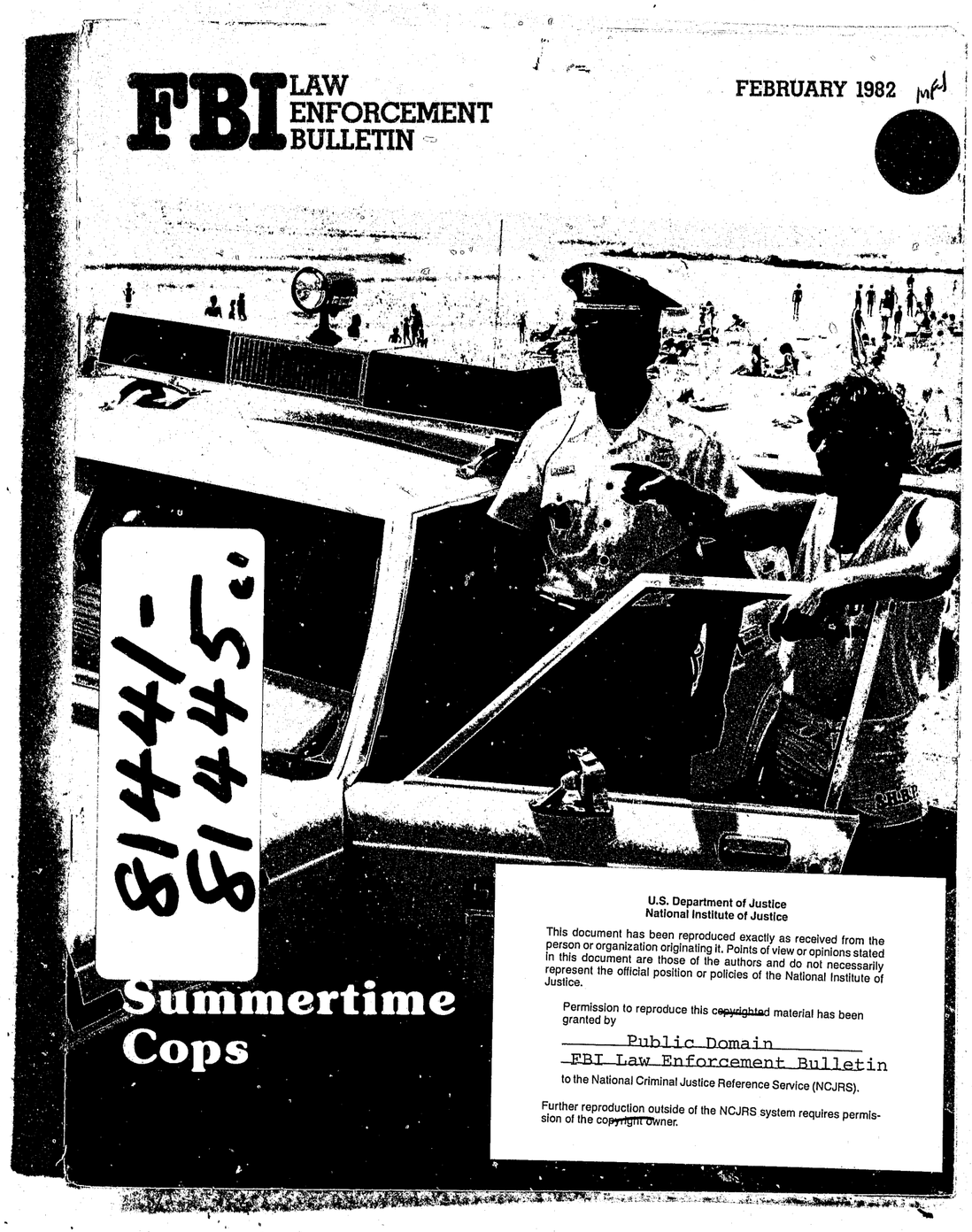

ENTRAPMENT, DUE PROCESS, AND THE U.S. CONSTITUTION

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Origin of Defense

The first U.S. Supreme Court case which examined the defense of entrapment with close scrutiny was *Sorrells* v. *United States,*[1] decided in 1932. In *Sorrells,* an undercover prohibition agent visited Sorrells' home and made several requests that Sorrells obtain whiskey for him. Finally, after conversation disclosed that both men had been members of the same division in World War I, Sorrells acquiesced and sold a half-gallon of whiskey to the agent for $5. Sorrells was indicted for possession and sale of illegal whiskey, a violation of the Federal prohibition law. At trial, he relied upon the entrapment defense; however, the judge refused to submit the entrapment issue to the jury and ruled as a matter of law that entrapment was not present. The jury returned a guilty verdict and the Federal appellate court affirmed. The Supreme Court granted review limited to the issue of whether the evidence was sufficient to require the trial judge to submit the entrapment question to the jury.

Justice Hughes, writing for the majority, answered this question in the affirmative, and in so doing, recognized the viability of a defense grounded in the entrapment concept. It was his view that the entrapment defense had its roots in a principle of statutory construction. He concluded that Congress, in enacting the National Prohibition Act, could not have intended that a person be found guilty of violating the statute if his conduct was instigated by the Government and if he was not predisposed to commit the crime. Justice Hughes observed:

> "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."[2]

The majority held that the scope of the entrapment defense includes the right of the defendant to offer evidence that he committed the crime at the instigation of the Government. It made equally clear that when the defense is raised, the Government is permitted to prove that the defendant is not otherwise innocent, but rather predisposed to commit the crime. The majority concluded that the issue of entrapment, including the question of whether the defendant already possessed the state of mind to commit the offense, is in most cases a question for the jury to decide.[3]

Thus, the so-called "subjective view" of the entrapment defense was born. It was labeled as such because of the *Sorrells'* majority view that the critical factor in the entrapment equation is the state of mind of the defendant and whether he was predisposed to commit the offense charged.

