

NOTES

THE ABSCAM INVESTIGATION: USE AND ABUSE OF ENTRAPMENT AND DUE PROCESS DEFENSES

From 1977 through 1980 the Federal Bureau of Investigation conducted a noteworthy criminal investigation.¹ Although the original purpose of this operation was the recovery of forged securities and stolen art work,² it quickly turned to the investigation of political corruption.³ With the help of former FBI informant and life-long confidence man Melvin Weinberg,⁴ FBI agents devised an elaborate scheme designed to provide opportunities for illegal conduct by public officials who were predisposed to political corruption.⁵ The scheme involved the creation of a fictitious corporation named "Abdul Enterprises."⁶ The corporation was purportedly headed by Sheik Yassir Habib of Abu Dhabi, whose desire it was to invest in and immigrate to the United States.⁷ The FBI named this operation "ABSCAM" after the first two letters of "Abdul" and the word "scam."⁸

ABSCAM was designed to use private persons, unaware of the FBI agent's true identities, to seek out public officials who would be willing to use their government influence on the sheik's behalf in return for money and other gifts.⁹ ABSCAM's first, and most influential middleman was then-Mayor of Camden and New Jersey state senator Angelo Errichetti who, along with Philadelphia attorney Howard Criden, expressed an interest in using Arab money to promote and build an Atlantic City casino.¹⁰ During a July, 1979 meeting on the sheik's Florida yacht, Errichetti agreed to use his political resources to find public officials who would use their influence in exchange for monetary rewards.¹¹

¹ *United States v. Myers*, 527 F. Supp. 1206, 1209-11 (E.D.N.Y. 1981), *aff'd*, 635 F.2d 932 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980). The program originated in the FBI's Hauppauge, Long Island office, under the supervision of agent John Good. *Id.*

² *Id.* at 1210.

³ *Id.*

⁴ Weinberg agreed to cooperate with law enforcement officials after pleading guilty to fraud charges in a Pennsylvania court. *Id.* at 1209.

⁵ *United States v. Jannotti*, 673 F.2d 578, 581 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

⁶ *Id.* Although credit for the idea is disputed, *United States v. Myers*, 527 F. Supp. at 1239, Abdul Enterprises bore a striking resemblance to Weinberg's own highly successful and equally fraudulent "London Investors, Ltd." *Id.* at 1209-10.

⁷ *United States v. Myers*, 527 F. Supp. at 1210.

⁸ *Id.*

⁹ *See id.*

¹⁰ *Id.* at 1210.

¹¹ *Id.* Errichetti claimed that he possessed "extraordinary influence" with licensing commissioners, connections with organized crime, and "intimate knowledge of which members of the New Jersey legislature could be bought." *Id.*

By the end of 1979 Errichetti and Criden had produced almost a dozen elected officials who met with FBI agents at locations monitored by hidden audio and video equipment.¹² At each of these meetings, cash payments ranging from ten to fifty thousand dollars were offered to these individuals,¹³ all but three of whom accepted.¹⁴ In addition, Errichetti introduced the FBI agents to several public officials who were offered financial interests in Abdul projects, in return for political influence.¹⁵

Eventually, information about the investigation began to leak to the press¹⁶ and, consequently, it was terminated on February 2, 1980.¹⁷ Within a year after ABSCAM ended, grand juries were convened in three locations¹⁸ and indictments were handed down involving twenty-six defendants.¹⁹ Despite both distinguishable fact patterns²⁰ and

¹² *Id.* These individuals included United States Representatives Michael O. Myers and Raymond Lederer of Pennsylvania, *id.* at 1212-13, Philadelphia City Councilmen Harry P. Jannotti and George X. Schwartz, *United States v. Jannotti*, 501 F. Supp. 1182, 1196-97 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578, 581 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982), and United States Senator Harrison A. Williams, Jr. of New Jersey, *United States v. Williams*, 529 F. Supp. 1085, 1090 (E.D.N.Y. 1981), *aff'd*, 705 F.2d 603 (2d Cir. 1983).

¹³ While Harry Jannotti accepted only \$10,000, *United States v. Jannotti*, 501 F. Supp. at 1184, Michael Myers, Raymond Lederer, and Frank Thompson each accepted \$50,000, *United States v. Myers*, 527 F. Supp. at 1212-14.

¹⁴ *United States v. Myers*, 527 F. Supp. at 1225. Those three individuals were Senator Larry Pressler of South Dakota, Congressman Edward Patten of New Jersey, and Congressman John P. Murtha of Pennsylvania. *Id.*

¹⁵ *Id.* at 1210.

¹⁶ *Id.* at 1210-11.

¹⁷ *Id.* at 1211.

¹⁸ The grand juries were convened in the Eastern District of New York, the Eastern District of Pennsylvania, and the District of Columbia. *Id.* at 1211-12.

¹⁹ *Id.* The resulting cases were:

1. *U.S. v. Alexander Andrew Alexandro, Jr. and Alfred Carpentier*, docket no. CR 80-00102, Eastern District of New York, tried before Hon. Mark A. Costantino in October, 1980.

2. *U.S. v. Michael O. Myers, Angelo J. Errichetti, Louis C. Johanson and Howard L. Criden*, docket no. CR 80-00249, Eastern District of New York, tried before Hon. George C. Pratt in August, 1980.

3. *U.S. v. Raymond F. Lederer, Angelo J. Errichetti, Louis C. Johanson and Howard L. Criden*, docket no. CR 80-00253, Eastern District of New York, tried before Hon. George C. Pratt in January, 1981.

4. *U.S. v. Frank Thompson, Jr., John M. Murphy, Howard L. Criden and Joseph Silvestri*, docket no. CR 80-00291, Eastern District of New York, tried before Hon. George C. Pratt in November, 1980.

5. *U.S. v. Harry P. Jannotti, George X. Schwartz, Howard L. Criden and Louis C. Johanson*, docket no. CR 80-00166, Eastern District of Pennsylvania, tried before Hon. John P. Fullam in September, 1980.

6. *U.S. v. John W. Jenrette and John R. Stowe*, docket no. CR 80-00289, District of Columbia, tried before Hon. John G. Penn in September, 1980.

7. *U.S. v. Richard Kelley, Eugene Robert Ciuzio and Stanley Weisz*, docket no. CR 80-00340, District of Columbia, tried before Hon. William B. Bryant in December, 1980.

8. *U.S. v. Harrison A. Williams, Jr., Alexander Feinberg, George Katz, and Angelo J. Errichetti*, docket no. CR 80-00575, Eastern District of New York, tried before Hon. George C. Pratt in April, 1981.

9. *U.S. v. Kenneth N. MacDonald and Angelo Errichetti*, docket no. CR 81-00366. Indictment returned June 18, 1981, Eastern District of New York, tried before Hon. George C. Pratt in November, 1981.

10. *U.S. v. Charles T. Walsh, Martin Gabey, Vincent J. Cuti, Jr., Nicholas Barbato, Angelo J. Errichetti, and Bowe, Walsh & Associates*, docket no. CR 81-00218. Indictment returned

varied legal strategies,²¹ each and every ABSCAM defendant asserted either the defense of entrapment or a violation of due process or both. None of these defenses proved successful.

This note will demonstrate ABSCAM's inherent improprieties as they relate to the defenses of entrapment and violation of due process. This note will also explore how similar investigations in the future should be conducted so as to protect innocent individuals from these improprieties. It is submitted that the convictions which resulted from the ABSCAM investigation may have been due not only to the guilt of the defendants, but also to the current state of the law of entrapment and due process and to the particular structure of the ABSCAM investigation. Part I of this note will examine the entrapment and due process defenses. First, it will discuss four United States Supreme Court cases which have considered the entrapment defense.²² The current "subjective" test for entrapment will be described as well as an alternative "objective" test which has been espoused by a minority of the Court.²³ Then, Part I will discuss the defense of a due process violation.²⁴ Next, Part II of the note will examine the individual ABSCAM cases, and the specific defenses which were alleged.²⁵ Part III presents a discussion of the problems inherent in the defenses of entrapment and due process as they relate to the ABSCAM scenarios.²⁶ It will be submitted that several factors, including the use of videotape, unsuspecting middlemen, legal offers mixed with illegal ones, and the lack of prior reason to suspect the defendants, made the subjective view of entrapment ineffectual as a defense for the crimes allegedly committed.²⁷ Furthermore, it will be submitted that a combination of the courts' refusal to adopt the objective view of entrapment and the vague standards of the due process defense gave ABSCAM defendants little chance of constructing a successful defense despite their true innocence or guilt.²⁸ Finally, Part IV will discuss precautions which should be taken to prevent similar improprieties in future investigations, and to insure that innocent individuals will not be entrapped by crimes manufactured by the government.²⁹

I. BACKGROUND: ENTRAPMENT AND DUE PROCESS

Courts uniformly have held that while the government and law enforcement agents may use artifice and stratagem to apprehend criminals, they may not go so far as to induce an innocent person to commit a crime.³⁰ Entrapment exists when the government supplies an otherwise innocent individual with the disposition to commit a crime.³¹ In

April 9, 1981; superseding indictment returned May 21, 1981, Eastern District of New York, tried before Hon. George C. Pratt in September, 1981.

Id.

²⁰ See *infra* notes 99-120, 158-64, 176-82, 189-205, and accompanying text.

²¹ See *infra* notes 121-57, 165-75, 183-88, 206-36, and accompanying text.

²² See *infra* notes 44-62 and accompanying text.

²³ See *infra* notes 33-69 and accompanying text.

²⁴ See *infra* notes 70-98 and accompanying text.

²⁵ See *infra* notes 100-236 and accompanying text.

²⁶ See *infra* notes 237-52, 298-318, and accompanying text.

²⁷ See *infra* notes 253-97 and accompanying text.

²⁸ See *infra* notes 300-18 and accompanying text.

²⁹ See *infra* notes 319-54 and accompanying text.

³⁰ *Sorrells v. United States*, 287 U.S. 435, 441-42 (1932).

³¹ *Sherman v. United States*, 356 U.S. 369, 371-72 (1958).

addition to the entrapment defense, an individual who has been encouraged to commit a crime by law enforcement officials can allege that the government's conduct was so outrageous that it violated his due process rights.³² This section of the note will examine the evolution of these defenses to determine how they applied to the ABSCAM scenario.

A. Entrapment

The defense of entrapment is rooted firmly in the American criminal justice system.³³ Traditionally, there have been two tests which courts have employed to determine whether an individual has been entrapped: the subjective test and the objective test. The subjective test, which has been adopted by the United States Supreme Court³⁴ and most state courts,³⁵ focuses on the predisposition of the accused in determining whether entrapment occurred.³⁶ Predisposition is determined by examining whether the defendant was already prone to commit the act for which the government merely supplied the opportunity, or whether the government persuaded an otherwise innocent person to commit the crime.³⁷ In contrast to the subjective approach, an objective test for entrapment has been advocated by several Supreme Court justices,³⁸ and by numerous commentators,³⁹ but has been employed in only a small number of state courts.⁴⁰ In the objective

³² *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

³³ The United States Supreme Court first recognized entrapment as a defense in *Sorrells v. United States*, 287 U.S. at 452. Tennessee is the only state which does not recognize the defense. Comment: *Entrapment in Tennessee*, 45 TENN. L. REV. 57, 59 (1977). For a listing of the cases or statutes which recognize entrapment in the forty-nine remaining states, see Comment: *Causation and Intention in the Entrapment Defense*, 28 U.C.L.A. L. REV. 859, 859-60 n.3 (1981) [hereinafter cited as *Causation*].

³⁴ *Sorrells v. United States*, 287 U.S. at 451-52. See *United States v. Russell*, 411 U.S. at 440 (Stewart, J., dissenting).

³⁵ See, e.g., *United States v. Webster*, 649 F.2d 346, 351 (5th Cir. 1981); *United States v. Benveniste*, 564 F.2d 335, 340 (9th Cir. 1977); *United States v. Watson*, 489 F.2d 504, 511 (3d Cir. 1973); *Tyson v. State*, 361 So.2d 1182, 1186 (Ala. Crim. App. 1978); *State v. Matheson*, 363 A.2d 716, 719 (Me. 1976). See *infra* note 40 for a list of those jurisdictions which do not follow the subjective test.

³⁶ *United States v. Russell*, 411 U.S. at 433.

³⁷ *Id.* at 440 (Stewart, J., dissenting).

³⁸ *Hampton v. United States*, 425 U.S. 484, 496-97 (1976) (Brennan, J., dissenting); *United States v. Russell*, 411 U.S. at 411-45 (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. at 382-85 (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. at 458-59 (Roberts, J., concurring).

