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Supervisory Power Meets the Harmless Error Rule in Federal Grand Jury Proceedings

Rebecca Ann Mitchells

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SUPERVISORY POWER MEETS THE HARMLESS ERROR RULE IN FEDERAL GRAND JURY PROCEEDINGS

Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988).

I. INTRODUCTION

In *Bank of Nova Scotia v. United States*,[1] the United States Supreme Court held that an indictment could not be dismissed unless the error committed during the grand jury proceedings substantially influenced the grand jury.[2] Initially, the district court had attempted to use its supervisory power to dismiss the indictment because of violations of the Federal Rules of Criminal Procedure and the combined effect of various instances of prosecutorial misconduct.[3] However, the Supreme Court held that "a federal court may not invoke supervisory power to circumvent the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)."[4] The harmless error rule, the Court stated, should be invoked[5] in cases where the error did not "substantially influence" the grand jury's decision.[6] Therefore, where the grand jury has not been substantially influenced by the error, the error is harmless and a court may not invoke its supervisory power to dismiss the indictment. The effect of this ruling is to subordinate the supervisory doctrine to the harmless error rule in federal grand jury cases involving nonconstitutional error.

This Note argues that the Court's subordination of the supervisory power doctrine to the harmless error rule eliminates dismissal of indictment as a supervisory power thereby reducing a court's con-

1 108 S. Ct. 2369 (1988).

2 *Id.* at 2378.

3 United States v. Kilpatrick, 594 F. Supp. 1324, 1353 (1984), *rev'd*, 821 F.2d 1456 (10th Cir. 1987), *aff'd*, Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988).

4 *Bank of Nova Scotia*, 108 S. Ct. at 2373. FED. R. CRIM. P. 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

5 When the harmless error rule is invoked, the error committed will lead to an affirmation of the indictment.

6 *Id.* at 2378.

trol over its own proceedings. The decision suggests that defendants can no longer expect grand jury proceedings free from even intentional prosecutorial error. The Court reduces Federal Criminal Procedure Rule 6[7] to a guideline for grand jury proceedings and strips it of its effect as law.[8] Furthermore, this Note argues that criminal defendants will now have an added burden to discover and substantiate allegations of prejudicial error where, prior to *Bank of Nova Scotia*, errors involving rule violations were presumed cause for dismissal.[9] The Court broadens the scope of the harmless error doctrine beyond its legislative intent.

Therefore, this Note concludes that in attempting to use the harmless error rule to reduce the cost of repeating the grand jury proceedings for trivial errors, the Court has sacrificed judicial integrity and added undue burden on defendants. Supervisory power should be a check on judicial proceedings to make certain that all equities are in balance. *Bank of Nova Scotia* gives an unjust priority to the harmless error analysis thereby effectively barring a court's authority to supervise grand jury proceedings.

II. BACKGROUND

A. SUPERVISORY POWER

In addition to testing constitutional validity,[10] the Supreme Court is obligated to "[j]udicial[ly] supervis[e] . . . the administration of criminal justice in the federal courts [which] implies the duty of establishing and maintaining civilized standards of procedure."[11] Through its supervision, the Court seeks to remedy violations of rights, maintain judicial integrity, and deter illegal conduct.[12] At-

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7 FED. R. CRIM. P. 6 states:

(c) The foreperson [of the grand jury] shall have power to administer oaths and affirmations and shall sign all indictments . . . . (d) Attorneys for the government, the witness under examination, interpreters, . . . and . . . a stenographer . . . may be present while the grand jury is in session . . . . (e)(2) A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist . . . an attorney for the government, or any person to whom disclosure is made under . . . this subdivision shall not disclose matters occurring before the grand jury.

8 The prosecuting attorneys committed various knowing violations of Federal Criminal Procedure Rule 6. *See infra* note 103 and accompanying text. *Bank of Nova Scotia* may affect the operation of procedural rules similar to Rule 6. However, this Note discusses only Rule 6.

9 A defendant's discovery of grand jury proceedings is difficult considering the numerous secrecy rules. *Bank of Nova Scotia* only compounds the defendant's burden of effectively discovering and alleging a cause for dismissal.

10 McNabb v. United States, 318 U.S. 332, 340 (1942).

11 *Id.*

12 United States v. Hasting, 461 U.S. 499, 505 (1983), *cert. denied*, Hasting v. United States, 469 U.S. 1218 (1985).

tempting to define supervisory power, one commentator suggests that the Court uses supervisory powers in three situations: (1) cases in which the Court is overseeing the quality of the judicial process; (2) cases in which the Court is addressing the violation of a statute; and, (3) cases in which the Court is trying to remedy conduct which does not violate constitutional or statutory provisions, but is considered judicially inappropriate.[13] It must be remembered that supervisory power is not easily definable and that the principles surrounding the judicial supervisory authority are constantly developing.[14]

Supervisory power was first recognized by the Court in *McNabb v. United States*.[15] The McNabbs had been arrested for allegedly murdering a police officer. The officer had investigated the McNabbs for selling whiskey without paying federal taxes.[16] A federal officer was assigned to investigate the policeman's murder. However, during the course of his investigation, the federal officer violated several rules of criminal procedure. One of those violations was failing to take the accused persons before a commissioner.[17] The Court did not review the constitutional issue of illegally detaining suspects, but rather focused on the need for a court to supervise the conduct of investigating officers.[18] Ordering reversal, the Court concluded that repeated violations of criminal procedure called for supervisory intervention.[19]

Most of the Court's post-*McNabb* development of the supervisory power doctrine has been in the review of basic procedural and evidentiary rules for federal criminal proceedings.[20] Supervisory power has been asserted in cases ensuring fair juries by mandating

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13 Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 194 (1969).

14 *See generally id.* at 181-205.

15 318 U.S. 332 (1942). For the history of federal judicial rulemaking and the influences that led to *McNabb*, see generally Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1435-1444 (1984); Hill, *supra* note 13, at 193-215 (1969); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of the Federal Courts*, 72, NW. U.L. REV. 595, 614-16 (1977) [hereinafter cited as *Judicially Required Rulemaking*]; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963) [hereinafter cited as *Supervisory Power*].

16 McNabb v. United States, 318 U.S. 322, 333-34 (1942).

17 *Id.* at 342.

18 *Id.* at 340.

19 *Id.* at 347. Interestingly enough, on remand evidence was brought forth that the defendants were taken to a judicial officer after their arrest. United States v. McNabb, 142 F.2d 904 (6th Cir. 1944). The McNabbs were convicted, and the convictions were upheld on appeal. *Id.* Therefore, the supervisory power created in *McNabb* was based on factual misconceptions.

20 Beale, *supra* note 15, at 1449.

that jurors be chosen from throughout the community[21] and calling for a new trial when jurors have access to pretrial publicity.[22] In most of these cases, the Court sought to ensure fairness in the judicial process.[23]

There is little legislation regarding supervisory power. Aside from statutes permitting courts to establish general rules of conduct for court administration,[24] Congress has acted only twice in response to Court rulings regarding supervisory authority. In response to the Supreme Court's decision in *Jencks v. United States*,[25] Congress adopted in 1982 what is commonly referred to as the Jencks Act[26] regarding disclosure of government memoranda. Also that year, Congress enacted the Omnibus Crime Control and Safe Streets Act[27] limiting the *McNabb* decision.[28]

Unlike the Supreme Court's creation of supervisory power in *McNabb*, lower federal courts' source of supervisory power has not been identified.[29] Since the Supreme Court's endorsement of the

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21 *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986)(racial discrimination is no basis to exclude a person from grand jury duty).

22 *See, e.g.*, Marshall v. United States, 360 U.S. 310 (1959)(new trial required because jurors read newspaper articles alleging defendant charged with illegal dispensing of drugs had committed two felonies). There is a wide array of cases in which the Court has used supervisory powers. Some decisions are made solely by use of the power, while others combine supervision with some constitutional question. For a more comprehensive discussion of the cases involving the Court's use of supervisory power, see generally Beale, *supra* note 15; Hill, *supra* note 13; *Judicially Required Rulemaking*, *supra* note 15; *Supervisory Power*, *supra* note 15.

23 Beale, *supra* note 15, at 1450. Also, as far as the creation of procedures, the Court stated in *McNabb* that the Court must be "guided by considerations of justice not limited to the strict canons of evidentiary relevance." *McNabb*, 318 U.S. at 341. Thus, as early as the *McNabb* decision, the overriding consideration in the use of supervisory power has been justice.

