

March 18, 1997

James H. Stevenson, Captain
Patrol Services Division
Oregon State Police
400 Public Service Bldg.
Salem, OR 97310

Re: Opinion Request OP-1997-2

Dear Captain Stevenson:

You ask whether Measure 40, which was approved by the people in last November's general election, changes Oregon law with respect to the legality of roadblocks used to detect persons driving under the influence of intoxicants (DUII roadblocks). We conclude that it does not. DUII roadblocks are not permissible absent legislation authorizing a DUII roadblock program, and no authorizing legislation exists at this time. You also ask whether the Oregon State Police (OSP) must continue to use the "Notice and Consent to Search Multi-Lingual Form" when conducting a drug interdiction search. We conclude that the notice and consent form must continue to be used for purposes of civil in rem forfeiture proceedings.

1. DUII Roadblocks

In *Nelson v. Lane County*, 304 Or 97, 104, 743 P2d 692 (1987), the Oregon Supreme Court announced that in Oregon, any inquiry about the legality of roadblocks (or any other search) must begin with the question of statutory authority: Does any statute explicitly authorize law enforcement officials to conduct this action? If the answer is no -- which it was at the time of *Nelson* and still is -- then the inquiry ends. *State v. Bridewell*, 306 Or 231, 239, 759 P2d 1054 (1988). No roadblocks may occur without explicit authorizing legislation. If such legislation exists, then (and only then) will the court ask whether that statute meets constitutional requirements.

Nothing in Measure 40 alters the holding in *Nelson v. Lane County*. The measure is directed to the admission of relevant evidence and provides that Article I, section 9, of the Oregon Constitution (governing searches and seizures) should not be construed more broadly than the analogous provisions of the Fourth Amendment to the United States Constitution. See Measure 40, subsections (1)(f) and (2).⁽¹⁾ Thus, the measure by its terms neither provides the necessary authority to conduct DUII roadblocks nor makes legislatively granted authority unnecessary.⁽²⁾ Whatever bearing Measure 40 might have on the constitutional analysis that would apply to DUII roadblock stops, it does not cure the defect that the court identified in *Nelson*, and it therefore does not make them lawful.⁽³⁾

2. Drug Interdiction Consent Searches

The second part of your question asks if OSP must continue to use the "Notice and Consent to Search Multi-Lingual Form" when conducting a drug interdiction consent search. Our understanding is that OSP officers follow the notice and consent procedure in order to meet the requirements of Oregon Laws 1993, chapter 699, section 20. The statute provides that in order for property seized on the basis of a consensual search of a motor vehicle to be subject to civil in rem forfeiture, the person who consented to the search must have been provided with written, multilingual notice of his or her right to refuse to consent to the search. The statute specifies the details of the notice required.

Measure 40 does not alter the obligation to comply with the statute. As stated above, Measure 40 is directed to the admissibility of evidence in a criminal case. The legislature has conditioned civil forfeitures in certain cases on compliance with the multilingual notice; without that notice, civil in rem forfeiture remains unavailable in those cases.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. Measure 40, subsection (1)(f) confers on victims in criminal cases the right to have all relevant evidence admissible against the criminal defendant. Subsection (2) provides:

The rights conferred on **victims** by this section shall be limited only to the extent required by the United States Constitution; Section 9, Article I and Section 12, Article I of this Constitution shall not be construed more broadly than the United States Constitution and in criminal cases involving a **victim**, the validity of prior convictions shall not be litigated except to the extent required by the United States Constitution.

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2. Measure 40 means that evidence seized unlawfully may not be suppressed for that reason. We cannot and do not advise that law enforcement officers should violate the law, even though under Measure 40 the fruits of their unlawful conduct may be used against the defendant. To the contrary, we explicitly and unambiguously advise that an officer who knowingly implements an unlawful DUII roadblock in order to secure unlawfully seized but nonetheless admissible evidence potentially exposes himself or herself, as well as his or her public employer, to civil liability and criminal prosecution.

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3. Even if the necessary legislative authorization were present, questions about the constitutionality of DUII roadblocks remain. Measure 40 may have potential bearing on those questions. The constitutionality of Measure 40 itself has been raised in several pending court cases. After the Oregon Supreme Court resolves questions of Measure 40's constitutionality and the meaning of subsection (2),

we will be in a better position to address what effect, if any, Measure 40 has on the constitutionality of DUII roadblocks. For present purposes, however, your question is fully answered by the lack of legislative authority to conduct such roadblocks.

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