³⁹ See, e.g., L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *DETECTION OF CRIME* 268-72 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1106-08, 1111-12 (1951); Goldstein, *For Harold Laswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain*, 84 YALE L.J. 683, 687-90 (1975); Sagarin & MacNamara, *The Problem of Entrapment*, 16 CRIM. & DELINQ. 363, 376-78 (1970); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecutions*, 28 FORDHAM L. REV. 399, 417 (1959); Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AM. J. TRIAL ADVOC. 293, 303 (1981); Recent Developments, *Entrapment — Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 CORNELL L. REV. 546, 566-68 (1974) [hereinafter cited as *Predisposition*]; Comment, *Entrapment: A Critical Discussion*, 37 MO. L. REV. 633, 659 (1972); Comment, *Entrapment by Federal Officers*, N.Y.U. L. REV. 1033, 1039 (1958).

⁴⁰ Four states have accepted the objective test judicially. See *Grossman v. State*, 457 P.2d 226, 229-30 (Alaska 1969); *People v. Barraza*, 23 Cal.3d 675, 689-91, 591 P.2d 947, 955-56, 153 Cal. Rptr. 459, 467-68 (1979); *State v. Mullen*, 216 N.W.2d 375, 382 (Iowa 1974); *People v. Turner*, 390 Mich. 7, 22, 210 N.W.2d 336, 342 (1973). North Dakota, New Hampshire, Hawaii, Pennsylvania, and Utah

test, the concern is not with the predisposition of the particular defendant, but with the conduct of the government officials and the degree of instigation or inducement.⁴¹ That is, the court must look to the scope of government influence as it would affect the "average person"⁴² and ignore the accused's subjective state of mind.⁴³ The development of these two tests deserves attention.

The subjective test has been the sole test applied by the United States Supreme Court in four landmark entrapment cases beginning with *Sorrells v. United States*.⁴⁴ In *Sorrells*, a government agent convinced the defendant to sell him a half gallon of whiskey.⁴⁵ After being indicted for possession and sale of whiskey in violation of the National Prohibition Act, the defendant pleaded not guilty and asserted the defense of entrapment.⁴⁶ The Supreme Court, relying on statutory interpretation⁴⁷ and lower court precedent,⁴⁸ determined that "a sense of justice" did not allow for otherwise innocent people to be "lured" into the commission of crimes by government officials and then to be punished as if they had been predisposed to commit the act.⁴⁹ Thus the defendant was found to be not guilty based on entrapment. As such, the predisposition of the defendant became the Supreme Court's test for entrapment.

The Supreme Court also addressed the entrapment defense in *Sherman v. United States*.⁵⁰ In *Sherman*, government officials arrested an individual whom they had coaxed, through a government informer, into selling narcotics to that informer.⁵¹ Although the Court found entrapment to have existed,⁵² it did so strictly by evaluating the accused's subjective state of mind which manifested both hesitancy and lack of predisposition.⁵³ Furthermore, because neither of the parties raised the issue, the Court refused to amend the doctrine of entrapment in light of the objective theory.⁵⁴ Thus, the subjective theory remained ruling law.

In the two remaining Supreme Court entrapment cases, the defendants specifically

have adopted the objective test by statute. HAWAII REV. STAT. §§ 702-237 (1976); N.H. REV. STAT. ANN. § 626:5 (1974); N.D. CENT. CODE § 12.1-05-11 (1976); PA. STAT. ANN., tit. 18, § 313 (Purdon 1973); UTAH CODE ANN. § 76-2-303 (1978).

⁴¹ *United States v. Russell*, 411 U.S. at 440-42 (Stewart, J., dissenting).

⁴² Justice Frankfurter, in *Sherman v. United States*, stated that the objective test was designed to prohibit inducements which would be likely to cause crimes by law-abiding persons:

This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. . . . It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations.

Sherman v. United States, 356 U.S. 269, 383-84 (1958) (Frankfurter, J., concurring). See also *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969) (government inducement would be improper if it "would be effective to persuade an average person . . . to commit . . . an offense.").

⁴³ *Sorrells v. United States*, 287 U.S. at 459 (Roberts, J., concurring).

⁴⁴ 287 U.S. 435 (1932).

⁴⁵ *Id.* at 439.

⁴⁶ *Id.* at 438.

⁴⁷ *Id.* at 445-48.

⁴⁸ *Id.* at 443-45.

⁴⁹ *Id.* at 448.

⁵⁰ 356 U.S. 369 (1958).

⁵¹ *Id.* at 371.

⁵² *Id.* at 373.

⁵³ *Id.* at 373-76.

⁵⁴ *Id.* at 376.

asked the Court to reconsider the entrapment theory as set forth in *Sorrells* and *Sherman* in terms of certain fundamental principles of due process. In *United States v. Russell*,⁵⁵ government agents supplied an illicit drug manufacturer with an essential narcotic ingredient and then arrested him for the subsequent manufacture and sale of the drug.⁵⁶ Refusing to overturn the long-standing subjective theory precedents of *Sorrells* and *Sherman*,⁵⁷ the *Russell* Court applied the subjective standard of entrapment to the facts of the case, and held that the defendant was clearly predisposed to commit the crime and, accordingly, denied the claim of entrapment.⁵⁸

The Court arrived at a similar holding in the more recent case of *Hampton v. United States*.⁵⁹ In *Hampton*, petitioner was arrested after participating in an illegal drug sale arranged by a government informant.⁶⁰ Although the defendant claimed entrapment, the Supreme Court upheld the conviction.⁶¹ In an opinion reminiscent of *Russell*, the *Hampton* Court ruled out the possibility that a claim of entrapment could ever be based upon governmental misconduct if the predisposition of the defendant has been established.⁶² Thus, the subjective theory of entrapment continued to be the appropriate test despite suggested alternatives.

The objective test for entrapment is the primary alternative test which has been advocated in the concurring or dissenting opinions of each of these four Supreme Court cases. The origins of the objective test can be traced to Justice Roberts' concurring opinion in *Sorrells*.⁶³ Justice Roberts foresaw problems associated with the use of the subjective test. He maintained that the danger existed that a defendant's predisposition to commit the crime could be determined erroneously by reliance on the defendant's prior reputation or acts.⁶⁴ Justice Roberts, therefore, claimed that the proper test for entrapment should not be predisposition, but the conduct of the government officials and the degree of the instigation and inducement.⁶⁵ Similarly, in *Sherman*, Justice Frankfurter warned that despite the defendant's past crimes and general predisposition, the defendant might not have committed these particular crimes.⁶⁶ He also felt that an "objective test" of entrapment was necessary to regulate police conduct.⁶⁷ The dissents in *Russell*⁶⁸ and *Hampton*⁶⁹ echoed these concerns and advocated the adoption of the "objective test." Despite such advocacy, the objective view of entrapment has remained only a minority view.

B. Due Process

Although in both *Russell* and *Hampton* the Supreme Court reaffirmed the subjective test for entrapment, the Court considered the notion that the government's conduct

⁵⁵ 411 U.S. 423 (1973).

⁵⁶ *Id.* at 424-27.

⁵⁷ *Id.* at 434-36.

⁵⁸ *Id.* at 436.

⁵⁹ 425 U.S. 484 (1976).

⁶⁰ *Id.* at 485-87.

⁶¹ *Id.* at 490-91.

⁶² *Id.* at 488-90.

⁶³ 287 U.S. at 459.

⁶⁴ *Id.* at 458-59.

⁶⁵ *Id.* at 459.

⁶⁶ 356 U.S. at 383 (Frankfurter, J., concurring).

⁶⁷ *Id.* at 384 (Frankfurter, J., concurring).

⁶⁸ 411 U.S. at 436-51.

⁶⁹ 425 U.S. at 492-500.

could be so outrageous that it would constitute a violation of the defendant's due process rights.⁷⁰ The *Russell* Court determined that "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."⁷¹ The Court emphasized, however, that "the instant case is not of that breed."⁷² Although the *Hampton* Court refused to consider the appropriateness of the government's conduct,⁷³ the concurring and dissenting Justices addressed the issue. The concurring opinion, written by Justice Powell and joined by Justice Blackmun,⁷⁴ maintained that although the subjective test stood,⁷⁵ a defendant found to be predisposed could claim that outrageous government conduct violated his due process rights.⁷⁶ The concurring Justices found, however, that the government conduct in this case was not outrageous.⁷⁷ The dissenting opinion, written by Justice Brennan and joined by Justices Stewart and Marshall,⁷⁸ stated that the objective test was proper and that predisposition did not matter.⁷⁹ In examining the facts of the case, the dissent concluded that the government conduct was outrageous enough to require dismissal.⁸⁰ Thus, a majority of the Justices in *Hampton* found that, although predisposition is the test for entrapment, even a predisposed defendant may be released if there is outrageous government conduct because such conduct is a due process violation. The Justices who supported the due process defense, however, failed to define what type of governmental conduct would be considered outrageous. Furthermore, only twice has a federal appellate court found outrageous government conduct to exist. These two cases, *United States v. Archer*⁸¹ and *United States v. Twigg*⁸² will now be discussed.

The defendants in *Archer* accepted bribes from an undercover FBI agent in return for assurances that a grand jury would not return an indictment against the FBI agent.⁸³ Although the Second Circuit Court of Appeals decided *Archer* on the other grounds,⁸⁴ the court did address the issue of outrageous government conduct.⁸⁵ The court reasoned that, in *Archer*, the government "authorized" its agents to engage in crimes which were

⁷⁰ *United States v. Russell*, 411 U.S. at 431-32; *Hampton v. United States*, 425 U.S. at 493. For a further discussion of a due process defense in an entrapment situation, see Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 582-611 (1982); Note, *Entrapment — A Due Process Defense — What Process is Due?*, 11 SW. U.L. REV. 663, 665-77 (1979).

⁷¹ *United States v. Russell*, 411 U.S. at 432.

⁷² *Id.* at 431-32.

⁷³ *Hampton v. United States*, 425 U.S. at 490.

⁷⁴ *Id.* at 491-95 (Powell, J. and Blackmun, J., concurring).

⁷⁵ *Id.* at 492 n.2 (Powell, J. and Blackmun, J., concurring).

⁷⁶ *Id.* at 493 (Powell, J. and Blackmun, J., concurring).

⁷⁷ *Id.* at 491 (Powell, J., and Blackmun, J., concurring).

⁷⁸ *Id.* at 495-500 (Brennan, J.; Stewart, J.; and Marshall, J.; dissenting).

⁷⁹ *Id.* at 496-97 (Brennan, J.; Stewart, J.; and Marshall, J., dissenting).

⁸⁰ *Id.* at 498-500 (Brennan, J.; Stewart, J.; and Marshall, J., dissenting).

⁸¹ 486 F.2d 670 (2d Cir. 1973).

⁸² 588 F.2d 373 (3d Cir. 1978).

⁸³ 486 F.2d at 672-74. The defendants in *Archer* were Leon Wasserberger, an associate of a Manhattan bailbondsman, and Norman Archer and Frank Klein who were both attorneys. *Id.* The arrest and detention of the FBI agent were part of the ruse, but the grand jury was legitimate. *Id.*

⁸⁴ *Id.* at 681-83. The *Archer* court reversed the convictions on the grounds that the evidence was insufficient to show a violation of, or a conspiracy to violate the Travel Act. *Id.*

⁸⁵ *Id.* at 676-77, 682.

"quite independent of the crimes the defendants committed."⁸⁶ This conduct, the court found, was completely reprehensible,⁸⁷ and the court added that it hoped that the "lesson of this case" would obviate the necessity for any case to reach them which would specifically require the court to find that the government conduct violated due process of law.⁸⁸

Following the *Archer* opinion, the United States Court of Appeals for the Third Circuit, in *United States v. Twigg*⁸⁹ held that the government's conduct was outrageous and violated the defendant's due process rights.⁹⁰ *Twigg* involved the arrest of two illicit drug manufacturers to whom government agents had furnished essential chemicals, equipment, materials and an entire farmhouse/laboratory for manufacturing certain narcotics.⁹¹ Considering the defendant's claim of entrapment, the court adhered to precedent and determined that predisposition was the sole basis for disproving entrapment.⁹² The court concluded that this defendant was, in fact, predisposed.⁹³ The *Twigg* court then examined whether the government's conduct was outrageous and found that the police involvement was so overreaching that it barred prosecution as a matter of due process.⁹⁴ In reaching this decision, the court weighed the extent of government conduct to determine where predisposition ended and government inducement took over.⁹⁵ Emphasizing that the government initiated the plan, supplied otherwise unavailable ingredients and took advantage of the weakness of the defendants,⁹⁶ the *Twigg* court concluded that the government actions "reached 'a demonstrable level of outrageousness.'"⁹⁷ Consequently, the court held that the extensive police involvement violated the defendant's due process rights.⁹⁸ *Twigg*, therefore, stands for the proposition that government conduct can reach a level so outrageous that it warrants dismissal of criminal charges on due process grounds.

