whether the proposed amendments should be submitted to the next decision-making body.

At this point, the proposed rule must run a statutory gauntlet requiring three separate sequential approvals before changes, deletions, or additions become effective. First, the Judicial Conference of the United States must approve the amendments and recommend them to the Supreme Court for its consideration. The Supreme Court may adopt, modify, or reject the proposed rule amendments. Assuming a favorable reception, the Supreme Court, exercising its rulemaking power, must recommend the amendments to Congress. Finally, in most instances, the rules may not take effect until ninety days after the Chief Justice has reported them to Congress. Congress may defer the effective date of the proposed rules, or modify the rules, and in some instances must expressly approve amendments.

146. See id. at 16-23.

147. See id. at 25-29.


149. Title 28, section 2071 provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. § 2071 (1976).


151. The statutory provision for rules of evidence permits either house of Congress to disapprove such amendments during the 180-day period and thereby prevent them from taking effect. 28 U.S.C. § 2076 (1976). In addition, either house may defer an effective date or require congressional approval before a rule can take effect. Id. Any rule addressing privilege expressly requires such approval. Id. The statute further provides that any rule may be amended by Act of Congress. Id.
Although the rulemaking process for the federal courts is time-consuming and cumbersome, its principal advantage is that it is designed to obtain all points of view, and is subject to the political process. The process also legitimizes judicial supervision of procedure because it is a statutorily authorized means of establishing that procedure. In addition, this method of adopting federal court rules ensures uniformity of procedure in the federal judicial system.

Independent exercises of supervisory power by twelve circuit courts of appeals conflict with the goal of uniformity. More fundamentally, Congress has placed the federal court rulemaking

152. For instance, the work by an Advisory Committee on the Federal Rules of Evidence began in 1965. Congress adopted the evidence rules ten years later. The revision of the criminal rules adopted in 1979 took five years and seven months from the first circulation of drafts to its enactment. Certain amendments to the civil rules took two years and nine months from initiation of the process to their effective date. The most recent amendments to some of the criminal rules took one and one-half years, but Congress deferred consideration of some amendments. See W. Brown, supra note 145, at 60-61 and app. The federal court rulemaking process is currently under reevaluation. See generally id.

153. The Supreme Court has acknowledged that Congress can control procedure in the federal court system. See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."); Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835) (Congress "power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceedings in [federal] courts"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 19 (1825) (Congress can regulate practice of courts).


The limits of such congressional control were outlined in United States v. Klein, 80 U.S. (13 Wall) 128 (1871). In that case, Congress attempted to force the courts to decide a factual issue as directed under threat of loss of jurisdiction. Id. at 145. In a prior case the Supreme Court had held that a presidential pardon was sufficient proof of loyalty for purposes of recovering the proceeds from a government sale of private property during the Civil War. Id. at 143. Pending the government's appeal from an adverse judgment, Congress passed an act which provided that such pardons would not be admissible as proof of loyalty, and that acceptance without protest or disclaimer of a pardon reciting that the recipient took part in or supported the rebellion would be conclusive evidence of disloyalty. Id. The statute instructed the Court of Claims and the Supreme Court to dismiss for lack of jurisdiction any pending claims based on such a pardon. Id. at 143. The Klein Court overruled the statute on the ground that in forbidding the Court to give the effect to evidence which in its own judgment the Court believed such evidence should have and directing it to give it a precisely contrary effect, Congress "inadvertently passed the limit which separates the legislative from the judicial power." Id. at 147.
power in institutions other than three member panels of appellate judges. For this reason, a court of appeals should not exercise its supervisory power to engage in this kind of rulemaking, and, to the extent it does so, the exercise of supervisory power is illegitimate.

As noted above, the exercise of supervisory power in the procedural arena by the Third Circuit can be divided roughly into three categories. The exercise or proposed exercise of supervisory power by the Third Circuit in each of these categories will be examined.


In two separate areas, the Third Circuit has exercised supervisory power to require district courts and litigants within the circuit to conduct litigation in a manner proscribed by the federal court rules. First, it has directed district courts to make findings of fact and conclusions of law under circumstances in which Rule 52(a) of the Federal Rules of Civil Procedure expressly states that such findings are unnecessary. For example, in Coastal States Gas Corp. v. Department of Energy, the Third Circuit reversed a district court ruling which had ordered the immediate disclosure of documents sought under the Freedom of Information Act (FOIA). At issue was a revised Vaughn index, which the Department of Energy (DOE) had filed one day prior to a hearing on Coastal's motion for partial judgment. The district court granted Coastal's motion to strike the revised index, holding that DOE's initial index was deficient, and ordered the documents released. In reversing this ruling, the Third Circuit noted that "the absence of any factual findings in the present case renders appellate review most difficult." Recognizing that Rule 52(a) negates any obligation to make factual findings in summary judgment dispositi-

154. For the text of Rule 52(a), see note 161 infra.
157. A Vaughn index is a procedural tool developed to enable a district court to evaluate government allegations of exemption under the FOIA and to ensure that claimed exemptions are justified under the Act. Coastal States Gas Corp. v. Department of Energy, 644 F.2d at 972; see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).
158. Coastal States Gas Corp. v. Department of Energy, 644 F.2d at 973.
159. 495 F. Supp. at 1180.
160. Id. at 980.
tions, the court characterized the action as an interlocutory injunction, “for which findings of fact and conclusions of law must be set forth.” The court then exercised its supervisory power to require district courts in the future “to state explicitly the legal basis as well as the findings that are necessary to demonstrate that the documents are exempt or disclosable under the FOIA,” explaining that “[a]rticulating such conclusions is, in a sense, implicit in the statutory duty of de novo review.”

This ruling directly contravenes Rule 52(a). Presumably, Congress was aware of Rule 52(a)’s requirement when it passed the FOIA, yet at no time did it propose that FOIA actions of this type not be governed by the federal rules. The Third Circuit cited no persuasive authority in the federal rules for its action, nor could it do so. In short, the Third Circuit’s exercise of supervisory power was in direct contradiction of the federal rules.

Second, in a series of cases beginning in 1967, the court has directed that civil rights complaints, especially those drafted by

161. Rule 52(a) provides:
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the courts shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). 

Fed. R. Civ. P. 52(a) (emphasis added).

162. 644 F.2d at 980. The Third Circuit obfuscated the procedural posture to avoid direct contravention of Rule 52(a). After initially recognizing the district court had before it plaintiff’s “motion for partial judgment,” it proceeded to label the matter before it an interlocutory injunction. Id. at 971, 980. Seemingly as an afterthought the court noted: “It may also be a ‘case not fully adjudicated on the merits’ for purposes of Rule 56(d), which similarly requires the district court ‘if practicable [to] ascertain what material facts exist without substantial controversy.’” Id. at 980 n.54.

