United States v. Tucker: Can the Sixth Circuit Really Abolish the Outrageous Government Conduct Defense?

Jason R. Schulze

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol45/iss3/10

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
UNITED STATES V. TUCKER: CAN THE SIXTH CIRCUIT REALLY ABOLISH THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE?

INTRODUCTION

The "outrageous government conduct" defense, while a product of the entrapment doctrine, is founded on the fundamentals of due process. It is separate from entrapment, which is based upon the notion that the defendant must not be convicted because he did not possess the criminal predisposition to commit the crime prior to the association with a government agent. Instead, the defendant may prove the outrageous government conduct defense by showing that the government agent, regardless of the defendant's predisposition, acted in such an "outrageous" manner as to violate the concepts of due process. However, the process of successfully proving such a claim is extremely difficult. As one court stated, "the banner of outrageous misconduct is often raised, but seldom saluted."

1. The term "defense" is arguably a misnomer when used in conjunction with the doctrine of outrageous government conduct. The essence of an outrageous government conduct claim is that the government action is so shocking to due process principles that an indictment should never have been issued. Paul Marcus, The Due Process Defense in Entrapment Cases: The Journey Back, 27 AM. CRIM. L. REV. 457, 461 (1990). While an outrageous government conduct claim is raised by the defendant, some courts have determined that it is not a defense, but rather an invalidation of the indictment. See, e.g., United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir 1995) ("Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed."). The author acknowledges the significant argument that the outrageous government conduct/due process claim is not technically a "defense," but uses the term to represent such a claim by a criminal defendant for the sake of simplicity.


3. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.2(b) at 423 (2d ed. 1986) ("A defendant is considered predisposed if he is 'ready and willing to commit the crimes such as are charged in the indictment, whenever opportunity was afforded.' ") (quoting 1 E. Dvitt & C. Blackman, Federal Jury Practice and Instructions § 13.09 (3d ed. 1977)).

4. Marcus, supra note 1, at 458 ("The Due Process defense looks to the activities of the government officers — rather than the activities of the defendant — in an attempt to determine whether the government has overstepped the boundaries of what Justice Cardozo called standards 'implicit in the concept of ordered liberty.' ") (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

5. United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993).
Because of the confusion surrounding its origin, the unsettled Supreme Court authority supporting it, and its inconsistent application by federal courts, one circuit court has abolished the defense. While sympathetic to the troubles the "outrageous government conduct" defense has caused the courts, this Note will demonstrate that complete abolition is not only inconsistent with case law, but will also have a detrimental impact on the criminal justice system and on all potential criminal defendants.

This Note will first analyze the origins of the due process defense, beginning with the advent of the entrapment doctrine in Sorrells v. United States and later reaffirmed in Sherman v. United States. Although in these cases, the Supreme Court majority emphatically stated that the subjective predisposition test should be used for entrapment, concurring justices suggested that an objective test might be more consistent with the Constitution and principles of public policy. Furthermore, this Note will analyze the important dicta in United States v. Russell, wherein Justice Rhenquist created the "outrageous government conduct" defense. He stated that, in extreme situations, there may someday be such a violation of a criminal defendant's rights of due process by a government agent as to warrant the dismissal of that defendant's indictment. This "someday" concept was supported three years later by a five to three Supreme Court majority in Hampton v. United States.

Next, this Note will demonstrate the various ways the federal courts have attempted to apply the due process defense, usually with little success for the defendant. The discussion will then focus on the

6. See infra notes 17-63 and accompanying text (discussing the influence of the entrapment doctrine on the origins of the outrageous government conduct defense).
7. See infra notes 64-90 and accompanying text (reviewing Supreme Court decisions involving outrageous government conduct cases).
8. See infra notes 112-20 and accompanying text (analyzing the inconsistent federal court application of the defense).
9. See United States v. Tucker, 28 F.3d 1420, 1426-27 (6th Cir. 1994) cert. denied, 115 S.Ct. 1426 (1995) (stating that "based on the lack of binding precedent from either the Supreme Court or the Sixth Circuit, we are of the view that this panel is not required to recognize the 'due process' defense"); see also United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (holding that the doctrine of outrageous government conduct does not exist in the Seventh Circuit).
10. For purposes of this Note, "outrageous government conduct" and the "due process defense" are synonymous and used interchangeably.
14. Id. at 431-32.
Sixth Circuit's failure to apply the defense in United States v. Tucker. The Note will then explain why the court's analysis is flawed and discuss possible effects of the extinction of this much needed check on government action. Finally, this Note will attempt to demonstrate the need for the continued use of the due process defense because of its importance to both criminal defendants and the criminal justice system.

I. BACKGROUND

A. Entrapment and the Origins of the Predisposition Test

Any study of "outrageous government conduct" must begin with an examination of entrapment. While it is currently considered a completely separate defense, the outrageous government conduct defense's origins can be traced to the creation of entrapment in Sorrells v. United States. In Sorrells, the defendant had been prodded into purchasing liquor for a government agent in violation of federal prohibition after the agent had posed as a visiting tourist and war veteran. The agent asked Sorrells to obtain liquor for him on three separate occasions; the defendant finally agreed to the last request. After examining the defendant's predisposition, the Court held that the controlling factor was whether or not the defendant was innocent but for the actions of the government agents. The Court found that Sorrells lacked the required predisposition to sell liquor. Only after repeated requests by the government agent did he violate federal law. Thus, in Sorrells, the Supreme Court held that the sole purpose of the government agent's behavior was to create a crime in order to later punish the crime's participant. This behavior was considered entrap-

16. 28 F.3d 1420 (6th Cir. 1994).
17. 287 U.S. 435 (1932).
18. Id. at 439-40.
19. Id. at 439.
20. Id. at 451.
21. Id. at 452.
22. Id.
23. Id. at 441, 451. The majority concluded that the government agent "lured [the] defendant, otherwise innocent, to [the crime's] commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." Id. at 441. The majority continued that this factual situation raised "the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it." Id. at 451.
ment and barred a successful prosecution because the Sorrells Court deemed it "so shocking to the sense of justice."\(^{24}\)

The majority in Sorrells justified its creation of the entrapment defense by examining hidden Congressional intent.\(^{25}\) The Court stated that Congress intends to prohibit a certain action when it passes a law.\(^{26}\) It believed, however, that Congress did not intend for its law to be upheld if there is government action that is "abhorrent to the sense of justice."\(^{27}\) While Congress intended to proscribe a given behavior, it did not intend to override the needs of plain public policy and the proper administration of justice.\(^{28}\) Therefore, the Supreme Court hypothesized that in certain situations, Congress did not actually intend for its laws to be upheld in contradiction of these important societal needs.\(^{29}\) The Court found that a conviction of Sorrells would demonstrate such a contradiction and dismissed the complaint against him.\(^{30}\)

The Supreme Court majority affirmed the entrapment defense and reiterated this justification in Sherman v. United States.\(^{31}\) In Sherman, a government agent solicited drugs from the defendant as the defendant was attempting to overcome his drug addiction.\(^{32}\) The Court held that entrapment would bar Sherman's prosecution.\(^{33}\) Relying on the "hidden Congressional intent" justification, which originated in Sorrells, the Court stated that, while the Constitution gave the executive branch authority to enforce the laws that Congress creates, these laws are not to be upheld when the government manufactures a crime to

\(^{24}\) Id. at 446. The Court reasoned that it could not apply a statute to Sorrells under the circumstances. It felt:

[T]hat such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the government itself, to protect it from the illegal conduct of its officers and preserve the purity of its courts.

Id. (citing Casey v. United States, 276 U.S. 413, 419, 423 (1928)).

\(^{25}\) Id. at 448.

\(^{26}\) See id. at 445-46 (stating that the legislature is the "arbiter of public policy").

\(^{27}\) Id. at 449.

\(^{28}\) Id. at 448.

We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.

Id.

\(^{29}\) Id. at 448-49.

\(^{30}\) Id.


\(^{32}\) Id. at 371.

\(^{33}\) Id. at 378.
trap an unwary defendant.\textsuperscript{34} Sherman affirmed the entrapment defense, as well as the hidden Congressional intent justification found in Sorrells.\textsuperscript{35} These decisions created a solid defense for defendants who could show that the government agent instigated the crime, providing that same defendant was not predisposed to commit the crime prior to the government involvement.

\section*{B. The Origins of the Objective Due Process Test}

The Supreme Court majorities in Sorrells and Sherman based their entrapment test on the defendant's predisposition for crime.\textsuperscript{36} This determination is a subjective one, focusing on the mental state of the defendant.\textsuperscript{37} The concurring Justices in these two cases used an alternative approach.\textsuperscript{38} This approach ignores the subjective predisposition of the defendant by focusing instead on the action of the government agents.\textsuperscript{39} Subsequent decisions dubbed this analysis the objective test for entrapment because it requires the courts to look to the overall legality of the government action.\textsuperscript{40} Both Justice Roberts in Sorrells,\textsuperscript{41} and Justice Frankfurter in Sherman\textsuperscript{42} advocated the use of the objective test for entrapment. Justice Roberts opined that not only is the objective test the correct analysis, but that it is the actual test used by the majority in Sorrells.\textsuperscript{43} He suggested that the hidden Congressional intent theory justifying the majority's opinion was un-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} See id. at 372 ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.").
\item \textsuperscript{35} Id. at 377-78 (citing Sorrells v. United States, 287 U.S. 435 (1932)).
\item \textsuperscript{37} LAFAVE & SCOTT, supra note 3, § 5.2(b) at 422. The authors state that "the majority view is usually referred to as the 'subjective approach', but can be called the federal approach or the Sorrells-Sherman doctrine." Id.
\item \textsuperscript{38} Sorrells, 287 U.S. at 453-59 (Roberts, J., concurring); Sherman, 356 U.S. at 378-85 (Frankfurter, J., concurring).
\item \textsuperscript{39} Id.
\item \textsuperscript{40} See Molly K. Nichols, Comment, Entrapment and Due Process: How Far Is Too Far?, 58 TUL. L. REV. 1207, 1210-11 (1984) (stating that the test articulated by Justices Frankfurter and Roberts has become known as the objective test of entrapment).
\item \textsuperscript{41} Sorrells, 287 U.S. at 453-59 (Roberts, J., concurring).
\item \textsuperscript{42} Sherman, 356 U.S. at 378-85 (Frankfurter, J., concurring).
\item \textsuperscript{43} Sorrells, 287 U.S. at 455 (Roberts, J., concurring). Justice Roberts stated that the same policy of protecting the purity of the government and its functions that does not allow the courts to uphold civil remedies where the remedy would aid "the perpetration and consummation of an illegal scheme" is applied to criminal law. Id. at 455. He stated that courts "cannot consummate a wrong" and that this reasoning "is the real basis of the decisions approving the defense of entrapment, though in statement the rule is cloaked under a declaration that the government is estopped and the defendant has not been proved guilty." Id.
\end{itemize}
\end{footnotesize}
warranted. He felt the majority bases its true reasoning upon a fundamental public policy issue: the protection of government's functions and preservation of its overall integrity. Justice Roberts argued it was the court's responsibility "to protect itself and the government from prostitutions of criminal law." Because Justice Roberts held this policy consideration as the main goal of the entrapment defense, he felt that the majority was not really concerned with the mental state of the defendant, but simply in making sure that the government does not overstep its bounds.

Similarly, in his concurrence in Sherman, Justice Frankfurter reiterated much of Justice Roberts' opinion regarding the true motives of the subjective approach to entrapment. He also criticized the majority's justification for the entrapment defense. He felt that the "hidden

44. In response to the hidden congressional intent theory, Justice Roberts called this a "strained and unwarranted construction of the statute; [which] amounts, in fact, to judicial amendment. It is not merely broad construction, but addition of an element not contained in the legislation." Id. at 456. He continued that this unwarranted application creates more problems because "no guide or rule is announced as to when a statute shall be read as excluding a case of entrapment; and no principle of statutory construction is suggested which would enable us to say that it is excluded by some statutes and not by others." Id. at 457.

