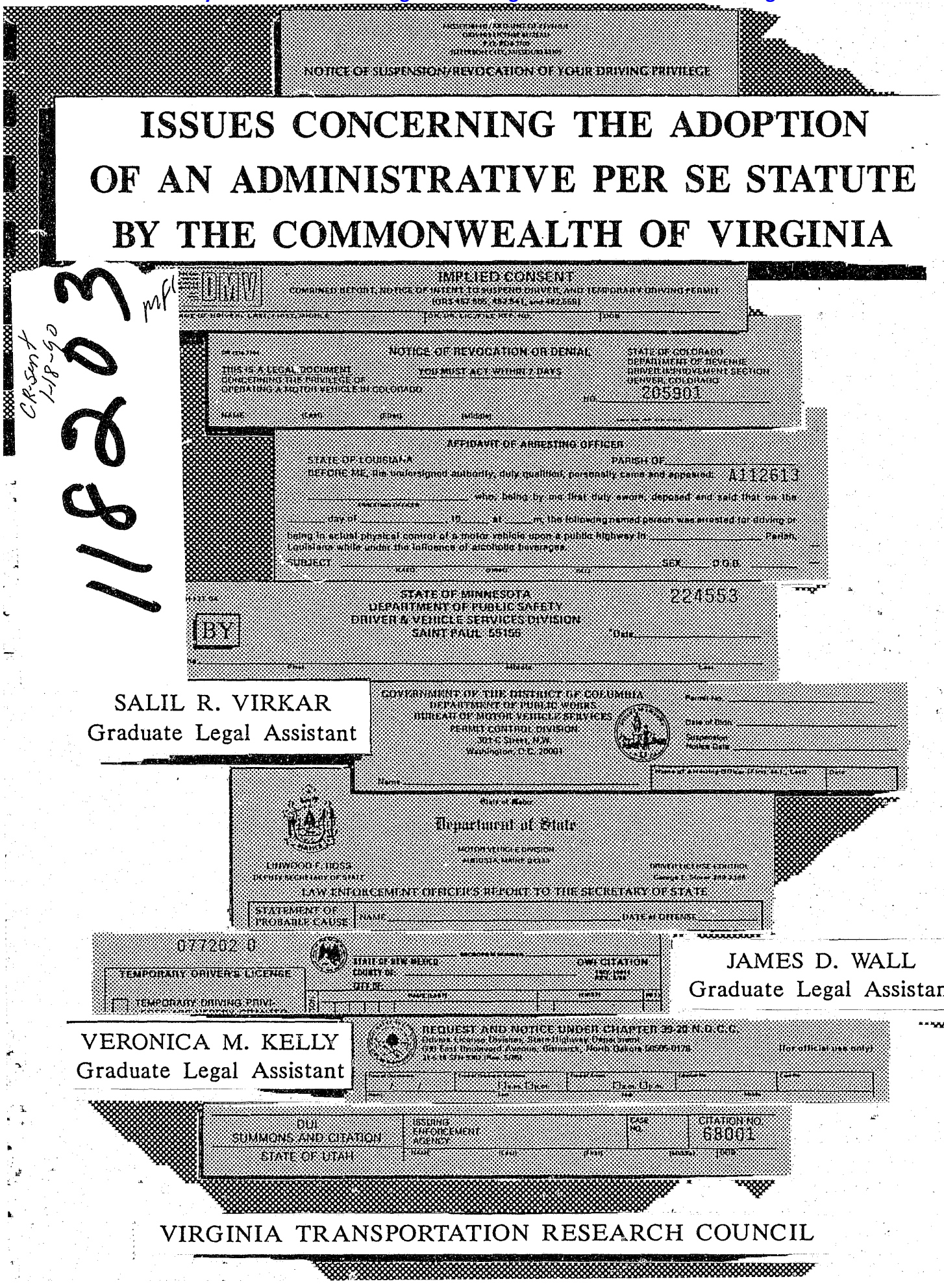
ISSUES CONCERNING THE ADOPTION OF AN ADMINISTRATIVE PER SE STATUTE BY THE COMMONWEALTH OF VIRGINIA



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Form R-396 (1/1/87)

118203

Standard Title Page -- Report on State Project

Report No.	Report Date	No. Pages	Type Report: Final	Project No. :
VTRC 89-R15	January 1989	39	Period Covered: N/A	Contract No.:

Title and Subtitle

Issues Concerning the Adoption of an Administrative Per Se Statute by the Commonwealth of Virginia

Key Words

Drunken Driving
Administrative Per Se
Judicial Per Se
Mandatory License Revocation

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Abstract

The most effective measures to deter drunken driving are legal actions that provide for certain, serious, and swift sanctions. An administrative per se statute that summarily revokes or suspends a driver's license for a DUI offense satisfies these criteria. Because the revocation would be imposed by an administrative, rather than a judicial, system, concerns about due process violations have been raised. Although the Supreme Court has never directly ruled on the constitutionality of an administrative per se statute, its rulings in other cases provide indications of what would be required for such a statute to be found constitutional. This report reviews the relevant cases on the issues of due process and double jeopardy. It also discusses the statutes and experience of states with per se laws and studies that document the impact of such laws.