163. Id. at 980.

164. Id. (footnote omitted).

165. The author of the Third Circuit opinion expressly recognized “that Rule 52(a) removes from the district judge any obligation to make findings of fact and conclusions of law in Rule 56 summary judgment dispositions . . . .” Id. at 980 (footnote omitted). Although the language is limited to summary judgment, it can safely be assumed that the “any other motion” language of the last sentence of Rule 52 had not gone unnoticed.
experienced counsel, be pleaded with specificity, even though Rules 8(a)(2) and 9(b) of the Federal Rules of Civil Procedure, when read together, limit the requirement of pleading with particularity to four specific instances.\(^{166}\) Rule 8(a) of the federal rules\(^ {167}\) directs the implementation of the notice pleading philosophy of the Federal Rules of Civil Procedure. Rule 8(a) simply states: “A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”\(^ {168}\) Moreover, Rule 9 of the Federal Rules of Civil Procedure explicitly provides that the only matters which must be pleaded with particularity are fraud, mistake, and denial of performance or occurrence of a condition precedent.\(^ {169}\) The requirement that a complaint set forth the factual basis for an allegation of a deprivation of a civil right in order to survive a motion to dismiss constitutes the imposition of a particularity requirement in direct contravention of the Federal Rules of Civil Procedure.

The Third Circuit has justified this requirement as enhancing the administration of justice within the circuit. In Rotolo v. Borough of Charleroi,\(^ {170}\) the court explained:

> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public

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166. See, e.g., Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978) (complaint sufficient to give notice of claims asserted); Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976) (per curiam) (requiring district court to provide plaintiff opportunity to amend defective complaint); Robinson v. McCorkle, 462 F.2d 111 (8th Cir.) (upholding dismissal of complaint for mere conclusory allegations of constitutional deprivation), cert. denied, 409 U.S. 1042 (1972); Kaufman v. Moss, 420 F.2d 1270 (3d Cir.) (requiring district court to permit amendment of conclusory complaint), cert. denied, 400 U.S. 846 (1970); Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967) (complaint insufficient because broad and conclusory).

167. Rule 8(a) provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.


168. Id.


170. 532 F.2d 920 (3d Cir. 1976) (per curiam).
officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.\footnote{171}

The dissent criticized this rationale as reflecting nothing more than "hostility to the assertion of civil rights against authority figures," \footnote{172} and accurately characterized the majority's holding as departing from the pleading standards of Rule 8.\footnote{178}

When the Third Circuit requires district courts and litigants to eschew the rules, it has arrogated unto itself power reserved by Congress to other institutions. Regardless of whether one begins with an analytic framework predicated upon a broad or narrow view of appellate court power, the conclusion is the same. The Third Circuit has abused its supervisory power when it employs that power to contravene the federal rules.

2. The Third Circuit's Exercise of Supervisory Power in Supplementation of Federal Court Rules

For the most part, the Third Circuit has not exercised its supervisory power in a manner contrary to federal court rules. In criminal matters, it has tended to supplement the federal court rules with additional requirements. It has exercised or implicated its supervisory power to supplement the requirements of Federal Rules of Criminal Procedure 6(e)(1), 11, 24(a), and 32. In the civil area, the Third Circuit has declined to exercise its supervisory power with respect to notice in class actions under Rule 23 of the Federal Rules of Civil Procedure.

a. Rule 6(e)(1) of the Federal Rules of Criminal Procedure

Prior to the 1979 amendments, the Federal Rules of Criminal Procedure did not require that grand jury proceedings be recorded.\footnote{174} In four of the five districts within the Third Circuit,\footnote{171 Id. at 922, quoting Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3d Cir. 1970).} 172 Id. at 925 (Gibbons, J., concurring in part and dissenting in part). 173 Id.

174 In 1979 Rule 6 was amended to include a new Rule 6(e)(1) which requires recordation of all grand jury testimony. Rule 6(a)(1) provides:

(1) Recording of Proceedings—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically
testimony of lay witnesses was routinely recorded, but that of
government agents was not.176 In the remaining district, the
Middle District of Pennsylvania, the general practice was not to
record any grand jury testimony. In 1974, five years before the
amended rules requiring recordation took effect, the Third Circuit,
in an effort to put defendants on a parity with the Government,
adopted a requirement that if any grand jury testimony was to be
recorded, all such testimony must be recorded.178 Although it did
not mention supervisory power in supplementing the federal rules,
the Third Circuit changed the prevailing practice in the district
courts through judicial procedural rulemaking. It is noteworthy
that the court expressly stated that it did not consider it "desirable"
to require the recording of all grand jury testimony at that time
because the Advisory Committee of the Judicial Conference was
then considering the question.177 As will be seen in other examples
involving supplementation of federal court rules, the persistent
question which the court has failed to address is not one of de-
sirability, but rather one of legitimization.

b. Rule 11 of the Federal Rules of Criminal Procedure

The Third Circuit frequently has considered using its super-
visory power as a method of supplementing Rule 11 of the Federal
Rules of Criminal Procedure. Its rulings have addressed four dis-
tinct areas: 1) imposition of a prophylactic rule setting aside guilty
pleas; 2) adoption of written guilty plea forms; 3) additions to the
Rule 11 litany coupled with an oath requirement; and 4) use of
conditional plea agreements.178

or by an electronic recording device. An unintentional failure of
any recording to reproduce all or any portion of a proceeding shall
not affect the validity of the prosecution. The recording or reporter's
notes or any transcript prepared therefrom shall remain in the custody
or control of the attorney for the government unless otherwise ordered
by the court in a particular case.


175. See United States v. Crutchley, 502 F.2d 1195, 1200 (3d Cir. 1974).
The districts were the Districts of Delaware, New Jersey, and the Eastern and
Western Districts of Pennsylvania. Id.

176. Id.

177. Id. at 1200 n.5.

178. Conditional plea agreements are an excellent illustration of the in-
evitability of overlap in the classification of the varied types of exercise of
intermediate appellate court supervisory power. Because the Third Circuit has
been so active in exercising its supervisory power in connection with Rule 11,
conditional plea agreements have been categorized in this analysis as falling
within supplementation of federal court rules, rather than under the heading
of subject areas not currently addressed by Congress, although that category
The Third Circuit has indicated that it considers Rule 11 guilty pleas to be a proper area for the exercise of supervisory power. In United States v. Carter, the court vacated a plea because the district court had violated Rule 11(c) by failing to advise the defendant of his right to counsel and his right to confront and cross-examine witnesses. In so doing, the court noted its concern that appeals from improperly conducted Rule 11 proceedings had been filed with “disconcerting frequency.” Rather than impose a prophylactic rule, the Third Circuit simply urged the district courts to “pay particular attention to and to adhere carefully to all the requirements of Rule 11.” The court cautioned, would be equally if not more appropriate. Cf. notes 194-201 and accompanying text infra.