45. Id.

46. Id.

47. See Abramson & Lindeman, supra note 2, at 141-42 (agreeing with Justice Roberts' contention that the majority cloaked its analysis in statutory interpretation, but really embraced the due process theory). In explaining the majority's analysis, the authors state:

While the Court's analysis focused upon whether or not the defendant's conduct was within the confines of the statute, it also set forth a basis or theory for scrutiny of police conduct. Although not specifically labeled a "due process" theory, a principle of fairness seems implicit in the Court's rationale.

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent . . . . Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so upon what theory, has given rise to conflicting opinions.

Id. at 141 (quoting Sorrells v. United States 287 U.S. 435, 441 (1932)).

48. 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring). Justice Frankfurter felt that courts will decide that certain government action should not be tolerated because "public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." Id. at 380 (Frankfurter, J., concurring). He also stated that the court appropriately used an objective test here because looking to the predisposition "loses sight of the underlying reason for the defense." Id. at 382 (Frankfurter, J., concurring). Government conduct, such as that of the agents in Sherman cannot be "tolerated in an advanced society." Id. at 383 (Frankfurter, J., concurring).
intent of Congress" rationale was "sheer fiction." In Justice Frankfurter's opinion, Congress intends only one thing when it enacts laws: to proscribe a given act or omission. With this justification unavailable to the courts, the real justification for the entrapment defense was that Congress enacted laws knowing that the Constitution gave the courts the authority to oversee the administration of justice. Thus, when the government acted in such a way as to unfairly induce a person to act "criminally," the defendant must not be prosecuted. Justice Frankfurter views this determination as an objective one, looking to the government action regardless of the mental state of the defendant.

In sum, there are two tests applied to the entrapment defense: the subjective test established by the Supreme Court majorities in Sorrells and Sherman, and the objective test advanced first by Justice Roberts in Sorrells, then by Justice Frankfurter in Sherman. The federal courts and a majority of state courts use the subjective approach. The objective approach, however, has support as well. Although described

49. Id. at 379 (Frankfurter, J., concurring). Justice Frankfurter stated that "[i]t is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.'" Id.

50. Id. "In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged." Id.

51. Id. at 381. Justice Frankfurter stated that Congress enacts laws that are completely silent on the issue of entrapment because these laws are passed "on the basis of certain presuppositions concerning the established legal order and the rule of the courts within that system in formulating standards for the administration of criminal justice." Id.

52. Id. at 383. "Certain police conduct to ensnare [a defendant with a criminal record] into further crime is not to be tolerated by an advanced society." Id.

53. Id. at 384-85. Frankfurter gave the courts factors to consider in determining whether the action is objectively inconsistent with the fundamentals of justice. Id. These factors include the following: "appeals to sympathy, the setting the inducement took place, the nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the criminal business is usually carried on." Id.

54. LaFave & Scott, supra note 3, § 5.2(b), at 422.

55. See generally id. § 5.2(c), at 601 n.30 (listing the following eight sources supporting the objective approach: National Commission on Reform of Federal Criminal Laws, Working Papers 303-28 (1970); Lawrence Tiffany et al., Detection of Crime 265-72 (1967); Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs, 60 Yale L.J. 1091 (1951); Joseph Goldstein, For Harold Losswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain, 84 Yale L.J. 683 (1975); Paul W. Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 Fordham L. Rev. 399 (1959); Beth Ela, Comment, Predisposition of Defendant Crucial Factor in Entrapment Defense, 59 Cornell L. Rev. 546 (1974); Reid Carron, Comment, Entrapment: A Critical Discussion, 37 Mo. L. Rev. 633 (1972); Stephen Clare Hoffman, Note, State v. Glen don Johnson: The Entrapment Defense is Sprung on South Dakota, 24 S.D. L. Rev. 510 (1979); id. at 601 n.31 (citing the Model Penal Code § 2.13 as recommending the objective approach); id.
by Justices Roberts and Frankfurter as a test to ensure that government limits its action to the fair and honorable administration of justice, these concepts are closely tied to due process.\textsuperscript{56}

The essential case for analyzing due process in this context is \textit{Rochin v. California}.\textsuperscript{57} \textit{Rochin} held that the courts may determine that if the actions of government "shock the conscience," a conviction cannot be upheld.\textsuperscript{58} The police found Rochin lying on his bed in his bedroom with two capsules sitting on his night stand.\textsuperscript{59} Upon seeing the police, Rochin swallowed the capsules.\textsuperscript{60} The police took Rochin to the hospital, pumped his stomach, and determined that the capsules contained morphine.\textsuperscript{61} The Court held that convictions cannot be obtained by methods that "offend a 'sense of justice.'"\textsuperscript{62} They felt such methods were used against Rochin.\textsuperscript{63} The objective test of entrapment is closely tied to these due process concepts illustrated in \textit{Rochin}. Justice Rehnquist combined these two concepts when he created the "outrageous government conduct" defense in \textit{United States v. Russell}.

\textbf{C. The Formation of the Outrageous Government Conduct Defense}

With the two competing tests for entrapment serving as a background, the Supreme Court created an entirely new defense based on due process principles in \textit{United States v. Russell}.\textsuperscript{64} Although the doctrine of entrapment played an important role in the creation of the

\textsuperscript{56} Due process has been defined as "a constitutional guarantee of respect for those personal immunities which, as Justice Cordozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' or 'implicit in the concept of ordered liberty.'" \textit{Rochin v. California}, 342 U.S. 165, 169 (1952) (quoting \textit{Snyder v. Massachusetts}, 291 U.S. 97, 105 (1934); \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937)).

\textsuperscript{57} 342 U.S. 165 (1952).

\textsuperscript{58} \textit{Id.} at 172. "[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically; this conduct shocks the conscience." \textit{Id.}

\textsuperscript{59} \textit{Id.} at 166.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.} at 173. "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" \textit{Id.} (quoting \textit{Brown v. Mississippi}, 297 U.S. 278, 285-86 (1936)).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} 411 U.S. 423 (1973).
outrageous government conduct defense, the two are nonetheless completely separate defenses. The primary difference lies in the tests used to prove each defense. Courts use a predisposition test to determine if entrapment will bar a successful prosecution. Conversely, the deciding factor for determining outrageous government conduct is the propriety of the governmental action. Thus, an objective test looks not to the mental state of the defendant, but rather to the actual methods employed by the government.

Justice Rhenquist created the objective/due process test through dicta in *United States v. Russell*. While defeating an entrapment claim brought by the defendant and reaffirming the subjective predisposition test for the entrapment defense, Justice Rhenquist stopped short of completely eliminating the possibility of a defense based solely on the government's conduct. He stated, "while we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed."

In Russell's situation, Justice Rhenquist felt the government action "stopped far short of violating that 'fundamental fairness, shocking to the universal sense of justice.' " Justice Rhenquist also reaffirmed the *Sorrells/Sherman* justification for the entrapment defense. He stated that Congress did not intend for a defendant to be punished if he was induced to commit the crime by government agents.

---

65. See *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (holding "the question is whether the defense . . . takes the case out of the purview of the statute because . . . its enactment should [not] be used to support such a gross perversion of its purpose"); *Sherman v. United States*, 356 U.S. 369, 376-77 (1958) (reaffirming *Sorrells*).

66. See *LAFAVE & SCOTT*, supra note 3, § 5.2(3), at 424 ("If government agents have instigated the commission of a crime, then the courts should not in effect approve that 'abhorrent transaction' by permitting the induced individual to be convicted.") (quoting *Sorrells*, 287 U.S. at 458-59 (Roberts, J., concurring)).

67. *Id.*

68. 411 U.S. at 431-32.

69. *Id.*

70. *Id.* (citation omitted).

71. *Id.* at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

72. See *id.* at 434 ("We are content to leave the matter where it was left by the Court in *Sherman*. . . .").

73. *Id.* at 435. In limiting the defense, Justice Rhenquist reiterated the *Sorrells/Sherman* justification:

It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government.
for Justice Rhenquist's dicta giving the possibility of a due process defense to criminal defendants, Russell reaffirmed all the existing aspects of the entrapment doctrine.\(^7\)

Three years later, the Supreme Court gave weight to this dicta in Russell as a Court majority ruled in favor of the availability of a due process defense to criminal defendants. In *Hampton v. United States*,\(^7\) a majority of the Court again rejected a defendant's claim of entrapment based on the facts, but was unable to completely ignore the "someday" dicta stated by Justice Rhenquist in Russell.\(^7\) Rather than completely ignore the dicta, the Court, including the dissent, held that a due process defense based on the impropriety of the government's agents is available to criminal defendants.\(^7\)

In *Hampton*, the lower court convicted the defendant of selling heroin, which was both supplied by and sold to government agents.\(^7\) Justice Rhenquist, writing for the plurality, retreated from his earlier "maybe someday" language in Russell, and held that a due process defense claim can never be successful outside of the Fourth Amendment search and seizure context.\(^7\) He ruled that because Hampton's case was not of this kind, due process was not violated; furthermore, since the defendant possessed the requisite predisposition for the offense, an entrapment defense was not available to him.\(^8\) As a result of this holding, Justice Rhenquist attempted to destroy the very defense he created in Russell.\(^8\) However, this portion of his opinion failed to gain a majority of the Court.\(^8\) Justice Powell, joined by Just-

\(^{74}\) *Id.* at 435.
\(^{75}\) *Id.* at 432, 435.
\(^{76}\) 425 U.S. 484 (1976).
\(^{77}\) *Id.* at 490-91.
\(^{78}\) *Id.* at 490; see also *Id.* at 497 (Brennan, J., dissenting) (agreeing with Justices Powell and Blackmun that there should remain a due process defense to defendants who have been improperly induced by government agents, and with Justices Stewart and Marshall that not only should such a defense exist, but that the defense should be applied in Hampton's case, thereby defeating his criminal prosecution).
\(^{79}\) *Id.* at 485-86.
\(^{80}\) *Id.* at 490 (1976). “The limitations of the Due Process Clause of the Fifth Amendment come into play only when the government activity in question violates some protected right of the defendant.” *Id.* at 490-91. Here, Justice Rhenquist concluded that there was no protected right of the defendant infringed upon by the government agent. *Id.* He felt that the defendant and the government agent acted in concert with one another. *Id.*
\(^{81}\) *Id.* at 490.
\(^{82}\) In *Hampton*, Justice Rhenquist stated that due process could never be violated where the defendant possessed the necessary predisposition. *Id.* But in *Russell*, Justice Rhenquist stated that there could possibly be instances where a defendant's due process rights were violated regardless of that defendant's state of mind. 411 U.S. 423, 431-32 (1973).
\(^{83}\) Justice Rhenquist's plurality opinion was joined by Chief Justice Burger and Justice White in its entirety, and by Justices Powell and Blackmun as to the result in Hampton. *Hampton*, 425
tice Blackmun, concurred in holding that the due process defense was not available to Hampton in this situation. However, they refused to join the plurality in holding that such an option should never be made available to criminal defendants. These two Justices, joined by Justices Brennan, Stewart, and Marshall, who felt that the due process claim should be successful in Hampton's situation, created a majority opinion holding that the due process/outrageous government conduct defense exists for criminal defendants.

Although tenuous, this group upheld the defense created in dicta by Justice Rhenquist in Russell. Thus, by a five to three majority, the Supreme Court upheld a defense that objectively looks to the conduct of the government agents for violations of fundamental rights of due process. Hampton expressly states that where government conduct is offensive to the extent these fundamental rights are impinged, the courts have the power to bar a defendant's prosecution. This determination is to be made without consideration of the state of mind of the defendant, and without considering his predisposition.

Even though the Hampton majority solidified the due process/outrageous conduct defense, there have been many problems with its application. One unsettled area of the defense is the judicial authority vested in the courts to make such a due process determination. Some courts have questioned the Supreme Court's power to engage in such an analysis.