From the foregoing discussion of case law, two conclusions may be drawn. First, the subjective test of entrapment, which focuses on the defendant's predisposition, is the only Supreme Court approved test for entrapment. Second, even with a predisposed defendant, government conduct may be sufficiently outrageous to support a defense of violation of due process. Keeping these conclusions in mind, it is necessary to examine the individual ABSCAM scenarios and evaluate their holdings in light of both the adequacy of the predisposition test, and the consideration given government conduct.

II. THE ABSCAM SCENARIOS AND DEFENSES

Each time a middleman brought an unsuspecting official into the ABSCAM investigation, one of four distinguishable scenarios was begun. These scenarios were: first, the

⁸⁶ *Id.* at 675. These crimes included perjury before judges and grand juries, misleading a police investigation, and "needlessly injecting the federal government into a matter of state concern." *Id.* at 672.

⁸⁷ *Id.* at 677.

⁸⁸ *Id.*

⁸⁹ 588 F.2d 373 (3d Cir. 1978).

⁹⁰ *Id.* at 380.

⁹¹ *Id.* at 375-76.

⁹² *Id.* at 376.

⁹³ *Id.*

⁹⁴ *Id.* at 377.

⁹⁵ *Id.* at 380-82.

⁹⁶ *Id.* at 381.

⁹⁷ *Id.* at 380.

⁹⁸ *Id.* at 377.

basic and most common, the "asylum scenario";⁹⁹ second, the more complicated version, the "stock and loan scenario";¹⁰⁰ third, the fact pattern with which the courts had the least trouble returning a guilty verdict, the "Alexandro scenario";¹⁰¹ and finally, a slight, but distinguishable variation of the asylum scenario, the "Kelly scenario."¹⁰²

A. The Asylum Scenario

The simplest and most common approach used by the FBI was the "asylum scenario." In this scenario, the unsuspecting middlemen contacted influential public officials and introduced them to undercover FBI agents who offered the officials cash in exchange for assurances of action on the sheik's behalf in immigration matters.¹⁰³ Each time the agents made an offer, they phrased it slightly differently and promised different amounts of money depending on the importance of the individual.

George X. Schwartz and Harry P. Jannotti, both influential members of the Philadelphia City Council, were informed that the sheik was interested in building an elaborate hotel complex in Philadelphia.¹⁰⁴ The FBI offered them money, assuring them that acceptance of the money would be an expression to the sheik of their "friendliness,"¹⁰⁵ as well as an assurance that the councilmen would use their official positions to expedite completion of the hotel complex.¹⁰⁶ Subsequently, the councilmen accepted the money.¹⁰⁷ Both men were indicted and eventually convicted of bribery and related crimes.¹⁰⁸ A former United States Congressman from Philadelphia, Michael O. Myers accepted \$50,000¹⁰⁹ before ABSCAM cameras in a hotel room in return for a promise to introduce into Congress a private bill to enable the sheik to enter the United States as a permanent citizen.¹¹⁰ Although Myers claimed at trial that he was only "play acting" to swindle the sheik,¹¹¹ the jury refused to believe the claim and Myers was convicted of bribery, conspiracy and unlawful interstate activity.¹¹² Another former United States Representative from Philadelphia, Raymond F. Lederer, was videotaped accepting \$50,000¹¹³ in exchange for a promise to assist the sheik in his immigration matters.¹¹⁴ A jury apparently found the videotape evidence "overwhelming"¹¹⁵ and returned guilty verdicts on all

⁹⁹ United States v. Myers, 527 F. Supp. 1206, 1212-13 (E.D.N.Y. 1981).

¹⁰⁰ United States v. Williams, 529 F. Supp. 1085, 1090-91 (E.D.N.Y. 1981).

¹⁰¹ United States v. Alexandro, 675 F.2d 34, 36-38 (2d Cir. 1982).

¹⁰² United States v. Kelly, 707 F.2d 1460, 1463-67 (D.C. Cir. 1983).

¹⁰³ See United States v. Jannotti, 501 F. Supp. 1182, 1195 (E.D. Pa. 1980).

¹⁰⁴ *Id.* at 1184.

¹⁰⁵ *Id.* at 1194. The FBI agents posing as the sheik's representatives indicated that, to the Arab mind, accepting monetary payments was merely a token of friendship. *Id.*

¹⁰⁶ *Id.* at 1184.

¹⁰⁷ *Id.* Schwartz, the President of the Council, received \$30,000 while Jannotti received only \$10,000. *Id.*

¹⁰⁸ United States v. Jannotti, 673 F.2d 578, 580-81 (3d Cir. 1982).

¹⁰⁹ United States v. Myers, 527 F. Supp. at 1212. Myers apparently only kept \$15,000. He divided the remainder between Errichetti, Criden, and Criden's law partner, Louis C. Johanson. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1213. Lederer only kept \$5,000. He divided the remaining amount between Criden, Errichetti, and Johanson. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

counts.¹¹⁶ Finally, United States Representatives Frank Thompson, Jr. of New Jersey and John M. Murphy of New York were each offered a bribe termed "walking around money" in October of 1979.¹¹⁷ At an FBI-arranged rendezvous captured on videotape, Thompson handed Murphy a briefcase containing \$50,000.¹¹⁸ Both men pleaded ignorance as to the contents of the case,¹¹⁹ but the jury believed otherwise and found both defendants guilty.¹²⁰

Of the six major defendants who were indicted under the "asylum scenario," only three chose to allege entrapment.¹²¹ Two of those defendants, Jannotti and Schwartz, were successful with the defense in the district court.¹²² The court first determined that the subjective test of predisposition was the appropriate standard for entrapment.¹²³ Under this test, the court observed the proper way to determine the existence of predisposition was to see if the government induced the defendants to commit a crime they would not have been likely to commit otherwise.¹²⁴ Analyzing the facts at hand, the *Jannotti* court concluded that the government agents had offered inducements that were so attractive, that the mere acceptance of the money did not prove predisposition.¹²⁵ The court based this conclusion on three factors. First, the \$10,000 and \$30,000 gifts were "a substantial temptation to commit a first offense."¹²⁶ Second, the defendants, by agreeing to help in the construction of the hotel complex, had done nothing inconsistent with their obligations as members of the City Council.¹²⁷ Third, the government agents had led the defendants to believe that if they did not accept the money, the hotel project would not come to Philadelphia.¹²⁸ This evidence, the court maintained, was insufficient, as a matter of law, to establish the defendants' predisposition beyond a reasonable doubt.¹²⁹ Consequently, the court held that the defendants were entrapped.¹³⁰ Furthermore, in discussing a possible due process violation, the court, referring to both the *Twigg* and *Archer* decisions,¹³¹ weighed the importance of apprehending corrupt public officials against the

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1214. The "sheik's representatives" offered Murphy a monetary sum in return for an assurance from Murphy that he would "meet with them." *Id.* As a result of the failure on Murphy's part to commit his Congressional interests and services to the sheik the jury found him not guilty of bribery. *Id.* His acceptance of the money, however, as well as his request for financing from the sheik to acquire a Puerto Rican shipping company led the jury to return guilty verdicts for criminal gratuity, conflict of interest and conspiracy. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Lederer, Jannotti and Schwartz alleged entrapment. *United States v. Myers*, 527 F. Supp. at 1218; *United States v. Jannotti*, 501 F. Supp. at 1202.

¹²² *United States v. Jannotti*, 501 F. Supp. at 1205.

¹²³ *Id.* at 1187-97. The *Jannotti* court relied on four Supreme Court opinions, see *infra* notes 44-80 and accompanying text, as well as a Third Circuit decision, *United States v. Watson*, 489 F.2d 504 (3d Cir. 1973).

¹²⁴ *United States v. Jannotti*, 501 F. Supp. at 1190. Although the district court said it was applying the subjective test, it did pay close attention to the amount of government inducement involved, which is the standard of the objective test. See *id.* at 1200.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1205.

¹³¹ *Id.* at 1203.

propriety of governmental subterfuge.¹³² In doing so, the court determined that the combination of offering the bribes, providing generous financial inducements and even appealing, in effect, to the accused's civic duty by offering to build a hotel which would benefit the whole city, was a violation of the defendants' right to due process through outrageous government conduct.¹³³ The asylum scenario, therefore, in at least one court's opinion, overstepped certain constitutional and ethical limits.

The Third Circuit Court of Appeals which reviewed the *Jannotti* case, however, disagreed with the findings of the district court and reinstated the guilty verdicts.¹³⁴ The appeals court, relying more heavily on the videotape evidence,¹³⁵ rejected the district court's finding that the government had offered the defendants overwhelming temptations.¹³⁶ In reaching its decision, the court emphasized four facts: First, \$10,000 or \$30,000 is not so large a sum as to overcome an official's natural reluctance to accept a bribe.¹³⁷ Second, a reasonable jury could find that the councilmen were clearly compromising their positions as elected officials by involving themselves in the hotel project,¹³⁸ rather than merely offering "friendship" to the sheik.¹³⁹ Third, there was insufficient evidence to prove beyond a reasonable doubt that the project would not have come to Philadelphia if the councilmen had not accepted the money.¹⁴⁰ Fourth, if the defendants, as a matter of law, were truly not predisposed to accept a bribe, they could simply have refused.¹⁴¹ Moreover, the court of appeals reversed the district court's finding of a due process violation,¹⁴² carefully distinguishing *Twigg*¹⁴³ and *Archer*.¹⁴⁴ Wary of adopting an objective standard of entrapment disguised as a due process defense,¹⁴⁵ the court determined that as long as undercover bribery operations are not "outrageous" they may be conducted.¹⁴⁶

The remaining four asylum scenario defendants, all joined in the *Myers* case, were

¹³² *Id.* at 1204.

¹³³ *Id.*

¹³⁴ United States v. *Jannotti*, 673 F.2d 578, 581 (1982).

¹³⁵ *Id.* at 582-89. The Third Circuit's opinion quotes lengthy segments of the tapes, and emphasizes that these defendants greedily took their bribes without exhibiting any signs of hesitation. *Id.* at 606.

¹³⁶ *Id.* at 603.

¹³⁷ *Id.* at 599.

¹³⁸ *Id.* at 600-01.

¹³⁹ *Id.* at 600. The district court had been impressed by the defendant's argument that the sheik's representatives had insisted that the money was not to be used in exchange for the councilman's vote, but rather, as a comfort for the sheik's "Arab mind" which they claimed could not trust a man until that man accepted a large sum of the sheik's money. United States v. *Jannotti*, 501 F. Supp. at 1194. The Third Circuit discounted this argument. United States v. *Jannotti*, 673 F.2d at 60.

¹⁴⁰ United States v. *Jannotti*, 673 F.2d at 602-03.

¹⁴¹ *Id.* at 606.

¹⁴² *Id.* at 610.

¹⁴³ *Id.* at 608. The court observed that in *Twigg* the government provided the defendant with essential materials necessary for the criminal conduct. *Id.* The court maintained, however, that in the ABSCAM investigation the government merely provided the opportunity for the defendants to sell their political influence, a "commodity" which the defendants already possessed. *Id.*

¹⁴⁴ *Id.* The court noted that while the government action in *Archer* caused harm to third persons, no such injury was caused in ABSCAM. *Id.* The court neglected to consider, however, that an injury did occur in that the councilmen's constituents were deprived of the services of a non-corrupted public servant.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 609.

equally unsuccessful with their defense strategies.¹⁴⁷ These strategies included defenses of objective entrapment¹⁴⁸ and due process violations,¹⁴⁹ using the latter to attack both the general nature and the specific operations of ABSCAM. In each case, the *Myers* court rejected the objective theory of entrapment based on "clear federal precedents that reject objective entrapment."¹⁵⁰ Furthermore, the court denied the due process defense because it believed the government conduct fell far short of "outrageousness."¹⁵¹ The court maintained that ABSCAM merely set out a "honey pot"¹⁵² and, at any time, the defendants could have refused, as did three legislators.¹⁵³ The court also determined that the government conduct was less extensive than in *Hampton*,¹⁵⁴ a case where the Supreme Court found no outrageousness.¹⁵⁵ Finally, regarding the need for and reliability of ABSCAM-like investigations, the court emphasized the value of uncovering political corruption.¹⁵⁶ The court also added that, thanks to the videotape evidence, these trials

¹⁴⁷ Only one of these defendants, Congressman Lederer, pleaded traditional, subjective entrapment. *United States v. Myers*, 527 F. Supp. at 1224. The *Myers* court noted that the decision on the remaining defendants' parts not to plead entrapment was not an oversight, but rather, a calculated risk of their defense strategies. *Id.* at 1224 n.13. Although the *Myers* court does not speculate on why the remaining defendants chose not to plead subjective entrapment, *see id.* at 1224, substantial evidence existed to allow a jury conviction. *Id.* Furthermore, it appears that, at one time or another, Myers, Thompson, and Murphy had made pretrial motions to dismiss the case on due process grounds, thus requiring only a hearing and saving themselves from a highly publicized trial. *United States v. Myers*, 510 F. Supp. 319, 320 (E.D.N.Y. 1980). Of course the strategy backfired as District Court Judge Mishlen reserved decision on the motions until the conclusion of the government's case at trial. *Id.* at 323. The motion were subsequently denied. *United States v. Myers*, 527 F. Supp. at 1251.