179. 619 F.2d 293 (3d Cir. 1980).
180. Id. at 294. Rule 11(c) provides:
    (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
    (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
    (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
    (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
    (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
    (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

FED. R. CRIM. P. 11(c).

181. 619 F.2d at 296.
182. Id. at 299. The court explained its concern:
On the one hand, a failure to properly apprise the criminal defendant of his rights leads to an unknowing, unintelligent and involuntary waiver. On the other hand, to the extent that improperly administered pleas generate and encourage appeals which are time consuming, burdensome and difficult to process, the societal interests in rehabilitation, speedy justice, swift punishment and deterrence are thwarted.

The harms caused by inexactitude and a lack of meaningful observance in implementing the rules are no longer acceptable. As we discuss below, these are rules which the Supreme Court has promul-
however, that "continued deviations from the provisions of Rule 11 . . . might very well require this court to take such action in the future." 183 The court further recommended, but did not require, the adoption of written guilty plea forms. 184

The method used by the appellate court to enlist district court compliance with Rule 11—warning of a possible prophylactic rule in the future coupled with suggesting the desirability of written plea agreements—cannot be faulted. 185 However, if the Third Circuit were to establish a prophylactic rule or require written plea agreements, the problem of identifying the source for a three-judge panel's authority to supplement formal federal rules would become apparent.

Not only has the Third Circuit hinted at the possibility of future rulemaking, but it has actually exercised its supervisory power to require an addendum to the Rule 11 litany. The cases leading to the development of this addendum are instructive in illustrating the Third Circuit's use of supervisory power. Before the adoption and effective date of the current form of Rule 11, the court had strongly suggested, in Paradiso v. United States, 186 that the district court inform the defendant that plea bargaining is approved by the court, and that the district court determine on the record whether plea negotiations had occurred. 187 Within a

gated and which Congress has endorsed in their joint effort to regulate and control the processing of guilty pleas.

183. Id. at 299.

184. Id. The court explained: "While at this time we do not require the adoption of written guilty plea forms, we believe that the use of such forms could only help in alleviating the problems which we have discussed." Id.

185. The merits of the proposed prophylactic rule and written plea agreements are beyond the scope of this article.

186. 482 F.2d 409 (3d Cir. 1973).

187. Id. at 413. The court explained:

We believe that it is appropriate at this time for the district courts to take similar prophylactic measures to cope with this problem. In connection with their Rule 11 inquiry on a plea of guilty, district judges should in essence inform the defendant that plea bargaining is specifically approved by the court and that he may truthfully inform the court of any plea negotiations "without the slightest fear of incurring disapproval of the court." Inquiry should also be made of counsel for the parties as to any plea negotiations. Should inquiry reveal the presence of plea negotiations, counsel for the parties should be required to state plainly the terms of record and the defendant should state of record whether he understands them and concurs. The court, of course, is not obligated to accept any recommendation or bargain reached by the parties, and it should so inform the defendant when any bargain is disclosed.
year, the Third Circuit further advised the district courts in *United States v. Valenciano* to inform and extract from defendants during the taking of a plea certain statements which might obviate the necessity for a post-conviction hearing under section 2255, the federal habeas corpus provision. Shortly thereafter, the Third Circuit apparently made these "suggestions" mandatory. In *United States v. Hawthorne*, the court asserted:

Considering the increasing number of applications for withdrawal of guilty pleas predicated on "promises," "representations," "predictions" and the like, allegedly made by defense counsel to defendants, it now becomes apparent that what we may have once considered merely an advisable measure for Rule 11 proceedings has now become imperative. We believe that the district courts should place defendants under oath for the Rule 11 proceedings, and that the *Paradiso* and *Valenciano* advice and disclaimers should be included as well.

These requirements appear nowhere in Rule 11. Finally, in a fourth case, the Third Circuit relied upon its supervisory power to require courts to follow the *Paradiso* procedure and to commit any plea bargain to the record.

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*Id.* Many of these suggestions have been incorporated into the current rule. See *Fed. R. Crim. P. 11(d)* (voluntariness of plea); *Fed. R. Crim. P. 11(c)(2)* (disclosure of plea agreements in open court).

188. 495 F.2d 585 (3d Cir. 1974).

189. Specifically, the court stated:

A showing in the Rule 11 plea reception proceeding may, under certain circumstances, obviate subsequent § 2255 hearing if the plea reception record discloses that (1) the defendant states that no promise, representation, agreement or understanding was made or that none other than that disclosed in open court was made to him by any person prior to the entry of the plea, and (2) the defendant affirmatively states that no out-of-court promise, representation, agreement or understanding required the defendant to respond untruthfully or contrary to the terms thereof in the in-court plea reception proceedings, and (3) that the defendant understands that he may not at a later time contend that any promise, representation, agreement or understanding was made by any person other than that set forth in open court.

*Id.* at 587-88. See also 28 U.S.C. § 2255 (1976).

190. 502 F.2d 1183 (3d Cir. 1974).

191. *Id.* at 1188.

192. *United States v. Dixon*, 504 F.2d 69 (3d Cir. 1974), cert. denied, 420 U.S. 963 (1975). The court held: "Under our supervisory powers we therefore instruct the district courts of this circuit that they are henceforth required to follow the *Paradiso* procedure, committing any plea bargain to the record at the time of arraignment in conjunction with the Rule 11 inquiry." *Id.* at 72. As can be seen, the above language only expressly requires the *Paradiso* procedure, and not the other additions outlined above. As a practical matter, however, the Third Circuit addendum to the Rule 11 litany cannot be separated from the rest of the litany.
The objective of the Third Circuit's addendum to Rule 11(c) and its oath requirement is the conservation of judicial and litigant resources at the appellate level by both reducing and simplifying the disposition of direct appeals and post-conviction relief. The merits of these exercises are beyond the scope of this article, but one troublesome point remains. As earlier noted, the Third Circuit's solution to this vexing problem suffers from the serious drawback of its questionable legitimacy.

Finally, the Third Circuit has exercised its supervisory power to supplement Rule 11 to permit the taking of conditional pleas. A conditional plea is a procedure whereby a defendant enters a plea of guilty, while at the same time preserving his right to appeal specific pretrial determinations. The Third Circuit first approved the conditional guilty plea procedure in 1970, thereby permitting a defendant to preserve for appeal his right to question the constitutionality of a criminal statute. Four years later, openly predating its holding on its supervisory power, the Third Circuit explicitly endorsed the use of this procedure when the issue to be preserved was not a constitutional question, but rather the applicability of a statute of limitations. In 1978, the court pushed the procedure to new frontiers by endorsing its use to preserve challenges to six non-dispositive pretrial suppression rul-

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193. The court in Paradiso explained its rationale: "Compliance with this procedure should avoid ostensible claims by defendants of unfairness in the guilty plea process and minimize the escalating number of cases complaining of aborted plea bargains, involuntary pleas, or frustrated plea expectations." Paradiso v. United States, 482 F.2d at 413. In Valenciano the court voiced its concern with post-conviction proceedings: "While such disclaimers may not obviate the necessity of subsequent § 2255 evidentiary hearings in all cases, it may be prudent for defense counsel, prosecutor, or the court to elicit such disclaimers from the defendant at the time of the reception of the guilty plea." United States v. Valenciano, 495 F.2d at 588.

