Views of Katzenbach, Bazelon Clash

Police Power Changes At Heart of Controversy

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A series of proposals to make major changes in the powers of police is at the heart of the dispute that flared into the open last week between Attorney General Nicholas deB. Katzenbach and Judge David L. Bazelon.

These proposals would clarify and in many instances expand the scope of police operations in investigating crime, making arrests and questioning suspects.

Still in a highly tentative form, the proposals are contained in a confidential draft of a Model Code of Pre-Arraignment Procedure. It was issued by the American Law Institute on May 6 and debated in a meeting early in June. It is now being revised by the men who drew it—James Vorenberg of the Department of Justice, Edward L. Barrett Jr. of the University of California Law School, Paul M. Bator and Charles Fried of the Harvard Law School.

Their proposals are particularly important for three reasons. One is the high prestige of the American Law Institute, a group composed of many of the Nation's most influential lawyers. The second is the indication on Capitol Hill that the final ALI proposals may find fertile ground there. While Congress does not legislate for the Nation in the field of criminal action, its action concerning the District of Columbia or Federal procedure generally would provide a guide for the states to follow. The third is what appears to be a general concern among the general public that all is not well in the criminal law.

It is not at all clear which, if any, of the fundamental changes proposed in the ALI's first draft may survive the debating stage. Several of the members of the advisory committee working with the four drafters are vigorously opposed to some of the proposals.

Judge Bazelon's letter to the Attorney General, written several weeks ago and published last week, says some of the ideas discriminate against the poor. Others have attacked some of the proposals as unconstitutional or as unnecessarily curtailing individual liberties.

On the other hand, some police officials are likely to think the proposals still tie their hands and reflect too little concern for the problems of law enforcement.

But the proposals do provide a basis on which the entire problem of the conflict between the needs of law enforcement and the rights of the individual can be debated.

Following is a condensation of the tentative proposals and the commentary about them. It does not reflect any changes made since the first draft was prepared.

I. Investigation of Crime

The proposed code would give police the authority to detain anyone for 20 minutes if there was reasonable cause to believe this would help solve or prevent a crime. During that time, the officer may order the person to identify himself and may search him under some conditions.

In addition, the code would create a new "Order to Appear." This woul be issued by the prosecuting attorney to require any person whose presence may aid in the investigation of a crime to appear at a set time at a set place for up to four hours. Anyone ordered to appear could take his lawyer or a relative with him and would not be required to answer questions.

Of this "Order to Appear," the drafting group said "though such an authority is novel in the United States, it is intended that it impose no other burden on the individual than that of being confronted clearly with the choice whether or not to aid the police or

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prosecuting attorney in the investigation of a crime."

The purpose of the order is to allow police to obtain information held by those who are not willing to cooperate. The power, the report says, may be of value where people who evade the police will be willing to cooperate when squarely confronted with a police request or when it is "important to allow a victim or witness to view a number of suspects whom it would be both illegal and oppressive to arrest."

The report says that under existing rules, if suspects refuse to cooperate, "the police are forced to resort either to an illegal arrest or to an elaborate and unreliable 'stake-out' of the suspect's residence in the hope that the witness might catch enough of a glimpse of the suspect to identify him or exclude him from the investigation."

Of these provisions, the proposal asks these questions: Should the police have power to stop persons when there is insufficient ground for a proper arrest? Would the Order to Appear aid signficantly in law enforcement? Does it constitute an offensive intrusion on the security of the person? Should it include a provision compelling a person to answer questions or claim the Fifth Amendment guarantee against self-incrimination?

Some who have seen the full report argue that the provision authorizing the 20-minute detention period is unconstitutional on the ground that any detention is an arrest and can be made legally only if there is reason to think the person detained committed a crime. Similarly, there are constitutional arguments against—as well as for—the search provision.

II. Arrests

The code would authorize a policemen to make an arrest with a judicially authorized warrant or without it if he "has reasonable cause to believe that the person to be arrested has committed a crime." This is the existing law in most parts of the country now as far as felonies (the more serious crimes) are concerned. But it is a departure from existing law as far as misdemeanors (lesser crimes) are concerned. The general law now is that an officer can make an arrest without a warrant in those cases only if the crime was committed in his presence.