D. Judicial Authority to Rule on Government Conduct

A key factor in the battle between the use of the subjective approach to entrapment and the objective due process approach to outrageous government conduct is whether a judge or a jury decides the proper approach to be used. For the subjective test of entrapment,
the jury hears the evidence of the defendant's state of mind and decides it as a factual issue. The due process issue, however, is a legal question decided by a judge. The power of the judiciary to resolve that issue evolved from McNabb v. United States. In McNabb, the Supreme Court gave the judiciary the authority to oversee the criminal justice system. The Court stated that the scope of federal court review is not limited to only matters of law or constitutional violations, but also includes "the duty of establishing and maintaining civilized standards of procedure and evidence." This process of judicial administration is not to be left solely to the law enforcement agents of the executive branch; it is also within the purview of the judicial system.

The Court in Rochin v. United States further discussed its authority to review due process claims brought against the government. The Court in Rochin stated that one of the duties of the court system is to "reconcile the needs both of continuity and of change in a progressive society." In order to do this, the Court placed confidence in self-critical and self-disciplined judges. The Court felt that society has a right to request that its judges make informed decisions regarding the propriety of government action. Justice Roberts held a similar view in his concurring opinion in Sorrells. He stated that in order for the court to protect its own functions, it must be allowed to make due process determinations.

---

91. LAFAVE & SCOTT, supra note 3, § 5.2(f)(2), at 428.
92. See Marcus, supra note 1, at 459 ("The due process contention, which focuses on the limitations of the Constitution, is determined by the judge as a matter of law."); see also United States v. Sotelo-Murillo, 887 F.2d 176, 182 (9th Cir. 1989) ("Whether the government's conduct is sufficiently outrageous to violate due process is a question of law. ... It is not an issue for the jury and [the defendant] was not entitled to a jury instruction on this issue.").
93. 318 U.S. 332 (1943).
94. Id. at 340; see also Nichols, supra note 40, at 1216-17 (stating that in McNabb, the Supreme Court expanded the federal court's review beyond "the contours of the Constitution," enabling the court system to share in the responsibility of the administration of justice with the law enforcement community).
96. Id. at 343-44.
98. Id. at 172.
99. Id. at 171-72. The Court expressed the possible difficulties facing judges in making vague due process determinations when it stated, "[t]o practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude ... and alert tolerance toward views not shared." Id. at 171.
100. Id. at 172. In response to the challenges that face judges, the Rochin Court stated "these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power." Id.
Although the Court's authority to rule on due process claims was advanced in *McNabb* and *Rochin*, the Court retreated from this position in *United States v. Payner*. In *Payner*, the Court denied a Fourth Amendment exclusion of incriminating evidence that government agents obtained by riffling through a briefcase. Alternatively, the defendants contended that the government agents gathered evidence through willfully lawless activities, and therefore, should be suppressed under the Due Process clause and the court's supervisory power. The Supreme Court rejected this claim. Writing for the majority, Justice Powell stated that the Fourth Amendment is a clear-cut rule, and if it is not applicable, it should not be replaced by ill-defined supervisory or due process standards. Justice Powell continued that even if the Court were to find that the government behavior offended fundamental "canons of decency and fairness," the Due Process Clause could only be invoked where another protected right of the defendant was violated. This language adopts the core of Justice Rhenquist's plurality opinion in *Hampton*, which stated that the due process defense is not available to defendants. *Payner* leaves unsettled the question of judicial authority to rule on due process claims. While *Payner* suggests another right besides due process must be violated, a majority of the justices in *Hampton* stated that crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.  

---

102. The *McNabb* Court emphasized that "[t]he history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." 318 U.S. 332, 347 (1943).  
105. *Id.* at 732. The incriminating evidence consisted of bank documents stored in the briefcase of a bank employee. *Id.* The Court reasoned that Payner "possessed no privacy interests" in the documents illegally seized from the bank employee. *Id.* Because the defendant lacked a privacy interest in another individual's briefcase, the Court concluded that the defendant lacked standing to bring a constitutional claim under the search and seizure clause of the Fourth Amendment. *Id.* at 731-32.  
106. *Id.* at 731.  
107. *Id.* at 735.  
108. *Id.* at 736-37. The Court was wary of expanding the power of the courts through the use of the supervisory power. *Id.* at 737. It stressed that the competing interests of law enforcement and the needs of the individual, which are balanced in Fourth Amendment determinations, are not to be discarded when the supervisory power is used. *Id.* at 736. With this function apparent in a Fourth Amendment analysis, the Court discouraged a use of the unclear supervisory power standards. *Id.* at 737. It warned "[w]here we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far." *Id.* 109. *Id.* at 737 n.9 (citing *Rochin v. California*, 342 U.S. 165, 169 (1952)).  
110. *Id.* (citing *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion)).  
111. *Hampton*, 425 U.S. at 490.
that the due process defense alone is available to defendants where
government conduct is "outrageous." The Payner decision further
confused the due process defense. As a result of the varying ap-
proaches taken by the Supreme Court Justices in Sorrells, Sherman,
Russell, Hampton, and now Payner, the federal courts have been with-
out any settled rules on which to resolve the due process issue. The
variety in these courts' interpretations of the state of the defense
demonstrate this confusion.

E. Federal Courts' Attempts to Define the Due Process Defense

Despite the creation of the due process defense in Russell, the
Supreme Court failed to establish any guidelines for courts to use in
determining what conduct of law enforcement agents would be "so
outrageous" that the due process defense may be invoked. 112 Thus,
federal courts have been inconsistent in their application of the due
process defense. One consistency is certain however — the defense is
seldom successful. 113 Despite its lack of success, the defense has been
held as one with existing vitality for criminal defendants. 114 However,
its actual application has remained inconsistent and unclear.

While some courts developed tests that apply factors to determine if
government conduct violated the defendant's due process, 115 eventu-

113. See, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (holding government con-
duct outrageous because defendant's right of fundamental fairness was impinged by the govern-
ment); Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (holding that the government
engaged in outrageous conduct where it essentially manufactured the crime in which the defend-
ant was convicted).

114. See United States v. Mosley, 965 F.2d 906, 909 (10th Cir. 1992) (listing ten circuits which
have used an application of the defense and concluding "[w]e know of no circuit that has denied
the viability of this defense. Thus, outrageous conduct is a viable defense."). The federal circuits
have continued to accept the viability of the defense even after the Sixth Circuit "abolished" the
defense in Tucker. See infra notes 220-74 and accompanying text (discussing the Tucker
holding).

suggesting factors to determine a subjective test to entrapment, many of which have been used
by courts as factors for a due process violation); United States v. Barger, 931 F.2d 359, 363 (6th
Cir. 1991) (listing four factors which are to control a due process determination in the Sixth
Circuit); People v. Isaacson, 378 N.E.2d 78, 83 (N.Y. Ct. App. 1978) (relying on four factors to
determine a due process violation had occurred). The factors the New York State Court of
Appeals used in Isaacson are:

1) [W]hether the police manufactured a crime which otherwise would not likely have
occurred, or merely involved themselves in an ongoing criminal activity; 2) whether the
police themselves engaged in criminal or improper conduct repugnant to a sense of
justice; 3) whether the defendant's reluctance to commit the crime is overcome by ap-
peals to humanitarian instincts such as sympathy or past friendship, by temptation of
exorbitant gain, or by persistent solicitation in the face of unwillingness; and 4) whether
ally courts seem to resolve each case on its specific facts. The courts have held that they must look to the "totality of the circumstances," with no one factor controlling the decision. Federal courts managed to break down an outrageous government conduct claim into three areas: 1) government behavior that "shocks the conscience," 2) situations where it appears that the government agents manufactured the crime, and 3) government conduct that violates concepts of "fundamental fairness."

1. Government Conduct Which "Shocks the Conscience"

While rarely successful, claims of outrageous government conduct brought by criminal defendants are consistently given consideration by federal courts. One category of government conduct given consideration has been characterized as conduct "that shocks the conscience" of the court. Clearly, the type of mental or physical coercion employed by the government agents in *Rochin* meets this standard. In order to constitute a Due Process violation, coercion must be at a high level and must be particularly egregious. The Ninth Circuit attempted to illustrate such egregious government coercion in *United States v. Bogart*. The defendant in *Bogart* claimed the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

378 N.E.2d at 83.

116. See, e.g., *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986) ("Ultimately, every case must be resolved on its own particular facts."); see also *Greene v. United States*, 454 F.2d 783, 786-87 (9th Cir. 1971) (listing a number of specific types of inappropriate government behavior, stating that all the factors considered individually did not bar the prosecution of the defendant, but holding that considering all the factors together, under the totality of the circumstances, the government agents violated concepts of due process, and engaged in outrageous behavior).

117. See, e.g., *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982) ("Although a totality of circumstances standard must be applied, it is beneficial to review the parts that made up the whole.").

118. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (observing that "the proceedings by which [Rochin's] conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically; this is conduct that shocks the conscience").

119. See, e.g., *Greene*, 454 F.2d at 787 (stating "[w]e don't believe the government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators").

120. See, e.g., *United States v. Luttrell*, 889 F.2d 806, 814 (9th Cir. 1989) ("We see substantial reason to scrutinize these operations for government overreaching and to do so with the greatest care.").


122. Id.

123. Id.

124. 783 F.2d 1428 (9th Cir. 1986).
that he was wrongfully jailed on a "trumped up" charge for six months, given excessive bail, and forced to sell cocaine in order to make bail and be released from prison. Bogart argued that he was effectively coerced by government agents to secure his freedom from a wrongful incarceration. The Bogart court held that this fact pattern, if true, would constitute outrageous government conduct and would bar conviction based on principles of due process.

Another often quoted example of a situation where all courts would agree that government action was outrageous was offered by Judge Friendly in United States v. Archer. Judge Friendly stated, "[t]here is a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums." However, such clear cut examples are rarely presented to the courts. Usually, defendants are mixed up in activities deemed by society as detrimental, and therefore deference is given to the police in order to ensure a correction of this societal wrong. This balancing is most commonly apparent in the drug trade.

125. Id. at 1430-31.
126. Id. at 1430.
127. Id. at 1438. The Bogart court concluded that government conduct shocks the conscience "where the police conduct involved unwarranted physical, or perhaps mental, coercion. However, also constitutionally unacceptable are those hopefully few cases where the crime is fabricated entirely by the police to secure the defendant's conviction, rather than to protect the public from the defendant's continuing criminal behavior." Id.
128. 486 F.2d 670 (2d Cir. 1973).
129. Id. at 676-70; see also People v. Isaacson, 378 N.E.2d 78, 87 (N.Y. Ct. App. 1978) (holding that the conduct of the New York police was outrageous where, in order to secure the services of an informant, the police had used trickery and deceit, along with physical force such as striking the informant hard enough to knock him out of his chair, kicking him in the ribs, mouth, and forehead, and threatening to shoot him and throw him down a flight of stairs).
130. See Hampton v. United States, 425 U.S. 484 (1976) (upholding petitioner's conviction where he sold heroin to government agent which had been supplied to him by a government informant and jury found he was predisposed to the crime); United States v. Russell, 411 U.S. 423 (1973) (upholding respondent's conviction where he had been involved in making drugs before agents visit and where respondent conceded that he may have harbored a criminal predisposition); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995) (holding government's involvement in underlying cocaine transaction as both buyer and seller was not outrageous conduct); United States v. Mosley, 965 F.2d 906 (10th Cir. 1992) (holding that government conduct was not outrageous where agent sold cocaine for a low price and there was no evidence that government knew or took advantage of defendant's addiction); United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (holding government actions were not outrageous where agents employed informant who was both cocaine addict as well as defendant's former girlfriend on a contingent fee basis); United States v. Leja, 563 F.2d 244 (6th Cir. 1977) (holding government conduct was not outrageous where agents established laboratory supplies and technical assistance in manufacturing narcotics).
Since the inception of the entrapment defense in *Sorrells*, the courts have made it clear that government agents are given "artifice and stratagem" in order to "catch those engaged in criminal enterprises."131 Because law enforcement agents are given this power, courts have found it very difficult to determine what government conduct is so extreme as sufficient to "shock the conscience."132 This discrepancy in the definition of outrageous conduct is exhibited by the discretion in which the government employs its informants.133 In *United States v. Simpson*,134 the government employed an informant who was a heroin addict, prostitute, fugitive from Canadian justice, and involved in a sexual relationship with the defendant.135 The court allowed her use as an informant.136 Courts have also determined that informants can be paid on a contingency fee basis.137 Government agents can also dangle rich incentives of financial gain before the defendants in order to help induce their commission of the crime.138 None of these actions are considered to "shock the conscience."