¹⁴⁸ *United States v. Myers*, 527 F. Supp. at 1224-25.

¹⁴⁹ *Id.* at 1225. In addition to alleging outrageous government conduct, the defendants claimed that their due process rights also were violated by the FBI's use of Melvin Weinberg, a known and untrustworthy criminal, *id.* at 1239; Weinberg's receipt of contingent payments from the FBI and his failure to pay taxes, *id.* at 1240; and the excessive pre-indictment publicity leaks, *id.* at 1242. The district court in *Myers* rejected these claims, maintaining that these actions had not deprived the defendants of any due process rights. *Id.* at 1240-42.

¹⁵⁰ *Id.* at 1225. The court stated that it would be improper to adopt the objective standard because it would constitute a fundamental change in law, and as such was only within the province of the Supreme Court or Congress. *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1226. The court quoted confidence-man Weinberg's testimony at trial that, "[w]e put out the word that money was available, we had a honey pot and the flies came." *Id.*

¹⁵³ *Id.* at 1225. The *Myers* court contended that if the inducements had been truly outrageous, Senator Pressler and Congressmen Pattern and Murtha would have accepted. *Id.*

¹⁵⁴ *Id.* The *Jannotti* court noted that in *Hampton* activity by the government on both "sides" of an illegal narcotics sale in supplying the defendant with heroin and then arranging for an FBI agent to buy it was not outrageous. *Id.* Therefore, the court reasoned, activity on one side, as when government agents offer money to politicians, "may not be outrageous, either." *Id.* The court emphasized that "a closer analogy to *Hampton* would be if the FBI, in order to prosecute middlemen Criden and Errichetti, had not only offered them bribe money, but also supplied them with "undercover" Congressmen to accept the bribe." *Id.* at 1225-26 n.15. This does not, however, justify the court's *a fortiori* conclusions regarding the bribery of Congressmen because this is an act which, by its very nature, cannot have the government working on "both sides" because one side must be the unsuspecting Congressman.

¹⁵⁵ *See supra* notes 73-80 and accompanying text.

¹⁵⁶ *United States v. Myers*, 527 F. Supp. at 1229.

were perhaps as reliable as any trial could ever hope to be.¹⁵⁷ Due process violations and entrapment, therefore, were not found in any of the "asylum scenario" cases.

B. The "Stock and Loan" Scenario

A slightly more complicated scheme led to the indictments and convictions of former United States Senator Harrison A. Williams of New Jersey. Camden Mayor Errichetti, acting as middleman, set up an "investment group" which included himself, Senator Williams, and four others.¹⁵⁸ According to Errichetti, the purpose of the group was to organize a titanium mine and a processing plant.¹⁵⁹ The group approached the FBI agents in an attempt to obtain \$100 million in financing from the sheik.¹⁶⁰ Senator Williams met with unidentified FBI agents posing as the sheik and his representatives on seven occasions.¹⁶¹ During the last of these meetings, Senator Williams actually refused a cash payment which was offered in exchange for his assistance in the sheik's immigration to the United States.¹⁶² Despite this refusal, the jury found that, at previous meetings with the sheik, Williams had agreed to use his position as Senator to obtain government contracts for titanium in exchange for the sheik's financial backing of the mine.¹⁶³ Thus, the jury found Williams guilty of several bribery related crimes.¹⁶⁴

At trial, Senator Williams alleged both entrapment and due process defenses,¹⁶⁵ neither with any success.¹⁶⁶ Williams' entrapment defense was based on what he considered insufficient evidence of predisposition to accept bribes,¹⁶⁷ and a lack of prior suspicion on the part of the investigators.¹⁶⁸ The district court disagreed, however, holding that the evidence at Williams' trial was sufficient to convince a jury of the Senator's predisposition.¹⁶⁹ Moreover, the district court stated that the government did not need to suspect an individual of criminal activity to initiate an investigation.¹⁷⁰ Senator Williams' argument that government officials violated his due process rights by their outrageous conduct included four points: First, Senator Williams alleged that the FBI "coached" him into saying and doing as he had before the video cameras.¹⁷¹ Second, the agents used certain on-camera verbal ploys which interrupted his explanations of why he was refusing the bribe.¹⁷² Third, an internal FBI memorandum existed which concluded

¹⁵⁷ *Id.* at 1229-30.

¹⁵⁸ *United States v. Williams*, 529 F. Supp. 1085, 1090-91 (E.D.N.Y. 1981). This group included Alexander Feinberg, Williams' attorney; George Katz, a New Jersey businessman who died before going to trial; and Sandy Williams, a long-time friend of the Senator against whom no charges were brought on account of his decision to cooperate with the authorities. *Id.* Senator Williams was to be a silent partner in the corporation, owning 18% of the stock. *Id.* at 1090.

¹⁵⁹ *Id.* at 1090.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1092.

¹⁶⁴ *Id.* at 1092-93.

¹⁶⁵ *Id.* at 1093.

¹⁶⁶ *Id.* at 1107.

¹⁶⁷ *Id.* at 1096.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1097.

¹⁷² *Id.* at 1099.

that Williams should not have been brought before a grand jury.¹⁷³ Fourth, Senator Williams, and all the ABSCAM defendants were singled out for investigation because they were supporters of then Presidential candidate Senator Edward Kennedy.¹⁷⁴ The district court rejected all these allegations, asserting that either they were completely unsupported by evidence or that, even if the allegations were true, they did not deny the defendant any "fundamental fairness" or similar "due process requirements."¹⁷⁵ Neither entrapment nor a due process violation, therefore, existed in the stock-and-loan scenario.

C. *The Alexandro Scenario*

The third scheme employed by the FBI resulted in the conviction of a criminal investigator with the Immigration and Naturalization Service name Alexander Alexandro, Jr.¹⁷⁶ Alexandro came to the FBI's attention through an unsuspecting middleman named Alfred Carpentier, a Long Island businessman.¹⁷⁷ Carpentier originally met with FBI agents at one of the sheik's lavish parties and advised them that he and Alexandro would help the sheik obtain a "green card" which was necessary for the sheik's immigration to the United States.¹⁷⁸ Rather than involve the sheik, the FBI agents requested that Alexandro obtain a green card for an Irish alien friend of the sheik.¹⁷⁹ Alexandro, thereafter, took complete control of the scenario, concocting an elaborate and highly illegal scheme involving a contrived marriage and subsequent divorce for the alien in order to obtain the necessary documents.¹⁸⁰ Alexandro then met with the sheik's representatives before hidden cameras, explained his elaborate plan in full detail, quoted a price of \$15,000 and received an initial payment of \$2,000 from an agent.¹⁸¹ Alexandro was eventually arrested, indicted and convicted on three criminal counts.¹⁸²

Alexander Alexandro simply alleged that the government's actions violated his due process rights,¹⁸³ apparently because his complete acquiescence in the criminal activities in which he took part foreclosed any claim of entrapment.¹⁸⁴ After considering the facts of the case, the court concluded that not only did the facts show a complete lack of coercion

¹⁷³ *Id.* at 1100. The memorandum stated that, because Senator Williams had not accepted a bribe, certain FBI officials believed that there was no case against him. *Id.* The court maintained that an internal memorandum evaluating the strengths and weaknesses of a case did not preclude the government from proceeding with its investigation. *Id.* at 1100-01.

¹⁷⁴ *Id.* at 1101. Originally, Senator Williams suggested that there was a direct connection between his support of Senator Kennedy and the investigation. *Id.* He later amended his allegation by maintaining that, as a supporter of Kennedy, he was "negatively selected" in that he didn't have any contacts in the Justice Department or FBI who would have "tipped him off" regarding the investigation. *Id.*

¹⁷⁵ *Id.* at 1099-1101.

¹⁷⁶ *United States v. Alexandro*, 675 F.2d 34, 35 (2d Cir. 1982).

¹⁷⁷ *Id.* at 36.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 37-38.

¹⁸¹ *Id.*

¹⁸² *Id.* at 35, 38. These counts included receiving a bribe, conflict of interest, and conspiracy to receive bribes. *Id.* at 35.

¹⁸³ *Id.* at 39.

¹⁸⁴ *Id.* at 41. The court reported that Alexandro explained his incriminating acts by claiming that he was trying to investigate his would-be corrupters. *Id.* at 38. The court emphasized, however, that Alexandro had failed to inform his supervisors, the FBI or the police of his "investigation." *Id.* at 39.

on the part of the government¹⁸⁵ but that Alexandro's conduct demonstrated the exact type of elusive, difficult-to-detect covert crime which justifies undercover government activities.¹⁸⁶ The most incriminating element which distinguished the *Alexandro* scenario from the other ABSCAM cases was that Alexandro, himself, became the "driving and persistent force behind the intricate scheme."¹⁸⁷ Alexandro's conduct made it unnecessary for the government to engage in any arguably unconstitutional activity.¹⁸⁸ Thus, no due process violation or entrapment existed in the *Alexandro* scenario.

D. *The Kelly Scenario*

The final variation in the ABSCAM investigation involved a former United States Representative, Richard Kelly of Florida,¹⁸⁹ and contains several details which distinguished it from the other three scenarios.

Certain facts were well established due to electronic recording devices.¹⁹⁰ The evidence indicated that Kelly became involved in ABSCAM through three middlemen, more than had been used to involve any other ABSCAM defendant.¹⁹¹ The FBI agents initially met with businessman William Rosenberg and expressed their desire to recruit Congressmen.¹⁹² Rosenberg contacted an accountant and friend, Stanley Weisz, who mentioned this proposition to his longtime business associate Eugene Ciuzio.¹⁹³ Ciuzio approached one of the FBI agents and convinced him that he would be able to influence Congressman Kelly.¹⁹⁴ Consequently, the FBI agents described to Ciuzio the standard ABSCAM proposition: a very attractive investment by the sheik in the Congressman's district, and money in return for help with the sheik's immigration concerns.¹⁹⁵ Ciuzio agreed and contacted Kelly with the sheik's proposal.¹⁹⁶ At trial, Kelly testified that he was interested only in the legitimate investment aspect of the deal, which he claimed he had made clear to Ciuzio.¹⁹⁷ Nevertheless, at a subsequent meeting, an FBI agent offered Kelly \$25,000 as an initial payment on a \$100,000 bribe for his assistance with immigration matters.¹⁹⁸ Kelly refused the offer twice and the agent left the room to speak with a government attorney who was monitoring the meeting in the basement.¹⁹⁹ Although their conversation was only vaguely recalled,²⁰⁰ the attorney told the agent that Kelly was merely "being cute."²⁰¹ After meeting with the attorney, the agent returned to Kelly,

¹⁸⁵ *Id.* at 40.

¹⁸⁶ *Id.* at 42.

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 41-42.

¹⁸⁹ *United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982).

¹⁹⁰ *See id.* at 368-70.

¹⁹¹ *Id.* at 367.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 370. Ciuzio informed the FBI agents that he wanted to take the bribe to Kelly alone, but the agents refused. *Id.* at 367. Before Kelly finally met with the agents, Ciuzio frantically attempted to convince confidence-man Weinberg not to offer the Congressman any money, thereby "making him a . . . hood." *Id.* at 368-69.

¹⁹⁹ *Id.* at 370.