Justice Roberts wrote a concurring opinion in *Sorrells,* which is the origin of what has come to be known as the "objective view" of the defense of entrapment. Justice Roberts criticized the majority's statutory construction approach as amounting to judicial amendment of the National Prohibition Act. It was his view that the entrapment defense should focus upon the conduct of the police, and specifically, whether that conduct instigated the defendant to commit the crime. Justice Roberts believed that this defense has its roots in the idea that the court has a right to protect itself from becoming a vehicle through which a citizen is prosecuted after committing a crime at the instigation of the Government.[4]

Consistent with Justice Roberts' view that the focus of the entrapment defense should be on the conduct of the police was his criticism of the majority's emphasis on the state of mind

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of the defendant. Justice Roberts observed:

> "To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction."[5]

He also criticized the majority view that the entrapment issue in most cases should be decided by the jury. It was his belief that the issue was for the court and not the jury to decide. Finally, Justice Roberts believed that the conviction should be reversed and the indictment quashed rather than allow the Government to retry the defendant as the majority opinion would have done.

The *Sherman* Case

Twenty-six years later, the Supreme Court was once again faced with deciding a case in which the issue of entrapment was a predominant factor. In *Sherman* v. *United States,*[6] a Government informer, initially working on his own, met Sherman in a doctor's office where both were being treated for narcotics addiction. The defendant turned down repeated requests from the informer to provide narcotics for him. Only after the informer appealed to the defendant's sympathy, based upon his knowledge of narcotics addiction withdrawal, did the defendant acquiesce. After several unmonitored sales took place, the informer alerted Federal narcotics agents who observed the three sales for which Sherman was indicted. Sherman raised the entrapment defense at trial. The issue of entrapment went to the jury and a conviction ensued. A Federal court of appeals affirmed. Sherman appealed to the Supreme Court, arguing that entrapment had been established as a matter of law and the trial court erred in allowing the jury to consider the issue.

Chief Justice Warren wrote the majority opinion which reversed the conviction. The majority held that the evidence of predisposition was so deficient that entrapment should have been determined to exist by the trial judge as a matter of law. In so holding, the majority placed no weight at all on two previous narcotics-related convictions of the defendant within the previous 9 years.