194. Presumably the same procedure would also be applicable to a plea of nolo contendere.


196. Id. at 53. The defendant wished to challenge the constitutionality of 18 U.S.C. § 1952. 436 F.2d at 53. The Third Circuit upheld the statute on appeal. Id. at 55.

197. United States v. Zudick, 523 F.2d 848, 851-52 (3d Cir. 1975). The court explained:

We have not hesitated in the past to express, in the exercise of our supervisory powers, what would best further the administration of criminal justice within this Judicial Circuit... Having found neither jurisprudential nor prudential impediment to doing so, we endorse the use of the conditional guilty plea in appropriate circumstances; and we have no problem concluding that appellant properly preserved the statute of limitations issue for review.

Id. at 852 (citation omitted).
The Federal Rules of Criminal Procedure have yet to sanction conditional plea procedures, and the Supreme Court has recently noted that it "express[es] no view on the propriety of such conditional pleas." 

The Third Circuit is not the only court to have grappled with this problem. Predictably, efforts by other courts to supplement Rule 11 have hopelessly split the circuits. Although the merits of the conditional plea agreement are beyond the scope of this article, it is clear that this judicial supplementation circumvents the statutory procedure for amending the federal rules of procedure.

198. United States v. Moskow, 588 F.2d 882 (3d Cir. 1978). The court stated that the rule of employing conditional pleas in appropriate circumstances was "based on our confidence in the proper exercise of discretion by the district judges in this circuit." Id. at 890. A vigorous dissent argued that permitting conditional pleas under these circumstances would have the effect of permitting interlocutory appeals to test the admissibility of evidence. Id. at 893 (Stern, J., dissenting).

199. New proposed Rule 11(a)(2) of the October 1981 Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure circulated by the Standing Committee on Rules of Practicce and Procedure of the Judicial Conference provides:

(2) Conditional pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be afforded the opportunity to withdraw his plea.


200. United States v. Morrison, 449 U.S. 361, 363 n.1 (1981). This case, which came from the Third Circuit and had employed the conditional plea device, was reversed on other grounds. Id. at 367.

201. The committee which considered the rule has noted:

In the absence of specific authorization by statute or rule for a conditional plea, the circuits have divided on the permissibility of the practice. Two circuits have actually approved the entry of conditional pleas, United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Moskow, 588 F.2d 882 (3d Cir. 1978); and two others have praised the conditional plea concept, United States v. Clark, 459 F.2d 977 (8th Cir. 1972); United States v. Dorsey, 449 F.2d 1104 (D.C. Cir. 1971). Three circuits have expressed the view that a conditional plea is logically inconsistent and thus improper, United States v. Brown, 499 F.2d 829 (7th Cir. 1974); United States v. Sepe, 472 F.2d 784, aff'd en banc, 486 F.2d 1044 (5th Cir. 1973); United States v. Cox, 464 F.2d 937 (6th Cir. 1972); three others have determined only that conditional pleas are not now authorized in the federal system, United States v. Benson, 579 F.2d 508 (9th Cir. 1978); United States v. Noonr, 565 F.2d 655 (10th Cir. 1977); United States v. Matthews, 472 F.2d 1175 (4th Cir. 1972); while one circuit has reserved judgment on the issue, United States v. Warwar, 478 F.2d 1183 (1st Cir. 1973).

PROPOSED AMENDMENTS, supra note 199, at 21, advisory committee note.
and therefore must be of questionable validity even if considered desirable.

c. Rule 24(a) of the Federal Rules of Criminal Procedure

The Third Circuit has also relied upon its supervisory power to aid district courts in establishing a procedure for conducting voir dire. Specifically, it has engrafted onto Rule 24(a) the recommendation that individual veniremen be isolated during voir dire to avoid contamination of the panel when there has been extensive pretrial publicity. Without addressing the desirability

202. Rule 24(a) provides:

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.


203. See United States v. Starks, 515 F.2d 112 (3d Cir. 1975); United States v. Addonizio, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972). In *Addonizio* there was no question that the Third Circuit relied upon its supervisory power:

> We feel impelled to add, however, that we find much merit in the method of voir dire recommended in the American Bar Association’s Standards Relating to Fair Trial and Free Press, § 3.4(a) (Approved Draft, March 1968). As an exercise of our supervisory powers over the district courts in this circuit, therefore, we recommend that in cases hereafter in which there is, in the opinion of the court a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. **The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial.**

451 F.2d at 67. In *Starks*, the court quoted the above language from *Addonizio* but then went on to state:

> In a case with serious racial and religious undertones and where the court is facing a ten-day trial, good sense would seem to suggest that the court adopt the practice of individual examination so that defense counsel may be in a position to make individualized judgments with respect to peremptory challenges. A small amount of time would be involved, when compared with the possibility of a new trial. While on this record we do not hold that the trial court abused its discretion, we are able to perceive of situations in which we might so decide. Total judicial resources will more likely be preserved by a cautious deference to the interest of the defendants in an unbiased jury.

515 F.2d at 125 (footnote omitted). Thus it is unclear whether the subsequent *Starks* panel abandoned supervisory power as a basis for decision, relying instead on an abuse of discretion standard.
of this supplement to Rule 24, it must again be noted that its legitimacy remains in doubt.

d. Rule 32 of the Federal Rules of Criminal Procedure

Rule 32, which governs sentence and judgment, does not require judges to explain the reasons for the sentences which they impose. On at least two occasions, one member of the Third Circuit has urged that court to exercise its supervisory power to supplement Rule 32 by requiring district judges within the circuit to articulate reasons for sentences. It is clear that he contemplates a requirement which would also formulate the type of explanation required.

This view is noteworthy even though it has yet to command a majority of a Third Circuit panel. The opinions cite no authority to justify such appellate involvement in sentencing, which is a duty currently reserved by statute and rule to the district judge. Under existing case law, the court’s review is limited to determining whether the sentence is within the statutory maximum, unless there is a demonstration of illegality or abuse of discretion. Unlike the

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204. See Fed. R. Crim. P. 32.


Although this Court was not asked by the parties to adopt a rule that the reasons for sentences should be given in all cases, in my view, the procedural requirement of a statement of reasons should be adopted for future cases.

[The time is now ripe to require, on the basis of our supervisory power over district courts in this Circuit, that trial judges set forth the reasons for the sentences they impose.