²⁰⁰ *Id.*

²⁰¹ *Id.*

persisted in his offer and soon after, Kelly accepted.²⁰² Kelly was indicted and found guilty on three counts.²⁰³ All the verdicts, however, were dismissed by the district court²⁰⁴ which held that the government's conduct in ABSCAM violated due process.²⁰⁵

Emphasizing that testing virtue of those previously unsuspected of criminal activity is an unacceptable form of law enforcement,²⁰⁶ the district court maintained that, at best, this type of police work results in "prosecution for the sake of prosecution."²⁰⁷ Assuming, *arguendo*, that this is permissible, the court continued, the temptations offered by the FBI must not exceed those which a politician ordinarily would encounter.²⁰⁸ The court maintained that this limit was well exceeded in the *Kelly* scenario.²⁰⁹ Emphasizing that the agents continued to offer the bribe to Congressman Kelly after he had rejected it twice,²¹⁰ the court reasoned that, in the "real world," no criminal would persist with such an offer for fear of his own apprehension.²¹¹ Although the court expressed deep chagrin that the defendant eventually did take the money,²¹² it determined that the government's persistent battle with the defendant's conscience rose above the level of offensiveness to that of "outrageousness."²¹³ This outrageousness, the court concluded, exceeded the bounds of law enforcement.²¹⁴ In effect, this deviation from "real-world constraints" shifted the criminal motivation from the defendant's predisposition to the government's outrageous conduct.²¹⁵ The court maintained that Kelly was "made into a criminal by his own government."²¹⁶ As such, the district court dismissed the indictment.²¹⁷

The government appealed the *Kelly* decision to the District of Columbia Circuit Court of Appeals which reinstated the guilty verdicts.²¹⁸ Reviewing the case solely on due process grounds,²¹⁹ the circuit court rejected the district court's "real world" test of government over-inducement.²²⁰ While the district court reasoned that no real criminal would persist with a bribe offer for fear of apprehension,²²¹ the circuit court alternatively stated that Congressman Kelly was in no way taken aback by the initial offer and,

²⁰² *Id.*

²⁰³ *Id.* at 364.

²⁰⁴ *Id.* at 365.

²⁰⁵ *Id.* at 376.

²⁰⁶ *Id.* at 373.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 374.

²⁰⁹ *Id.* at 374-76.

²¹⁰ *Id.* at 374.

²¹¹ *Id.* at 376.

²¹² *Id.* at 375.

²¹³ *Id.* at 376.

²¹⁴ *Id.*

²¹⁵ *Id.* at 377.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ 707 F.2d 1460, 1461 (D.C. Cir. 1983). Three opinions were filed. The first opinion was per curiam. *Id.* The second was filed by Circuit Judge MacKinnon. *Id.* at 1461-74. The third was filed by Circuit Judge Ginsburg. *Id.* at 1474-77. The MacKinnon and Ginsburg opinions together constitute the opinion of the court. *Id.* at 1461.

²¹⁹ *Id.* at 1468, n.48. The court maintained that Kelly never aggressively pursued his claim of entrapment and that, although the jury did consider the entrapment defense, the district court did not specifically hold that Kelly had been entrapped as a matter of law. *Id.*

²²⁰ *Id.* at 1470, n.51.

²²¹ See *supra* notes 212-16 and accompanying text.

therefore, the offer was within Kelly's "real world."²²² The court then discussed ABSCAM in both general and specific terms so as to develop its own due process test.

The circuit court compared government involvement in ABSCAM to the *Russell* and *Hampton* drug cases.²²³ The court maintained that, in *Russell* and *Hampton*, the government provided both the opportunity and the means to commit a crime, but that no due process violation was held to exist in either case.²²⁴ The court determined that, therefore, no due process violation could exist in ABSCAM where the government provided merely the opportunity, and not the means, to commit a crime.²²⁵ The court then discussed the specific claims which Kelly asserted in his defense. First, regarding the lack of any prior suspicion of Kelly by the government, the court found that ABSCAM operatives did have evidence, prior to the bribe offer, that Kelly was "fully aware that he was participating in an illicit transaction,"²²⁶ and from which they could conclude that "Kelly was, in fact, corrupt."²²⁷ Second, regarding the use of convicted felon Weinberg, his compensation,²²⁸ and his failure to record every conversation which he had held with Kelly's middlemen, the court held that these facts were adequately considered by the trial jury and that Kelly failed to explain how these factors would have added "anything of significance" to his defense.²²⁹ Finally, regarding the multiple bribe offers which distinguished this scenario from the others, the court reexamined Kelly's initial refusals and characterized them not as rejections of bribes themselves, but as rejections of the manner in which the bribe was to be paid.²³⁰ The court held, therefore, that the government had actually made only one bribe offer, which Kelly accepted, and for which he should be found guilty.²³¹

The circuit court in *Kelly* concluded with a second opinion filed by Circuit Judge Ginsburg.²³² In it, the court stated that, although the "real-world" test of the district court was speculative, the circuit court might have applied it in *Kelly*, if "the slate were clear."²³³ In other words, the court was bound by precedent not to "alter the contours of the entrapment defense under a due process cloak."²³⁴ The court added that "without further Supreme Court elaboration," the test for outrageous government conduct would not be transgressed absent "coercion, violence or brutality to the person."²³⁵ According to the court, because Congressman Kelly was not inflicted with "pain or physical or psychological coercion," no due process violation existed in the *Kelly* scenario as a result of outrageous government conduct.²³⁶

It is apparent both from the facts of their cases and their claimed defenses, that none

²²² 707 F.2d at 1470, n.51.

²²³ *Id.* at 1470.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 1471.

²²⁷ *Id.* The court cites the example that Kelly was asked to call his middlemen from a "safe" phone booth to discuss the deal, and then did so. *Id.* Additionally, the court mentioned that prior even to enlisting Rosenberg in the scenario, one Congressman had already accepted a bribe. *Id.*

²²⁸ One court estimated Weinberg's total compensation for ABSCAM at about \$225,000. *United States v. Weisz* No. 82-2123, slip op. at n.5 (D.C. Cir. 1983).

²²⁹ 707 F.2d at 1472.

²³⁰ *Id.* at 1473.

²³¹ *Id.*

²³² *Id.* at 1474-77.

²³³ *Id.* at 1475.

²³⁴ *Id.* at 1475-76.

²³⁵ *Id.* at 1476.

²³⁶ *Id.* at 1477.

of the public officials, in their entrapment and due process claims, denied that they had committed the acts of which they were accused. Rather, they claimed that certain extenuating circumstances required dismissal of their cases. Whether they claimed traditional entrapment or the more vague notion of a due process violation, it is evident that they were attempting to redirect the attention of the court to the conduct of the government. Each defendant met with differing degrees of success, ranging from Alexandro, whom the court believed was just grasping for straws, to Kelly, Schwartz, and Jannotti, with whom at least their respective district courts agreed. The broad spectrum of resolutions seems a result of more than just differing fact patterns. It seems to be due to a variety of different, and often contradictory views, on the part of judges and juries, about how the appropriate law should be applied to the facts of the ABSCAM scenarios. It is the purpose of the next section of this note, therefore, to reexamine the theories of entrapment and due process, to discern how they should be applied to the crime of political corruption.

III. THE FAILURE OF THE ABSCAM DEFENSES

Having examined the four ABSCAM scenarios, it is evident that the defendants in each had a difficult time presenting their respective defenses. In fact, none succeeded to the point of acquittal. This section of this note will submit that the failure of these defenses had less to do with the merits of the cases than with the manner in which the FBI structured the scenarios. This contention will be advanced through a reevaluation of modern entrapment and due process law as they pertain to the ABSCAM scenarios. The examination of entrapment will demonstrate the insufficiency of the subjective theory as a defense for ABSCAM defendants in light of the particular structure of the ABSCAM scenarios. The examination will also take into account the unavailability of the objective theory as a defense, due to the clear federal precedents which have discarded this alternative theory. Then, the examination of due process will investigate the refusal of most ABSCAM courts to allow this defense, apparently due to a lack of precedents and standards, and its likeness to the unsuccessful objective theory of entrapment.

A. Entrapment

Theoretically, entrapment occurs when an "unwary innocent," as opposed to an "unwary criminal," is apprehended.²³⁷ Traditionally, entrapment is limited to "victimless crimes" such as bribery, gambling, prostitution, and contraband sales. It is difficult for the government to prosecute such crimes because there are no victims to come forward and testify.²³⁸ Thus, the government often resorts to undercover schemes to apprehend individuals committing such crimes.²³⁹ Moreover, in any crime where there is a victim, or where someone else's rights are endangered, police may not create opportunities for the commission of these crimes.²⁴⁰ The police cannot, for example, create opportunities for someone to commit burglary, rape, or murder²⁴¹ because in those cases, the police would

²³⁷ *Sherman v. United States*, 356 U.S. at 372.

²³⁸ *United States v. Jannotti*, 673 F.2d at 609. Livermore, *Enforcement Workshop: ABSCAM Entrapment*, 17 CRIM. L. BULL. 69, 72 (1981).

²³⁹ See, e.g., *United States v. Jannotti*, 501 F. Supp. at 1193-99; *United States v. Myers*, 527 F. Supp. at 1209-11.

²⁴⁰ *United States v. Archer*, 486 F.2d at 676-77. See Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 283-86 (1975).

²⁴¹ *United States v. Archer*, 486 F.2d at 676-77.

not merely be instigators, they would also be accomplices. In ABSCAM, the "crime" involved was bribery. Entrapment, therefore, potentially could exist. Entrapment would exist if, in offering the bribe, a government official afforded the suspect not only the opportunity to commit a crime, but also instigated or induced its commission by one not ready or willing to commit it.²⁴² Thus, in evaluating the entrapment defense, courts must determine whether the crime was a result of the defendant's willingness, or the government's creativity and instigation.²⁴³ Because of the Supreme Court precedent, all the ABSCAM courts made this determination through the subjective test of predisposition.²⁴⁴

Due to the facts of the ABSCAM investigation, the subjective test was not too easy to apply. An individual's predisposition is only apparent in extreme situations. At one end of the spectrum is a Congressman who may have offered his unsolicited services to the sheik for certain sums, and at the other, is a Congressman who simply may have refused all offers. Any fact pattern that falls within these extremes requires a more detailed evaluation of the facts of the case to determine if the defendant was predisposed to commit the crime.

One of the few actual enumerations of available standards for determining predisposition was advocated by Judge Learned Hand in *United States v. Becker*.²⁴⁵ This test, which the *Myers* court employed to the disadvantage of Congressman Lederer,²⁴⁶ involves three factors for proving predisposition: first, an existing course of similar criminal conduct; second, the accused's already formed design to commit the crime or similar crimes; and third, his willingness to do so as evidenced by ready compliance.²⁴⁷ Although these three factors are aimed at determining whether a defendant had a predisposition to commit the crimes,²⁴⁸ there are difficulties in applying the factors to the facts of a case. It may be difficult for a court to examine character evidence without convicting individuals on the basis of past criminal conduct.²⁴⁹ Such an examination might run into opposition from evidence rules²⁵⁰ and could result in a constitutionally unsavory outcome for the case.²⁵¹ Also the willingness factor, which the *Myers* court emphasized, allows a jury to place tremendous weight on the actual commission of the crime.²⁵² This, too is unaccept-

²⁴² *United States v. Russell*, 411 U.S. at 445 (Stewart, J., dissenting).

²⁴³ *Id.*

²⁴⁴ *United States v. Kelly*, 707 F.2d at 1474; *United States v. Jannotti*, 673 F.2d at 597; *United States v. Williams*, 529 F. Supp. at 1095-96; *United States v. Myers*, 527 F. Supp. at 1222.

²⁴⁵ 62 F.2d 1007, 1008 (2d Cir. 1933).

²⁴⁶ *United States v. Myers*, 527 F. Supp. at 1242.

²⁴⁷ 62 F.2d at 1008.

²⁴⁸ *United States v. Myers*, 527 F. Supp. at 1242.

²⁴⁹ *United States v. Russell*, 411 at 443-44 (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. at 382 (Frankfurter, J., concurring).

²⁵⁰ Federal Rule of Evidence 404(b) forbids the admission of evidence of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Fed. R. Evid. 404(b).

²⁵¹ *Cf. Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, petitioner was found guilty at trial of being addicted to the use of narcotics based on admissions of occasional use of narcotics and needle marks and scar tissue on his arm. *Id.* at 660-63. The Supreme Court overturned the conviction, maintaining that to convict and punish an individual for his "status" as an addict, without any supplementary evidence about his actual use of the drug within the prosecuting state, was "cruel and unusual punishment in violation of the Fourteenth Amendment." *Id.* at 666-67.

²⁵² *United States v. Myers*, 527 F. Supp. at 1242.

able, since the acceptance of money, in and of itself, cannot prove predisposition to bribery. If it could, subjective entrapment would never exist; to accept the money would prove guilt and to refuse it would imply that there was no criminal act. The subjective test is inequitable in the ABSCAM scenarios because of four factors: the use of videotape; the lack of prior suspicion and the use of random targets; the mixture of legal offers with illegal bribes; and the involvement of unsuspecting middlemen. Each of these elements will now be discussed.