The majority affirmed the statutory construction approach to the origin of the entrapment defense which first appeared in the *Sorrells'* majority opinion. Moreover, it broadened that approach by making it applicable to all Federal criminal statutes, not just the prohibition law. The majority reemphasized that the focus should be on the defendant's state of mind, that is, whether he was predisposed to break the law, and criticized the so-called objective view of the defense as being unduly restrictive upon the prosecution.[7]

Justice Frankfurter, while concurring with the majority in the reversal of Sherman's conviction, disagreed with its reasoning. He adopted the objective view of entrapment and rejected the idea that the defendant's state of mind should have any bearing on the issue. He suggested that the entire focus of the Court should be upon the nature of the police conduct in the case and whether it falls below acceptable standards.

Justice Frankfurter attempted to further refine the objective view by expanding it from a test that focuses solely on police conduct. He suggested that it include a "hypothetical innocent man" test, i.e., whether police conduct in a particular case would have successfully tempted a person not involved in criminal activity.[8]

The importance of *Sorrells* and *Sherman* lies not in the result but rather in the emergence of the subjective view of entrapment over the objective approach. Notwithstanding this fact, three Federal appellate courts applied the objective view of the defense to cases presented to them in the early 1970's.

In *United States* v. *McGrath,*[9] U.S. Secret Service agents infiltrated an already existing counterfeiting ring and took substantial control over it. In *Greene* v. *United States,*[10] an undercover agent for the Bureau of Alcohol, Tobacco and Firearms contacted persons recently convicted of manufacturing and selling illegal whiskey, and over a protracted period, urged them to resume their operation, supplied them with resources, and offered to supply them with additional equipment. And in *United States* v. *Bueno,*[11] the uncontradicted testimony of the defendant was that the Government, through an informant, provided him with heroin that he was ultimately charged with selling to a Government agent. In all three cases, the courts reversed the convictions and held as a matter of law that the defendants were entrapped, notwithstanding substantial evidence of predisposition. In view of the rejection of the subjective view of entrapment by three appellate courts, the time was ripe in 1972 for the Supreme Court to reconsider the entrapment question.

The *Russell* Decision—Due Process Emerges

In *United States* v. *Russell,*[12] an undercover agent was instructed to infiltrate an ongoing operation suspected of producing methamphetamine. The agent offered Russell a scarce but lawful chemical ingredient essential to the production of the drug. Russell accepted the offer and the agent provided Phenyl-two-Propanone. Russell was eventually indicted for manufacturing and selling the drug. At trial, his sole defense was entrapment. The evidence disclosed a substantial predisposition on Russell's part to produce and sell methamphetamine. The jury rejected the entrapment claim and returned a guilty verdict. The Ninth Circuit Court of Appeals reversed, holding that:

> "Regardless of the significance of predisposition . . . there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." [13]

The court adopted the objective view of entrapment and also suggested, without specifically so holding, that the objective view was premised on due process of law.[14] The United States appealed, and the Supreme Court reversed.[15]

In urging that the appellate court decision be affirmed, Russell argued two alternative theories. First, he suggested that the Court adopt the objective view of entrapment, which might allow him to prevail, notwithstanding his concession in the appellate court that he may have been predisposed.

Justice Rehnquist, writing for the majority, declined Russell's invitation, and once again affirmed the subjective view as the predominant view of the defense. He also made it clear that entrapment is a defense that is not constitutional in origin. He observed:

> "Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." [16]

Justice Rehnquist took the opportunity to criticize the objective view by suggesting that if the Government could not offer evidence of predisposition after the defendant had raised the issue of entrapment, it would be difficult for the Government to secure convictions in cases where the crimes are normally carried out in secret. In addition, he pointed out that application of the objective view is tantamount to a judicial grant of immunity to a clearly guilty defendant because of police actions which might have induced not the predisposed defendant, but some hypothetical innocent person to commit the offense.

Finally, he faulted the objective test as one enabling the judiciary to exercise "a chancellor's foot" veto over law enforcement practices of which it does not approve. Under the objective view, the judiciary can impose its own subjective belief of right and wrong to reject police activity which it finds offensive.[17]

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Russell also argued that the entrapment defense should rest on constitutional grounds. He claimed that Government involvement in his case was so great that any prosecution emanating from such conduct violated fundamental principles of due process. Justice Rehnquist, in rejecting this contention, recognized the difficulty that police encounter in attempting to detect drug-related crimes. He approved of police infiltration of drug rings and specifically sanctioned police participation, which includes providing some item of value to the conspirators to gain their confidence.