24 *See, e.g.*, 28 U.S.C. § 2071 (1982); FED. R. APP. P. 47; FED. R. CIV. P. 83; FED. R. CRIM. P. 57(a). These rules provide for the creation of court procedures but do not discuss the court's use of supervisory power as a method of dismissal.

25 353 U.S. 657 (1957)(government must disclose memoranda prepared by witnesses against the defendant).

26 18 U.S.C. § 3500 (1985). Primarily, the Act limits the types of memoranda disclosure required of the government. Also, directly influencing appeals of grand jury indictments, the Act states that memoranda disclosure is forbidden until the witness has testified on direct examination at trial.

27 18 U.S.C. § 3501 (1985).

28 Essentially, the Act declares that delay in presenting the accused before a judicial officer only influences whether the defendant's confession was voluntary, not automatically assumes that it was. 18 U.S.C. § 3501 (1985). Recall in *McNabb* that one reversible error was the federal investigating officer's failure to present the defendants to a Commissioner. This Act provides that such an error is only a contributing factor in the decision to reverse.

29 The first instance of lower federal court supervisory power was in Helwig v. United States, 162 F.2d 837 (6th Cir. 1947), where the court of appeals ordered a new trial so that the defendant could admit evidence even though he knew of its existence before the

lower courts' supervisory authority,[30] the exercise of supervision has been diverse.[31] Most significantly, supervision has occasioned control of prosecutorial conduct[32] and of grand jury proceedings.[33]

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first trial. *Id.* at 839-40. The court needed to use its supervisory power to guarantee the defendant's right to a new trial. *Id.* at 840.

30 *See* Bartone v. United States, 375 U.S. 52, 54 (1963)(per curiam)(where it is necessary to correct plain errors on appeal, "the Courts of Appeals and this Court . . . have broad powers of supervision").

31 Supervisory power has been used to ensure judicial integrity involving use of false evidence to obtain a warrant, United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980); to create general procedural rules, United States v. Singer, 710 F.2d 431 (8th Cir. 1983)(new trial because trial judge took part in government's presentation); to regulate admission of evidence, Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952) (new rules created for consensual sodomy trials); and to govern jury trials, United States v. Florea, 541 F.2d 568 (6th Cir. 1976)(communication between parties or their representatives and jurors during deliberation is *per se* prejudicial). This list is by no means exhaustive. It represents the range and pervasive use of supervisory power by lower federal courts. For a more comprehensive review of lower federal court exercise of supervisory power, see Beale, *supra* note 15, at 1456-59. The nature of supervisory power (used at the discretion of judges) has divided the federal courts of appeals. For instance, the Fifth Circuit in United States v. McKenzie, 678 F.2d 629 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1983) has rejected the Third Circuit's decision in United States v. Serubo, 604 F.2d 807 (3d. Cir. 1979), to use supervisory power to dismiss indictments where the prosecutorial misconduct was not prejudicial to the defendant and where other avenues of sanction were available. The inconsistent use of supervisory authority within the circuits itself raises questions of fairness.

32 Supervisory power has been used to create sanctions for prosecutorial misconduct, United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983)(appeal by two attorneys and client prosecuted for conspiracy to bribe a police officer based on prosecutorial misconduct of "vindictive prosecution" is denied); to ensure professional standards, United States v. Banks, 383 F. Supp. 389 (1974)(prosecutorial misconduct caused dismissal of criminal charges), *appeal dismissed sub nom* United States v. Means, 513 F.2d 1329 (8th Cir. 1975); to dismiss counsel who had a conflict of interest, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); and to exclude evidence procured through false information, United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980). *But see* United States v. Pino, 708 F.2d 523 (10th Cir. 1983)(for reversal of an indictment, prosecutorial misconduct in grand jury proceeding must be so flagrant that it interferes with grand jury's ability to exercise independent judgment). For a more comprehensive review of supervisory use to control prosecutorial conduct, see Beale, *supra* note 15, at 1457-1459.

33 Supervisory power over federal grand jury proceedings has included dismissing indictments because of flagrant prosecutorial misconduct. *See, e.g.*, United States v. Hogan, 712 F.2d 757 (2d Cir. 1983)(prosecutor's abusive language, speculation, and use of false testimony interfered with independence of grand jury); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972)(prosecutor used hearsay evidence); United States v. Samango, 607 F.2d 877 (9th Cir. 1979)(grand jury deceived in a significant way by prosecutor's conduct). Supervisory power has been used to require prosecution to make a three-part preliminary justification to enforce grand jury subpoenas. *See, e.g.*, In re Grand Jury Proceedings, 507 F.2d 963 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1976). Supervisory power has also been used to dismiss indictments even where misconduct was not shown to be prejudicial. *See, e.g.*, United States v. Serubo, 604 F.2d 807 (3d Cir. 1979)(dismissed for misconduct but requiring initial determination whether misconduct affected only an earlier grand jury). Additionally, supervisory power has been used to dismiss perjury indictments where the prosecutor failed to warn a target of a grand jury investigation before he testified. *See, e.g.*, United States v. Jacobs, 436 U.S. 31 (1978).

Courts have delicately applied supervisory power to grand jury proceedings because such involvement may impinge upon the grand jury's independence.[34] Although the Constitution calls for independent grand juries, the Court has not clearly defined the parameters of this independence.[35]

When using supervisory power, lower courts may not ignore Supreme Court constraints on constitutional remedies.[36] To permit otherwise, the Court has concluded, would extend judicial power beyond the limits set by the Constitution.[37] However, lower courts may set procedures which are not constitutionally stipulated.[38] Supervisory power, in effect, can be a stopgap where the Court has not identified procedural standards.[39]

B. THE HARMLESS ERROR DOCTRINE

At the turn of the 20th-century, appellate courts often reversed district court decisions that were based on what amounted to trivial errors.[40] Appellate courts were hesitant about declaring errors harmless because the "harmless error" doctrine seemed to infringe upon the jury's duty to weigh evidence.[41] Lawyers used this strict

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Although this list is not exhaustive, it provides an insight into the amount of supervision courts apply. For a more detailed examination of this area, see Beale, *supra* note 15, at 1458-59.

[34] In ascertaining the need for trial, grand juries are not assigned to any particular branch of the government. U.S. CONST. amend. V provides: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Addressing the proposition that supervisory power may be judicial encroachment on grand jury independence, the Court stated that the grand jury "must be free to pursue its investigation unhindered by external influence or supervision." United States v. Dionisio, 410 U.S. 1, 17 (1973)(voice exemplars for identification purposes do not violate the fourth or fifth amendments).

[35] Beale, *supra* note 15, at 1460.

[36] *See, e.g.*, Thomas v. Arn, 474 U.S. 140 (1985), *reh'g denied* 474 U.S. 1111 (1986)(petitioner failed to timely object to decision and court of appeals would not use supervisory power to extend filing period), in which the Court concluded that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Id.* at 148.

[37] United States v. Payner, 447 U.S. 727, 737 (1980), *reh'g denied*, 448 U.S. 911 (1980).

[38] *See, e.g.*, Cupp v. Naughten, 414 U.S. 141, 145-46 (1973)(state conviction affirmed even though appellate court had objected to the same jury instruction in a federal case because appellate courts may have trial courts "follow procedures deemed desirable from the viewpoint of judicial practice although in no wise commanded by statute or by the Constitution").

[39] Beale, *supra* note 15, at 1464.

[40] For a brief history of the harmless error doctrine, see generally R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 4 (1970). One example of dismissal for trivial error is People v. Sinclair, 56 Cal. 406 (1880), in which an indictment was dismissed because "larceny" was misspelled on the indictment form.

[41] R. TRAYNOR, *supra* note 40, at 13.

view of error as a weapon to gain dismissal.[42] Critics called for change.[43]

On the federal level, reform first took shape in several harmless error statutes.[44] The purposes of these statutes were to end costly retrials and legitimize the appellate procedure by ridding court dockets of cases founded on trivial error.[45] These statutes broadly defined harmless error as any error which did not "affect the substantial rights of the parties."[46] But, difficulties arose in defining substantial rights and in distinguishing substantial from technical rights.[47] Consequently, the factors defining substantial rights were narrowed to include only the nature of the proceedings at issue, the stake in the outcome, and the amount of influence the error had on the judgment.[48] The last factor was given increasingly greater weight in defining harmless error until courts eventually agreed that "[t]he crucial [consideration] is the impact of the [error] on the minds of other men."[49]

Problems, however, arose in determining a level of assurance that the error affected the jury's decision.[50] Before adopting the harmless error rule in cases where the error involved constitutional

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42 Kotteakos v. United States, 328 U.S. 750 (1946). "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." *Id.* at 759.

