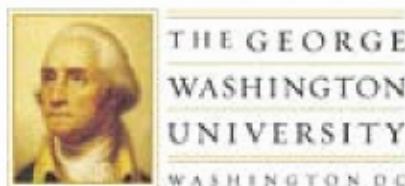


# The Burger Court Opinion Writing Database

*Brennan v. Arnheim & Neely, Inc.*  
410 U.S. 512 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAM  
TIN

X  
X  
X  
X  
X

April 12, 1973

Re: No. 71-1585 - U. S. v. Russell

Dear Bill:

Please join me.

Regards,

WFB

Mr. Justice Rehnquist

Copies to the Conference

B  
-  
Petition for  
Review

1st DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Douglas, D.

SUPREME COURT OF THE UNITED STATES

No. 71-1585

Circulated:

3-72

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Richard Russell. } peals for the Ninth Circuit.

[March —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

A federal agent supplied the accused with one chemical ingredient of the drug known as methamphetamine ("speed") which the accused manufactured and for which act he was sentenced to prison. His defense was entrapment, which the Court of Appeals sustained and which the Court today disallows. Since I have an opposed view of entrapment, I dissent.

My view is that of Justice Brandeis expressed in *Casey v. United States*, 276 U. S. 413, 423 (dissent), that of Justice Frankfurter stated in *Sherman v. United States*, 356 U. S. 369, 378 (concurrence), and that of Justice Roberts contained in *Sorrells v. United States*, 287 U. S. 435, 453 (concurrence).

In my view, the fact that the chemical ingredient supplied by the federal agent might have been obtained from other sources is quite irrelevant. Supplying the chemical ingredient used in the manufacture of this batch of "speed" made the United States an active participant in the unlawful activity. As stated by Justice Brandeis, dissenting in *Casey v. United States*, *supra*, at 423:

"I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or

P. 1

## 2nd DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 71-1585

From: Douglas, S.

United States, Petitioner, } On Writ of Certiorari to the  
v. United States Court of Ap-  
Richard Russell. } peals for the ~~Fourth~~ Circuit: 4/11/23

[March —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

A federal agent supplied the accused with one chemical ingredient of the drug known as methamphetamine ("speed") which the accused manufactured and for which act he was sentenced to prison. His defense was entrapment, which the Court of Appeals sustained and which the Court today disallows. Since I have an opposed view of entrapment, I dissent.

My view is that of Justice Brandeis expressed in *Casey v. United States*, 276 U. S. 413, 423 (dissent), that of Justice Frankfurter stated in *Sherman v. United States*, 356 U. S. 369, 378 (concurrence), and that of Justice ~~Roberts~~ contained in *Sorrells v. United States*, 287 U. S. 435, 453 (concurrence).

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"I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 9, 1973

RE: No. 71-1585 United States v. Russell

Dear Bill:

Please join me in your dissenting  
opinion in the above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 9, 1973

RE: No. 71-1585 United States v. Russell

Dear Potter:

Please join me in your dissenting  
opinion in the above.

Sincerely,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 20, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-1585, United States v. Russell

In due course, I shall circulate a dissenting opinion in this case.

*P.S.*

P. S.

B  
You waited for  
me to fix



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: APR 9 1973

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 71-1585

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Richard Russell. } peals for the Ninth Circuit.

[April —, 1973]

MR. JUSTICE STEWART, dissenting.

It is common ground that “[t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents.” *Lopez v. United States*, 373 U. S. 429, 434 (1963). For the Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman v. United States*, 356 U. S. 369, 372 (1958). As Mr. Justice Brandeis put it, the Government “may not provoke or create a crime and then punish the criminal, its creature.” *Casey v. United States*, 276 U. S. 413, 423 (1928) (dissenting opinion). It is to prevent this situation from occurring in the administration of federal **criminal justice that the defense of entrapment exists.** *Sorrells v. United States*, 287 U. S. 435 (1932); *Sherman v. United States, supra*. Cf. *Masciale v. United States*, 356 U. S. 386 (1958); *Lopez v. United States, supra*. But the Court has been sharply divided as to the proper basis, scope, and focus of the entrapment defense, and as to whether, in the absence of a conclusive showing, the issue of entrapment is for the judge or the jury to determine.