Justice Rehnquist refused to rule out the possibility of a constitutionally based due process defense based upon a different set of facts. The following language from the majority opinion could be viewed as the genesis of a separate defense:

> "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."[18]

The importance of *Russell* is twofold. It solidified the preeminence of the subjective view of entrapment, and it gave birth to the notion that where the conduct of Government agents is challenged, there exists the possibility of a separate, constitutionally based defense lodged in principles of due process.

Hampton—Due Process Solidified

The most recent Supreme Court case dealing with the entrapment issue and the separate constitutional due process issue was *Hampton* v. *United States*.[19] *Hampton* involved a disputed fact situation which included claims by the defendant that a Government informant suggested to him that he (the informant) had a friend who could produce a nonnarcotic, heroin-like substance which could be sold to gullible persons. Following Hampton's arrest for participation in a distribution scheme, he was tried on two Federal charges of selling heroin. At trial, Hampton testified that the two sales leading to the charges against him were solicited by him. The trial judge rejected Hampton's proposed jury instruction which would have enabled the jury to find entrapment, regardless of predisposition, if it found that the heroin sold by the defendant to Federal agents was supplied to him by the informant. Hampton was found guilty by the jury, which suggests by implication that the jury disbelieved his claim that he did not know what he sold was heroin. Both a Federal appellate court and a divided Supreme Court affirmed.

The judgment of the Supreme Court was announced by Justice Rehnquist in an opinion in which two Justices joined. For the sake of analysis, Justice Rehnquist adopted Hampton's view of the facts of the case, that is, he appeared to accept as correct Hampton's claim that a Government informant provided the substance which resulted in the charges being brought against him.

Hampton, because of his clear predisposition to commit the crime, recognized that past Supreme Court cases effectively barred him from arguing entrapment. Therefore, his argument before the Court was based upon a separate constitutional defense grounded in due process. Justice Rehnquist, in rejecting this constitutional argument, retreated from his statement in *Russell* that due process might be a viable defense in a future case. It was his view in *Hampton* that if police act improperly in concert with an equally culpable defendant, the remedy should not be to free the predisposed defendant, but rather to prosecute the police. Justice Rehnquist also made it clear that the subjective view of entrapment is the correct one to be used in the Federal courts.

Justice Powell, in a concurring opinion in which one other Justice joined, agreed with Justice Rehnquist that Hampton's predisposition effectively precluded him from claiming entrapment.[20] Thus, five Justices in *Hampton* accepted the subjective view of entrapment.

Justice Powell was not willing to agree with Justice Rehnquist that predisposition of a defendant would bar him from making a constitutional due process claim. However, he believed that the conduct of the Government did not amount to a due process violation in *Hampton* any more than the Government conduct in *Russell*. He was not willing to rule out the successful application of a due process defense in circumstances that would merit its application even when the defendant was predisposed to commit the crime.[21]

Justice Brennan wrote a dissenting opinion in which he was joined by two Justices. Justice Brennan agreed with Justice Powell that a separate defense on due process grounds should be available to even a predisposed defendant when Government conduct reaches beyond acceptable levels.[22]

The *Hampton* decision is important for several reasons. It represents the fourth Supreme Court case in which a majority of the Justices adopted the subjective view of the defense. *Hampton* could be said to stand for the last rites, if not the death, of the objective view of entrapment in the Federal courts. Secondly, *Hampton* is a case in which five Justices affirmed a conviction after accepting the defendant's view of the facts, which included a claim that the Government provided him with the substance for which he stood convicted. Finally, five Justices agreed as to the viability of a separate constitutional defense based upon due process principles in cases where Government conduct is deemed outrageous, regardless of predisposition. Hence, out of the ashes of the objective view arose a strikingly similar but separate defense with a constitutional dimension added to it. Therefore, it is important to examine the parameters of this new defense, its similarities to the objective view of entrapment, and its differences.