43 R. TRAYNOR, *supra* note 40, at 4. Among the multitude of comments on this development in law, John Henry Wigmore characterized dismissals for trivial error as the "Baal-worship of the rules of Evidence." *Id.* (quoting J. WIGMORE, EVIDENCE § 21, at 368 (3d ed. 1940)).

44 *See, e.g.*, 28 U.S.C. § 2111 (1982); FED. R. CRIM. P. 52(a); FED. R. CIV. P. 61.

45 R. TRAYNOR, *supra* note 40, at 14.

46 FED. R. CRIM. P. 52(a). *See supra* note 4.

47 Kotteakos v. United States, 328 U.S. 750, 761 (1946).

48 *Id.* at 762.

49 *Id.* at 764.

50 R. TRAYNOR, *supra* note 40, at 33. Comparing the harmless error doctrine to the level of assurance can be confusing. It might be easier to think of the assurance level as a spectrum: on one end no certainty, followed by reasonably certain, then highly probable, to certain beyond a reasonable doubt, and, on the opposite end, certainty. *See generally* R. TRAYNOR, *supra* note 40. In determining the error's effect on the jury, the extreme ends of the spectrum are, for the most part, not considered (as human beings, we can speculate to some degree how other human beings would be affected by evidence or testimony, but that same human characteristic will not allow us to be ever completely certain of how another would react). Therefore, a judge is left with applying one of the middle standards. When applying the harmless error doctrine to the highly probable test, it means that in order for a conviction to be affirmed, the reviewing judge has to be highly certain that the error was harmless. When the assurance test is only reasonable, then the judge just has to be reasonably certain that the error was harmless. Therefore, the *less* certain a judge has to be before granting dismissal of a conviction or indictment, the *easier* it is to apply the harmless error rule.

rights,[51] the Court decided that the reviewing judge had to be certain beyond a reasonable doubt that the error did not affect the jury's decision.[52] However, in federal cases involving nonconstitutional issues, the level of assurance had not been established in all case types.[53] Procedural errors, such as discrimination in the jury selection process,[54] were almost always reversed. Assurance level of harmful error ran high in cases involving such influences as trial domination by hostile observers[55] or pretrial publicity.[56] The standard of assurance in other types of procedural error, such as willful violations of the Federal Rules of Criminal Procedure and prosecutorial misconduct, was less clear.

United States v. Mechanik[57] is the most recent case involving federal nonconstitutional error. A federal grand jury in that case indicted the defendants on drug-related offenses and conspiracy.[58]

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51 For a discussion of the use of the harmless error doctrine where the error involves a constitutional right, see S. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980).

52 Use of harmless error doctrine in cases involving constitutional rights was first debated in Fahy v. Connecticut, 375 U.S. 85, 87 (1963)(defendant was convicted of willfully despoiling a public building by painting swastikas on a synagogue). Evidence admitted at trial in that case was illegally seized in violation of the fourth amendment right against illegal searches and seizures. *Id.* The Court questioned "whether there was a *reasonable possibility* that the evidence complained of might have contributed to the conviction." *Id.* at 85-87 (emphasis added). The Court held that the possibility was indeed more than reasonable that the jury was affected by the evidence and reversed the conviction. *Id.* at 92. The "reasonable possibility" test was altered in Chapman v. California, 386 U.S. 18, 19 (1967)(prosecutor, in violation of the fifth amendment right against self-incrimination, commented on the defendant's failure to testify and the judge instructed the jury that they could draw inferences from the defendant's silence). In reversing the conviction, the Court held that to use the harmless error doctrine, the reviewing court must be certain "beyond a reasonable doubt" that the error did not affect the jury's decision. *Id.* at 24. *See also* United States v. Hasting, 461 U.S. 499 (1983)(prosecutor's comment on defense's evidence and defendant's silence in closing arguments is violation of fifth amendment).

53 R. TRAYNOR, *supra* note 40, at 48.

54 *See, e.g.*,.Vasquez v. Hillery, 474 U.S. 254 (1986)(racial discrimination in the jury selection process compelled dismissal of indictment).

55 *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915)(conviction of defendant for the murder of Mary Phagan not reversible on the basis of mob dominance during the trial because the two crowd outbursts heard by the jury were not prejudicial); and Moore v. Dempsey, 261 U.S. 86 (1923)(a murder was committed due to outbreak of racial violence and the trial was dominated by a mob mentality which led to reversal of conviction).

56 *See, e.g.*, Estes v. Texas, 381 U.S. 532 (1965)(reversal of swindling charges because four jurors saw most or all of news broadcasts regarding the trial and because cameras and microphones dominated the courtroom); Rideau v. Louisiana, 373 U.S. 723 (1963)(a change of venue was required where defendant's confession was broadcast throughout the county of trial).

57 475 U.S. 66 (1986).

58 *Id.* at 67.

During the grand jury process, two law enforcement officers testified in tandem.[59] The defendants appealed the indictment on the basis that the in tandem testimony violated Rule 6(d) of the Federal Rules of Criminal Procedure.[60] Before the appeal was heard, however, the defendants were found guilty at the trial.[61] The Court held that because the petit jury found the defendants guilty beyond a reasonable doubt, the appeal of the indictment was moot.[62] However, the Court did not say that the "beyond a reasonable doubt" test would necessarily apply in all cases involving federal nonconstitutional error.

C. SUPERVISORY POWER MEETS HARMLESS ERROR

Many cases involve aspects of both supervisory power and harmless error but few courts have wrestled directly with the convergence of the two doctrines.[63] The standard for supervisory power use when a statute is involved was established in *Thomas v. Arn*[64] in which the Court said "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions."[65] In *United States v. Payner*,[66] the Court said that to permit supervisory power to invalidate statutes would "confer on the judiciary discretionary power to disregard the considered

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59 *Id.*

60 *Id.* FED. R. CRIM. P. 6(d) provides: "Attorneys for the government, the witness under examination, interpreters, . . . and . . . a stenographer . . . may be present while the grand jury is in session." Note that "witness" is singular.

61 *Mechanik*, 475 U.S. at 67.

62 *Id.*

63 At times it is difficult to determine whether a court is addressing the conflict between harmless error and supervisory power or only one of those topics. For instance, in Ballard v. United States, 329 U.S. 187 (1946), where the defendant's conviction was overruled because women were not permitted to serve on the grand jury, it is difficult to determine whether reversal was based on harmless error, whether the court wanted to exercise supervisory power to ensure a fair trial, or both, thereby establishing that where there is a "harmful" error, supervisory power is appropriate. The Court did not expressly state its holding in terms of a clash between supervisory power and harmless error. Another example is United States v. Payner, 447 U.S. 727 (1980)(conviction of defendant for falsifying federal income tax return affirmed even though government illegally searched third party's briefcase for evidence against defendant). The Court discussed harmless error and supervisory power in a roundabout way. It concluded that the exclusion of necessary but illegally seized evidence "exacts a costly toll" upon a court's ability to discover the truth. *Id.* at 734. The Court might be claiming that the cost of retrial has to be weighed against the magnitude of the error—but this is not clear. Similar cases will not be explored in this section in order to avoid confusion. Rather, discussion is limited to those situations in which the Court expressly debated use of supervisory power in place of harmless error.

64 474 U.S. 140 (1985).

65 *Id.* at 148.

66 447 U.S. 727 (1980).

limitations of the law it is charged with enforcing."[67]

The peculiar nature of the conflict between harmless error and supervisory power is furthered by the dilemma that harmless error statutes do not offer specific boundaries for their application. Rather, they apply when even something less than substantial rights have been abridged.[68] Courts have struggled to determine when supervisory power may be used, at what point harmless error analysis takes over, and whether the two are unrelated.