United States v. Bazzano, 570 F.2d at 1130, 1137-38 (Adams, J., concurring) (emphasis in original) (footnotes omitted). He reasserted his position in Del Piano:

Accordingly, I write separately to urge my colleagues, once again, to adopt a rule, pursuant to our supervisory power, that would require trial judges to explain the reasons for the sentence being imposed, at least when the circumstances are such that one might justifiably expect the defendant to receive a substantially lighter or substantially heavier sentence.

United States v. Del Piano, 598 F.2d at 541 (Adams, J., concurring).

206. See United States v. Bazzano, 570 F.2d 1120, 1138 n.44 (3d Cir. 1977) (Adams, J., concurring). Judge Adams stated: “The additional question of what sort of explanation is required in certain circumstances is a matter worthy of separate consideration in an appropriate case.” Id. at 1138 n.44 (Adams, J., concurring). The merits of his proposed rule are beyond the scope of this article.

207. Id. at 1131 (Adams, J., concurring), citing United States v. Fessler, 453 F.2d 953, 954 (3d Cir. 1972).
other supplements to federal court rules discussed above, this particular exercise of supervisory power would enlarge the court of appeals' function and power under the rubric of that court discharging its "responsibility to superintend the sentencing process." This enlargement of power, which would exceed the statutory function of the appellate court, may explain why this proposal has never claimed a panel majority.

e. Rule 23 of the Federal Rules of Civil Procedure

Third Circuit supplementation of federal rules generally takes place only in the criminal area. However, the subject has surfaced in a published opinion relating to the supplementation of Rule 23(b)(2) of the civil rules. In *Wetzel v. Liberty Mutual Insurance Co.*, a defendant in a class action suit urged "that if the action is maintainable under (b)(2), [the Third Circuit] should hold that notice should have been given prior to determination of liability to all members of the class, . . . under [its] supervisory powers over the circuit district courts . . . ." After concluding on the merits that its supervisory power should not be exercised, the court essentially relied upon its lack of power to supplement federal court rules. The court stated:

Rule 23 definitely does not require mandatory notice for (b)(2) actions. By its terms, the mandatory notice

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[T]he principle of deferring to the discretion of a trial court clearly does not require abdication of an appellate court's responsibility to superintend the sentencing process. Moreover, respect for a district court's discretion in framing the substance of sentences within statutory limits entails no lack of power to review sentencing procedures. Indeed, "the careful scrutiny of the judicial process by which the particular punishment was determined" is "a necessary incident of what has always been appropriate appellate review of criminal cases."

570 F.2d at 1131 (emphasis in original) (footnote omitted).

209. Rule 23(b)(2) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

... (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.


210. *Id.* at 254. Rule 23(c)(2) requires such notice to be given in actions maintained under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2).
requirement of (c)(2) applies only to actions maintained under (b)(3).

Whether the court should require notice to be given to members of the class to make a determination [of whether a class should be maintained under (b)(2)] or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

*We will not presume to exercise supervisory powers, as urged upon us by counsel . . . , to mandate notice which the Federal Rules of Civil Procedure, promulgated by the Supreme Court under authority from Congress, 28 U.S.C. § 2072, specifically do not require.*

The rationale underlying the panel's unanimous response is both surprising and revealing. Unlike its approach in the criminal area, the Third Circuit apparently recognized a significant limitation on its power to supplement federal rules of civil procedure.


The Third Circuit's declining to exercise its supervisory power to supplement Rule 23 is readily contrasted with its position on Rule 37. In a recent decision involving the exercise of its supervisory power, the Third Circuit employed its power to supplement Rule 37(b) of the Federal Rules of Civil Procedure. In *Quality Prefabrication, Inc. v. Keating*,212 the plaintiff challenged the district court's refusal to reconsider its order pursuant to Rule 37 dismissing the complaint with prejudice as a sanction for plaintiff's failure to provide discovery, claiming that the district court abused its discretion in dismissing the complaint.213 Noting that the articulation of the basis for the district court's action would facilitate judicial review as to whether the court's discretion was soundly exercised,214 the Third Circuit stated:

> [E]xercising our supervisory authority over the district courts in this judicial circuit, we hold that in the future a dismissal of a complaint with prejudice as a Rule 37 sanction must be accompanied by some articulation

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211. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d at 254 (emphasis added) (citation omitted).
212. No. 81-2567 (3d Cir., Mar. 30, 1982).
213. Id., slip op. at 2-4. Rule 37(b)(2)(C) authorizes as sanctions for failure to comply with an order compelling discovery '[a]n order . . . dismissing the action or proceeding . . .' *Fed. R. Civ. P. 37(b)(2)(C)*.
214. No. 81-2567, slip op. at 6.
on the record of the court's resolution of the factual, legal, and discretionary issues presented.\textsuperscript{215}

In support of its imposition of this requirement upon the district courts, the Third Circuit stated that "[w]hen such a severe sanction [as dismissal] is imposed, values of consistency and predictability, reviewability, and deterrence . . . outweigh the values of economy and efficiency that may be promoted by allowing inarticulate decisions." Although the supplementation of Rule 37(b) in this manner may be desirable, this judicial action circumvents the statutory procedure for amending federal rules of procedure. Therefore, the Third Circuit's action in this matter is of questionable legitimacy.

g. Validity of Federal Rule Supplementation

The Third Circuit has frequently exercised its supervisory power to supplement the rules of criminal procedure. Unlike an individual district judge, who might be faced with a novel question emerging under a rule, the court of appeals necessarily has a far broader perspective on whether changes in substantive law and procedural imperfections or gaps require amendment of federal court rules. District courts, and ultimately the courts of appeals, are among the first to become aware of inadequacies in the federal court rules through actual experience. Moreover, the district courts are in a prime position to perform experimental supplementation of the rules under the supervision of the appellate courts. Furthermore, it is advantageous to have some limited experience under a proposed supplement to a rule before engaging in the cumbersome, time-consuming, formal rulemaking process. To do otherwise enhances the probability of adopting a rule which will not accomplish its objective. If the experimental supplement to a rule proves to be unworkable, the judicial system is not saddled with an ineffective formal federal court rule. On the other hand, if the experience under a rule supplement is notably successful, it should ultimately be adopted as a federal court rule with national applicability.\textsuperscript{216}

Notwithstanding the advantages of experimental rule supplementation, the fact remains that Congress has placed federal court

\textsuperscript{215} Id., slip op. at 9.

\textsuperscript{216} Examples which come readily to mind are the advice to defendants contained in Rule 11(c), which had its origins in experimental rule supplementation, and conditional plea agreements reflected in proposed rule of criminal procedure 11(a)(2). For a discussion of Rule 11(c), see notes 178-93 supra and accompanying text. For a discussion of Rule 11(a)(2), see notes 194-201 and accompanying text supra.
rulemaking power in institutions other than a panel of appellate judges. As a consequence, all federal court rule supplementation accomplished under the aegis of the Third Circuit's supervisory power is an illegitimate exercise of that power. The benefit to the judicial process from the experimental supplementation to federal court rules should nevertheless be preserved. The obvious answer is to devise a mechanism to legitimate the exercise of intermediate appellate court supervisory power in this limited area. A proposal to further that end is set out in Section IV of this article.