Due Process and the Lower Courts

Since *Hampton,* the Supreme Court has not decided any case involving this new defense. The only Federal appellate decision since *Hampton* in which the defense has been successful is *United States* v. *Twigg*.[23] In *Twigg,* one Kubica, as part of a plea bargain, agreed to assist Federal drug enforcement agents in detecting narcotics violators. He told the agents that 3 years previously, he operated a methamphetamine laboratory with a person named Neville. Kubica was told to recontact Neville to determine if he was interested in resuming operations. Neville responded to that contact in a positive manner. Kubica undertook responsibility for setting up the laboratory, and the Government provided considerable assistance. They supplied him with the same scarce chemical that the agents supplied to the defendant in *Russell.* Kubica received from the agents 20 percent of the glassware needed for manufacture, and when difficulty ensued in finding a suitable location for production, the agents rented a farmhouse where the lab could be set up. The agents told Kubica where he could purchase the rest of the needed chemicals. The entire manufacturing process was controlled by Kubica. Neville had little, if any, involvement in it. While leaving the farmhouse with a suitcase containing contraband, Neville was arrested and later tried for a Federal narcotics violation. The Government's case included uncontradicted evidence of predisposition on the part of Neville. The jury found him guilty, and by implication, predisposed to commit the offense. On appeal, he argued that the Government involvement was so overreaching that the prosecution should be barred on due process grounds as a matter of law. In a split decision, a three-judge appellate court agreed and reversed the conviction. In doing so, the court balanced the defendant's predisposition and the great difficulty facing law enforcement in detecting drug-related offenses on one side of the ledger against the conduct of the Federal drug agents on the other. The court noted that the defendant was not known to be involved in illegal activity when Kubica made the initial contact with him. In finding that the conduct of the Government violated the Constitution, the court stated:

> "They set him up, encouraged him, provided the essential supplies and technical expertise . . . . This egregious conduct . . . generated new crimes. . . . 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."[24]

Due Process v. Objective View

There are marked similarities between the objective view of entrapment and the constitutional due process defense. Both defenses focus primarily upon the conduct of the Government in terms of whether it falls below acceptable standards. Both defenses are available to the defendant, regardless of predisposition.[25] And both defenses present an issue which is to be decided by the court as a matter of law rather than by the jury as a question of fact.[26] These similarities might suggest that the due process defense is nothing more than the objective view of entrapment reincarnated. Judge Adams, dissenting in *Twigg,* took the position that regardless of these similarities, the Supreme Court considered the defenses different. It was his belief that the due process defense which emerged from *Hampton*

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should be applied only to truly outrageous cases. He stated:

"For once the Supreme Court has decided to eschew close scrutiny of law enforcement techniques under the objective approach to entrapment, it would seem inconsistent for it to announce a new doctrine allowing just such a review. Had a majority of the Court intended that due process review of government involvement in crime should constitute anything more than a seldom used judicial weapon reserved for the most unusual cases, it would have been more forthright for it to have adopted the position . . . urged by the minority voices in *Sorrells, Russell* and *Hampton*. ..."[27]

Justice Powell, in his concurring opinion in *Hampton*, pointed out the unique nature of the due process defense. It was his view that this defense should be reserved for the rare case wherein police conduct was particularly offensive.[28] He cited *Rochin* v. *California*[29] as an example of such a case. It should be noted that *Rochin* involved a particularly flagrant exercise of police power. Several Federal appellate decisions have articulated the view that the due process defense should be applied only when police conduct is particularly flagrant.[30] It is also true that in *Hampton*, a majority of Justices found nothing constitutionally objectionable in highly questionable police conduct. Since most police conduct in due process cases probably will not be as offensive as that in *Hampton,* the likelihood that the defense will prevail is remote.[31]

The most salient factor supporting the view that the constitutional due process defense was intended by the Supreme Court to be reserved for the exceptional case involving flagrant abuse of fundamental fairness by the Government is the fact that although this defense has been raised in many Federal appellate cases after *Hampton,* only in *Twigg* has it been successful.[32]