The Supreme Court first addressed this convergence in *United States v. Hale*.[69] In *Hale*, the defendant was arrested for robbery and while at the police station asserted his right to remain silent.[70] At trial, however, the prosecutor attempted to impeach the defendant's testimony by suggesting his silence was somehow incriminating.[71] The Court affirmed the appellate court's decision to employ supervisory power to reverse the conviction because the defendant's assertion of his right to remain silent had no probative value and the prosecutor's questioning had "a significant potential for prejudice."[72] In terms of harmless error analysis, this decision suggests that supervisory power is appropriate where there exists a significant possibility that the error or conduct affected substantial rights.

The prevailing decision in the convergence of the harmless error and supervisory doctrines involving constitutional harmless error was *United States v. Hasting*.[73] Respondents were charged, tried, and convicted in *Hasting* for kidnapping and transporting women across state lines for immoral purposes, and for conspiring to commit such offenses.[74] The respondents did not testify during the trial.[75] During summation, and over defense counsel's objection, the prosecution made references to the respondents' silence.[76] As in *Hale*, the court of appeals used its supervisory power to reverse the conviction because the summation violated the respondents' fifth amendment privilege against self-incrimination.[77] The court did not rely on harmless error because use of that doctrine " 'would

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67 *Id.* at 737.

68 *See supra* note 4. Note that there is no boundary provided around the concept of "substantial rights."

69 422 U.S. 171 (1975).

70 *Id.* at 173-74.

71 *Id.* at 175.

72 *Id.* at 180.

73 461 U.S. 499 (1983).

74 *Id.* at 501-02.

75 *Id.* at 502.

76 *Id.* at 502-03.

77 *Id.* at 503. U.S. CONST. amend. V provides: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights.' "[78] The Supreme Court upheld the district court and stated that even constitutional violations are subject to harmless error.[79] The Court concluded that the use of "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error."[80]

The lower courts disagree in the application of supervisory power when there are nonconstitutional errors in the trial process. The Third Circuit Court of Appeals decided in *United States v. Serubo*[81] that dismissal of an indictment is permissible even if there is no actual prejudice.[82] In the Fifth Circuit, the appellate court held in *United States v. McKenzie*[83] that an indictment could be dismissed only when the defendant's case has been unfairly prejudiced.[84] In *United States v. Pino*,[85] the Tenth Circuit determined that indictments could be dismissed only where there has been a "significant infringement on the grand jury's ability to exercise independent judgment."[86]

Arguably, *Mechanik*[87] is also a case in which supervisory power and the harmless error doctrine converged.[88] However, the supervisory power in *Mechanik* is of a different sort than in the cases cited above. The court of appeals dismissed the indictment thereby re-

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78 *Id.* (quoting United States v. Hasting, 660 F.2d 301, 303 (7th Cir. 1981)).

79 *Id.* at 508.

80 *Id.* at 506.

81 604 F.2d 807 (3d Cir. 1979)(reversal of convictions for internal revenue violations even though the errors committed during trial were not prejudicial; errors committed included violations of issuing subpoena and prosecutorial misconduct in questioning witnesses).

82 *Id.* at 817.

83 678 F.2d 629 (5th Cir. 1982)(grand jury indicted several police officers for misconduct; defendants' appeal based on prosecutorial misconduct is denied).

84 *Id.* at 635.

85 708 F.2d 523 (10th Cir. 1983)(defendant convicted of manslaughter; due process not violated by 28-month delay between arrest and indictment nor was prosecutorial misconduct flagrant enough to support an infringement on the grand jury's ability to act independently).

86 *Id.* at 530.

87 475 U.S. 66 (1985). *See supra* notes 57-62 and accompanying text for a discussion of *Mechanik*. Briefly, though, the prosecution violated Federal Rule of Criminal Procedure 6(d) regarding permissible grand jury appearances. *Id.* at 67. The Court held that where a petit jury subsequently convicted the defendant, the indictment could not be dismissed because of a rule violation. *Id.*

88 It can be argued that the court of appeals used supervisory power to reverse the conviction because of the Rule 6 violation and that the Supreme Court upheld the conviction because the error was harmless.

versing the conviction because the prosecutor violated Federal Rule of Criminal Procedure 6 and not because the court believed it was necessary to invoke supervisory power.[89] But by dismissing the indictment, the appellate court signalled to trial courts that supervisory power is a means of dismissing statutory violations.[90] Furthermore, *Mechanik* cannot be classified as a true supervisory case because the Supreme Court did not weigh the error on the minds of the grand jurors to determine if the error affected their decision.[91] Rather, the Court assumed the error was not prejudicial because the petit jury convicted the defendants.[92]

As of the initiation of the grand jury proceedings against the defendants in *Bank of Nova Scotia*, the Supreme Court had not determined whether a district court might use supervisory power to dismiss an indictment for prosecutorial misconduct and rule violations committed during the grand jury investigation where the errors did not prejudice the defendants. The procedural differences between trials and grand jury proceedings may call for different views of supervisory authority in cases involving harmless error.

III. Facts and Procedural History

In 1982, eight defendants were indicted by two successive grand juries[93] on 26 counts of conspiracy to defraud. Some of the defendants were also indicted with mail and tax fraud.[94] The final

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89 *Id.* at 69.

90 *Id.* The court of appeals was not using supervisory power to determine whether a rule was violated—that was a conclusion of fact. Rather, the court dismissed the indictment and conviction because there was no other prescribed avenue of sanction.

91 *Id.* at 70.

92 *Id.*

93 Assisting the grand juries were two attorneys from the Tax Division of the Department of Justice. The attorneys were assisted by Internal Revenue Service personnel. Brief for the Respondent at 7, Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988)(Nos. 87-578 and 87-602).

94 Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2372 (1988). The indictment alleged that defendant Kilpatrick and his company, United Financial Operations, marketed illegal tax shelters. Brief for Petitioner Bank of Nova Scotia at 5, *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988)(No. 87-578). Count I charged six defendants with willful tax fraud in violation of 18 U.S.C. § 371. The basis of the conspiracy charges was the creation of mineral leases of false tax deductions for nonexistent advance royalty payments for investor-taxpayers. Count II charged five defendants with similar conspiracy as in Count I in violation of 18 U.S.C. § 371. The basis of this count was the creation of false tax deductions on conjured research and development payments coming from investments in limited partnerships formed to fund research and development of methanol conversion processes. Counts III through X charged various defendants with aiding and assisting in the preparation and presentation of false partnership and individual tax returns in violation of 26 U.S.C. § 7206(2). Defendants allegedly made false claims to taxpayers regarding deductions for royalty entitlements or

count charged one defendant with obstruction of justice.[95]

The district court dismissed the first 26 counts on the grounds that the indictment failed to charge a crime and was improperly pleaded.[96] The court also dismissed the charges against the Bank of Nova Scotia because the indictment failed to allege the Bank's or its representatives' requisite knowledge or intent to commit the crimes charged.[97] The government appealed all the dismissals.[98]

Prior to oral argument, the United States Court of Appeals for the Tenth Circuit partially remanded the case to determine if grounds for dismissal should also have included prosecutorial misconduct and irregularities in the grand jury proceedings.[99] Before and immediately after the partial remand, the district court granted defendant Kilpatrick a new trial on the obstruction of justice count, and ordered the government to disclose transcripts of the grand jury proceedings.[100]

After ten days of post-trial hearings, the district court dismissed all 27 counts.[101] The dismissal was based on prosecutorial violations of Rule 6 of the Federal Rules of Criminal Procedure[102] and on the totality of the circumstances involving the prosecutors' behavior.[103] The district court determined that the prosecutors' mis-

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research and development. Counts XI and XII charged two defendants with willfully making and filing false individual tax returns in violation of 26 U.S.C. § 7206(1). Counts XIII through XXVI charged various defendants with substantive mail fraud violations for allegedly defrauding investors through the mail in the conspiracy outlined in Counts I and II in violation of 18 U.S.C. § 1341. United States v. Kilpatrick, 821 F.2d 1456, 1460-61 (10th Cir. 1987).

95 Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2372 (1988).

96 United States v. Kilpatrick, 594 F. Supp. 1324, 1327 (1984).

97 *Id.*

98 *Id.*

99 United States v. Kilpatrick, 821 F.2d 1456, 1460 (10th Cir. 1987).

100 *Id.* The court characterized the grand jury proceedings as "bizarre." United States v. Kilpatrick, 575 F. Supp. 325, 327 (1983). In response, the government instituted a mandamus proceeding and received a temporary restraining order prohibiting publication of the opinion. Both mandamus petition and restraining order were later denied. Brief for Petitioner at 6, Bank of Nova Scotia v. United States, 108 S. Ct. 2369 (1988)(No. 87-578).