The FBI's use of videotape to establish the ABSCAM defendants' criminal predisposition hindered a reliable determination of such predisposition. Videotape, by its nature, is compelling evidence.²⁵³ The *Myers* court went so far as to say that, thanks to videotape evidence, these trials were as reliable as any criminal trials could ever hope to be.²⁵⁴ Admittedly, videotape is a reliable form of evidence for reproducing and proving physical happenings,²⁵⁵ but for proving predisposition, its reliability is limited considerably by its inability to photograph a defendant's "state of mind."²⁵⁶ One study has determined that the videotape evidence used in ABSCAM was deceptive in terms of what the defendants "said" versus what they actually "meant."²⁵⁷ According to Roger Shuy, a linguistics professor at Georgetown University, the tapes were misleading in three ways. First, verbal imprecisions which were actually ambiguous, taken in the context of the ABSCAM investigation, appeared to indicate guilt.²⁵⁸ Second, confidence-man Weinberg manipulated and interrupted conversations so that only incriminating material was recorded.²⁵⁹ Third, clever editing and presentation of the tapes to jurors created false impressions.²⁶⁰ These ambiguities may have prevented jurors from distinguishing between guilt and appearances of guilt.²⁶¹ Consequently, while the use of videotape may have been extremely reliable and helpful to the government in its ability to prove that the defendants physically took the money, it may have been extremely prejudicial in terms of character evidence. Because it is a defendant's character that is key to his predisposition, jurors who were presented with videotaped evidence of ready acquiescence may have felt compelled

²⁵³ United States v. Alexandro, 675 F.2d at 39; Boster, Miller & Fontes, *Videotape in the Courtroom: Effects in Live Trials*, 14 TRIAL, June 1978 at 50.

²⁵⁴ United States v. Myers, 527 F. Supp. at 1229-30.

²⁵⁵ "Undoubtedly this process of reproducing movement, background, color and sound will more and more be recognized by lawyers and judges as a valuable resource for adding vividness, accuracy and entertainment to the presentation of facts." C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 181 (1954).

²⁵⁶ See Hocking, *Videotape in the Courtroom*, 14 TRIAL, April 1978 at 53-55. According to Hocking, "when untrained observers rely on nonverbal information, they are unable to distinguish reliably between when a person is lying and when he or she is telling the truth." *Id.* Videotape has its effect on information offered to the jury by presenting a narrowed visual field, electronic and photographic distortion, loss of detail and a selective content. Doret, *Trial by Videotape — Can Justice Be Seen to Be Done?*, 47 TEMP. L.Q. 228, 241-45 (1974).

²⁵⁷ See Winter, *Probing the Probers; Does Abscam Go Too Far?*, 68 A.B.A.J. 1347, 1349 (1982).

²⁵⁸ *Id.* For example, Shuy notes that the phrase "uh huh" can indicate "Okay, I'm waiting until you're finished to tell you whether I agree" as well as "Yes." *Id.*

²⁵⁹ *Id.* Senator Williams alleged this as part of his defense, but the *Williams* court disagreed. United States v. Williams, 529 F. Supp. at 1099.

²⁶⁰ See Winter, *supra* note 257, at 1349. Shuy gives as an example a tape which was admitted into evidence at Congressman Murphy's trial with one sequence showing middlemen assuring FBI agents that Murphy was "on the take" followed by another showing Murphy denying that he took any money. *Id.*

²⁶¹ See *id.*

to read parallel mental intentions into the evidence.²⁶² Through its use of videotape, therefore, the FBI presented a serious hurdle to a jury's successful application of the subjective test of entrapment.

Proof of predisposition was also complicated by the manner in which the FBI selected its targets. This complication resulted from the lack of any previous suspicion on the part of the government that the target was engaged in illegal activities.²⁶³ This is particularly important to the notion of predisposition because in the Supreme Court cases holding that the defendants were predisposed, testimony indicated that the investigating agents had some reason to suspect that the defendants had either dealt in the past, or were dealing presently in contraband.²⁶⁴ In the ABSCAM scenarios, conversely, there was a complete lack of any previous suspicion on the part of investigating officials.²⁶⁵

As a result, the government structured its proof of the defendants' predisposition around the commission of the crime which was captured dramatically on videotape. The government presented no testimony alluding to any prior illegal behavior. The lack of such testimony was an apparent flaw in the government's case. Nonetheless, jurors presented with mere oral testimony regarding the defendants' good character, and law abiding propensities, might find videotape of the defendant accepting large sums of money overwhelming proof of predisposition. In this way, the random selection process employed by ABSCAM agents resulted in further detriment to a defense of entrapment under the subjective test.²⁶⁶

Another source of confusion in determining whether the defendants were predisposed emanated from the nature of the offers made to the defendants which included a combination of legal, community-serving investments, and illegal bribes. This mixture made it difficult to determine predisposition by confusing the defendants and the courts. The offers confused the defendants by containing elements that benefited both their own interests and those of their constituencies. Councilmen Jannotti and Schwartz, for example, argued that they were concerned with the best interests of their constituencies,²⁶⁷ and therefore their predisposition was not solely their own. In addition, the defendants may have been confused about whether they were accepting offers which were actually legitimate, or ones which were obviously criminal.²⁶⁸ Furthermore, attempts to clarify the situation through some form of "verbal insulation"²⁶⁹ served only to increase the

²⁶² District Court Judge Bryant, in deciding the *Kelly* case, seems to be the only judge who, in writing a majority opinion, took care to distinguish between Kelly's actions and his reasons for performing those actions. *United States v. Kelly*, 539 F. Supp. at 376. According to Shuy, Kelly refused bribe money nine times, and when he finally accepted, he did so not out of acquiescence, but out of confusion. *See Winter, supra* note 257, at 1349.

²⁶³ *See, e.g., United States v. Kelly*, 539 F. Supp. at 371; *United States v. Myers*, 527 F. Supp. at 1226.

²⁶⁴ *Hampton v. United States*, 425 U.S. at 485-87; *United States v. Russell*, 411 U.S. at 425-26, 436.

²⁶⁵ *See supra* notes 263.

²⁶⁶ No ABSCAM defendant made this allegation in terms of an entrapment defense except for Senator Williams who maintained that government must have evidence of a defendant's predisposition in order to begin an investigation. *United States v. Williams*, 529 F. Supp. at 1096. The *Williams* court rejected the argument. *Id.*

²⁶⁷ *United States v. Jannotti*, 501 F. Supp. at 1200.

²⁶⁸ *Id.*

²⁶⁹ The *Myers* defendants claimed that their actions were devoid of criminal intent because they told their bribers that they wanted only to operate within the law. *United States v. Myers*, 527 F. Supp. at 1231-32. The *Myers* Court found, however, that mere "verbal insulation" could not negate

insidiousness of the events by attempting to justify morally clearly illegal acts. Because of this combination of legal and illegal offers, actual intent-to-commit-crime was often muddled in the minds of the defendants and predisposition became unclear.

The combined offers may also have been confusing to judges and juries. As complicated as it was for the defendants to be able to distinguish between legitimate and illegitimate offers, the confusion was compounded when a court was asked to view isolated videotaped conversations and to make not only those judgments, but also to determine the defendant's true motivations and predisposition, judgments even the defendants must have found difficult to make. Furthermore, courts were presented with the illegal aspect of the offer without any comparable evidence of the meetings between targets and middlemen where clearly legitimate offers were made.²⁷⁰ In this way, the mere appearance of the defendants at the videotaped meetings may have seemed to indicate predisposition to accept illegal bribes, even though the defendant may have believed there was no criminal intent whatsoever. Accordingly, the use of legitimate inducements combined with illegal bribes, served to make a determination of a defendant's predisposition more difficult.

The final problem in determining predisposition, and the one which has actually attracted the most intense scrutiny, was ABSCAM's use of middlemen.²⁷¹ The purpose of middlemen was to help the agents find public officials who would assist the sheik.²⁷² This tactic, however, produced several problems. First, because these middlemen were offered a fraction of all monies eventually accepted by the politicians, the middlemen had an incentive to approach as many officials as they could.²⁷³ Although the agents were instructed to turn away any officials if there was some question about whether they would accept an illegal offer,²⁷⁴ the middlemen were never so instructed. These middlemen, therefore, still had an incentive to make legitimate offers to the politicians, in the hopes that the politicians later would accept an illegal offer from the sheik's representatives.²⁷⁵ In this way, the middlemen may have attracted politicians who initially were not predisposed to accept illegal offers. Perhaps the most offensive example of this problem was middleman Eugene Ciuzio who convinced the FBI agents that he had "virtual control" over Congressman Kelly and could persuade him to accept a bribe.²⁷⁶ None of Ciuzio's assertions were true.²⁷⁷

Additionally, because middlemen rather than undercover agents were employed to induce the officials, there was a chance that the middlemen, who would profit from the officials' accepting the bribe, would supplement or completely fabricate the inducements offered by the government agents.²⁷⁸ More dangerously, because middlemen were used to contact politicians initially, judges and jurors were presented with video evidence of the FBI/target meetings and only oral testimony regarding what occurred during the

guilt or else it would "provide a corrupt politician easy insurance against any undercover investigation . . . [by] invoking the magic incantation 'I desire to act within the law.'" *Id.*

²⁷⁰ See, e.g., *United States v. Kelly*, 539 F. Supp. at 367.

²⁷¹ For a thorough discussion of the use of unsuspecting middlemen see Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122 (1982) [hereinafter cited as *Entrapment*].

²⁷² *Id.* at 1136.

²⁷³ *Id.* at 1135.

²⁷⁴ *United States v. Kelly*, 539 F. Supp. at 374.

²⁷⁵ *Entrapment*, *supra* note 271, at 1135.

²⁷⁶ *United States v. Kelly*, 539 F. Supp. at 367.

²⁷⁷ *Id.*

²⁷⁸ See *Entrapment*, *supra* note 271, at 1135.

middlemen/target meetings.²⁷⁹ It is precisely this type of evidence, however, which could play a crucial role in determining whether the defendants were predisposed. Thus, the lack of any reliable evidence of these early meetings seems to constitute a potential prejudice which even the most legitimate entrapment defense could not withstand.

In the ABSCAM scenarios, the predisposition of the defendants was difficult to ascertain. The videotape evidence of the physical act of the commission of the crime was one source of this difficulty. In addition, the absence of any reason to suspect the defendants of prior illegal activity, as well as the minimal or confusing testimony of the middlemen made the determination of predisposition difficult. Videotape evidence of the physical commission of a crime is not a reliable indicator of predisposition, yet the dramatic nature of such evidence may lead a jury to regard it as conclusive proof of predisposition. When the subjective test for entrapment is used, the effect of the videotaped evidence on the factfinder may make proving entrapment difficult.

As a result of the failure of the subjective theory, a variety of scholars,²⁸⁰ legislators,²⁸¹ courts,²⁸² and Supreme Court justices,²⁸³ have advocated the alternative, objective theory. Many of the arguments made in support of the objective test are actually criticisms of the subjective test.²⁸⁴ It is argued that predisposition is a test for which there are no workable, non-prejudicial standards;²⁸⁵ that predisposition allows for the admission of evidence of the accused's character, reputation and past criminal conduct;²⁸⁶ that it is particularly unfair to the second offender who must deny predisposition in spite of his past act;²⁸⁷ and that it may even involve a denial of equal protection of the law.²⁸⁸ Furthermore, it has been alleged that because the subjective test avoids any consideration of police conduct, it ignores a basic function of the entrapment defense: to deter improper police conduct.²⁸⁹ Control over police tactics is a responsibility to which a defendant's predisposition is completely irrelevant. Along with the need for deterrence, which has been a vital force behind the push for a uniform entrapment test,²⁹⁰ an important potential benefit of the objective standard is the protection of the "purity of the judicial system."²⁹¹ This protection, advocated by Justice Roberts in *Sorrells*²⁹² and by Justice

²⁷⁹ See, e.g., *United States v. Kelly*, 539 F. Supp. at 367-70.

²⁸⁰ See *supra* note 39.

²⁸¹ See *supra* note 40.

²⁸² See *id.*

²⁸³ See *supra* note 38.

²⁸⁴ See, e.g., *Predisposition*, *supra* note 39, at 550-57; Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324, 335-39 (1977) [hereinafter cited as *Objective*].

²⁸⁵ See *Objective*, *supra* note 284, at 336.

²⁸⁶ *United States v. Russell*, 411 U.S. at 443 (Stewart, J., dissenting); *Predisposition*, *supra* note 39, at 552; *Objective*, *supra* note 284, at 336.

²⁸⁷ See *Predisposition*, *supra* note 39, at 552 n.39; Note, *Criminal Procedure — The Entrapment Defense — A Reexamination*, 25 MERCER L. REV. 957, 960 (1974).