The proposal rejects an idea recently enacted in three states that police may detain for two hours anyone they suspect of committing a crime. It did so on the ground that an arrest is "awesome and frightening" and ought not to be allowed except where "there is some solid objective ground for believing that he is guilty of crime."

The code also requires that when a man is arrested the policemen must "as soon as possible" warn him that he is under arrest, that he is not obliged to say anything and that anything he says may be used against him.

The basic question that the drafters ask of these new rules is whether the idea of changing the ground rules for arrests in misdemeanor cases is justified.

III. Disposition of Arrested Persons

The code proposed that all persons must be brought before the station officer promptly after arrest. That officer must immediately give the arrested person an oral and a written warning of his rights and an opportunity to telephone his lawyer or his friends.

Then the proposal draws a distinction between arrests made under a warrant and arrests made without a warrant. Those arrested under a warrant would be taken before a magistrate as soon as one is available.

Those arrested without a warrant could be held for a period of "preliminary screening" not to exceed four hours. During this time, the police could carry out investigatory routines (fingerprinting, lineups, confrontations) and could question the prisoner.

If the prisoner obtained a lawyer, the lawyer would be permitted to remain with his client throughout this period but the proposal does not create any obligation upon the government to furnish lawyers

to those who cannot obtain one.

At the end of the four-hour period, the prisoner would be released or formally charged with a crime. However, those arrested in connection with a serious felony could be held for up to 20 more hours while police had "a reasonable period of daytime investigation." The police could ask the prisoner a few questions during the period but there could be no sustained questioning.

This is the point where the sharpest disagreements arise. The drafters recognize this by asking their advisory committee whether the entire idea of in-custody investigation and screening is valid.

They point out that this "breaks new ground in setting forth an explicit statutory scheme governing in some detail the legality, duration and conditions of stationhouse custody." Under existing law, most states require that a policeman must bring an arrested person before the courts "without delay" or "forthwith" or "without unnecessary delay." The later phrase is the requirement imposed in Federal jurisdictions, like the District of Columbia and is the phrase in question in the Mallory decision.

The drafters concede that their proposal "departs from the model of criminal procedure suggested by Mallory v. United States (or at least some of the cases following it)." Those cases indicate that detention of a prisoner for questioning prior to his first appearance in court is improper and that any information so obtained cannot be used against him.

The fundamental distinction, however, is the belief of the drafters that police may justifiably arrest persons who subsequently are not charged with a crime. They distinguish between the amount of evidence needed to make the arrest and the amount of evidence on which a prosecutor may decide to go forward. The existing law does not make that distinction. It is based on the premise that police ought not to arrest anyone until there is sufficient evidence on which a prosecutor can proceed.

The drafters explain this by saying that arrests without a warrant are normally made by policemen who are worried about maintaining public order and preventing crime as well as instituting criminal procedures. It adds that a policeman must "often act under emergency circumstances and on incomplete information, in a context of doubt, confusion and alarm."

And it says that an arrest may often occur before it is precisely clear what the formal charge should be.

The argument the drafters make is: ". . . a reasonable standard for arrest without a warrant will bring into custody many persons who cannot and should not be prosecuted for crime without further investigation by the police and consideration by the prosecutor. At some point there must be a period of screening, during which a responsible decision can be made on how to proceed. It is, furthermore, the premise of this Code that, if this is so, explicit and adequate provision must be made for such screening, rather than leaving it hidden in the interstices of other procedures which serve other purposes."

The drafters recognize that their idea may be fairly challenged. They say the points of special difficulty are: the fairness of a system which allows questioning of suspects who have not obtained counsel, the dangers of abuse in questioning after the four-hour period, the difficulty in distinguishing what is sustained questioning, and the impediment to police investigation of limited questioning.

IV. Other Provisions

The draft proposal also envisions the maximum possible use of a summons to appear in court rather than an arrest under a warrant and bars certain practices used by police in questioning (such as mistreatment, questioning of those who are incapacitated, use of drugs or hypnosis or lie detectors without consent, and certain kinds of deception). Additional sections dealing with such subjects as bail, searches and seizures, sanctions against police, and the recording or photographing of the questioning process are under consideration.