101 Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2373 (1988).

102 *See supra* note 7 for the provisions of FED. R. CRIM. P. 6 involved in this case.

103 The district court determined that the government violated Rule 6 by:

(1) administering unauthorized oaths to Internal Revenue Service (IRS) agents in violation of Rule 6(c);

(2) causing the same IRS agents to summarize falsely evidence against the Bank and by permitting joint appearances by IRS agents before the grand jury in violation of Rule 6(d);

(3) disclosing grand jury materials to IRS agents involved in civil tax enforcement, failing to notify promptly the court of this disclosure, disclosing the names of persons targeted for grand jury investigation to possible witnesses, and imposing unauthorized

conduct prevented the grand jury from acting independently of the prosecution.[104] Furthermore, the court dismissed on the basis of its supervisory power and stated that "the supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither 'silly' nor 'frivolous' and that it will not be tolerated."[105]

A divided panel of the appellate court then reinstated the indictment.[106] The court held that violations of Federal Rule of Criminal Procedure 6 are not *per se* grounds for dismissal.[107] It also held that dismissal could not be based on the totality of circumstances because the misconduct did not interfere with the grand jury's ability to act independently.[108] The court concluded that "the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without significant infringement on the grand jury's ability to exercise independent judgment."[109]

The United States Supreme Court granted certiorari to review the tenth circuit decision to determine the use of supervisory power in light of the harmless error rule. More specifically, the Court framed the issue as "whether a District Court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, where the misconduct does not prejudice the defendants."[110]

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secrecy obligations on two grand jury witnesses for strategic purposes in violation of Rule 6(e). United States v. Kilpatrick, 594 F. Supp. 1324, 1344-45 (1984).

Although some of the prosecutorial conduct could not on its own be the basis for dismissal, the district court held that the totality of the misconduct called for dismissal. The government's misconduct included:

(1) violations of the Witness Immunity Statutes (18 U.S.C. §§ 6002, 6003) by granting pocket immunity to 23 witnesses;

(2) violations of the fifth amendment by calling seven witnesses who the government knew would invoke their privilege against self-incrimination;

(3) violations of the sixth amendment by interrogating high level bank employees after the indictment;

(4) knowing and deliberate presentation of misinformation to the grand jury;

(5) verbal mistreatment of a defense witness before grand jury members; and

(6) numerous violations of Federal Rule of Criminal Procedure 6. *Id.* at 1348-1353.

104 *Id.* at 1353.

105 *Id.*

106 United States v. Kilpatrick, 821 F.2d 1456, 1475 (1987).

107 *Id.* at 1469.

108 *Id.* at 1472.

109 *Id.* at 1475.

110 Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2372 (1988).

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY

Writing for the majority,[111] Justice Kennedy held that "as a general matter, a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."[112] Justice Kennedy noted that a federal court has the authority to exercise supervisory power[113] and stated such power cannot conflict with constitutional requirements or federal statutory prescriptions.[114] Nor can, said the Court, the harmless error rule[115] be disregarded.[116] A difficult question arises, Justice Kennedy stated, when the dismissal of a grand jury indictment conflicts with the harmless error inquiry required by the Federal Rules of Criminal Procedure.[117] The tension results from the use of supervisory power to address procedural violations that are harmless.[118] Embedded in that tension is the task of defining a harmless error.[119]

When dismissal of the indictment is sought for nonconstitutional errors, Justice Kennedy concluded that an error is harmful and thereby dismissible "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there was 'grave doubt' that the decision to indict was free from the substantial influence of such violations."[120] Justice Kennedy cited *Vasquez v. Hillery*[121] and *Ballard v. United States*[122] as examples of ex-

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111 Along with Justice Kennedy, Chief Justice Rehnquist, Justices Blackmun, Brennan, O'Connor, Stevens, and White constituted the majority. *Id.*

112 *Id.* at 2373.

113 Justice Kennedy flatly asserted that a federal court " 'may within limits, formulate procedural rules not specifically required by the Constitution or the Congress.' " *Id.* (quoting United States v. Hasting, 461 U.S. 499, 505 (1983)).

114 Justice Kennedy stated that " '[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.' " *Id.* (quoting Thomas v. Arn, 474 U.S. 140, 148 (1985)).

115 *See supra* note 4.

116 *Bank of Nova Scotia*, 108 S. Ct. at 2374. Justice Kennedy stated that "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* Justice Kennedy also emphasized that the harmless error rule balances the rights of the accused and costs to society. He warned that the harmless error rule may not be "casually . . . overlooked" through use of supervisory power. *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)(O'Connor, J., concurring)).

121 474 U.S. 254 (1986)(racial discrimination in selecting grand jury members resulted in dismissal of indictment).

122 329 U.S. 187 (1946)(women were excluded from the grand jury).

ceptions to the harmless error rule.[123] The grand jury's structural protections[124] in these cases are violated so that the proceedings are presumed prejudiced[125] and application of harmless error would require unguided speculation.[126]

Citing *Mechanik*[127] and *Hasting*,[128] Justice Kennedy stated that the harmless error test is applicable when a court must determine the validity of an indictment before the conclusion of the trial and the prosecutorial misconduct is not prejudicial to the defendant.[129] In applying the harmless error test, Justice Kennedy warned that "a federal court may not invoke supervisory power to circumvent the harmless error inquiry prescribed by Federal Rules of Criminal Procedure 52(a)."[130]

The majority then assessed whether there was grave doubt that the grand jury was substantially influenced by the prosecutors' violations and misconduct in this case.[131] Justice Kennedy focused on five findings of the district court that had the possibility of throwing

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123 *Bank of Nova Scotia*, 108 S. Ct. at 2375.

124 *Id.* Although Justice Kennedy does not define "structural protections," the cases cited suggest he was referring to the fair selection of the grand jury.

125 *Id.* (construing Rose v. Clark, 478 U.S. 570, 577-578 (1986)).

126 *Id.*

127 475 U.S. 66 (1986). In *Mechanik*, the Court held that there is "no reason not to apply [Rule 52(a)] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." *Id.* at 71-72.

128 461 U.S. 499 (1983). *Hasting* limits use of supervisory power as deterrence where "means more narrowly tailored" may dissuade prosecutorial misconduct. *Id.* at 506. Also, where the error is harmless, worry over the "integrity of the [judicial] process" is less burdensome. *Id.* Furthermore, a court may not disregard the harmless error rule "in order to chastise what the court view[s] as prosecutorial overreaching." *Id.* at 507.

129 *Bank of Nova Scotia*, 108 S. Ct. at 2374.

130 *Id.* Contrary to the appellate court, Justice Kennedy did not equate judicial assessment of the violations' influences on the grand jury with infringement on the grand jury's independence. *Id.* Such infringements may, but not necessarily will, he said, substantially influence the grand jury's decision to indict. *Id.* Justice Kennedy added that the Court did not grant certiorari to decide the issue of grand jury independence. *Id.* Presumably, the grand jury's independence means its ability to conduct the grand jury proceedings and reach a decision without undue influence by either the government or the defense. The grand jury should not act as an arm of the government. *See* United States v. Dionisio, 410 U.S. 17 (1973).

131 Justice Kennedy readily dismissed the following violations' influences on the grand jury:

(1) violation of the sixth amendment by conducting investigations on bank employees occurred after the indictment and, therefore, could not have influenced the decision to indict;

(2) violation of the fifth amendment by calling seven witnesses who were predicted to invoke their privilege against self-incrimination was not error because the government was not required to depend on unsworn assertions by these witnesses and the

grave doubt on the grand jury's charge.[132] First, the Court concluded that the jurors were adequately advised that the Internal Revenue Service (IRS) agents sworn as "agents" of the grand jury were aligned with the prosecutors.[133] Second, in regard to the IRS agents' false summaries, the majority decided that the Government did not cause the agents to testify falsely and that the unreliable evidence was not enough reason to dismiss the indictment.[134] Third, Justice Kennedy found nothing to indicate that the prosecutorial misconduct before the grand jurors substantially affected the charging decision.[135] Fourth, as to the Government's grant of pocket immunity[136] to 23 witnesses, Justice Kennedy concluded that the grand jury was not substantially influenced.[137] Finally, the majority

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government repeatedly requested the grand jury not to draw any conclusions from a witness's use of the fifth amendment;

(3) manipulation of the grand jury investigation to gather evidence for civil tax investigations could not affect the decision to indict;

(4) violation of rule 6(e) by revealing targets of grand jury investigation to potential witnesses could not affect the charging decision;

(5) violation of rule 6(e) by imposing secrecy violations on grand jury witnesses could not alter the decision to indict. *Bank of Nova Scotia*, 108 S. Ct. at 2375-76. The majority did not give specific reasons why the last three violations could not affect the charging decision.