If one embraces the alternative analytic framework which presents a broad view of supervisory power, there is no need for a legitimizing mechanism. Moreover, the alternative approach yields dramatically different results with respect to the legitimacy of the exercise of supervisory power to supplement procedural rules. That approach does not treat intermediate appellate court supervisory power in terms of "power" to supplement a procedural rule, but instead examines whether the court has accorded the proper deference to rules established by higher authority. Under this standard, the legitimacy of each exercise of supervisory power to supplement formal court rules would depend upon whether the rule supplement is contrary to statutes, rules, or decisions of the Supreme Court. Applying this standard, the Third Circuit's supplementation of Federal Rules of Criminal Procedure 6(e)(1) and 24(a) would constitute legitimate exercises of its supervisory power. Adoption of written guilty plea forms, the addendum to the Rule 11 litany, and the use of conditional plea agreements, all in supplement of Rule 11, would also be valid exercises of its supervisory power. Finally, the proposed requirement of having district judges articulate the reasons for sentencing decisions would invalidly supplement Rule 32 because such an exercise would be contrary to the long-standing position of the Supreme Court against appellate review of sentences.

3. Exercise of Supervisory Power in Procedural Areas Not Currently Addressed by Federal Court Rule (Procedural Innovation)

As noted above, the federal court rulemaking power is vested in Congress. That institution has delegated its power to the

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217. See notes 174-77 and accompanying text supra.
218. See notes 202-03 and accompanying text supra.
219. See note 184 and accompanying text supra.
220. See notes 186-93 and accompanying text supra.
221. See notes 204-08 and accompanying text supra.
Supreme Court through enabling statutes, 222 retaining the right to accept, reject, or modify any proposed rule or amendment to existing rules. All procedural matters are potential subjects for the exercise of the Court's rulemaking power.

When the delegated rulemaking power has not been exercised, district and appellate courts find themselves in a difficult situation. These cases are distinguished from those falling within category two in that although the power to regulate procedure has been placed elsewhere, that power has not been exercised. As a consequence, the courts' inherent power derived from congressional intent in adopting the Court of Appeals Act—to regulate and improve the quality of the judicial process and ensure the ability to discharge its appellate function—can legitimize certain exercises of supervisory power. Even the rulemaker's default cannot justify those exercises which cannot be validated by reference to congressional intent. Therefore, the remaining cases in the third category also require a legitimizing mechanism.

A prime example of the void created by unexercised delegated rulemaking authority is provided by reference to the procedure followed in the imposition of a gag order. In United States v. Schiavo, 223 a divided Third Circuit, sitting en banc, addressed the issue of the procedure to be employed when issuing a gag order directed toward non-party mass communication media during an ongoing criminal trial. 224 The district court had issued an oral gag order without notice or an adequate prior hearing. 225 A plurality of the court, relying upon its supervisory power to impose procedural requirements, held that

\[ \text{[t]he district court should have vacated the oral order, held a prompt hearing after notice to the involved members of the press and parties, and if a silence order was deemed to be justified, reduced such order to writing with specific terms and reasons and had it entered on the district court docket.} \]

A three-member concurring opinion eschewed grounding the decision on the court's supervisory power, arguing that such pro-

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222. See Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (Congress has power to delegate rulemaking authority).
224. 504 F.2d at 2-4.
225. Id. at 6-8.
226. Id. at 8.
cedural requirements were mandated by constitutional consider-
ations.\textsuperscript{227} Two members of the court dissented, urging that the
appellate court could not use its supervisory power to formulate
procedural rules for district courts.\textsuperscript{228}

The general problem is now being addressed by proposed
amendments to the Federal Rules of Criminal Procedure circulated
in October, 1981.\textsuperscript{229} Gag orders are specifically addressed by Pro-

\textsuperscript{227} Id. at 12 (Adams, J., concurring). Judge Adams explained in his
concurring opinion:

Upon the basis of the Court’s purported supervisory power, the
plurality proceeds to erect some procedural requirements that should
be met before such an order is issued. This approach is somewhat
disquieting. Appellate courts, it appears, exercise their supervisory
power over lower courts to impose procedural requirements that seem
wise, but that are not compelled by the Constitution or statute. How-
ever, a fair reading of the pertinent case law suggests that First Amend-
ment considerations do, in fact, dictate procedural requirements like
those set forth by the majority. Thus, I would not rely in this case
on the rubric of “supervisory powers.”

\textsuperscript{228} Id. (footnote omitted). Judges Gibbons and Garth joined in the concurring
opinion. Id. at 17.

\textsuperscript{229} Proposed Rule 43.1, a completely new rule, appears in the October
1981 Preliminary Draft of Proposed Amendments to the Federal Rules of
Criminal Procedure as submitted by the Standing Committee on Rules of
Practice and Procedure. It provides as follows:

(a) **Proceedings Covered.** Except as otherwise provided by law,
the provisions of this rule are applicable to:

(1) any portion of the trial that take place outside the presence
of the jury, if the jury has not been sequestered;

(2) any voir dire examination of prospective jurors; and

(3) any pretrial hearing.

The provisions of this rule are not applicable to bench conferences,
conferences in chambers, or matters customarily handled in camera.

(b) **Motion for Closure.** Upon a motion for closure of a pro-
cceeding or portion thereof made or consented to by any defendant on
the record, the court shall permit the parties and members of the
public and news media present and objecting to be heard. If neces-
sary, the court may conduct all or part of the hearing on the motion
in camera. The court shall order that the public, including represen-
tatives of the news media, be excluded from the proceeding or a
portion thereof upon a finding

(1) that there is a reasonable likelihood that dissemination of in-
formation from the proceeding would interfere with the defend-
ant’s right to a fair trial by an impartial jury; and
posed Rule 43.1. Should Proposed Rule 43.1 or a variation thereof be adopted, the Third Circuit procedure established under its supervisory power will no longer govern to the extent that it would conflict with a procedural rule that has run the gauntlet of the formal rulemaking process. In this case, the exercise of supervisory power permitted the adoption of an interim procedure. In addition, the doctrine's flexibility allowed the court to avoid constitutionalizing a debatable right. Yet the absence of authority for the court's action leaves the troublesome issue of legitimacy unresolved.