Another distinguishing factor which sets the due process defense apart from the objective view of entrapment is the manner in which the predisposition of the defendant is considered. Under the objective approach, predisposition to commit the crime is irrelevant. The total focus of the court is upon the conduct of the police. The manner in which the due process defense has evolved in the post-*Hampton* Federal appellate cases suggests that predisposition, far from being irrelevant, is considered by the courts in a balancing process. The predisposition of the defendant, along with other factors, are weighed against the flagrant and intrusive nature of the police conduct.[33] Thus, predisposition does not preclude the defendant from making a constitutional argument and is far more important in the due process equation than it was in the objective approach to entrapment.

The Federal courts, in deciding whether the due process defense will prevail, consider many factors. Among them are the following:

1) The degree of difficulty that the Government has in detecting certain types of crime, such as narcotics and bribery offenses;[34]
2) The level of predisposition of the particular defendant;[35]
3) Whether the Government created an essentially new crime[36] or infiltrated an already existing enterprise;[37]
4) Whether the Government took command of the operation or merely followed the orders of the conspirators;[38]
5) The level and degree of Government participation in the crime in terms of providing resources to enable the defendants to commit the offense, i.e., equipment, technical expertise, contraband, manpower, etc.;[39]
6) Whether the Government, through undercover agents or informants, has made threats to the defendants to induce commission of the crime;[40]
7) Whether undercover agents abused the judicial process by furnishing, for example, untruthful testimony to a grand jury;[41] and
8) Whether the Government offered significant enticements to induce the defendants to commit the crime.[42]

While the foregoing list is not exhaustive, it does represent the kinds of factors which the courts have considered in making the difficult due process determination.

Conclusion

In the Federal courts, the law regarding the defense of entrapment is clear. The subjective view of the defense has been established as the correct one to be applied in Federal criminal cases. However, since the entrapment defense has not been held by the Supreme Court to be of constitutional dimension, the States are free to adopt either the subjective or objective view of the defense. The majority of States have adopted the subjective interpretation of the defense;[43] others, the objective approach.[44] Among the States which have adopted the latter, some have done so by decision of the highest court of the State;[45] the remainder have done so by statute.[46]

It is important that police officers at the State and local level determine which view of the entrapment defense has been adopted in their jurisdictions because, as has been suggested, the objective view of this defense is much more restrictive on police investigations than the subjective view. This is true because evidence of the defendant's predisposition to commit the charged offense is irrelevant in those jurisdictions which espouse the objective test. Thus, police work which might be deemed acceptable in a jurisdiction holding to the subjective view might be considered improper in a jurisdiction where there is adherence to the objective idea.

Finally, regardless of what interpretation of the entrapment defense prevails in a particular jurisdiction, it is important for law enforcement officers from all jurisdictions to recognize the existence of a separate, constitutionally based defense which may be available to a defendant regardless of predisposition. Such defense is grounded in due process and notions of fundamental fairness. This defense, as it has developed, is available as a remedy only in the extraordinary case in which law enforcement conduct has been found to be particularly overreaching.