132 *Id.*

133 *Id.* at 2376-77. Justice Kennedy supported this conclusion by citing prosecutorial references to the IRS agents as "my agent(s)" and grand jury references to the agents as "your guys" or "your agents." *Id.* at 2377.

134 *Id.* Justice Kennedy emphasized that an indictment valid on its face cannot be challenged on the reliability or competency of the evidence presented. *Id.* at 2377 (citing United States v. Calandra, 414 U.S. 338, 344-45 (1974)). Also, Justice Kennedy pointed out that a court may not look behind the indictment to determine if the evidence was sufficient. *Id.* (citing Costello v. United States, 350 U.S. 359, 363 (1956)).

135 *Id.* Justice Kennedy noted that the prosecutor requested the grand jury to disregard the conversations. These ameliorative measures were sufficient to alleviate grave doubt that the grand jury was substantially influenced by the remarks. *Id.*

136 Pocket immunity is "putative immunity granted to a witness by letter or oral representation of the prosecutor rather than ordered by a judge after satisfaction of the procedures of 18 U.S.C. §§ 6002 and 6003." United States v. Anderson, 577 F. Supp. 223, 233 (1983).

137 *Bank of Nova Scotia*, 108 S. Ct. at 2377. Justice Kennedy pointed out that the jurors were aware that these witnesses made a deal with the Government thereby alleviating the substantial influence of the pocket immunity. *Id.* Also, the Court said that a substantial effect on the charging decision could not be construed by the fact that some prosecutors told the grand jury that the immunized witnesses could invoke a fifth amendment privilege while other prosecutors stated the witnesses had no such privilege. *Id.* Justice Kennedy noted that if the Government threatened to revoke immunity, prejudice might be established. Although one witness believed that the prosecutor's statement that if he " 'testified for Mr. Kilpatrick, all bets were off' " was a threat to withdraw immunity if he did not conform his testimony, the Court found this was not enough to warrant dismissal. Instead, Justice Kennedy claimed that, at most, the reliability of his testimony would be questionable. *Id.* at 2377-78 (quoting United States v. Kilpatrick, 594 F. Supp. 1324, 1338 (1984)).

acknowledged that permitting two IRS agents to read transcripts in tandem was in violation of Rule 6(d).[138] Such a violation did not, however, prejudice the grand jury.[139] Justice Kennedy further noted that the alleged misconduct occurred over the course of a 20-month investigation with many witnesses and documents.[140] In the totality of such an involved investigation, the Court concluded that the "violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury's decision to charge."[141]

Justice Kennedy stated that alternatives to dismissal included contempt of court,[142] directing the prosecutor to show why he should not be disciplined,[143] and reprimanding the prosecutor in a published opinion.[144] The Court said that these alternatives would reprimand the prosecutor but not "grant . . . a windfall to the unprejudiced defendant[s]."[145]

The Court concluded that a district court could dismiss an indictment upon finding that the defendants were prejudiced by the prosecutorial misconduct. The district court must determine whether the errors impacted the grand jury's decision to indict. "If violations did substantially influence [the] decision [to indict], or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless."[146] The Court held that the errors in this case did not pass this standard and affirmed the indictment.[147]

B. THE CONCURRENCE

Concurring, Justice Scalia[148] acknowledged that federal courts have the authority to dismiss grand jury indictments procured in vi-

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138 *Id.* at 2378.

139 *Id.* Justice Kennedy noted that the agents did not offer original testimony and that the jurors were instructed not to question the agents during the reading. *Id.*

140 *Id.*

141 *Id.*

142 *Id.* FED. R. CRIM. P. 6(e)(2) states: "A knowing violation of rule 6 may be punished as a contempt of court."

143 *Bank of Nova Scotia*, 108 S. Ct. at 2378. Justice Kennedy asserted that the judge may request the bar or Department of Justice to begin disciplinary proceedings against the prosecutor. *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* (Scalia, J., concurring).

olation of the law.[149] Justice Scalia further acknowledged that the Supreme Court may review lower courts' use of supervisory power although he did not see any direct authority for the Court to supervise lower courts.[150] Justice Scalia stated that lower courts might use their supervisory powers to regulate a prosecutor's performance before the court and to establish that a prosecutor is a member of the court's bar.[151] Justice Scalia then merely said, "I join the opinion of the Court because I understand the supervisory power at issue here to be of the first sort."[152]

C. THE DISSENT

In the dissent, Justice Marshall argued by reference to his earlier dissent in *Mechanik*,[153] where he asserted that the "goal of upholding criminal convictions not marred by substantial defect does not justify reducing Congress' command regarding the proper conduct of grand jury proceedings to a mere form of words, without practical effect."[154] Unfortunately, he said, the secrecy of the grand jury process makes prosecutorial misconduct difficult to prove.[155]

In light of this procedural advantage for the prosecution, Justice Marshall stated that Rule 6 had "little enough bite."[156] He then assailed the majority for leaving the rule "toothless" by subordinating it to the harmless error rule.[157] Moreover, Justice Marshall claimed that this could not have been Congress' intent.[158]

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149 *Id.* (Scalia, J., concurring).

150 *Id.* (Scalia, J., concurring).

151 *Id.* (Scalia, J., concurring).

152 *Id.* (Scalia, J., concurring).

153 475 U.S. at 80 (Marshall, J., dissenting). For a review of this case, see *supra* notes 57-62 and accompanying text. *Mechanik*, however, involved the prosecutor's violation of Rule 6(d) by permitting two law enforcement agents to testify in tandem before the grand jury. In the present case, additional violations occurred. *See supra* note 103 and accompanying text for discussion of these violations.

154 *Id.* at 84 (Marshall, J., dissenting).

155 *Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J. dissenting). Defendants, he said, regularly must rely on the Jencks Act, 18 U.S.C. § 3500, which allows for disclosure of grand jury transcripts only after trial is underway, making dismissal difficult for defendants to procure in the first place. *Id.* (Marshall, J., dissenting). Furthermore, the information disclosed may be incomplete. *Mechanik*, 475 U.S. at 81 (Marshall, J., dissenting).

156 *Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J., dissenting).

157 *Id.* (Marshall, J., dissenting).

158 *Mechanik*, 475 U.S. at 82-83 (Marshall, J., dissenting). Justice Marshall outlined the legislative history of Rule 6 and how the harmless error doctrine was intended to affect Rule 6 errors in *Mechanik*. Due to the presence of stenographers at grand jury proceedings, Congress enacted a harmless error rule to offset dismissals due to Rule 6 violations. Act of 1946, § 1025 (codified as amended at 18 U.S.C. § 556 (1985). However, Congress never disagreed with the general idea that the presence of unauthorized per-

Justice Marshall then noted that affirming criminal convictions not marred by substantial error in the grand jury process reduces to formality Congress' intent as to proper conduct in grand jury proceedings.[159] Respect for the law and legislative intent, Justice Marshall claimed, require dismissal of indictments issued for rule violations so that " 'the ardor of prosecuting officials be kept within legal bounds and justice be secured.' "[160] Deterrence of Rule 6 violations could be achieved only by a *per se* rule of dismissal.[161]

Justice Marshall also asserted that the prejudicial impact created by Rule 6 violations would be impossible to evaluate accurately.[162] Reviewing cases for alleged prejudice places an administrative burden on courts and will not offer defendants meaningful protection.[163] Justice Marshall concluded that subjecting Rule 6 to harmless error analysis reduces that rule to "little more than a code of honor that prosecutors can violate with impunity."[164]

V. ANALYSIS

Supervisory power and the harmless error doctrine should be applied in conjunction to ensure the defendant of a fair trial and to uphold the integrity of the judicial system. In *Bank of Nova Scotia*, however, the Supreme Court did not establish a technique by which both judicial tools work together to achieve these goals. Instead, the Court subordinated the use of supervisory authority to the harmless error rule thereby narrowing the scope of a fair trial and devaluing the integrity of the judicial system. Rather than using the tools of supervisory authority and harmless error to improve the judicial process, the Court in *Bank of Nova Scotia* misapplied them thereby misshaping their definitions and misdirecting their purposes.