In contrast, other exercises of supervisory power by the Third Circuit bypassing the formal rulemaking process can be legitimizated by reference to the Court of Appeals Act. For example, the Third Circuit has used its supervisory power to establish a procedure to be followed in enforcing grand jury subpoenas in order to achieve the twin goals of protecting the citizenry from governmental abuse of grand jury subpoenas and compelling compliance with valid subpoenas under the Organized Crime Control Act of 1970. In

(2) that the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The court shall make findings for the record supporting the ruling on the motion, but in its discretion some or all of those findings may be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(c) Partial Closure. Whenever the court could otherwise order closure under subdivision (b), it may limit the persons permitted to attend and condition such attendance upon agreement to the court's order restricting the time at which persons in attendance may disclose to others matters occurring at the proceeding or portion thereof partially closed. Findings supporting such ruling and order shall be made for the record as provided in subsection (b).

(d) Public Access to Record. Whenever the public has been excluded under subdivision (b) or (c) of this rule, a complete record of the proceeding or portion thereof from which the public has been excluded shall be kept and shall be made available to the public following return of the verdict or at such other time as may be consistent with defendant's right to a fair trial.

Proposed Amendments, supra note 177, at L5-L7.

230. Id.

231. 28 U.S.C. § 1826 (a) (1976). Section 1826(a) provides in part:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.

Id.
enforcing a section of this Act, the Third Circuit has ruled "that the Government [must] be required to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose."\(^{232}\) In a similar vein, the court exercised its supervisory power to establish a procedure and limitation on the use of evidence in order to permit a potential defendant to testify in opposition to an Internal Revenue Service (IRS) enforcement summons without waiving fifth amendment rights.\(^{233}\) Unlike gag orders, no pending amendments to the criminal rules address the procedures to be employed with respect to either a grand jury subpoena or an IRS enforcement summons. Those procedures established under its supervisory power will remain the law of the Third Circuit for the foreseeable future. However, unlike gag orders, these procedures involve a matter within the traditional competence of courts because they relate to the control of the courts' process.\(^{234}\)

Another procedure not currently addressed by a formal federal court rule, but within an area of traditional judicial competence, is the removal of attorneys from particular litigation. In one case, the district court revoked the pro hac vice status of an attorney retroactive to the date of verdict after the filing of a notice of appeal and without any prior notice or hearing. In reversing, the Third Circuit set forth the procedures to be used when a district court

\(^{232}\) In re Grand Jury Proceedings (Schofield I), 486 F.2d 85, 98 (3d Cir. 1973); see also In re Grand Jury Proceedings (Schofield II), 507 F.2d 963, 964 (3d Cir.), cert. denied, 421 U.S. 1015 (1975). The court justified its imposition of this requirement as pursuant to the federal courts' supervisory power over grand juries and pursuant to our supervisory power over civil proceedings brought in the district court pursuant to 28 U.S.C. § 1826(a)." 486 F.2d at 98.

\(^{233}\) United States v. Waltman, 525 F.2d 971, 374 (3d Cir. 1975).

\(^{234}\) Another recent example is the Third Circuit's resolution of a defendant's dilemma when confronted with a probation revocation hearing based upon a pending and unresolved criminal charge. In United States v. Bazzano, No. 81-1936 (3d Cir. July 7, 1982), the court noted that the defendant may compromise his constitutional privilege against self-incrimination if he testifies, and may have his probation revoked if he does not testify, even though he is later acquitted. The Third Circuit held:

"[T]he better practice is that, unless the probationer requests otherwise or the Government shows a compelling contrary need, probation revocation proceedings should await the completion of the criminal trial resolving the substantive charges giving rise to the revocation proceeding. If the Government insists or the district court decides that probation revocation proceedings must be held prior to the disposition of the criminal charges, the defendant should be given use immunity to testify in the revocation proceeding. The determination as to the appropriate course to follow will necessarily rest in the sound discretion of the district court."
seeks to revoke an attorney's pro hac vice status. The court held that at a minimum there should be notice and an opportunity to respond. Except for the requirement that notice include a statement of the standard to be applied to the attorney's conduct, the type of notice and hearing was left to the discretion of the trial judge. In imposing these requirements, the appellate court noted that "some sort of procedural requirement serves a number of salutary purposes. It ensures that the attorney's reputation and livelihood are not unnecessarily damaged, protects the client's interest, and promotes more of an appearance of regularity in the court's processes." The court did not set forth the legal justification for its holding, but simply opined that it has "inherent supervisory power to regulate certain procedural matters of significance."

Finally, the Third Circuit has occasionally employed its supervisory powers to aid in the discharge of its appellate function. For example, in the absence of statutory authority, the court employed its supervisory power as a basis upon which to recall its own mandate. It has relied upon the same power to prescribe procedures to be followed by the district court clerks' offices when no filing fee for an appeal is tendered with the notice of appeal in order to allow the court of appeals to ascertain the timeliness of the filing of a notice of appeal. These exercises of supervisory power represent no more than a court establishing procedural rules which are indispensable to the discharge of its function.

In summary, the Third Circuit cases involving delegated but unexercised rulemaking power fall into two subclassifications. The first category involves instances not within the traditional com-

\[\text{Id.}, \text{slip op. at 17 (footnote omitted). Because the district court had failed to follow this procedure, the court vacated the judgment and remanded the case. Id., slip op. at 17-18.}
\[235. \text{Johnson v. Trueblood, 629 F.2d 302, 305 (3d Cir. 1980) (per curiam), cert. denied, 450 U.S. 999 (1981).}
\[236. \text{Johnson v. Trueblood, 629 F.2d 302, 303-04 (3d Cir. 1980) (per curiam), cert. denied, 450 U.S. 999 (1981).}
\[237. \text{Johnson v. Trueblood, 629 F.2d 302, 305 (3d Cir. 1980) (per curiam), cert. denied, 450 U.S. 999 (1981).}
\[238. \text{Id.}
\[239. \text{American Iron & Steel Inst. v. EPA, 560 F.2d 589, 593-94 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).}
petence of courts or in aid of the discharge of an appellate court’s function, such as gag orders. In subject matter areas falling within this classification, a mechanism to legitimize an exercise of supervisory power establishing a procedure is urged because the concerns raised by such exercises are identical to those present in cases involving supplementation of formal court rules. Although a failure of the legitimizing mechanism would revive the void which prompted judicial action in the first instance, such a void is preferable to a system which would allow individual courts of appeals to burden litigants with idiosyncratic rules which could be abolished only by resort to either a Supreme Court holding directly on point or the formal rulemaking process. The second subclassification treats matters commonly thought of as being either within the traditional competence of courts or in aid of the discharge of an appellate court’s function. Illustrative of situations falling within this category are enforcement of grand jury subpoenas or an IRS summons, withdrawal of pro hac vice status, recall of a court’s mandate, and the prescription of procedures for the filing of a notice of appeal. Such exercises of supervisory power are legitimate as being authorized by the legislation establishing the intermediate appellate court system.²⁴²

Under the alternative analytic framework, all exercises of supervisory power in category three are legitimate because the delegated rulemaking power has not been exercised. Inasmuch as the power has not been exercised, there is no deference owing to higher authority.