One problem facing courts is the difficulty determining what is shocking. What is shocking to a judge, may not be shocking to a federal law enforcement agent in the field, and what is shocking to one

133. See Gail M. Greaney, *Crossing the Constitutional Line: Due Process and the Law Enforcement Justification*, 67 NOTRE DAME L. REV. 745, 773-80 (1992) (discussing the lack of guidelines or a precise definition with which to apply the defense).
134. 927 F.2d 1088 (9th Cir. 1991). The *Simpson* case is an excellent example of the differences of judicial opinion that can stall a due process defense. The original district court decision dismissed the indictment using the outrageous government conduct defense. United States v. Simpson, 813 F.2d 1462, 1471 (9th Cir.), cert. denied 484 U.S. 898 (1987). The Ninth Circuit Court of Appeals, disagreeing with the due process claim, reversed and remanded. *Id.* On remand, the district court again dismissed the indictment using its supervisory powers. United States v. Simpson, 927 F.2d 1088, 1089 (9th Cir. 1991). On second appeal, the Ninth Circuit again reversed and remanded the decision instructing the district court to reinstate the indictment. *Id.* at 1091. The Court of Appeals felt the use of supervisory powers was unwarranted. *Id.*
135. *Simpson*, 927 F.2d at 1089.
136. *Id.* Judge Kozinski demonstrated the irreverence with which some judges treat defendants' outrageous government conduct claims by holding that the informant in the *Simpson* case "was a prostitute, heroin user and fugitive from Canadian justice; but otherwise she was okay." *Id.* at 1089.
137. Owen v. Wainwright, 806 F.2d 1519, 1522 (11th Cir. 1986). But see United States v. Solorio, 37 F.3d 454 (9th Cir. 1994) (holding that a contingency fee plan was outrageous when it was dependent on a conviction of the defendant and proportionate to the amount of illegal contraband seized).
138. See United States v. Emmert, 829 F.2d 805 (9th Cir. 1987) (allowing government agents to approach a college student and offer him a $200,000 finder's fee to secure a supply of cocaine for the agents).
judge may not be shocking to another.\textsuperscript{139} Because of the difficulties associated with its application, one commentator, Donald A. Dripps, has advocated the abolition of the outrageous government conduct defense because of this inconsistency.\textsuperscript{140} Dripps argues that judges simply cannot apply a universal test because:

A judge asked to apply the \textit{Rochin} test will know of sadistic serial killers like Leonard Lake and John Wayne Gacy, will remember the Zapruder film and the photo of a Vietnamese girl consumed by napalm. We live, for better or worse, "with a callous heart." Much that has lost the power to outrage or to shock should be outlawed nonetheless.\textsuperscript{141}

Inconsistent application of the "shocking to the conscience" type of defense threatens its continued viability.

2. Situations Where the Government Essentially Manufactured the Crime

Another instance where courts find outrageous government conduct arises when the government essentially creates a crime in order to punish its participants.\textsuperscript{142} Though decided before \textit{Russell}, \textit{Greene v. United States}\textsuperscript{143} is an example of a federal court holding that a particular government action violated due process because it essentially manufactured a crime.\textsuperscript{144} In \textit{Greene}, a federal agent approached the defendant and asked him to establish a distillery for the illegal production of liquor.\textsuperscript{145} In furtherance of this goal, the agent supplied Greene with the still, the still site, as well as various ingredients needed in the production of liquor, including 2000 pounds of sugar.\textsuperscript{146} The operation was maintained for over two and one half years and

\textsuperscript{139} See United States v. Miller, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring) (explaining how some sting operations do not bother him but "[o]ther judges are offended by immorality (such as sponsoring an informant's use of sexual favors as currency) or by acts that endanger informants (such as supplying them with drugs for personal use) but not by the traditional sting").

\textsuperscript{140} Donald A. Dripps, \textit{At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace Outrageous Government Conduct Defense}, 1993 U. ILL. L. REV. 261, 271-72 (1993). Professor Dripps advocated eliminating the outrageous government conduct defense and replacing it with a broader \textit{Terry} type rule to regulate the government agents' actions. \textit{Id.} at 261. This rule would require government agents to have a "reasonable justification" for any investigative methods "that 'deprive' individuals of their 'liberty.' " \textit{Id.} at 262.

\textsuperscript{141} \textit{Id.} at 271 (citation omitted).

\textsuperscript{142} See Hampton v. United States, 425 U.S. 484, 498 (1976) (Brennan, J., dissenting) (stating that in Hampton's case the government agents did nothing more than "buy contraband from itself and jail the intermediary").

\textsuperscript{143} 454 F.2d 783 (9th Cir. 1971).

\textsuperscript{144} \textit{Id.} at 787.

\textsuperscript{145} \textit{Id.} at 784.

\textsuperscript{146} \textit{Id.} at 785-86.
during that time the government was the only customer of the operation. The Ninth Circuit held this conduct to be outrageous because there would have been no crime had it not been for the extensive efforts of the government agents in trying to obtain a conviction. The court felt that "when the Government permits itself to become enmeshed in criminal activity, from beginning to end," to the degree that it had done in Greene, a conviction of the defendant would be "repugnant to American criminal justice." However, such a situation is rare. In a later case, the Ninth Circuit warned that such government involvement must lead to an actual, complete, and long-functioning criminal apparatus wholly induced by the government. This too is rare. It is more often the case that the government agents will suggest a criminal scheme and let it develop, or will enter the scheme once it has begun.

Many degrees of government involvement in crime have been determined not to be outrageous. For example, in United States v. Citro the Ninth Circuit held that an undercover agent's conduct that proposed and explained the details of a counterfeit credit card scheme to the defendant, supplied him with the cards, and arrested him when he used them, did not constitute outrageous government conduct. Government agents have also been allowed to misrepresent themselves as agents of fictitious corporations to illicit bribes to public officials in order to obtain bribery convictions. In addition, courts have held that agents may infiltrate ongoing criminal activities, as well as induce defendants to repeat or continue crime, or to expand their previous criminal activity. Hampton illustrated that the government agency may both supply the illegal contraband and purchase it in order to obtain a conviction from the defendant. These cases demonstrate that while extreme government involvement such as the active participation of agents in Greene may occur, it is more likely that con-

---

147. Id. at 785.
148. Id. at 787. The court stated "we do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." Id.
149. Id.
150. United States v. Lutrell, 889 F.2d 806, 812 (9th Cir. 1989).
152. 842 F.2d 1149 (9th Cir. 1987).
153. Id. at 1153.
156. See, e.g., Mosley, 965 F.2d at 911 (citing United States v. Cantwell, 806 F.2d 1463, 1468-69 n.3 (10th Cir. 1986)).
duct short of intensive government involvement will survive an allegation of outrageous conduct.

3. **Government Conduct That Violates Principles of Fundamental Fairness**

The last category courts use when considering outrageous government conduct is activity that violates concepts of fundamental fairness found inherently in the Bill of Rights. The doctrine of fundamental fairness relies on the notion that criminal investigations should move "deliberately, purposely and fairly." This doctrine has its origins in Justice Brandeis' famous dissent in *Olmstead v. United States.* He stated that the Constitution contains "the right to be left alone — the most comprehensive of rights and the right most valued by civilized men." While these rights might be the most fundamental and most strongly defended, they are still the most vague.

Two decisions have given the fundamental fairness claim some merit. In *United States v. Twigg,* the Third Circuit recognized that government conduct could be adjudged outrageous on the basis of violations of fundamental fairness. The defendant in *Twigg* had been recruited into a manufacturing operation for methamphetamine hydrochloride ("speed"). The agents supplied all the chemicals and all the expertise. Twigg's primary function was to run errands for groceries and coffee, contributing little to the actual operation. The court held that a conviction in this instance would violate fundamental rules of fairness. Moreover, the court held that the facts of *Twigg*

---

158. See *United States v. Lutrell,* 889 F.2d 806, 813 (9th Cir. 1989) (stating that "[r]ooted in the Bill of Rights is a concept that processes of criminal investigation move ... fairly"). As support, the court cited the probable cause requirement of the Fourth Amendment, and Justice Brandeis' famous dissent stating that the Constitution contains "the right to be left alone." *Id.* (quoting *Olmstead v. United States,* 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting)).

159. *Id.*


161. *Id.* at 478 (Brandeis, J., dissenting).

162. See Marcus, *supra* note 1, at 471-72 (arguing that the outrageous government conduct defense must be continued because it protects individuals' rights to fundamental concepts of honesty and fair play).

163. 588 F.2d 373 (3rd Cir. 1978).

164. *Id.* at 374-75.

165. *Id.*

166. *Id.* at 375-76.

167. *Id.* at 376.

168. *Id.* at 381. The court continued: *T*he DEA agents deceptively implanted the criminal design in Neville's mind. They set him up, encouraged him, provided the essential supplies and technical expertise, and when he and Kubica encountered difficulties in consummating the crime, they assisted in finding solutions. This egregious conduct on the part of government agents
were distinguishable from Russell and Hampton; thus, the majority in Twigg overturned a conviction based on outrageous government conduct for the first time since its inception in Russell.

The concept of fundamental fairness was extended to the right to not be investigated without just cause in United States v. Lutrell. In Lutrell, the Ninth Circuit held that government agents must have "reasoned grounds . . . [to] approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct." Apparently, this significant step towards an extended due process standard was later rejected by the Ninth Circuit in an en banc hearing. With only a single dissenting opinion from Judge Pregerson, the Ninth Circuit Court of Appeals vacated the "reasoned grounds" requirement for investigating an individual under the due process clause. Even before the later rejection, this original extension of the outrageous government conduct defense had its limitations. Furthermore, the government can easily support its investigation with a factual basis, and thus, the Lutrell standard is not as demanding as it appears. As a result of the Twigg holding and the original Lutrell extension, the concepts of fundamental fairness have gained the most support of the three categories considered for outrageous government conduct.

generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred.

Id.

169. The court distinguished Twigg from Russell because in Twigg the defendants were not active participants in an illegal drug manufacturing enterprise which existed before the government agent appeared on the scene. Id. at 378. Twigg was distinguished from Hampton because the crime was "conceived and contrived by the government agents" in Twigg and not in Hampton. Id. at 378-79.

170. 889 F.2d 806 (9th Cir. 1989).

171. Id. at 813.

172. United States v. Lutrell, 923 F.2d 764, 764 (9th Cir. 1991) (en banc).

173. Id.

174. Marcus, supra note 1, at 471. Professor Marcus warns that the Lutrell holding is limited, and that the government agents who can show this factual basis will prevail. He continued:

Thus, the case says little about broad concepts of shocking behavior and the involvement of the due process clause generally in the entrapment area. Lutrell does, however, strike a significant blow on behalf of those who would encourage courts to take a tough look at intense undercover operations based on minimal information concerning particular individuals.

Id.