Originally, harmless error doctrine was adopted to prevent defendants from receiving unfair advantages.[165] One argument rightly

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sons in the grand jury proceedings invalidates the indictment. *Mechanik*, 475 U.S. at 83 (Marshall, J. dissenting). Justice Marshall also asserted that in the Advisory Committee notes to the harmless error doctrine espoused in 18 U.S.C. § 556 (1946 ed.), harmless errors are those " 'in matter of form only' " which did not prejudice defendant. *Id.* at 87 n.4 (Marshall, J., dissenting)(quoting Act of 1946, § 1025) (codified as amended 18 U.S.C. § 556 (1985)).

159 *Id.* at 84 (Marshall, J., dissenting).

160 *Id.* (quoting United States v. Remington, 208 F. 2d 574 (1946)(Hand, J., dissenting)).

161 *Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J., dissenting).

162 *Mechanik*, 475 U.S. at 86 (Marshall, J., dissenting).

163 *Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J., dissenting).

164 *Id.* (Marshall, J., dissenting).

165 *See supra* notes 10-40 and accompanying text.

posed in favor of the harmless error doctrine is the high cost of retrial.[166] The harmless error rule is appropriate where excessive observance of formality turns courtrooms into technical battlegrounds. The Supreme Court, however, has now expanded this initial intent of the doctrine so that all alleged errors are reviewed in light of potential prejudice suffered by the defendant.[167]

The supervisory power doctrine has been used to ensure fairness to the defendant and the judicial system where sanctions are not prescribed or where the error is not specifically addressed in a statute.[168] Judges use the power to manage court business by ensuring that conduct follows statutory guidelines.[169] The judge can therefore use supervision as a means of ensuring the fairest outcome possible.

It seems odd that these two tools striving for equity should clash. Yet the differing methods of attaining that goal can conflict. In *United States v. Kilpatrick*,[170] the district court used its supervisory power to correct the prosecutor's violations of the Federal Rules of Criminal Procedure and his misconduct.[171] The appellate court applied the harmless error rule to hold these violations benign.[172] The Supreme Court upheld the appellate court's decision[173] and subordinated supervisory authority to a new narrow definition of harmless error. Now, errors are harmful and dismissible only where they substantially prejudice the defendant.[174]

The Court did not note that the supervisory doctrine, however, has a much larger scope of dismissible errors. That doctrine includes not only the prejudicial impact suffered by the defendant, but also the prejudicial impact on the integrity of the judicial system.[175] In reality, these two types of prejudicial errors must be related: errors prejudicing the defendant also negatively affect the integrity of

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166 *Mechanik*, 475 U.S. at 72.

167 *Bank of Nova Scotia*, 108 S. Ct. at 2373 ("[A]s a general matter, a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.").

168 *See supra* notes 10-39 and accompanying text.

169 In United States v. Payner, 447 U.S. 727, 736 n.8 (1980), the Court said, "[S]upervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity."

170 594 F. Supp. 1324 (D. Colo. 1984). This is the case name of *Bank of Nova Scotia* in the district court.

171 *Id.* at 1353.

172 United States v. Kilpatrick, 821 F.2d 1456, 1466, 1475 (1937).

173 Bank of Nova Scotia v. United States, 108 S. Ct. 2369, 2378 (1988).

174 *Id.*

175 *See* Hill, *supra* note 13, at 92; Beale, *supra* note 15, at 1450-53.

the judicial system.[176] In *Bank of Nova Scotia*, the Supreme Court ignored this relation, perhaps thereby sacrificing the goals of supervisory power and the harmless error rule.

The Court decided that because " '[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provision,' "[177] and because the harmless error doctrine was a statutory provision, supervisory power must bow to harmless error.[178] This ruling thereby effectively eliminates dismissal of a grand jury's indictment as a supervisory power.[179]

Now, only where the grand jury's decision to indict has been substantially influenced by error can there be dismissal of the indictment based on the harmless error rule.[180] Substantial prejudicial influence means an error harmful enough to dismiss.[181] Therefore, only harmful errors can result in dismissal. Other errors are harmless and no other means of intervention, including supervisory power, can achieve dismissal.

Bank of Nova Scotia also has due process[182] implications. A defendant cannot expect a trial free of all error,[183] but now a defend-

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176 In United States v. Hasting, 461 U.S. 499, 527 (1983)(Brennan, J., dissenting), Justice Brennan stated:

> Both the harmless-error rule and the exercise of supervisory powers advance the important judicial and public interest in the orderly and efficient administration of justice. Exercise of the supervisory powers also can further the strong public interest in the integrity of the judicial process. . . . Admittedly, using the supervisory powers to reverse a conviction under these circumstances appears to conflict with the public's interest in upholding otherwise valid convictions that are tainted only by harmless error. But it is certainly arguable that the public's interests in preserving judicial integrity and in insuring that Government prosecutors, as its agents, refrain from intentionally violating defendants' rights are stronger than its interest in upholding the conviction of a particular criminal defendant. Convictions are important, but they should not be protected at any cost.

177 *Bank of Nova Scotia* 108 S. Ct. at 2373 (quoting Thomas v. Arn, 474 U.S. 140, 148 (1985)).

178 *Id.*

179 In *Hasting*, Justice Brennan noted that the Court's decision to use the harmless error doctrine to affirm a conviction "could be read to establish a *per se* rule against use of the supervisory powers to reverse a conviction based on harmless error." *Hasting*, 461 U.S. at 523, (Brennan, J., dissenting). Justice Brennan, however, did not believe that the Court had either addressed or decided this point. *Id.* at 500 (Brennan, J. dissenting). *Bank of Nova Scotia*, however, closes the door on the use of supervisory power where there is harmless error because only substantially prejudicial errors (harmful errors) result in dismissal. *Bank of Nova Scotia*, 108 S. Ct. at 2378.

180 *Id.*

181 *Id.* Because the Court determined that the district court could not dismiss absent a finding of prejudice that substantially influenced the jury, it follows that substantial prejudice is the new definition of a harmful error.

182 U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

183 Kotteakos v. United States, 328 U.S. 750, 761 (1946). "By [the] very nature [of justice] no standard of perfection can be attained."

ant cannot expect a trial free of even flagrant procedural error or intentional prosecutorial misconduct. Essentially, due process in grand jury proceedings currently means an indictment free from prejudicial error regardless of statutory violations or prosecutorial misconduct during the proceedings.

Bank of Nova Scotia also strips Federal Criminal Procedure Rule 6 of its statutory rank, reducing it to a suggested guideline for grand jury proceedings.[184] Given *Bank of Nova Scotia*, the only enforceable statute is Rule 52 whereby all errors—statutory or otherwise—are reviewed for their prejudicial impact. If a Rule 6 error is not prejudicial then Rule 6 is suspended; if a Rule 6 error is prejudicial then Rule 6 is enforced. The need, then, for Rule 6 has been effectively eliminated.

All alleged errors, including those defined by Rule 6, can be subjected to the Rule 52 harmless error test. The effect of this broad application leads to the absurd result that the Federal Rules of Criminal Procedure applicable to grand jury proceedings are reduced to the harmless error test.[185] This could not have been the legislature's intent.

Additionally, the Court's misapplication of the harmless error rule is not supported by legislative history. The committee note corresponding to Rule 52(a) states that the rule was a restatement of 28 U.S.C. § 391[186] and 18 U.S.C. § 556.[187] The language of these two rules strongly suggests that the harmless error doctrine was originally meant to affirm decisions where the error was superficial.[188] The Court has severely narrowed the meaning of "substan-

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184 *See supra* note 162 and accompanying text.

185 If the decision reduces Rule 6 to what Justice Marshall refers to as a code of honor, then the remaining Federal Criminal Procedure Code follows a similar fate. *See Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J. dissenting).

186 The Committee stated

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to "*technical errors, defects, or exceptions*" which do not affect the substantial rights of the parties.

FED. R. CRIM. P. 52(a) advisory's committee's note (quoting 28 U.S.C. § 391)(emphasis added).

