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In opposition to
HJR 25
(Amendment to Article I, section 9: Police Roadblocks)

Before the House Rules Committee
February 28, 2011

The American Civil Liberties Union of Oregon strongly opposes HJR 25, a constitutional amendment to Article I, section 9 of the Oregon Bill of Rights because it would weaken our search and seizure provision. Article I, section 9 states "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." This provision was part of our Constitution passed by the people in 1857 and effective upon statehood in 1859. It has not been amended in the 152 years since.

The Bill of Rights came about because the American people wanted strong guarantees that the government would not trample upon their newly won freedoms of speech, press and religion, nor upon their right to be free from warrantless searches and seizures. So, the U.S. Constitutional framers heeded Thomas Jefferson who argued, "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

Like the federal Bill of Rights, the Oregon Bill of Rights was premised on the belief that it was necessary to protect the people against government infringement of our fundamental rights. The Oregon Bill of Rights includes protections to ensure religious freedoms – in fact there are 6 separate provisions, Article I, sections 2-7. It also gives us the right to express our opinion and not be restricted in our right to speak write or print freely on any subject (Article I, section 8). It ensures our courts are open and that the accused has a right to a public trial and an impartial jury (Article I, sections 10 and 11). And it provides that no law shall be passed granting privileges or immunities to any citizen or class of citizens on terms not equally shared (Article I, section 20).

We should not be so quick to put these rights up to a popular vote, especially when it asks us to weaken any of these guarantees against government intrusion under the guise of "fixing" a problem, no matter how compelling a case proponents make of a particular problem or perceived fix. When voters have been asked to weaken some of

these constitutional rights, indeed some of the above mentioned provisions, including a number of times in recent history, it is often framed as necessary to safeguard our community. Despite that, Oregonians have consistently rejected these attempts, understanding that our Bill of Rights contain fundamental rights that should not be weakened.

When it comes to Article I, section 9, the courts have carved out exceptions to the probable cause warrant requirement. In some cases, the courts have found exceptions and in other cases, the courts have held such government actions go too far. And in the case of the use of police roadblocks, the Oregon Supreme Court drew the line. In that case, *Nelson v. Lane County,* 304 Or 97, 743 P2d 692 (1987), the Court stated that "some procedures may invade the personal freedoms protected from government interference by the constitution. Roadblocks are seizures of the person, possibly followed by a search of the person or the person's effects." *Nelson,* 304 Or at 103. The Court held that police roadblocks were a search and seizure without a warrant or even suspicion of wrongdoing and was in clear violation of Article I, section 9, of the Oregon Constitution." *Nelson,* 304 Or at 101.

HJR 25 asks us to weaken one of our core provisions of the Oregon constitution for the first time to allow for the police to use police roadblocks. While it is true that the ACLU would be hard pressed to find any reason sufficiently justified to limit or weaken the freedoms guaranteed by our funders under the Oregon Bill of Rights, we strongly believe that this proposal asks Oregonians to weaken our Constitution to employ a means of enforcing our drunk driving laws that has not proven as effective as means that are currently allowed under Article I, section 9. Roadblocks divert scarce law enforcement resources by using law enforcement to stop and question thousands of innocent people, while the drivers who actually pose a danger to the public because they are driving under the influence avoid visible and well-advertised roadblocks.

The reason this constitutional amendment, and identical proposals have been put forward for more than two decades is because of a successful challenge of police roadblocks that was sponsored by the ACLU of Oregon in the 1980s. The facts of that case, *Nelson v. Lane County, supra,* perfectly illustrate the reasons we oppose this legislation.

On December 17, 1982, Lynda Nelson was working as an administrative aide in the Eugene City Manager's office. That evening she attended the Mayor's Christmas party for city staff. She arrived at the party with a friend at about 6:30 p.m. and had one drink with hors d'oeurvres, followed by a potluck dinner, dessert and coffee. She left the party about 10:15 p.m. to return to her home in Marcola.

As Ms. Nelson was driving east on Interstate 105, she and her friend were passed by a vehicle that was weaving and driving erratically. She suspected the other driver was drunk and she slowed down to make sure she was not near him and breathed a sigh of relief when she reached her exit from the freeway and the other driver continued on.

Once Ms. Nelson got on Marcola Road, she noticed flashing lights up ahead and about six to ten patrol vehicles from the Oregon State Police and the Lane County Sheriff's office. There was a long line of cars in both directions and all vehicles were being stopped. It took about 15 minutes before she reached the front of the line; she then asked the state trooper if there had been a prison escape or some other crime. The trooper said the officers were conducting a police roadblock for drunk drivers and asked her when she had had her last drink. She replied that she had consumed only one drink that evening around 7:00 p.m. before she ate a full dinner, followed by dessert and coffee.

Ms. Nelson's friend leaned over to tell the trooper that Ms. Nelson had not been the one who was drinking, hoping to notify the trooper of the dangerous driver they had been following earlier. The trooper became upset and ordered Ms. Nelson to pull up ahead and exit the vehicle. He asked her again when she had her last drink and she gave the same answer. The trooper then required Ms. Nelson to perform a series of field sobriety tests, including standing on a gravel slope on one foot with the other foot crossed over her knee. In between the various tests, the trooper asked her twice more when she had her last drink and she gave the same answer each time. Ms. Nelson passed all of the tests because she was sober. Eventually, the trooper told her she was free to go. By then, it was about 11:15 p.m.

The next morning, Ms. Nelson called the Eugene office of the ACLU of Oregon and we agreed to file a civil lawsuit on her behalf. By then she was quite upset; she felt strongly that the roadblock had been a waste of police resources and actually made the public less safe. She felt – and we agree – that police should focus on drivers who are exhibiting visible signs of driving under the influence, rather than stopping hundreds of innocent people who have done nothing wrong.

Over the years since the *Nelson* decision, this legislature has taken many steps to strengthen Oregon's laws that are designed to deter individuals from getting behind the wheel of a motor vehicle if they are under the influence of alcohol or any other intoxicant.

We believe that there are current tools available to law enforcement in Oregon that do not violate the Oregon Constitution. These include saturation patrols and strong public education and awareness. Saturation patrols have been shown to be a more effective tool of stopping actual drunk drivers and at a lesser cost. Data shows that police roadblocks result in far fewer arrests per officer than either routine traffic patrols or saturation patrols.[1] Proponents argue that police roadblocks serve as a deterrent and that the fewer number of arrests is proof of their effectiveness. Part of the deterrent effect is people know about the possibility of running into a roadblock. Even if that was the reason, we believe that in 2011, with the increasing use of instant messaging and

[1] *See* FBI Law Enforcement Bulletin, January 2003, Vol. 72, No. 1 "Battling DUI: A Comparative Analysis of Checkpoints and Saturation Patrols" by Jeffrey W. Greene. *See also* "Effectiveness of Sobriety Checkpoints Questioned" by Benita Williams, The Kansas City Star (July 4, 2008).

twitter that people who want to avoid roadblocks will be able to do so by learning of the exact location.

We believe the same deterrent effect can also be obtained by well-publicized saturation patrols (with the added benefit that the locations will not be set in one specific spot), such patrols will result in more arrests than a similar number of roadblocks, can be used on highways and locations where it's impossible to set up roadblocks, allow for police to patrol for and stop other reckless activity such as distracted drivers, and cell phone users, making our roads safer for all of us.

Oregon has clearly established over the last 24 years that a state can change public attitudes about driving under the influence – and deter drunk driving – and has the necessary tools available to aggressively find drunk drivers without weakening our Bill of Rights. For all these reasons, the ACLU of Oregon urges you to oppose HJR 25.