175. While Twigg has been criticized and the Lutrell "reasonable grounds" extension was vacated, these holdings were the most receptive to the due process defense.
F. Policy Considerations Behind Outrageous Government Conduct

The confusion behind the outrageous government conduct defense is a result of its inconsistent application. This inconsistent application is due to the fact that different judges have different opinions as to the state of the law and the means by which justice should be employed.\(^{176}\) Judges have different opinions because of the various underlying policy reasons that bear on the defense. These various policy considerations are as diverse as the opinions they influence. The defense was created to strike a balance between the societal need for police investigation and as Justice Brandeis termed it, the "right to be left alone."\(^{177}\)

Another policy reason for the defense was not to protect the individual, but as Justice Roberts stated in his concurrence in *Sorrells*, to protect and preserve the purity of our government's functions.\(^{178}\) Justice Frankfurter echoed this sentiment in his *Sherman* concurrence.\(^{179}\) He stated that the public relies on the fair and honorable administration of justice, with this reliance ultimately lying on the rule of law.\(^{180}\) The individual and the system are therefore protected through the due process standards.\(^{181}\) Not only can the individual feel his "right to be left alone" will be protected, but also law enforcement agents can receive guidance as to what behavior will be deemed unacceptable.\(^{182}\) This guidance to the law enforcement community has been invaluable in justifying the due process defense.\(^{183}\)

It is clear that courts balance these policy interests with the government's need to combat crime and preserve an ordered society. While the objective test by its name, indicates that courts should not let policy considerations taint their decisions, often this is not the case. Usually, the first factor taken into consideration by the court in making a

\(^{176}\) Compare United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (invalidating a conviction pursuant to the due process defense) *with* United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (holding that government did not engage in outrageous conduct by employing informant on a contingent fee basis); see also, Greaney, supra note 133 (discussing a critical analysis of the due process defense which explores the inconsistent application of the doctrine).

\(^{177}\) *Olmstead* v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).


\(^{180}\) *Id.*

\(^{181}\) *Id.* at 381.

\(^{182}\) *Id.*

\(^{183}\) See Greaney, supra note 133, at 780-85 (advocating the need for the due process defense in order to provide a sufficient check on police behavior); see also United States v. Barger, 931 F.2d 359, 363 (6th Cir. 1991) (listing "the need for the police conduct as shown by the type of criminal activity involved" as the first of four factors to be considered for outrageous government conduct).
due process determination is the type of crime committed by the defendant.\textsuperscript{184} This shows that when the crime is particularly unwanted in a progressive society, the court will grant the police greater deference in their attempts to ferret out this societal wrong.\textsuperscript{185} In \textit{United States v. West}, the Third Circuit Court of Appeals held that the type of crime committed has enormous bearing on how government conduct will be reviewed.\textsuperscript{186} This illustrates that while there is an objective due process standard by name, these principles can be stretched when the criminal activity is of an unsavory kind.

One critic of the outrageous government conduct defense is Judge Easterbrook of the Seventh Circuit. In his concurring opinion in \textit{United States v. Miller},\textsuperscript{187} Judge Easterbrook advocated the abolition of the defense.\textsuperscript{188} He felt that judges use no real guidelines.\textsuperscript{189} Instead, when they make important judicial decisions, they vote "with their lower intestines."\textsuperscript{190} He argued that the defense had been so unsuccessful because most judges agreed with the underlying policy that "when push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous."\textsuperscript{191}

Judge Easterbrook offered two reasons why the due process defense should be abolished: 1) it raises false hopes for the defendant;\textsuperscript{192} and 2) the defense is useless because it fails to give the police any guidance and because the courts can not agree on how to apply it.\textsuperscript{193} He suggests that the legislature would be a more appropriate forum in which to resolve the problem.\textsuperscript{194} By engaging in "outrageous" conduct, the police are going against moral standards.\textsuperscript{195} If this is the

\begin{thebibliography}{99}
\bibitem{184} See, e.g., United States v. West, 511 F.2d 1083, 1085 (3rd Cir. 1974) (indicating that the type of crime committed bears on how the government conduct will be reviewed).
\bibitem{185} Greaney, \emph{supra} note 133, at 775. The author states:
Moreover, the fact that the court began its analysis in \textit{Twigg} by asserting that the type of crime being combated must be considered when analyzing a due process claim revealed that the Third Circuit was willing to let social policy considerations override faithfulness to the constitutional mandate of due process.
\bibitem{186} Id. at 1271-72 (Easterbrook, J., concurring).
\bibitem{187} Id. at 1272-73.
\bibitem{188} Id. at 1273. In response to judges' efforts to determine what actually constitutes a due process violation, Judge Easterbrook stated, "any line we draw would be unprincipled and therefore not judicial in nature . . . [m]ore likely there would be no line . . . [s]uch meandering, personal approach is the antithesis of justice under law, and we ought not indulge it." \textit{Id.}
\bibitem{189} Id. at 1271.
\bibitem{190} Id.
\bibitem{191} Id.
\bibitem{192} Id.
\bibitem{193} Id.
\bibitem{194} Id.
\bibitem{195} Id. at 1273.
\end{thebibliography}
case, Judge Easterbrook felt this is a political problem to be addressed by Congress, not a problem to be handled by the courts. Judge Easterbrook would defer the entire outrageous government conduct issue to Congress.

While the extreme solution offered by Judge Easterbrook is becoming a stronger possibility, there is much more authority and court opinion against such a view. Professor Paul Marcus, an authority on the entrapment/due process doctrine, gives a critical account of Judge Easterbrook's concurring opinion in *Miller.* He argues that Judge Easterbrook's first contention, namely that the defense gives false hopes, is simply not true. Observing that it would be hard to imagine many lawyers who look at a handful of successes in over two hundred tries as being too hopeful, he suggests that those invoking the defense know the odds, and have no false hopes. Professor Marcus

196. *Id.* at 1271. Judge Easterbrook demonstrated his stance on crime, and his opinion on how the decision should have come out with the following comments:

As [Miller] committed the crime, he should stand convicted. If the investigators were too creative or squandered their limited resources, this is a political problem. Congress can hold oversight hearings or pass a law; we shouldn't apply a chancellor's foot veto. Dissipating law enforcement resources injures persons who become victims of crime when the deterrent force of the law declines. Reversing convictions of the guilty cannot apply balm to these wounds.

*Id.*

197. *Id.*

198. See United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994) *cert. denied,* 115 S.Ct. 1426 (1995) (heeding to Judge Easterbrook's recommendations to abolish the viability of the outrageous government conduct defense in the Sixth Circuit). *But see* United States v. Santana, 6 F.3d 1, 4 n.5 (1st Cir. 1992) (terming outrageous government conduct defense "moribund," but declaring that Judge Easterbrook stretches the military analogy too far, preferring more neutral language, and recommending the continued viability of the due process defense); United States v. Mosley, 965 F.2d 906, 909 (10th Cir. 1992) (citing the absolute viability of the outrageous government conduct defense in ten federal circuits); Marcus, *supra* note 1 (encouraging the viability and expansion of the due process doctrine).


201. *Id.* at 465.

202. *Id.* In response to the false hopes claim, Professor Marcus states:

To state the proposition in this rather flip fashion, however, is to demonstrate its weakness. As a preliminary matter, one must question whether any defendant or defense
concludes that the likelihood of failure is no reason to abandon an important defense.\textsuperscript{203}

Marcus also rejects Judge Easterbrook's second contention, that the courts can never agree on conditions for the defense, and therefore, police receive no guidance.\textsuperscript{204} With the defense intact, there is always a threat to police officers that their actions may be deemed outrageous.\textsuperscript{205} Marcus argues that all courts would agree that actions such as those used in Judge Friendly's example in \textit{Archer} and the behavior in \textit{Isaacson} would be seen as outrageous and violative of the defendant's due process.\textsuperscript{206} While the defense is not universally applied, he feels this is no reason to abolish a viable check on massive governmental power.\textsuperscript{207}

\textbf{G. Sixth Circuit Attempts to Define Outrageous Government Conduct}

The Sixth Circuit has faced many of the same problems that have plagued other federal circuits. The first case dealing with the outrageous government conduct defense heard by the court was \textit{United States v. Leja}.\textsuperscript{208} In \textit{Leja}, the court acknowledged that extreme egregious conduct by government agents could offend concepts of fundamental fairness to justify the rare use of judicial power to stop it.\textsuperscript{209} However, the court found that the government conduct in Leja's instance was not of this type.\textsuperscript{210} Noting that courts should not automatically reject the due process defense when predisposition is found, the court seems to mix the predisposition and the objective outrageous government conduct tests.\textsuperscript{211} The court stated that when the defendant has the requisite predisposition to defeat an entrapment defense,
the conduct would have to be taken to a "constitutional magnitude." The *Leja* court stated if government action rises to a constitutional magnitude, the outrageous government conduct defense should be applied. However, the *Leja* court did nothing to state what behavior constitutes such a magnitude.

The Sixth Circuit has never overturned a conviction on outrageous government conduct grounds, but by 1992 it had applied the due process defense several times, and established a test to be used by the courts for a due process determination. This test consists of four factors for determining a due process violation by the government, and is outlined in *United States v. Barger*. The factors considered are: 1) the need for the police conduct as shown by the type of criminal activity involved, 2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement, 3) the control the government exerted over the criminal enterprise, and 4) the impact of the police activity on the commission of the crime. These factors are considered by the court and are not mandatory prongs in a test. The standard used by the Sixth Circuit courts is in the form of traditional outrageous government conduct language; that government conduct must violate fundamental fairness and be shocking to the universal sense of justice to violate concepts of due process. While the Sixth Circuit has never overturned a conviction on this basis, it is clear

---

212. *Leja*, 563 F.2d at 247. The court stated, "[i]f the egregious conduct of implanting an unlawful motive in an innocent mind does not rise to constitutional magnitude, it is difficult indeed to prohibit on constitutional grounds the prosecution of the defendants on these facts, where they were clearly predisposed to commit the acts." *Id.*

213. *Id.*

214. See, e.g., *United States v. Payne*, 962 F.2d 1228 (6th Cir. 1992) (holding that an undercover IRS agent's conduct of posing as a drug dealer trying to launder money and providing the defendant with money was not outrageous under a four factor test); *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985) (ruling that the government's actions were neither shocking nor such an unwarranted interference that the court should set aside the verdicts of the district court); *United States v. Norton*, 700 F.2d 1072 (6th Cir. 1983) (finding that a government agent did not violate any of the factors of a four part test in infiltrating the Ku Klux Klan to obtain criminal bombing convictions from the defendant); *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980) (establishing a four factor test to be considered in a due process claim, and determining that the government action did not meet the standard necessary for outrageousness).

215. 931 F.2d 359 (6th Cir. 1990).

216. *Id.* at 363.

217. *Id.* In *Barger*, the court failed to find an outrageous government conduct violation where the agent infiltrated the Hell's Angels biker gang to expose a murder plot against a rival biker gang. *Id.* It ruled the defendant was ready and willing to go along with the plot and such government action was necessary considering the violent nature of the organization. *Id.*

that a test for outrageous government conduct had been consistently applied. However, all this changed in United States v. Tucker.

II. Subject Opinion: United States v. Tucker

In United States v. Tucker, the claim of outrageous government conduct is raised as a result of a "reverse sting" operation initiated by the United States Department of Agriculture. In an effort to "catch . . . a lot of people that had been abusing the [food stamp] system," the Department hired Linda Hancock to find people willing to buy the stamps below face value and to record the transactions. For her efforts, Hancock worked on a commission basis, keeping half of the money she collected from her customers.

Two of Hancock's customers were the defendants, Brenda Tucker and Barbara McDonald. In November of 1990, Hancock called Tucker, who had been a friend of hers for ten years, to inquire if she was interested in purchasing food stamps. Hancock stated that she was selling the stamps in order to raise much needed money to give her children a "proper Christmas." Tucker resisted at first but later agreed to buy the stamps when she saw Hancock at a beauty salon dressed in a manner representative of her grave financial situation. Hancock then asked Tucker if she knew of anyone else that might be interested in purchasing food stamps, and Tucker supplied her with the name of one of her employees, McDonald. McDonald also

219. See supra note 214 (listing various Sixth Circuit decisions which contain a full outrageous government conduct analysis). The Sixth Circuit has continued to engage in a due process analysis even after the Tucker holding. In United States v. Zaia, No. 93-1452, 1994 U.S. App. LEXIS 24346, at *3 (6th Cir. Sept. 2, 1994), cert. denied, 115 S.Ct. 1252 (1995), the Sixth Circuit analyzed the credibility of the particular defendant's due process claim. While finding against the defendant, a due process analysis was nonetheless undertaken. See infra notes 350-52 and accompanying text (discussing the Zaia holding in context with the impact of the Tucker holding).