187 The committee further stated:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of "any defect or imperfection *in matter of form only*," which shall not tend to prejudice of the defendant.

Id. (quoting 18 U.S.C. § 556)(emphasis added).

188 "Technical errors, defects, or exceptions", 28 U.S.C. § 391, and "any defect or imperfection in matter of form only", 18 U.S.C. § 556, suggest that legislative intent was focused on technical or superficial errors.

tial rights."[189] Congress, however, must have intended "substantial rights" to include the grand jury guidelines set forth in the criminal code or it would not have gone to such lengths to promulgate procedural rules ensuring the integrity of grand jury proceedings. This is not to imply that all rules promulgated by Congress are accorded substantial rights status. But, where extensive rules are set forth to ensure that the accused is guaranteed certain procedural guidelines assuring the accused a fair hearing or trial, there is a strong presumption that those guidelines are themselves substantial rights. According to 28 U.S.C. § 391 and 18 U.S.C. § 556, where substantial rights are involved, only technical errors or errors of form can be viewed as harmless. The Court does not view the grand jury procedures or prosecutorial conduct as substantial rights outside the scope of the harmless error doctrine. The Court has thus narrowed the meaning of substantial rights and enlarged the opportunity for using harmless error far beyond the intent of the legislature.

Bank of Nova Scotia places an enormous burden on a defendant to prove that the grand jury was prejudicially affected by error.[190] Yet, grand jury proceedings by their very nature are difficult for defendants to appeal.[191] The Federal Rules of Criminal Procedure are

189 The two statutes state that where substantial rights of the parties are involved, technical errors will not cause dismissal of a conviction or indictment. This suggests that technical errors of rights which are less than substantial may lead to dismissal. Certainly the legislature sought to avoid dismissal for technical defects in all cases. However, the latter interpretation of the statute may lead to the notion that where less than substantial rights are involved, the error does not have to be as egregious as in cases involving substantial rights in order to result in dismissal. Therefore, the more a right is substantial, the more egregious the error must be before the error will result in dismissal. The dilemma is in deciphering what the legislature considered a substantial right as opposed to what the Court considered a substantial right. The latter question can be easily addressed. If a substantial right is viewed as that which any error can result in dismissal (exceptions to the harmless error rule), then *Bank of Nova Scotia* itself spells out the class of cases the Court would dismiss without harmless error review: cases involving the structural protections of the grand jury as in Rose v. Clark, 478 U.S. 570 (1986), Vasquez v. Hillery, 474 U.S. 254 (1986), and Ballard v. United States, 329 U.S. 187 (1946). The small size of this class of cases indicates that the Court takes a very narrow view of substantial rights.

190 *Bank of Nova Scotia*, 108 S. Ct. at 2379 (Marshall, J., dissenting).

191 As Justice Marshall suggests, because of the strict secrecy associated therewith, defendants have virtually no access to information regarding grand jury proceedings. Also, requests for disclosure of grand jury materials are almost never granted. Access to grand jury materials allowed under the Jencks Act, 18 U.S.C. § 3500 (1982), is permitted only after the trial has begun. United States v. Mechanik, 475 U.S. 60, 80, 81 (1986)(Marshall, J., dissenting). The protection offered by the Jencks Act was diluted in *Mechanik* where the conviction of defendant at trial prevented a reversal of the indictment. *Id.* at 66. If the defendant is not entitled to grand jury transcripts until trial is underway, the court reviewing a motion to dismiss the indictment need only wait until trial is over and if the defendant is convicted, the motion to dismiss indictment is moot. *Id.* at 81 (Marshall, J., dissenting).

guideposts leading to an equitably issued indictment. Now that *Bank of Nova Scotia* has essentially removed those guideposts, the defense has an even more difficult task of detecting and proving prejudicial errors. Instead of a clear statutory basis for dismissal, the defense is now at the mercy of judicial speculation over the magnitude of the error.

Supervisory power ought to be employed in cases like *Bank of Nova Scotia* where procedural guidelines are violated and prosecutorial misconduct has occurred. In a narrow application of the cost/benefit analysis,[192] the cost of dismissal would be another grand jury proceeding which might only result in reindictment. However, the greater implications made in this analysis predict a greater cost to the integrity of the judicial process that must eventually limit the rights of the defendant in a grand jury proceeding.

The effect of this decision is to make dismissal of federal grand jury indictments more difficult and increasingly unlikely. The Court has swung the harmless error pendulum from the need to remove decisions for the defense based on excessive formalities to the opposite end where the defense has the burden of effectively alleging prejudicial impact on the mental process of grand jury members. The Court misapplied the tools of supervisory power and harmless error so that the goals of judicial integrity and fair grand jury proceedings are still unmet.

Furthermore, courts are now far less able to correct the attacks on the integrity of the judicial system resulting from rule violations and prosecutorial misconduct. If a court cannot control the behavior and procedures before it, no other avenue remains to protect the judicial system. This dilemma is even more alarming in the grand jury stage than at the trial stage because during the former, the accused has few methods of ensuring a fair grand jury proceeding and must rely on the court to uphold the procedural guidelines when violations have occurred. In other words, during a grand jury proceeding, the defense has no process available to correct or contradict violations as it has at trial.

Flagrant and repeated prosecutorial misconduct and procedural violations during a grand jury proceeding are substantial violations that result in harmful errors that cannot be categorized as technical errors and defects. Dismissal is an extraordinary means of correcting errors.[193] But, if the harmless error pendulum is to

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192 Mechanik, 475 U.S. at 72. *See supra* note 166 and accompanying text.

193 The Court suggested that attorneys who commit errors like those in *Bank of Nova Scotia* be disciplined by other means such as contempt charges. *Bank of Nova Scotia*, 108 S. Ct. at 2378. But there might be reasons why a reviewing court would reject the use of

swing to a more middle ground, between use of the harmless error doctrine to prevent technical errors from resulting in dismissal of an indictment and the over-use of the harmless error rule in all but a very few cases involving a narrow definition of substantial rights, dismissal should be used more often in cases where judicial integrity and the defendant's right to a grand jury proceeding free from flagrant rule violations are abridged.

Also, in the vein of squeezing out equity in the *Bank of Nova Scotia* decision, the standard of harmless error review should be more clearly defined so as to accommodate the need to make at least a deferential nod in the direction of judicial integrity and adherence to procedural rules. The Court stated that where there is "grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless."[194] The review standard ought to be that where the error was harmless *beyond a reasonable doubt*, not left to just the obscure standard of a "grave doubt," the reviewing court should affirm the indictment.

VI. CONCLUSION

Supervisory power and the harmless error doctrine can and ought to work in conjunction to maintain and perhaps to improve the quality and integrity of federal grand jury proceedings. It is a mistake to permit one doctrine to overshadow the other. *Bank of Nova Scotia* elevates the harmless error doctrine above supervisory power even though such a decision contravenes legislative intent, places added burden on the defendants, and ignores due process concerns. Where the harmless error rule should act as a check on certain types of errors, supervisory power should catch those errors which threaten the judicial process. *Bank of Nova Scotia*, however, broadens the use of harmless error by limiting the definition of a substantial right and precluding supervisory power from acting as a secondary check guarding the judicial process. The result is a dangerous imbalance of equities in grand jury proceedings.

However, the *Bank of Nova Scotia* decision can be rendered more palatable if the standard for harmless error review is strict. Any er-

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methods other than dismissal. United States v. Hasting, 61 U.S. 499, 522 (1983). One such reason is the "futility of relying on Department of Justice disciplinary proceedings." *Id.* It should also be restated that the prosecutor's actions and violations have affected more than just that particular proceeding. Also at stake are the integrity of the judicial process and eventual impact on the grand jury process. Taken in that context, dismissal may be the only appropriate method of discipline.

194 *Bank of Nova Scotia*, 108 S. Ct. at 2378.

ror may be deemed harmless only if the court is certain beyond a reasonable doubt that the grand jury was not prejudiced.

This solution is temporary. A complete review of the use of harmless error and supervisory power is necessary to achieve a balance between judicial efficiency and judicial integrity. In *Bank of Nova Scotia*, the Court subordinated the tool of supervisory power to the harmless error rule. As a result, judicial integrity was sacrificed for a narrow view of reversible error. The goals of fair grand jury proceedings and judicial integrity are still unmet.

REBECCA ANN MITCHELLS