### I

In *Sorrells v. United States, supra*, and *Sherman v. United States, supra*, the Court took what might be called a “subjective” approach to the defense of entrap-

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No 71-1585

Circulated:

Recirculated: APR 13 1973

United States, Petitioner, v. Richard Russell. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[April 1, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

It is common ground that "[t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Lopez v. United States*, 373 U. S. 429, 434 (1963). For the Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman v. United States*, 356 U. S. 369, 372 (1958). As Mr. Justice Brandeis put it, the Government "may not provoke or create a crime and then punish the criminal, its creature." *Casey v. United States*, 276 U. S. 413, 423 (1928) (dissenting opinion). It is to prevent this situation from occurring in the administration of federal criminal justice that the defense of entrapment exists. *Sorrells v. United States*, 287 U. S. 435 (1932); *Sherman v. United States*, *supra*. Cf. *Masciale v. United States*, 356 U. S. 386 (1958); *Lopez v. United States*, *supra*. But the Court has been sharply divided as to the proper basis, scope, and focus of the entrapment defense, and as to whether, in the absence of a conclusive showing, the issue of entrapment is for the judge or the jury to determine.

T

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(3)

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 22, 1973

Re: No. 71-1585 - United States v. Russell

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 21, 1973

Re: No. 71-1585 - United States v. Russell

Dear Bill:

I shall wait for Potter's proposed  
dissent.

Sincerely,



T.M.

Mr. Justice Rehnquist

cc: Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 11, 1973

Re: No. 71-1585 - United States v. Russell

Dear Potter:

Please join me in your dissent.

Sincerely,



T.M.

Mr. Justice Stewart

cc: Conference

(B)

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 22, 1973

Re: No. 71-1585 - United States v. Russell

Dear Bill:

Please join me.

Sincerely,

*H.A.B.*

Mr. Justice Rehnquist

Copies to the Conference

B

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 19, 1973

109-1

Re: No. 71-1585 United States v. Russell

Dear Bill:

Please join me.

Sincerely,

*L. Lewis*

Mr. Justice Rehnquist

cc: The Conference

15  
Initial wait for  
Petitioners proposed  
dissent

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

Circulated: 3/20/73

**SUPREME COURT OF THE UNITED STATES**

No. 71-1585

Recirculated: \_\_\_\_\_

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Ap-  
Richard Russell. | peals for the Ninth Circuit.

[March —, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Richard Russell was charged in three counts of a five count indictment returned against him and codefendants John and Patrick Connolly.<sup>1</sup> After a jury trial in the District Court, in which his sole defense was entrapment, respondent was convicted on all three counts of having unlawfully manufactured and processed methamphetamine ("speed") and of having unlawfully sold and delivered that drug in violation of 21 U. S. C. §§ 331 (q)(1), (2), 360a (a), (b) (Supp. V, 1964). He was sentenced to concurrent terms of two years in prison for each offense, the terms to be suspended on the condition that he spend six months in prison and be placed on probation for the following three years. On appeal the United States Court of Appeals for the Ninth Circuit, one judge dissenting, reversed the conviction solely for the reason that an undercover agent supplied an essential chemical for manufacturing the methamphetamine which formed the basis of respondent's conviction. The court concluded that as a matter of law "a defense to a

<sup>1</sup>John Connolly did not appear for trial. Patrick Connolly was tried with the respondent and found guilty of all five counts against him. The validity of his conviction is not before us in this proceeding.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 30, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases held for United States v. Russell, No. 71-1585

No. 71-1515 - Rodovich v. United States: This case is before the Court on a petition for rehearing. It appears that one week before we granted certiorari in Russell, we unanimously denied the petitioner's request for certiorari on the grounds, inter alia, that we reconsider the rationale of the entrapment defense set forth in Sorrells and Sherman. The petition for rehearing was based solely on our granting certiorari in Russell. Since the petitioner was clearly predisposed to commit the crime, I shall vote to deny the petition for rehearing. It is also noteworthy that unlike Russell the government did not supply an essential ingredient or otherwise become as involved in the commission of the crime as it did in Russell.

No. 72-786 - Basey v. United States: The essential facts leading to conviction in this case are virtually the same as in Russell, and the sole questions presented by the petitioner here are the same as those urged by Russell. Since the opinion below is consistent with our position in Russell, I shall vote to deny the petition.

No. 72-965 - United States v. Knight: This case was held for both Russell and Brown v. United States, No. 71-6193. Here the respondent was indicted for the possession of heroin with the intent to distribute it. The district court granted his motion to suppress the heroin on the ground that although there was no entrapment in the traditional sense, the governmental conduct violated due process standards. It appears that an undercover agent infiltrated a drug ring and delivered the heroin from its illegal source to the respondent. The court below affirmed the action of the district court, citing, inter alia, its prior holding in Russell. On this issue I shall vote to vacate and remand for reconsideration in light of Russell.