221. A reverse sting is most often used by narcotics agents in attempting to obtain convictions for narcotics offenses. Greaney, supra note 133, at 747. In a reverse sting, the government agent attempts to sell drugs or other controlled substances to the defendants, arresting them after they have purchased the illegal narcotics. Instead of drugs, the illegal purchase in Tucker was food stamps. Tucker, 28 F.3d at 1421.

222. Id.

223. Id.

224. Id.

225. Id.

226. Id.

227. Id.

228. Id.

229. Id.

230. Id.
purchased food stamps from Hancock after listening to her stories of ill-health and financial need.\textsuperscript{231} Tucker and McDonald were then arrested for purchasing, and aiding and abetting the purchase of, food stamps.\textsuperscript{232}

A. The District Court's Ruling

The case was referred to a magistrate for evidentiary hearings, findings, and recommendations.\textsuperscript{233} The magistrate recommended dismissal.\textsuperscript{234} The District Court for the Western District of Tennessee agreed.\textsuperscript{235} Judge Jerome Turner held that the government should not "lower itself" into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct.\textsuperscript{236} This, along with a totality of the factors approach, led the district court to dismiss the indictment because the government conduct was outrageous.\textsuperscript{237}

B. The Sixth Circuit's Ruling

The Sixth Circuit Court of Appeals disagreed with the district court, overturned the dismissal, and remanded the case for trial.\textsuperscript{238} The court engaged in a lengthy analysis of the history of the outrageous government conduct defense.\textsuperscript{239} The court stated that while the door to the "objective" defense was left open after the Hampton decision, this precedent had questionable value.\textsuperscript{240} According to the court, the concurrences by Justices Powell and Blackmun upholding the possibility of the defense are questionable because they rely on dicta.\textsuperscript{241} The court also noted that Justice Rhenquist's passage creating the defense

\textsuperscript{231} Id.
\textsuperscript{232} Id. The violation is listed under 7 U.S.C. § 2024(b)(1) (1994).
\textsuperscript{233} Tucker, 28 F.3d at 1421. The defendants moved to dismiss the indictment, claiming that the government's conduct in inducing defendants to commit their crimes was so "outrageous" that it violated their due process rights. Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. In response to all of the government agent's actions, the district court concluded: [C]ertainly there is no reason why the government cannot use undercover agents, cannot pay those undercover agents, cannot have undercover agents deal with friends, cannot use untrue ploys. All of those things individually are certainly useful techniques for investigation. But when they are employed in totality with people who are not otherwise suspected of engaging in crime, it seems to me that the conduct, as the Magistrate concluded, crosses [the constitutional] boundary.
\textsuperscript{238} Id. at 1428-29.
\textsuperscript{239} Id. at 1422-26.
\textsuperscript{240} Id. at 1426.
\textsuperscript{241} Id. at 1423.
in *Russell* relied on dicta. Consequently, the court held that there was no substantial precedent created by the Supreme Court to warrant an outrageous government conduct defense.

The court then explored the Sixth Circuit precedent for such a viable defense. While discussing *Leja*, and four other cases when analyzing the defense, the court held that there was "no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment." The court stated that while the defense has been analyzed, courts have done nothing more than "assume" the existence of such a defense, while holding that it "would not apply under the present facts." The *Tucker* court found no precedent supporting the defense in the Sixth Circuit, and held that "the legal existence of the defendants' asserted 'due process' defense is an open question."

Next, the court reviewed judicial authority from other federal circuits. In light of the lack of precedent and the questions concerning the constitutionality of a due process defense, the court found no persuasive authority to guide the matter. Therefore, given the state of the law, the Sixth Circuit Court of Appeals concluded that no de-

---

242. *Id.*

243. *Id.* at 1426. The court stated:

In sum, there is no binding Supreme Court authority recognizing a defense based solely upon an objective assessment of the government's conduct in inducing the commission of crimes. Nonbinding dicta of the Court, indicating that there may be such a defense, has been recanted by its author . . . .

*Id.*

244. *Id.* at 1424 (citing United States v. *Leja*, 563 F.2d 244 (6th Cir. 1977)).

245. *Id.* (citing United States v. *Barger*, 931 F.2d 359 (6th Cir. 1991); United States v. *Qaoud*, 777 F.2d 1105 (6th Cir. 1985); United States v. *Norton*, 700 F.2d 1072 (6th Cir. 1983); United States v. *Brown*, 635 F.2d 1207 (6th Cir. 1980)).

246. *Id.*

247. *Id.* at 1424-25.

248. *Id.* at 1425.

249. The court did not regard *Twigg* as authority on this case because it felt that the Third Circuit had improperly relied on United States v. *West*, 511 F.2d 1083 (3rd Cir. 1975), which had been limited by *Hampton* and other more recent Third Circuit opinions such as United States v. *Beverly*, 723 F.2d 11, 12 (3rd Cir. 1983) (en banc), *cert. denied*, 457 U.S. 1106 (1982). *Tucker*, 28 F.3d at 1426.

250. *Id.* (citing United States v. *Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991)). The court suggested that when defendants raise the due process defense, it is the "wrong" which is illusory and the "remedy" sought which is unconstitutional. *Id.*

251. *Id.*
fense existed. The court based this reasoning on three premises: 1) government conduct, even if labeled "outrageous, does not violate the defendant's constitutional right of due process", 2) because no violation of another constitutionally protected right was shown, the District Court lacked authority to dismiss the indictment, and 3) "the continued recognition of this defense" invites violation of the constitutional separation of powers.

The court pointed to a logical inconsistency inherent in the defense as evidence of how inducement by the government does not violate due process. Referring to defendants who use the due process defense, the court confusingly stated:

They argue that it would be "fundamentally unfair" to convict them of a crime, even assuming that they were predisposed to commit that crime, because of the outrageous conduct of the government in inducing their actions. As noted above, however, the Supreme Court has held that the basis for the entrapment defense lies in congressional intent and, specifically, not in the Due Process Clause of the Fifth Amendment. From this it must certainly follow that, if Congress were to reject entrapment as a defense, even defendants who were induced to commit a crime and who were not predisposed could be convicted without violating due process. If due process is not offended by convicting those who are not predisposed, a priori it is not offended by convicting those who are predisposed.

The court noted that Justice Rhenquist attempted to eliminate this inconsistency in Hampton when he found that the only defense available to defendants was that of entrapment.

Next, the court, relying principally on United States v. Payner, held that because there was no constitutional violation, the District Court had no authority to dismiss an indictment. In Payner, the Supreme Court held that the Fourth Amendment exclusionary rule represented a balancing of competing interests, "the interest of society in convicting criminals" and the interest of protecting individuals' rights. "This balance . . . was not subject to a case-by-case second-guessing by the lower courts in the guise of exercising their supervisory power." A due process challenge could similarly not be successful because the

252. Id. at 1426-27. The court held that "based on the lack of binding precedent from either the Supreme Court or the Sixth Circuit, we are of the view that this panel is not required to recognize the 'due process' defense." Id.

253. Id. at 1427.

254. Id.

255. Id. (citations omitted).

256. Id. (citing Hampton v. United States, 425 U.S. 484, 490 (1976) (plurality opinion)).

257. Id. (citing United States v. Payner, 447 U.S. 727 (1980)).

258. Id. (citing Payner, 447 U.S. at 733).

259. Id.
fact remains that "the limitations of the Due Process Clause . . . come into play only when the government activity in question violates some protected right of the defendant." In this case, the defendants did not show a protected right. Therefore, the Tucker court ruled that the district court overstepped the limits of judicial power by dismissing the indictments.

Finally, the Court of Appeals held that the due process defense violated the constitutional separation of powers. The court stated that the "executive branch is responsible for, and answerable to the electorate . . .," for its actions. Thus, the court reasoned that it is not for the judiciary to determine what government action is "outrageous" enough to be intolerable under due process principles. The court relied on Jacobson v. United States, which stated the only time in which a conviction can be overturned is when the subjective predisposition is not met. Because this line is not to be circumvented on an ad hoc basis, the court held that predisposition analysis is the only one authorized by the Constitution. Moreover, any other analysis, such as the objective due process test engaged in by the district court in Tucker, is violative of the separation of powers. For these three reasons, the Court of Appeals held that "a defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition."

C. Judge Martin's Concurrence

Circuit Judge Martin concurred in the result, but disagreed with the majority on the viability of the outrageous government conduct defense. Judge Martin agreed that the case should be remanded for trial, but only because the government action in Tucker was not sufficiently "outrageous" to raise a successful due process claim. He
did, however, feel that there is sufficient established Supreme Court and Sixth Circuit authority to conduct a thorough due process analysis.272 He pointed to the Sixth Circuit’s Barger decision where a thorough due process analysis was done and a four factor test was outlined.273 Thus, in light of this established precedent, Judge Martin felt the panel was bound to prior Sixth Circuit authority recognizing the existence of the outrageous government conduct defense under the Due Process Clause of the Fifth Amendment.274

III. Analysis of the Tucker Holding

The Sixth Circuit Court of Appeals’ decision in Tucker is flawed in several distinct ways. First, contrary to stare decisis, the court incorrectly finds that it is not bound by Supreme Court and Sixth Circuit authority.275 Secondly, all three propositions presented by the court for justifying its holding misinterpret the history and state of the outrageous government conduct defense. Lastly, if these mistaken justifications are adhered to by the courts, the result would be to do away with the due process defense; which would be an affront to the policy of providing a much needed check on overzealous law enforcement agents.

A. Precedent Must Be Followed

The Court of Appeals incorrectly stated that there was no precedential value left from the Hampton decision.276 In Hampton, a five to three majority decision, the Supreme Court held that an objective due process defense was available to defendants in situations where the government conduct was found “outrageous.”277 In his concurrence, Justice Powell, joined by three dissenting justices, found viabil-

272. Id. at 1429-30. He continued, “[i]t seems clear to me that this Circuit has recognized outrageous government conduct as a valid due process defense, and, as the majority concedes, the Supreme Court has not clearly held otherwise.” Id.
273. Id. at 1429. Referring to both the Barger and Payne decisions, Judge Martin continued, “[t]his analysis was undertaken, in both instances, in a separate section of the opinion devoted solely to the briefed and argued issue of outrageous government conduct, and not simply in a passing statement or cursory, superfluous commentary.” Id.
274. Id. at 1429-30.
275. Stare decisis is a doctrine that establishes the value of precedent, and the necessity for the courts to “abide by, or adhere to, decided cases.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990).
276. Tucker, 28 F.3d at 1423-24. The court referred to a “clear” statement that rejects the objective standard. Id. But this clear statement is simply Justice Rhenquist quoting his plurality opinion in Hampton. Id. On this issue, the opinion failed to gain a majority. Id.
ity of the defense undeniable.278 He stated “I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.”279 A careful reading through the double negative will show that Hampton is strong precedent for the existence of the due process/outrageous government conduct defense.

The Tucker court felt free to disregard Hampton because both Justice Rhenquist’s language in Russell and Justice Powell’s language in Hampton were what it termed “[n]onbinding dicta.”280 This is an unwarranted rejection of Supreme Court precedent. Even if the language is technically dictum, “this carefully considered language of the Supreme Court generally must be treated as authoritative.”281 Whether dicta or not, the Supreme Court precedent should not have been denied.

