



## National Safety Council

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### Position/Policy Statement

#### **Committee on Alcohol and Other Drugs Enforcement of Laws Aimed at Alcohol Impaired Driving**

The National Safety Council urges jurisdictions to develop and evaluate new pilot police enforcement programs based on objective assessments of drivers' use of alcohol. Recommended programs could include one or more of the following:

- Require all drivers in nighttime moving violations and crashes to be tested for alcohol by a reliable breath screening device or chemical test.
- Use passive alcohol sensors (those not requiring the cooperation of drivers) to screen all drivers involved in nighttime moving violations and crashes. Require all drivers with a positive indication of alcohol to submit to a more precise breath alcohol test.
- Use passive alcohol sensors to screen all drivers stopped at random roadside safety checks.
- Any procedure used in roadside safety checks by law enforcement officers should be measured against the following considerations and priorities:
  1. Enhancement of officer and motorist safety
  2. Avoidance of undue inconvenience to the public
  3. The deterrent effect created by the roadside safety check
  4. Compliance with laws and court established criteria.

*This position statement reflects the opinions of the National Safety Council but not necessarily those of each member organization.*

Approved by the Highway Traffic Safety Division, October 28, 1985

Approved by the Board of Directors, October 21, 1986

Alcohol Testing for All Nighttime Drivers  
Stopped for Violations, at Crashes and  
Sobriety Checkpoints

A Pro/Con Paper

**Pro**

A crucial factor in deterring drinking drivers is their perception of the risk of detection and apprehension. Both the perceived and actual risks of detection are low because the number of personnel that can routinely be devoted to enforcement of alcohol and driving laws are limited; police contacts with drivers are relatively infrequent; and even when they occur, many alcohol-impaired drivers are not identified. Drinking and driving and alcohol-related crashes occur most commonly at night. Two methods of increasing the perceived and actual risk of detection are: (1) to routinely administer alcohol tests to all nighttime drivers who are stopped for moving violations or who are involved in crashes, and (2) to use passive alcohol sensors as an aid in evaluating all drivers passing through sobriety checkpoints.

A basic legal question arising from these recommendations is whether alcohol testing constitutes a search under the Fourth Amendment. The hallmark of a search is whether a reasonable, and recognized by society, expectation of privacy, has been violated. Anything that is exposed to the public is not protected from police scrutiny. Thus, anything the police see in plain view or perceive through any of their senses is not protected so long as the police are where they legally have a right to be when they are conducting their investigation. The same criterion applies to devices that enhance police perceptions. For example, ordinary binoculars or flashlights are permitted, but sophisticated instruments capable of prying into areas otherwise inaccessible to a casual observer require a warrant.

Passive alcohol sensors detect the presence of alcohol about a person by drawing the air near the person's mouth over a sensor that is substance specific for alcohol. The sensor gives a positive reading when alcohol is present in the normally expelled breath. The process is not inherently different from an officer sniffing a driver for the scent of alcohol; however, the sensor is objective and is not hampered by differences in the strength of the odor of alcoholic drinks. The difference is not legally relevant because a person's scent is always subject to the "plain view" doctrine. It simply is not possible to contain breath and thereby protect it from a casual observer with a sensitive nose.

Although the use of passive sensors has not been tested in court because the devices are so new, courts have consistently held that examination of physical characteristics such as facial features, tone of voice, manner of walking and writing, even fingerprints that are routinely displayed to the public is not a search.

Unless the police have illegally detained a driver, there is no constitutional impediment to the use of a reliable passive alcohol sensor as a preliminary screening device, either for drivers stopped for violations, crashes, or at sobriety checkpoints.

A different legal issue is presented when police use conventional breath testing devices on all drivers stopped for violations and at crash sites. Because conventional breath tests require drivers to provide samples of deep lung air that is not subject to the plain view doctrine, their use is a limited search. There is, however, no constitutional limitation on police requests for voluntary tests if there are no sanctions for refusal.

Implied consent laws, as currently written, require some suspicion that a driver is alcohol-impaired before testing may be demanded and impose sanctions for refusal. The overwhelming evidence on the relation between alcohol use and nighttime crashes and the percentages of drivers who are impaired late at night, provide ample justification for widespread nighttime driver breath testing. The breath tests are minor intrusions that occur in a public place and are not capable of revealing anything other than alcohol concentrations.

### **CON**

Because the Constitution protects people from undue governmental interference, the authority of police to detain someone for investigation must be related to individual conduct. There is a limited exception under Delaware v. Prouse allowing police to stop all, or a defined sampling of, motorists to check for infractions of motor vehicle laws that are otherwise difficult to enforce.

The laws prohibiting alcohol-impaired driving are enforceable with traditional techniques. There is no need for such drastic measures as roadblocks and widespread breath testing without individualized suspicion. Officers who are proficient in detecting alcohol-impaired drivers can perform as well as those at sobriety checkpoints using alcohol sensors. Officers who are relatively poor at detecting alcohol violations should be given adequate training and, if that is not successful, reassigned. Constitutional rights cannot be eroded based on the least common denominator of police investigative competence.

The only legitimate objective of the police is detecting and arresting criminals. Deterrence is a natural by-product of police activity, not a proper objective in and of itself. The laws of all 50 states require some evidence to suspect alcohol impairment before a test may be required. This is true for both evidentiary breath tests that may be used in court and preliminary tests that are permitted by statute in 26 states. Indeed, the purpose of the preliminary test is to give an officer an objective means of evaluating a driver's condition before he decides an arrest is justified.