band,[1053] or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes.[1054] In such cases, an "entrapment" defense is often made, though it is unclear whether the basis for the defense is the Due Process Clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).[1055]

The Court has employed the so-called "subjective approach" in evaluating the defense of entrapment.[1056] This subjective approach

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[1053] For instance, in Sorrells v. United States, 287 U.S. 435, 446–49 (1932) and Sherman v. United States, 356 U.S. 369, 380 (1958) government agents solicited defendants to engage in the illegal activity, in United States v. Russell, 411 U.S. 423, 490 (1973), the agents supplied a commonly available ingredient, and in Hampton v. United States, 425 U.S. 484, 488–89 (1976), the agents supplied an essential and difficult to obtain ingredient.

[1054] For instance, this strategy was seen in the "Abscam" congressional bribery controversy. The defense of entrapment was rejected as to all the "Abscam" defendants. *E.g.*, United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

[1055] For a thorough evaluation of the basis for and the nature of the entrapment defense, *see* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111. The Court's first discussion of the issue was based on statutory grounds, *see* Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. In United States v. Russell, 411 U.S. 423, 490 (1973), however, the Court rejected the use of that power, as did a plurality in *Hampton*, 425 U.S. at 490. The *Hampton* plurality thought the Due Process Clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); *Russell*, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S. 540 (1992) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

[1056] An "objective approach," although rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. *See American Law Institute*, MODEL PENAL CODE § 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Final Draft, 1971). The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be