More importantly, the court is bound by prior Sixth Circuit decisions confirming the viability of the due process defense. One panel of the Sixth Circuit cannot overrule an opinion of another panel.282 As Judge Martin’s Tucker concurrence stated, there is a long line of accepted cases that thoroughly analyzed the defense.283 He correctly noted that in two Sixth Circuit cases,284 there were separate sections of the opinions “devoted solely to the briefed and argued issue of outrageous government conduct, and not simply in a passing statement or cursory, superfluous commentary.”285 The majority opinion characterized the prior Sixth Circuit authority as dicta because in every case in which the issue had been raised, the government conduct was held to be “outrageous.”286 While it is true that an outrageous government

278. Id. at 492, 497 (Powell, J., concurring).
279. Id. at 493.
280. Tucker, 28 F.3d at 1424.
282. See United States v. Edge, 989 F.2d 871, 876 (6th Cir. 1993) (noting that requisite bad faith would substantiate a due process claim and that it may be used if the case is “exceptional” or if refusing to consider it would result in a great injustice).
283. Tucker, 28 F.3d at 1429 (Martin, C.J., concurring).
286. Id. at 1426. The Tucker majority held:

Moreover, this court has recognized the availability of this defense only in dicta because, in every case in which the issue has been raised, the government’s conduct has been held not to have been “outrageous.” The only case squarely holding that an objective assessment of the government’s conduct in a particular case may bar prosecution without regard for the defendant’s predisposition [Twigg] has been greatly criticized, often distinguished, and recently, disavowed in its own circuit.
conduct defense has never been successful in the Sixth Circuit, this does not mean that the defense does not exist. The Tucker court incorrectly views the failure of a due process claim as the basis of the extinction of the defense. While the defense claim has consistently failed, the Sixth Circuit has always given the due process defense careful consideration. In fact, the defense has held great weight in the circuit, and a four factor test was created in United States v. Barger.\textsuperscript{287} The Tucker court was bound by precedent, and should have applied the Barger four factor test to determine if outrageous government conduct violated the defendants' due process rights.

B. The Court's Justifications are Flawed

While the Tucker court erred in failing to give the Hampton decision precedent, its holding is also incorrect because each of its three justifications for the elimination of the defense are flawed. In Tucker, the Sixth Circuit incorrectly stated that government action can never violate due process, that the courts have no authority to dismiss an indictment under due process, and that such an attempt by the court violates the constitutionally mandated separation of powers.\textsuperscript{288} None of these claims can be supported by case law, nor by the principles of the Due Process Clause.

1. The Majority's Claim that Inducement can Never Violate Due Process

After finding no precedential value in the sixty years of decisions since the inception of the due process defense in Sorrells, the Sixth Circuit analyzed the prospect of a due process defense as if it were a clean slate.\textsuperscript{289} It first found that no government inducement of a defendant could ever violate that defendant's due process rights.\textsuperscript{290} The court pointed out a "logic inconsistency" in a due process defendant's

\textsuperscript{287} Tucker, 28 F.3d at 1427-28.

\textsuperscript{288} Tucker, 28 F.3d at 1427.

\textsuperscript{289} Id. at 1426-27. The court held that "based on the lack of binding precedent from either the Supreme Court or the Sixth Circuit, we are of the view that this panel is not required to recognize the 'due process' defense." Id.

\textsuperscript{290} Id. at 1427.
To illustrate this apparent inconsistency, the court posed a hypothetical situation of what would result if Congress were to repeal the entrapment defense. With the elimination of entrapment, the court asked how a predisposed defendant could find a defense in the due process clause, where a non-predisposed (assumedly more innocent) defendant would have no defense, and therefore be guilty under law. The court's reasoning in this hypothetical situation is flawed for two reasons. Its first flaw is the circular and confusing manner in which a simple doctrine is stated, and then attacked. The court clearly does not agree with the due process defense, and cloaks this disagreement in a complex and improper hypothetical problem. The way the issue is framed by the court causes a simple doctrine to sound like a logical inconsistency.

Secondly, and much more importantly, the court incorrectly decides the result of its own hypothetical. The court is correct in stating that a predisposed defendant would find a defense in the Due Process clause if the government agents' actions were sufficiently outrageous. However, this defense could also be applied by a non-predisposed defendant. The court attempted to show an injustice by stating that a defendant with the sufficient predisposition would be let free while one who lacked the criminal intent would be convicted. This is not the case. Due process does not distinguish predisposition from non-predisposition. All citizens are protected by the rights of Due Process. The Tucker court fell into the same trap as have many other federal courts since the inception of the defense in Russell. It confused due process principles with those of entrapment. The court displayed this confusion by citing Justice Rhenquist's opinion in Russell stating that the basis of the entrapment defense lies in congressional intent, and specifically not in the Due Process Clause of the Fifth Amendment. While this is a true statement of entrapment law, this statement has no bearing upon an outrageous government conduct determination. The two defenses are distinct from each other. They have separate histo-

291. Id.
292. Id.
293. Id. at 1427.
294. Id.
295. See, e.g., United States v. Payner, 447 U.S. 727 (1980) (holding the government conduct of riffling through a brief case was not a due process violation); United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (holding that government did not engage in outrageous conduct by employing an informant on a contingent fee basis); see also Greaney, supra note 133 (presenting a critical analysis of the due process defense which explores the inconsistent application of the doctrine).
ries, bases, and applications. Any mixing of the two defenses will result in the unnecessary confusion found in the court's hypothetical.

The correct application of the defense hinges upon the government agents' behavior, not upon a defendant's predisposition. If a trial court determined the agents' activity to be "outrageous," due process would ensure that a conviction could not be had by the prosecution. Not only is such an analysis not a "logical inconsistency," in many ways it is more logical and consistent than entrapment. Rather than requiring the trier of fact to get into the mind of the defendant to determine his predisposition, the judge may simply review the conduct of the government agents. If such conduct is sufficiently "outrageous," there will be no conviction.

The Sixth Circuit further confused due process with entrapment when it cited Justice Rhenquist's plurality opinion in Hampton for support. In that opinion, Justice Rhenquist rejected any due process defense. As previously noted however, Justice Rhenquist's position on the due process defense failed to gain a majority. The Hampton majority solidified the defense as one available to defendants. This availability was denied to the Tucker defendants by the Sixth Circuit Court of Appeals.

2. The Court's Authority To Dismiss the Indictment

For its second justification of why the due process defense "simply should not exist," the court stated that the lower court had no authority to dismiss the defendants' indictments. The court relied on United States v. Payner for this proposition. It relied on Justice Powell's proposition in Payner that lower courts are not to replace explicit, clear-cut legal rules with ill-defined standards under the "guise of exercising their supervisory powers." However, Payner is inapposite to cases of outrageous government conduct, such as that exhibited in Tucker. The two cases deal with entirely different situations, types of defendants, and legal issues. Payner involved the appli-

297. See supra notes 121-175 and accompanying text (discussing the origins and tests needed to prove the respective defenses).
298. Tucker, 28 F.3d at 1427.
299. Hampton v. United States, 425 U.S. 484, 490 (1976). In Hampton, Justice Rhenquist stated that the basis for entrapment is an implied congressional intent and specifically not the Due Process Clause. Id.
300. See supra notes 75-90 and accompanying text (discussing the Hampton holding).
301. Tucker, 28 F.3d at 1427.
302. Id.
303. Id. (citing United States v. Payner, 477 U.S. 727, 735-36 (1980)).
304. Id. (citing Payner, 477 U.S. at 734).
cation of the Fourth Amendment exclusionary rule in a situation where the government conduct did not affect the rights of the defendant. The Court stated that it will not allow lower courts to apply their supervisory power to suppress otherwise good evidence just because it was unlawfully seized from a third party non-defendant.

In due process cases such as *Tucker*, the defendants are not third parties to the action. They are the persons whose rights are infringed, and whose lives are affected by a criminal conviction. This distinction makes the *Payner* holding inapplicable to criminal defendants using the due process defense. The holding of *Payner* applies to 1) search and seizure exclusionary cases, and 2) third party non-defendants.

The *Tucker* case involves neither of these two *Payner* qualifications. In *Tucker*, the defendant's rights were directly violated by the actions of law enforcement authorities, and *Payner* should not control in any manner.

As support for its repeal of the due process defense, the *Tucker* court stated that Justice Powell's *Payner* holding "lays to rest whatever modicum of *Russell*'s dicta may have survived *Hampton.*" As already stated, *Payner*’s holding involved issues not before the Court in due process cases like *Russell* and *Hampton*, and before the Sixth Circuit in *Tucker*. The Sixth Circuit should not speculate as to how the Supreme Court would have approached the due process defense if it were addressed in *Payner*, and then use this speculation as authority for the abolition of this established defense. The due process defense was last brought before the Court in *Hampton*. In that case, the defense gained a five to three majority, and until its abolishment by another Supreme Court majority, speculation as to inapposite holdings must not control lower courts’ decisions.

3. *Separation of Powers*

For its third justification, the Sixth Circuit stated that the due process defense violates the Constitutional separation of powers. The court addressed the issue that underlies the entire outrageous government conduct analysis: "What to do about this conduct and which
branch of the government should do it?” The court stated that this is the duty of the legislature. With regard to inducement, it held that Congress has implicitly curbed government actions by impliedly intending in each statute that a conviction not be had against a defendant who did not possess a requisite amount of predisposition. This is the hidden intent of Congress’ rationale so strongly criticized by the concurrences in Sherman and Sorrells. The Tucker court continued, because entrapment was created by Congress, the mere mention of the phrase “due process” does not give the courts license to conduct its own ‘oversight’ of police practices.

However, simply because a defense of entrapment was created “impliedly” by Congress, it does not follow that there must not be a constitutionally based due process defense as well. Again however, entrapment and due process are distinct and do not rely on the existence of each other for life. More clearly, Hampton does give the courts authority to rule on the “outrageousness” of police practices regardless of any predisposition analysis. This authority has been used by every circuit, including the Sixth Circuit, until the Tucker decision.

In this last justification section, the Tucker court demonstrated its holding’s fundamental problem. In explaining how authority to curb government conduct is limited to Congress it stated: “[t]hus, a defendant’s subjective predisposition marks the point at which society’s interest in preventing governmental overreaching is outweighed by society’s interest in punishing those who commit crimes, not the objective character of the government’s conduct.” This statement demonstrates the Sixth Circuit’s fundamental error that plagues its entire analysis. The court continually denies the existence of the Hampton majority’s holding that a defense does exist that determines the propriety of the objective character of the government’s conduct.

313. Id.
314. Id.
315. Id. (citing Jacobson v. United States, 112 S.Ct. 1535, 1540 (1992)).
316. See supra notes 25-35 and accompanying text (discussing the hidden congressional intent rationale).
318. Hampton v. United States, 425 U.S. 484, 492, 497 (1976). The concurring opinions of Justices Powell and Blackmun, joined by three dissenting justices on that issue, establish the viability of a due process defense. Id.
319. See, e.g., United States v. Zaia, 35 F.3d 567 (6th Cir. 1994) (continuing the use of the due process defense in the Sixth Circuit even after the Tucker case).
320. Tucker, 28 F.3d at 1428.
Tucker court continues to hold that one defense called entrapment exists, while another defense called due process, does not. However, the legal truth, as defined by the Supreme Court, is that both exist. The Hampton majority did not hold that an objective analysis of the government's conduct violates the constitutional separation of powers. It did not hold this because the Constitution gives the courts the authority to ensure that "Due Process" is carried out. The Sixth Circuit surely cannot find unconstitutional what the Supreme Court found constitutional in Hampton.

4. Policy Considerations

The Tucker court erred by refusing to follow Supreme Court and Sixth Circuit precedent, and by using flawed justifications in its abolishment of the outrageous conduct defense. However, sound public policy demands the retention of the defense. The first of these policy considerations is an overwhelming need to give law enforcement officers guidance as to what type of behavior is unacceptable in a progressive society. Government agents must know that there is some check on their behavior at the judicial level. The due process defense accomplishes this task. The defense's value is in its creation of an outer limit on appropriate law enforcement techniques. It demonstrates to the police community, and more importantly, to society at large, that the courts will draw some line that cannot be crossed even in the pursuit of criminals. While the defense succeeds only on rare occasions, these successes have an impact. From the seminal due process case in Rochin v. California to United States v. Twigg, the courts have demonstrated that some behavior from the police will not be tolerated. This is an important value of the defense.