²⁸⁸ See *Sherman v. United States*, 356 U.S. at 383 (Frankfurter, J., dissenting); *Objective*, *supra* note 284, at 336. Given two defendants in identical situations a court or jury may find one defendant was entrapped because he has no prior criminal record, but find that the other defendant was not entrapped because of a prior record of totally unrelated criminal activity. *Id.*

²⁸⁹ *Sherman v. United States*, 356 U.S. at 382-83 (Frankfurter, J., concurring).

²⁹⁰ The American Law Institute adopted a form of this test in the Model Penal Code § 2.13 (Official Draft 1962) and the National Commission on Reform of Federal Laws proposed a similar test in FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED FEDERAL CRIMINAL CODE § 702(2) (1971).

²⁹¹ See Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 224 (1976).

²⁹² 287 U.S. at 457 (Roberts, J., concurring).

Frankfurter in *Sherman*,²⁹³ insures the public that its law enforcement officials and its courts will continue to "formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,' "²⁹⁴ a protection not offered under the predisposition test. Despite this impressive undercurrent favoring the objective test of entrapment, and despite the particular ABSCAM-related problems existing because of the use of the subjective test, clear federal precedent still requires that the subjective test be applied.²⁹⁵

Considering the benefits which the objective theory seems to avail to defendants in general, it is necessary to examine the advantages which the theory would afford the ABSCAM defendant. With the objective theory, a reviewing court's emphasis shifts from the conduct of the defendant to that of the government.²⁹⁶ As such, many of the problems the ABSCAM defendants faced under the subjective test become less severe. Because "outrageous government conduct," unlike predisposition, does not involve intent, or the defendant's state of mind, physical evidence such as videotape becomes much more reliable. Similarly, because the objective test relies on a reasonable man standard, as opposed to the defendant's predisposition, the courts are not confronted by the problems that were encountered regarding character testimony, evidence of past crimes, and the possibility of confusion on the part of the defendant.²⁹⁷ Rather, judges and jurors need only determine how the reasonable man would react to the actual, physical conduct which the government clearly displayed on the videotape, a decision whose resolution will not depend on prior suspicion, combination offers or irresponsible middlemen. Therefore, not only are the problems peculiar to videotaped evidence itself resolved, but the employment of such evidence reaches the high levels of reliability for which it was designed. The methods of proof would no longer involve subjective, state of mind, character evaluations, but rather, objective, physical, conduct evaluations. The videotape evidence so important to the ABSCAM investigation seems, therefore, to be a perfect complement to the objective test of entrapment. Unfortunately, as long as the subjective theory remains ruling precedent, the objective theory will be beyond the reach of entrapment defendants.

B. Due Process

Although the objective theory of entrapment proved to be of no avail to ABSCAM defendants, courts did examine whether government conduct may have been outrageous through the defendants' due process argument. Like the defense of objective entrapment, this defense focused not on the defendant's state of mind, but on the actions of the policing agents. These actions could conceivably become so outrageous that they would be the sole cause of the crime, thus overstepping permissible police conduct and denying the defendant's due process rights. Several judges have warned of the possibility that the due process defense could become merely a reworking of the unacceptable objective

²⁹³ 356 U.S. at 380 (Frankfurter, J., concurring).

²⁹⁴ *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1942)).

²⁹⁵ The *Myers* court determined that adoption of the objective test was only within the power of the Supreme Court or Congress. *United States v. Myers*, 527 F. Supp. at 1225.

²⁹⁶ *Sherman v. United States*, 356 U.S. at 386 (Frankfurter, J., concurring).

²⁹⁷ For a discussion of the problems associated with the subjective test, see *supra* notes 253-79 and accompanying text.

theory.²⁹⁸ Although this criticism is warranted in that both theories seek to protect individuals against outrageous government conduct,²⁹⁹ due process has a constitutional basis whereas the objective theory does not.

The test for due process has never been clearly articulated. The Supreme Court has never found that government conduct was outrageous in the context of a criminal investigation. In considering whether the drug-manufacturing defendant in *Russell* had been entrapped, however, the Court did make reference to *Rochin v. California*,³⁰⁰ in which the police pumped a suspect's stomach against his will because they believed that he had swallowed two capsules of narcotics.³⁰¹ Finding that the police conduct "shocked the conscience,"³⁰² the Court held that these acts violated the defendant's due process rights.³⁰³ Only two ABSCAM courts, in the *Alexandro* and *Kelly* circuit court of appeals, considered this precedent,³⁰⁴ and both courts clearly distinguished the police conduct in *Rochin* from the actions of the ABSCAM agents, noting that the ABSCAM investigation included no bodily invasion, coercion or physical or psychological pain.³⁰⁵

The United States Court of Appeals for the Third Circuit in *United States v. Twigg*,³⁰⁶ is the only circuit court which has acquitted a defendant based on a "demonstrable level of outrageousness."³⁰⁷ The *Twigg* court, however, failed to articulate a clear standard for determining outrageousness other than conduct which violates "fundamental fairness."³⁰⁸ Among the ABSCAM courts, the district court in *Kelly* was the only court which attempted to define what constitutes outrageous government conduct. The *Kelly* district court stated that the situation contrived by the government should be one which the individual is likely to encounter in the ordinary course.³⁰⁹ The court used this standard to find that the government conduct was outrageous due to the agents' persistence in offering the bribe after Kelly's initial refusal.³¹⁰ The court reasoned that it was not realistic for a real person to persist in offering bribes to a politician for fear of being revealed to the police.³¹¹ Congressman Thompson presented the *Myers* court with a similar argument.³¹² In *Myers*, however, the court reached a contrary result,³¹³ reasoning that there was no constitutional issue raised by more than one bribe offer, and that Thompson's rights were in no way infringed by such additional offers.³¹⁴

²⁹⁸ *United States v. Jannotti*, 673 F.2d at 608; *United States v. Twigg*, 588 F.2d at 383 (Adams, J., dissenting).

²⁹⁹ *United States v. Russell*, 411 U.S. at 431-32, 441 (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. at 383-84 (Frankfurter, J., dissenting).

³⁰⁰ 342 U.S. 165 (1952).

³⁰¹ *Id.* at 166.

³⁰² *Id.* at 172.

³⁰³ *Id.* at 174.

³⁰⁴ *United States v. Alexandro*, 675 F.2d at 40; *United States v. Kelly*, 707 F.2d at 1476.

³⁰⁵ 675 F.2d at 40, 707 F.2d at 1476.

³⁰⁶ 588 F.2d 373 (1978).

³⁰⁷ *Id.* at 380.

³⁰⁸ *Id.* at 381 (quoting *Hampton v. United States*, 425 U.S. at 494-95 n.6 (Powell, J., concurring)).

³⁰⁹ *United States v. Kelly*, 539 F. Supp. at 374.

³¹⁰ *Id.* at 374-76.

³¹¹ *Id.* at 374. The *Kelly* circuit court, in refuting the lower court standard, pointed out that parties to a real bribe transaction could easily adjust to a "one-refusal" rule: the real bribe-taker would always refuse the initial offer. 707 F.2d at 1475 n.9.

³¹² *United States v. Myers*, 527 F. Supp. at 1237.

³¹³ *Id.*

³¹⁴ *Id.*

The lower *Kelly* court also attempted to expose such improprieties as ABSCAM's ability to punish both criminally and politically.³¹⁵ In the post-Watergate American society, even if a politician were to be fully acquitted, his career undoubtedly would be ruined, if not because his constituency watched him accepting a bribe on the evening news, certainly because he had spent considerable amounts of time, money and energy on a long and painful trial.³¹⁶ But although Congressmen do have certain, ostensibly job-related, privileges³¹⁷ that other citizens do not, they are by no means citizens above suspicion. It is highly unlikely that any court would seriously consider the notion that the Constitution presents Congressmen with any special due process rights, either to be a Congressman, to be immune from investigation or to be free from the political ramifications of such investigations.

In summary, the ABSCAM courts almost universally held that the ABSCAM investigations did not violate the due process rights of the defendants. Although this finding may be due more to the lack of precedent, the vagueness of due process standards and the similarity of the due process defense to objective entrapment than to the actual degree of the government conduct, the mandate of a majority of the courts is clear. The conduct of the ABSCAM agents did not reach a level so outrageous that it should require dismissal of the case. Despite this mandate, several judges, and even the federal government have spoken out against the manner in which the FBI conducted the ABSCAM investigation.³¹⁸ These statements, as well as those of Congress and the United States Attorney General's office will be examined in the final section of this article. That section will also reevaluate ABSCAM and make suggestions regarding the structure, purpose and merits of similar investigations for the future.

IV. ABSCAM'S FUTURE IMPLICATIONS

The purpose of the ABSCAM investigation was the identification and eradication of corruption in government. It was successful in that almost a dozen men in important government positions were convicted of several bribery-related crimes. ABSCAM's success, however, raised several important questions regarding the limits to which such investigations may go to achieve these goals. This final section of this note will deal with these questions and some of the answers which have been suggested.

³¹⁵ *United States v. Kelly*, 539 F. Supp. at 378 n.58.

³¹⁶ None of the United States Representatives who were defendants in ABSCAM trials were able to keep their elected offices. Michael Myers was formally expelled from the House of Representatives and lost a subsequent bid for the reelection in 1980. M. BARONE & G. UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1982, at 941-42. Raymond Lederer was reelected in 1980 but resigned in May of 1981 following a move to oust him from the House. *Id.* at 944-45. John Murphy, Frank Thompson and John Jenrette each won their respective 1980 Democratic primaries but lost in the general elections. *Id.* at 765, 686, 1015. Richard Kelly, the only Republican Congressman to have been indicted, came in third in his party's 1980 primary. *Id.* at 223.

³¹⁷ One such privilege is provided by the Speech and Debate Clause which Kelly attempted to employ to suppress extensive amounts of evidence, but to no avail. *In re Possible Violations of 18 U.S.C. §§ 201, 371, 491* F. Supp. 211, 213-15 (1980).

³¹⁸ The *Kelly* district court went so far as to say that the whole scenario had "an odor to it that is absolutely repulsive . . . it stinks." *United States v. Kelly*, 539 F. Supp. at 373 n.45. The *Kelly* circuit court, while reinstating the guilty verdicts, shared the district court's "grave concern that the Abscam drama . . . unfolded as 'an unwholesome spectacle.'" 707 F.2d at 1477. Dissenting Circuit Judge Aldisert, in *Jannotti* wrote that the operation "emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear." *United States v. Jannotti*, 673 F.2d at 613 (Aldisert, J., dissenting).

Several of the opinion-writing ABSCAM judges voiced their disapproval of certain undercover investigatory techniques.³¹⁹ The *Alexandro* court, speaking in general terms, maintained that at the heart of our democracy rests the principle that all individuals are protected from governmental overreaching and that "the end cannot justify the means."³²⁰ The *Kelly* district court, more specific in its protest, wrote, "even if a victim successfully invoked the [due process and entrapment] defenses . . . this would be of little solace to him, for he nevertheless has been destroyed as a voice in public affairs."³²¹

The concern expressed by these courts is related to Senator Williams' defense regarding the anti-Kennedy conspiracy.³²² Although the *Williams* court held that the accusations had no basis in reality,³²³ the possibility exists that an ABSCAM-type investigation could be focused upon a particular individual for reasons unrelated to the detection of criminal activity.³²⁴ Thus, the ramifications relate not only to personal vendettas but even to the balance of power between the branches of the federal government.³²⁵

In light of these concerns, the United States Attorney General's office has promulgated specific guidelines for FBI undercover operations.³²⁶ Several of these guidelines specifically address some of the problems inherent in the ABSCAM investigation.³²⁷ One

³¹⁹ *United States v. Kelly*, 539 F. Supp. at 373; *United States v. Jannotti*, 501 F. Supp. at 1204.

³²⁰ *United States v. Alexandro*, 675 F.2d at 43. The court added confidently, however, that "we find it clear in this case that the means fully vindicate the end . . ." *Id.*

³²¹ *United States v. Kelly*, 539 F. Supp. at 378 n.58.

³²² See *supra* note 174 and accompanying text.

³²³ *United States v. Williams*, 529 F. Supp. at 1101.

³²⁴ *United States v. Kelly*, 539 F. Supp. at 377-78 n.58.

³²⁵ The FBI, as an arm of the executive branch, could potentially rout the legislative branch by offering unwary Congressmen huge bribes in large numbers. Even if they did not accept, the resulting scandal would undoubtedly rock the government.

³²⁶ ATTORNEY GENERAL GUIDELINES ON FBI UNDERCOVER OPERATIONS (Dec. 31, 1980) [hereinafter cited as GUIDELINES].

