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Law Institute Asks Easier Search Rule

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The American Law Institute voted yesterday to recommend that judges should not suppress illegally seized evidence unless the defendant can prove that the police violation of his constitutional rights was "willful."

Model legislation approved by the ALI would also permit judges to admit otherwise inadmissible evidence if they found the violation less than "flagrant" or if excluding the seized evidence would not stop police from future invasions of privacy.

If widely adopted by legislatures and courts, the relaxed enforcement policy would revolutionize constitutional law as it has been practiced since the late 19th century.

For generations the prosecution has been required to carry the entire burden of proving the admissibility of evidence when the accused challenged the legality of the manner in which police or federal agents obtained it.

The ALI proposal would not make it easier for prosecutors to prove the legality of the search.

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But it would give trial judges broad discretion to permit the results of the search to reach the jury even if the search violated constitutional standards.

The ALI, an organization of 1,800 leading lawyers, judges and educators, meets here every spring to study changes in the law. Its membership is predominantly conservative. The ALI's major work is in such noncriminal fields as law governing commercial transactions, land use and civil damage suits.

ALI proposals, even tentative ones, frequently find their way into court opinions because of the prestige of the institute and the specialists who work on the drafting. Dissenters in the 1966 Miranda v. Arizona confessions case criticized the majority for not waiting until the ALI had completed its model code of pre-arraignment procedure, of which yesterday's search-and-seizure action was a part.

Approval in principle of the draft legislation followed a spirited floor debate over whether the proposal, drafted principally by Columbia University professor Telford Taylor, would weaken obedience to the Fourth Amendment, which forbids unreasonable searches and seizures.

Supreme Court decisions dating back to 1886 hold that the government must not be allowed to profit from unconstitutionally obtained evidence by using it to convict an accused person. In 1916 the court ruled that federal courts may not admit into evidence the results of an illegal search by federal agents. Ten years ago the court extended the exclusionary rule for searches to state and local courts.

Taylor said the proposal would not supplant court decisions but added, "It is simply impossible to look into a crystal ball and say what the Supreme Court will say is constitutional four or five years from now."

William L. Marbury of Baltimore said the high court already was "leaning" away from strictly enforced exclusionary rules. "We must never forget that we are suppressing truth when we suppress evidence," he said, adding that there was "an apparent assumption on the part of some people" that a burden should be placed on those who seek "to establish truth."

Opposing the model legislation, Sam Dash of the Georgetown Law Center argued that the ALI should not try to use a "crystal ball" but should adhere to principles already established in the Supreme Court.

Yale Kamisar of the University of Michigan and federal Judge Frank A. Kaufman of Baltimore said trial judges should not be given the new and time-consuming task of deciding how serious a violation of the Constitution has occurred. Kamisar said the proposal would be "a signal to the police" that they may conduct more intrusive searches.

Judge Carl McGowan of the U.S. Court of Appeals here and Judge Charles Breitel of New York's highest court said court exclusionary rules should not be the only method of making sure officials obey the Constitution.

McGowan, whose motion to endorse the Taylor proposal was approved by an overwhelming voice vote, said more hope should be placed in police regulations such as those recently drafted covering identification procedures in arrests in Washington. John P. Frank of Phoenix said police were turning to regulations primarily because of the force of court-imposed exclusionary rules.

A motion by Sigmund Timberg of Washington to amend the proposal by placing the burden of proof on the prosecution was rejected 69 to 48.

ALI director Herber Wechsler said Timberg's amendment ran counter to the overwhelming sentiment within the institute's ruling council. "We are hopeful that the Supreme Court in time will recognize that an absolute rule is and undesirable interpretation of the Constitution," Wechsler said.

The wisdom and effectiveness of bans on illegally obtained evidence have come under increasing attack in the Supreme Court since Warren E. Burger became chief justice. In February a 5-to-4 majority said it was only "assuming" the rules' utility but in March a 6-to-3 majority applied the exclusionary principle to an illegal arrest.