Another value of the due process defense is that it bypasses some of the problems found with entrapment. With the entrapment predisposition analysis, the trier of fact is informed of the criminal background

322. See supra notes 75-90 and accompanying text (discussing the Hampton majority's holding).
323. See Greaney, supra note 133 at 785-96 (discussing the need to monitor police officer's behavior).
324. See id. at 745 (arguing that the very value of the due process defense is its influence over law enforcement officers' behavior).
325. See Marcus, supra note 1 at 465 (comparing the beneficial effects of the due process theory to that of the exclusionary rule of the Fourth Amendment). Professor Marcus states that both are really not often successful, but their value is "important both to deter improper police procedure and promote judicial integrity." Id. at 465 n.46.
327. 588 F.2d 373 (3rd Cir. 1978).
and unseemly associations of the defendant.\textsuperscript{328} This is allowed not as impermissible character evidence, but as evidence of the state of mind of the defendant — his predisposition/lack of predisposition.\textsuperscript{329} Most juries are unable to distinguish such crucial evidence and only apply it to the issue of whether the defendant intended to commit a crime. Rather, most juries will use this evidence to assume, correctly or incorrectly, that a person with such "bad character" must have wanted to commit the crime charged.\textsuperscript{330} Justice Stewart warned of this very occurrence in his dissent in \textit{Russell}.\textsuperscript{331} He stated that this evidence could even include rumored criminal activities of the defendant that were insufficient to obtain an indictment, and agents’ suspicions about the defendant.\textsuperscript{332} Not only is this evidence unreliable, it is also hearsay.\textsuperscript{333} However, under entrapment, this prejudicial evidence is permitted to determine the defendant’s state of mind.

Not only does this evidence hurt the defendant in the courtroom, it also creates an incentive for overzealous police officers to pursue “shady” characters with more fervor. This concept was first stated by Justice Roberts’ concurrence in \textit{Sorrells},\textsuperscript{334} and later reiterated by Justice Stewart in \textit{Russell}.\textsuperscript{335} Content with the knowledge that his actions will be secondary to evidence of the defendant’s past criminal behavior or bad reputation, a government agent may go beyond his usual tactics to obtain a conviction. This puts many defendants claiming entrapment closer to potential conviction simply because of their past.

\begin{itemize}
\item \textsuperscript{328} See United States v. Russell, 411 U.S. 423, 443-45 (1973) (discussing the prejudicial effect the use of character evidence of this nature may have on a defendant).
\item \textsuperscript{329} See id. (discussing again the negative impact the use of such evidence would have on a defendant).
\item \textsuperscript{330} See Abramson & Lindeman, supra note 2, at 149 (stating that by pleading entrapment as a defense, the defendant subjects himself to an inquest into his past behavior that would not normally be permitted; the prejudice of such an “inquest” is seen by the authors to create more of an injustice than any use of the due process clause by the defendant).
\item \textsuperscript{331} \textit{Russell}, 411 U.S. at 443 (Stewart, J., dissenting).
\item \textsuperscript{332} \textit{Id}.
\item \textsuperscript{333} \textit{Id}. This evidence would be hearsay because testimony would be allowed in court about what various police officers and other typical prosecution witnesses heard about the defendant. \textit{Id}. The speakers of the statements would not be in court (only the hearers), and the testimony would be presented to show that the defendant had a bad reputation, and most likely a criminal disposition. \textit{Id}. While this testimony is an out of court statement offered for the truth of the matter asserted, thus hearsay, it would still be allowed in court to show that the defendant’s state of mind was such that he was most likely “predisposed.” \textit{Id}.
\item \textsuperscript{334} See \textit{Sorrells} v. United States, 287 U.S. 435, 458-59 (1932) (Roberts, J., concurring) (stating that overreaching by the police is not condoned simply because the defendant has a prior criminal record).
\item \textsuperscript{335} \textit{Russell}, 411 U.S. at 443-48 (“Stated another way, this subjective test means that the government is permitted to entrap a person with a criminal record or bad reputation and then to prosecute him for the manufactured crime, confident that he was predisposed to commit the offense anyway.”).
\end{itemize}
As Justice Frankfurter stated: "[p]ermissible police activity does not vary according to the particular defendant concerned . . . one should not go to jail simply because he has been convicted before and is said to have a criminal disposition."\(^{336}\)

The due process defense avoids this injustice. This reason alone should warrant its continued use. In engaging in a due process analysis, the judge, as trier of law, not as trier of fact, looks only to the actions of the government agents involved.\(^{337}\) The state of mind of the defendant is never a consideration in this analysis. As its name points out, the defense allows for an "objective" interpretation of the government agents' behavior. The overzealous police officers who pump a defendant's stomach searching for evidence,\(^{338}\) or who supply the defendant with a rare ingredient necessary for the illegal production of methamphetamine,\(^{339}\) have been found to reach this threshold level of outrageousness. As the successful uses of the defense have shown, there is a point at which the court can no longer condone the government's "outrageous" behavior. The due process defense allows the court to bar the type of abuse seen in *Rochin* and *Twigg*. The defense must be retained to ensure the courts of this power.

IV. IMPACT OF THE TUCKER DECISION

The *Tucker* court's decision to deny defendants the due process defense will have serious effects. First, it only continues to muddle a confused and often ill-applied doctrine of law. By stating that the due process defense does not exist, the *Tucker* court abolishes a constitutional defense that had been raised hundreds of times since its inception in *Russell*. The *Tucker* holding has just recently been joined by another federal circuit. The Seventh Circuit abolished the defense through Chief Judge Posner's opinion in *United States v. Boyd*.\(^{340}\) In three short sentences of analysis, and in a case that did not directly deal with an outrageous government conduct claim, Judge Posner "let the other shoe drop . . ." on the defense.\(^{341}\) In its brief analysis, the Seventh Circuit expanded on the "moribund" characterization of the due process defense by calling it "stillborn."\(^{342}\) The court stated that the defense "never had any life," and that the Seventh Circuit had

340. 55 F.3d 239, 241 (7th Cir. 1995).
341. *Id.*
342. *Id.* (citing United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993)).
consistently gone out of its way to criticize the doctrine.\textsuperscript{343} The court continued this practice in \textit{Boyd} by going out of its way to analyze the defense where it was not raised by the defendants.\textsuperscript{344}

Judge Posner concluded that as far as the Seventh Circuit was concerned, "the doctrine does not exist."\textsuperscript{345} Where the Sixth Circuit had spent an entire case, a case where the due process defense was raised by the defendants, analyzing why its holding was to abolish the outrageous government conduct defense, the Seventh Circuit reached the same conclusion in 95 words.\textsuperscript{346} In its holding, the \textit{Boyd} court did not refer to \textit{Tucker}. It did, however, justify its abolishment of the defense by finding that the due process defense had no life to begin with,\textsuperscript{347} a conclusion that was also reached in \textit{Tucker}.\textsuperscript{348} Although the Sixth and Seventh Circuits now adhere to such a conclusion, and therefore take away a viable claim for criminal defendants, this conclusion is incorrect.

In other circuits, however, the defense continues to be raised by defendants and addressed by courts.\textsuperscript{349} In these cases, other circuits continue to engage in due process analysis of government conduct, often using factor tests which have been developed by the courts since \textit{Hampton}. These holdings demonstrate that the \textit{Tucker} holding is not universally accepted, and that other circuits continue to recognize the viability of the defense. Because of the difference in the approaches taken by the various federal circuits, there is a circuit split as to the viability of the due process defense.

Not only is the defense still recognized by other federal circuits, the Sixth Circuit has also continued to do a cursory due process analysis.

\textsuperscript{343} Id.
\textsuperscript{344} Id. at 242-43. The matter being appealed in \textit{Boyd} was the granting of a new trial for six leaders and one associate of a notorious Chicago street gang, the "El Rukins." \textit{Id.} at 241. The United States appealed a finding of the district judge that the prosecutors and staff in the office of the U.S. Attorney had "engaged in misconduct far more serious than anything involved in typical cases in which a prosecutor is accused of the knowing use of perjured testimony or of the violation of a defendant's right under \textit{Brady v. Maryland}, 373 U.S. 83 (1963)." \textit{Id.} The Court of Appeals ruled that the government had engaged in prosecutorial misconduct to the extent that required a new trial, but only after abolishing the due process defense. \textit{Id.}
\textsuperscript{345} \textit{Id.} at 241.
\textsuperscript{346} \textit{Id.}
\textsuperscript{347} \textit{Id.}
\textsuperscript{348} 28 F.3d 1420, 1426 (6th Cir. 1994).
\textsuperscript{349} See \textit{Sanchez v. United States}, 50 F.3d 1448, 1455-56 (9th Cir. 1995) (holding that the government agent did not engineer a criminal enterprise from start to finish and that the agent did not induce the defendant to plead guilty); \textit{United States v. Maxwell}, No. 93-5917, 1995 U.S. App. LEXIS 1631 (4th Cir. Jan. 27, 1995) (refusing to overturn a conviction because government's actions did not seriously affect the integrity or reputation of the judicial proceeding); \textit{United States v. Laporta}, 46 F.3d 152, 161 (2nd Cir. 1994) (holding after a due process analysis that the government conduct in question did not reach a demonstrable level of outrageousness).
In *United States v. Zaia*, the Sixth Circuit engaged in due process analysis over a month after the *Tucker* decision. While it was unsuccessful, the defense was available to the defendant. But this analysis is not guaranteed in the Sixth Circuit. A panel of judges, one of whom was the author of the *Tucker* opinion, Judge Suhrheinrich, not surprisingly adhered to the *Tucker* holding by denying the availability of the due process defense to a defendant in *United States v. Mack*. In *Mack*, the court held that any outrageous government conduct claim "is nothing more than a claim of entrapment." It is apparent that in the Sixth Circuit the application of an outrageous government conduct defense relies not only on the circuit in which it is tried, but also upon the panel of circuit judges to whom the case is presented. By abolishing the due process defense, the Sixth Circuit has further confused the application of a necessary doctrine.

Further effects of the *Tucker* decision could be seen if it is accepted by other courts, and the due process defense is consequently abolished. Reaching this conclusion, through implication and contrary to the defenses creation in the *Russell* dicta, the courts would in effect be stating there could never be government conduct so egregious and outrageous as to offend the concepts of due process. This is a difficult conclusion to reach. If shown to be predisposed, there would be no recourse for a defendant who has been subjected to behavior of the type in *Rochin* and *Twigg*. If a government agent could establish this sufficient predisposition, he may be able to abuse his awesome power in order to obtain a conviction. The Due Process Clause prohibits such abuse, and the court system is in place to assure it does not happen. If accepted, *Tucker* would sanction this type of abuse.

V. Conclusion

The outrageous government conduct defense was created because Justice Rhenquist felt that in extreme situations, government conduct...
might be so harmful to its citizens that it would, regardless of the state of mind of an individual defendant, do harm to both the individual and the system it was designed to protect. That possibility still remains. In *Tucker*, the Sixth Circuit has eliminated this valuable line of protection.

By deciding that no Supreme Court or Sixth Circuit authority for the defense existed, where the court record clearly states otherwise, the *Tucker* court used the type of random judicial discretion it had condemned. While the doctrine of *stare decisis* should be enough to demonstrate the *Tucker* holding's error, important public policy demands the retention of the outrageous government conduct defense. The judicial system was designed to protect both the individual and the government's functions. By allowing the court to have the final determination of judging the extreme behavior of the government, the outrageous government conduct defense accomplishes this valuable task.

*Jason R. Schulze*