V. THE NEED FOR A LEGITIMIZING MECHANISM

A. Introduction

If one adopts the broad theory of intermediate appellate court supervisory power, the legitimacy of every exercise of the power is measured against whether Congress or the Supreme Court has by statute, decision, or formally promulgated rule explicitly or by implication provided for a contrary result. In most instances, each individual exercise of supervisory power will be valid since the theory assumes the legitimacy of exercises of supervisory power by the courts of appeals. If an isolated exercise of supervisory power is invalid when tested against this relaxed standard, resort to a legitimizing mechanism would be fruitless because higher authority has already directed a contrary result.

²⁴². See notes 48-53 and accompanying text supra.
The simplicity of the broad analytic framework makes it attractive. However, its significant weaknesses make the narrow theory preferable. Under this theory, an exercise of supervisory power is valid only if the subject is within an area of traditional judicial competence or in furtherance of the discharge of a court's appellate function. To the extent that the Third Circuit has exercised supervisory power beyond those spheres, the exercise is illegitimate.

The Third Circuit's exercises of supervisory power and the legitimacy of such exercises can be divided into three categories.\textsuperscript{243} First, supervisory power may not be legitimately exercised to contravene the formal court rules.\textsuperscript{244} Second, the Third Circuit may not supplement the federal court rules through the exercise of its supervisory power, although benefits would be derived from the exercise of the power in this situation.\textsuperscript{245} Finally, the legitimacy of the exercise of the power when the rulemaker has not promulgated a formal court rule is dependent upon the subject matter.\textsuperscript{246} In light of this analysis, a mechanism should be established to validate those illegitimate exercises of intermediate appellate court supervisory power which do not contradict formal federal court rules.

B. Legitimizing Mechanism

This presentation of the Third Circuit's use of supervisory power to establish and supplement procedural rules indicates the importance of this activity to the efficient functioning of the judiciary. Frequently, these rules address concerns which are of pressing significance but which were not specifically treated by Congress or by the institution established to develop the rules. Nevertheless, to the extent that the courts of appeals exercise supervisory power in areas where Congress has already created a process to reform the rules, they act illegitimately. The necessity for legitimizing this form of rulemaking by the courts of appeals becomes apparent when one further considers that the federal courts often may be the only bodies capable of perceiving a problem and acting quickly enough to resolve it efficiently through rulemaking.

Several possibilities present themselves in response to the dilemma of the existence of desirable but illegitimate exercises of supervisory power to supplement federal court rules. Most ob-

\textsuperscript{243} For a discussion of the legitimacy of the exercise of supervisory power in situations falling within each of the three categories, see notes 140-42 and accompanying text supra.
\textsuperscript{244} See notes 154-73 and accompanying text supra.
\textsuperscript{245} See notes 174-221 and accompanying text supra.
\textsuperscript{246} See notes 222-42 and accompanying text supra.
viously, one alternative is to do nothing, and simply to permit the courts of appeals to exercise supervisory power whenever they see fit in order to prescribe procedures for the district courts to follow. The advantage to this alternative is that it preserves the status quo and leaves courts of appeals with the flexibility necessary to remedy various procedural problems which arise. There is nevertheless a significant drawback to this alternative. The analysis of the Third Circuit's use of supervisory power has shown that as a doctrinal matter there is no legitimate basis for a court of appeals to create rules through exercises of supervisory power when a specific process for such rulemaking has been adopted by Congress. Not only is there no authority for these assertions of supervisory power, but in engaging in rulemaking the court of appeals seriously impinges upon the prerogatives of the legislative branch by ignoring procedures established by Congress. For this reason, it is imperative that some action be taken to legitimize this otherwise unauthorized exercise of supervisory power.

A second alternative is to flatly preclude the courts of appeals from engaging in procedural rulemaking. Simply put, this alternative would require that the appellate courts rule only on a case-by-case basis and not utilize supervisory power to impose additional procedural requirements. This proposal would eliminate the concern about unwarranted use of supervisory power because rule changes would emanate only from the bodies established to develop them. Nevertheless, the drawbacks to this approach far outweigh the advantages. Courts of appeals would be unable to act when confronted with significant gaps in procedural rules. Often the established process for rulemaking is cumbersome, and in the interim the burden on courts of appeals might be increased by the frequent appeals of issues which could be addressed more efficiently by judicial rulemaking.

Neither of the above alternatives adequately addresses the problem. One alternative simply permits appellate courts to exercise supervisory power even when unwarranted. The other approach prevents the courts from using supervisory power even when circumstances might indicate that it would be appropriate. What is required is a mechanism which limits appellate exercise of supervisory power, yet retains the flexibility necessary to remedy procedural problems. Any such mechanism would require legislation.

One such mechanism might function as follows. A court of appeals may engage in procedural rulemaking to supplement existing rules as it currently does. However, when it exercises its super-
visory power to amend a procedural rule, that supplement will have a limited life span. After a period of six months, if that rule has not been adopted by the Judicial Council for the circuit, it will no longer be in effect. If the rule is adopted by the Judicial Council, it remains effective for a period of five years. During that time, it will have binding effect only within the enacting circuit. If at the end of five years no formal action has been taken to formalize the rule through the appropriate rulemaking channels established by Congress, the rule will expire. Therefore, the rule will retain vitality only if adopted in accordance with statutory procedures, and thereafter will be applicable nationally.

This proposal has several advantages over the other two alternatives. It retains discretionary power in the courts of appeals to implement procedures when those provided have proven inadequate, without requiring the more circuitous route of following the congressionally-mandated procedure. It enables a certain amount of experimentation within the various circuits. On the other hand, it furthers the interest in legitimizing these exercises of supervisory power by requiring that a rule not be permanently imposed until it has been adopted through the formal rulemaking process. The proposal also ensures that these supplements to the rules are ultimately applied uniformly nationwide, thus eliminating the current anomaly of twelve circuits with twelve different sets of federal rules. In addition, placing initial responsibility for review of the rule in the Judicial Council would provide a more detailed analysis of the proposed rule by a broader group including district court judges as well as court of appeals judges to consider its merits, and a more open procedure than that provided when a three-judge panel decides to promulgate a procedural rule in the context of an individual case.

This proposal is not without its drawbacks. Its primary disadvantage is that it renders certain holdings by the courts of appeals temporary in effect. The possibility of confusion and disarray is apparent. However, it is also true that all intermediate appellate court procedural rulings are subject to reversal by the Supreme Court or by Congress, so that they are already to some degree “temporary.” In addition, the principal advantage of this proposal of legitimizing certain exercises of supervisory power, coupled with its retention of speed and flexibility in the court of appeals while maintaining congressional prerogatives, far outweighs the possible confusion engendered by its application.