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Footnotes

[1] 287 U.S. 435.
[2] *Id.* at 448.
[3] *Id.* at 451, 452.
[4] *Id.* at 456–459.
[5] *Id.* at 459.
[6] 356 U.S. 369 (1958).
[7] *Id.* at 371–377.
[8] *Id.* at 382–384.
[9] 468 F.2d 1027 (7th Cir. 1972).
[10] 454 F.2d 783 (9th Cir. 1971).
[11] 447 F.2d 903 (5th Cir. 1971).
[12] 459 F.2d 671 (9th Cir. 1972).
[13] *Id.* at 673.
[14] *Id.* at 674. U.S. Const. amend. V states in part: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law." Similar language, operative against the States, is found in U.S. Const. amend. XIV.
[15] 411 U.S. 423 (1973).
[16] *Id.* at 433.
[17] *Id.* at 434, 435.
[18] *Id.* at 431, 432.
[19] 425 U.S. 484 (1976).
[20] *Id.* at 492, note 2.
[21] *Id.* at 491–493.
[22] *Id.* at 499.
[23] 588 F.2d 373 (3d Cir. 1978).
[24] *Id.* at 381.
[25] *Id.* at 378, 379 (due process); *supra* note 5 (objective view).
[26] *United States* v. *Wylie,* 625 F.2d 1371, 1378 (9th Cir. 1980) (due process); *supra* note 4, at 457 (objective view).
[27] *Supra* note 23, at 385.
[28] *Supra* note 19, at 495, note 7.
[29] 342 U.S. 165 (1952).
[30] *United States* v. *Johnson,* 565 F.2d 179, 181 (1st Cir. 1977); *United States* v. *Leja,* 563 F.2d 244, 246 (6th Cir. 1977); *United States* v. *Quinn,* 543 F.2d 640, 648 (8th Cir. 1976); *United States* v. *Smith,* 538 F.2d 1359, 1361 (9th Cir. 1976); *United States* v. *Artuso,* 618 F.2d 192, 196 (2d Cir. 1980); *United States* v. *Tavelman,* 650 F.2d 1133, 1140 (9th Cir. 1981).
[31] *United States* v. *Johnson, supra* note 30, 182.
[32] The due process defense has been successfully raised in two Federal district court cases: *United States* v. *Janotti,* 501 F.Supp. 1182, 1204 (E.D. Pa. 1980); *United States* v. *Batres-Santolino,* 30 Cr.L. 2004 (N.D. Cal. 1981). For recent Federal cases which have rejected defense claims of due process violations, see note 30, *supra;* notes 33, 37, 39, 40, *infra.* See also, *United States* v. *Bocra,* 629 F.2d 281 (3d Cir. 1980); *United States* v. *Gentry,* 642 F.2d 385 (10th Cir. 1981); *United States* v. *Fekri,* 650 F.2d 1044 (9th Cir. 1981); *United States* v. *Diggs,* 649 F.2d 731, 738, note 6 (9th Cir. 1981).
[33] *United States* v. *Lentz,* 624 F.2d 1280, 1288 (5th Cir. 1980); *United States* v. *Nunez-Rios,* 622 F.2d 1093 (2d Cir. 1980); *United States* v. *Caron,* 615 F.2d 920 (1st Cir. 1980); *United States* v. *Perez,* 600 F.2d 782, 785 (10th Cir. 1979); *United States* v. *Wylie,* 625 F.2d 1371, 1378 (9th Cir. 1980).
[34] *Supra* note 23, at 380; *supra* note 19, at 491; *supra* note 15, at 432, *United States* v. *Myers, et al.,* 29 Cr.L. 2421, 2423, (E.D. N.Y. 1981).
[35] *Supra* note 33.
[36] *Supra* note 23.
[37] *United States* v. *Brown,* 635 F.2d 1207 (6th Cir. 1980).
[38] *Id.*
[39] *Supra* note 23; *United States* v. *Gray,* 626 F.2d 494, 498 (5th Cir. 1980); *United States* v. *Nunez-Rios,* 622 F.2d 1093 (2d Cir. 1980); *United States* v. *Corcione,* 592 F.2d 111, 115 (2d Cir. 1979).
[40] *United States* v. *McQuin,* 612 F.2d 1193, 1196 (9th Cir. 1980); *United States* v. *Johnson,* 565 F.2d 179, 182 (1st Cir. 1977).
[41] *United States* v. *Archer,* 486 F.2d 670, 677 (2d Cir. 1973).
[42] *United States* v. *Janotti, supra* note 32, at 1204; *United States* v. *Myers, et al., supra* note 34, at 2423.
[43] 21 Am.Jur.2d 372; see, e.g., *State* v. *Anderson,* 16 Wash. App. 553, 558 P.2d 307 (1976); *State* v. *Hogerworst,* 90 N.M. 580, 566 P.2d 828 (1977).
[44] 21 Am.Jur.2d 375.
[45] See, e.g., *People* v. *Barraza,* 23 Cal.3d 675, 153 Cal. Rptr. 459, 591 P.2d 947 (1979).
[46] See, e.g., *Commonwealth* v. *Jones,* 242 Pa. Super. 303, 363 A.2d 1281 (1976).

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