³²⁷ GUIDELINES, *supra* note 326, at 13-14. Paragraph J, "Authorization of the creation of opportunities for Illegal Activities," provides in full:

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that

(a) There is a reasonable indication, based on information developed through

(b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual had engaged, or is engaging, in the illegal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Director, *unless* the Undercover Operations Review Committee determines, . . . insofar as practicable, that *either*

(a) There is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

guideline focuses on the requirement of prior suspicion of targets.³²⁸ The Guidelines require that agents make no offers or inducements without specific written authorization from the Director of the FBI or unless there is reasonable indication that the subject has engaged in, is engaged in, or is likely to engage in such a crime or that the subject is clearly predisposed to such crimes as can be evidenced by the structure of the inducement.³²⁹ The Guidelines also require that the corrupt nature of the inducement be made clear and specific,³³⁰ thus alleviating the problem presented by middlemen who misrepresent the inducement. In addition, the Guidelines require that the actual decision to offer an illegal inducement should be made solely on law enforcement considerations.³³¹ Finally, the Guidelines address the possible confusion which may result in combination legal/illegal offers. The Guidelines require that the corrupt nature of the activity must be reasonably clear, that there be a reasonable indication that a corresponding illegal activity will follow on the part of the subject and that the inducement itself must not be unjustifiably attractive in view of the overall illegal transaction.³³² The Justice Department hoped that by establishing standards "significantly more restrictive" than the standards of entrapment or due process enforced by the courts,³³³ these Guidelines would reduce the likelihood that FBI investigations would entrap their targets.

Congress has also taken a close look at the ABSCAM investigation and FBI investigations in general.³³⁴ The Senate Select Committee on Justice Department Activities has addressed itself to a number of the problems of the ABSCAM investigation, paying particular attention to the reliability of middlemen.³³⁵ The committee has considered recommending that middleman reliability be tested under the same light that an informant's word is considered in requesting a search warrant.³³⁶ In addition, the committee may rectify the problems relating to a lack of prior suspicion by requiring that the FBI obtain a court order based on "reasonable suspicion" before investigating any individual.³³⁷ Other recommendations being considered by Congress include the requirement of a warrant for electronic monitoring, amendment of the federal bribery law to clarify entrapment standards, modification of FBI and Justice Department internal controls, and a requirement that all undercover operation inducements be modeled after real world temptations.³³⁸ Should any or all of these recommendations come to fruition, it is evident

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in illegal activity, shall be based solely on law enforcement considerations.

Id. at 14.

³²⁸ *Id.* Paragraph J(3)(b) at 14.

³²⁹ *Id.* Paragraphs J(3)(a) and (b) at 14.

³³⁰ *Id.* Paragraph J(2)(a) at 14.

³³¹ *Id.* Paragraph J(4) at 14.

³³² *Id.* Paragraphs J(2)(a), (b) and (c) at 14.

³³³ N.Y. Times, Jan. 6, 1981, at A16, col. 1.

³³⁴ See Winter, *supra* note 257, at 1347.

³³⁵ See *id.* at 1348. (Although this article reports that a committee report was due out on December 15, 1982, as of the writing of this draft, the report had yet to be made available.)

³³⁶ See *id.* The United States Supreme Court in *Aguilar v. Texas* established a two-pronged test for determining the availability of a warrant based on an informant's information. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). The Court required that the affidavit supporting the warrant must lead a neutral magistrate to believe, first, that the informant is generally credible, and second, that in this particular case, the informant's information is accurate. *Id.*

³³⁷ Winter, *supra* note 257, at 1350.

³³⁸ *Id.*

that they could only help resolve the various obstacles encountered by the ABSCAM defendants, especially in terms of protecting those for whom no prior suspicion exists.

ABSCAM did have at least one scenario, the *Alexandro* case, involving the corrupt Immigration Service official, which proved to be an efficient and responsible attempt to achieve ABSCAM's purposes without adversely affecting the defendant's personal rights.³³⁹ Although its design was based on the simple asylum scenario, the investigation was conducted so as to involve certain elements missing from the other scenarios. These elements should set the very standards by which all future bribery scams should be conducted.

One element which distinguished the *Alexandro* scenario from other ABSCAM scenarios is that *Alexandro* was presented to the agents through only one middleman; a man who had worked with *Alexandro* in the past and could attest to some form of clear, criminal disposition.³⁴⁰ Such familiarity between middlemen and targets is essential for several reasons: First, it minimizes the lack of control which the agents can have over a middleman, as exhibited by the diluted link between the agents and Congressman Kelly in his case.³⁴¹ Second, it allows for more accurate testimony regarding the target's predisposition, thus supplementing the physical, video evidence with evidence of state of mind. Third, it lessens the potential that the offer itself will be misrepresented.

A second element which distinguished the *Alexandro* scenario is that *Alexandro* was never presented with anything but an illegal offer.³⁴² In this way, the government lessens the likelihood that the offer will be misunderstood, and that the target himself will be able to console his conscience with the notion that illegality is only a small means to achieve a greater, completely legal, end. Of course, using only illegal offers creates a greater risk that the middleman may be turned in to the authorities by the target, but this also insures that the middleman will seek out only those targets who he really believes will be open to his proposals, and hence, be predisposed.

A third element which distinguishes the *Alexandro* scenario is that *Alexandro* was required to take an active role in planning the illegal activity.³⁴³ Unlikely many of the other ABSCAM defendants, *Alexandro* actually volunteered not only a list of the services he could provide the sheik, but also a price for them.³⁴⁴ This conduct demonstrated a clear understanding of the criminal nature of the deal, and an active and enthusiastic desire to participate in commission of a crime.³⁴⁵ Thus, proof of predisposition was based not on the commission of the act, but on a premeditated desire to proceed with the act.³⁴⁶

The final element which set the *Alexandro* scenario apart from the others is that *Alexandro* was not offered any money until after he had displayed his active interest in proceeding with the criminal activity.³⁴⁷ With this method of bribery, there is little chance that the defendant is trying to "swindle the sheik" by not keeping his promise,³⁴⁸ and it

³³⁹ *United States v. Alexandro*, 675 F.2d at 37. See *supra* notes 176-88 and accompanying text.

³⁴⁰ See *United States v. Alexandro*, 675 F.2d at 36-37.

³⁴¹ See *supra* notes 191-92 and accompanying text.

³⁴² See *United States v. Alexandro*, 675 F.2d at 37.

³⁴³ *Id.* at 37-38.

³⁴⁴ *Id.*

³⁴⁵ See *United States v. Jannotti*, 501 F. Supp. at 1200.

³⁴⁶ Predisposition was not difficult for the court to infer in *Alexandro*, especially considering the defendant's recorded comment about the success of the transactions, which he "guaranteed . . . because I've done it before." *United States v. Alexandro*, 675 F.2d at 38-39.

³⁴⁷ See *id.*

³⁴⁸ Congressman Myers made this claim in *United States v. Myers*, 527 F. Supp. at 1212-13.

certainly dismisses the possibility that the target was investigating his investigators.³⁴⁹ The mere passage of time seems to work in favor of justice. Each of the other ABSCAM defendants was faced with virtual ultimatums to either take the money now or forego it. Perhaps if they had been given more time to consider the offer, or better yet, if they had been given the opportunity to show their sincerity by actually introducing the immigration bill, their clear intent and predisposition would then be irrefutable.

Thus, the strengths of the *Alexandro* scenario illuminated ABSCAM's most grievous weakness. To overcome claims of entrapment, the government must establish that the defendant was predisposed to commit the crime. Yet many of the techniques used in ABSCAM suggest that the government, rather than the defendants, may have supplied the willingness to commit the crime. Confidence man Weinberg, in testimony taken from the Schwartz trial, boasted, "we had a honey pot and the flies came."³⁵⁰ Although this is undoubtedly the way ABSCAM was designed to operate, there is considerable doubt about its basis in fact.³⁵¹ This, therefore, is the crux of the ABSCAM entrapment dilemma: Entrapment occurs when the government manufactures a crime and the manner through which it disproves this allegation is the proof of predisposition.³⁵² In ABSCAM, the government showed that it had the ability to ferret out corruption. As the *Jannotti* dissent put it, "if sufficiently attractive monetary and civic inducements are dangled, there are fish who will bite."³⁵³ Unfortunately, as the dissent continued, this "does not demonstrate that the fish were predisposed to take the bait."³⁵⁴

CONCLUSION

ABSCAM was not the FBI's first corruption investigation.³⁵⁵ Nor is it likely to be its last. It is therefore necessary that the FBI and the courts carefully reevaluate ABSCAM and the problems that it presented.

The ABSCAM investigation resulted in the indictment of over a dozen politically-influential individuals, all of whom have been found guilty.³⁵⁶ Each of these defendants pleaded an entrapment or due process defense.³⁵⁷ It has been submitted, however, that the subjective theory of entrapment was unavailable to the ABSCAM defendants because of the selection procedure employed by the FBI.³⁵⁸ This procedure effectively limited the

³⁴⁹ This was alleged in both *United States v. Kelly*, 539 F. Supp. at 377 n.58, and *United States v. Alexandro*, 675 F.2d at 38-39.

³⁵⁰ *United States v. Myers*, 527 F. Supp. at 1226.

³⁵¹ Judge Aldisert of the Third Circuit Court of Appeals contended, "The party was by invitation only; when the guests came to the pot it was not necessary for them to ask for a sample; rather, their mouths were opened for them and the honey poured down their gullets." *United States v. Jannotti*, 673 F.2d at 613 (Aldisert, J., dissenting).

³⁵² *United States v. Russell*, 411 U.S. at 429.

³⁵³ *United States v. Jannotti*, 673 F.2d at 621 (Aldisert, J., dissenting).

³⁵⁴ *Id.*

³⁵⁵ Two simultaneous investigations were also held during ABSCAM. One, called PENDORF, involved, among other things, conspiracy to bribe a United States Senator. See *United States v. Dorfman*, 542 F. Supp. 345, 356-58 (N.D. Ill. 1982), *aff'd*, 690 F.2d 1217 (1982). The other, called BRILAB, involved labor organization corruption. See *United States v. Marcello*, 508 F. Supp. 586, 588-89 (E.D. La. 1981), *reheard* at 537 F. Supp. 1364 (E.D. La. 1982).

³⁵⁶ See *supra* notes 18-19 and accompanying text.

³⁵⁷ See *supra* notes 20-21 and accompanying text.

³⁵⁸ See *supra* notes 263-66 and accompanying text.

government's proof of disposition to the "on the spot" video coverage, thus considerably devaluing any standard oral testimony which could dissuade a finding of predisposition.³⁵⁹ As long as the subjective theory is the test to be applied, random selection investigations like ABSCAM will be no-win situations for the defendants.

It has also been submitted that due to federal precedents rejecting the objective theory of entrapment, it also presents little chance of acquittal.³⁶⁰ This unavailability of the objective theory goes hand-in-hand with the problems courts faced in deciding claims that government conduct was sufficiently outrageous to violate the defendants' due process rights.³⁶¹ Many courts simply refused to consider such claims, treating them as if they were merely the objective theory of entrapment in another form.³⁶² More importantly, the courts which did decide to consider these claims found no suitable tests, standards or precedents to be applied in bribery-type cases.³⁶³ Defendants who alleged these defenses, therefore, fared poorly.

Structurally, ABSCAM was flawed. As long as modern entrapment and due process law remain as they are, random selection bribery investigations which employ unsuspecting middlemen and videotape evidence will remain fundamentally inequitable. Although few courts could specifically connect these inequities with a particular due process or entrapment claim, most courts strongly urged that the FBI and all law enforcement agencies must structure future investigations differently.³⁶⁴ Whether this will be done because of Attorney General Guidelines, Congressional recommendations or some other bureaucratic or legislative mandates has yet to be decided, but it seems evident from the suggestions made so far that the goal of the restructuring must be a greater respect for the rights of the individual targets of the investigations. Policing agencies and reviewing courts must consider a careful balance; they must weigh the need to expose political corruption against the costs such exposure will levy against innocent parties. In doing so, they must always bear in mind Justice Holmes' observation that "it is a less evil that some criminals should escape than that the Government should play an ignoble part."³⁶⁵

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³⁵⁹ See *supra* notes 253-62 and accompanying text.

³⁶⁰ See *supra* notes 280-97 and accompanying text.

³⁶¹ See *supra* notes 298-317 and accompanying text.

³⁶² See *supra* notes 298-99 and accompanying text.

³⁶³ See *supra* notes 300-14 and accompanying text.

³⁶⁴ See *supra* notes 319-25 and accompanying text.

³⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).