In addition to deterring drunken driving, enactment of an administrative per se statute would benefit Virginia by bringing the Commonwealth one step closer to qualifying for additional federal funds.

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(A Cooperative Organization Sponsored Jointly by the Virginia Department of Transportation and the University of Virginia)

Charlottesville, Virginia

January 1989
VTRC 89-R15

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ACKNOWLEDGMENTS

The authors wish to thank all of the individuals at the Virginia Transportation Research Council who helped in the preparation of this report. In particular, thanks are in order to our colleagues in the Safety Research Group who reviewed and commented on the report. Moreover, special recognition is due Sharon Clark, who typed the numerous rough drafts as well as the final report, and Linda Evans, who edited the final draft.

SUMMARY

This report focuses on the legal issues raised by an administrative per se law as well as the effectiveness of such a statute in improving highway safety. An analysis of legal precedent in this area indicates that an administrative per se law (if properly drafted) could withstand any constitutional challenges to it that might be posed. In addition, studies of mandatory license revocation laws in general and administrative per se statutes in particular demonstrate that such a statute could have a considerable impact on drunken driving.

In 1971, the U.S. Supreme Court determined that a driver's license is an entitlement that can be taken away only if the revocation procedures meet the due process standards of the Fourteenth Amendment. Nevertheless, the Court also held that in certain "emergency" situations, the government may dispense with the requirements of pre-deprivation notice and an opportunity for a hearing. Although the definition of emergency is ambiguous, it has been held to include the context of highway safety. As a result, in situations in which the governmental purpose is to promote highway safety, a driver's license may be summarily revoked. An administrative per se law, which is designed to promote highway safety by removing drunken drivers from the roads, meets the required governmental interest criterion; therefore, a government agency could take away a driver's license prior to an administrative hearing.

Concerns about double jeopardy, given the dual nature of sanctions under an administrative per se law, are also unfounded. The U.S. Supreme Court ruled that the constitutional prohibition against double jeopardy refers only to double criminal sanctions for the same conduct. An administrative per se law, however, provides for a civil penalty in addition to any criminal sanctions for drunken driving. Consequently, the difference in nature between the two sanctions makes each one permissible.

In examining the effectiveness of administrative per se statutes in improving highway safety, two studies of interest were found to be particularly relevant. The Insurance Institute for Highway Safety issued a report in February 1988 on the impact of an administrative per se law in reducing alcohol-related fatal crashes. The Insurance Institute's report concluded that an administrative per se law could reduce alcohol-related fatal crashes overall by 4.6 percent. Another study, conducted by the U.S. Department of Transportation, examined the deterrent effects of mandatory license revocation laws in general. It concluded that the mandatory license revocation statute in Wisconsin helped reduce alcohol-related crashes in the state by 25 percent. Since an administrative per se law is one type of mandatory license revocation statute, it follows that it could have a similar effect in reducing alcohol-related crashes.

Given the strong legal precedent supporting the constitutionality of an administrative per se law and such a statute's potential effectiveness in reducing alcohol-related crashes, the Commonwealth of Virginia should consider adopting an administrative per se law. In the fight against drunken driving, an administrative per se law would be an effective weapon for law enforcement officials who are all too often frustrated by the inadequacies of the criminal justice system.

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INTRODUCTION

More than half of the fatalities that occur on our nation's highways each year involve persons operating motor vehicles while under the influence of alcohol (1). In response to this problem, almost all states have enacted laws that provide for licensing action against a person who has been convicted of driving while under the influence of alcohol or drugs (DUI) (2).

In many cases, however, convictions are neither quick nor certain. Delays in the criminal justice system are the product of the dilatory tactics of defense attorneys as well as overcrowded dockets (3). In some instances, drivers can escape the consequences of their actions by having their drunken driving charge reduced to a lesser charge in exchange for a guilty plea.

An effective way to avoid problems engendered by the criminal justice process is to summarily revoke the licenses of drivers whose blood alcohol concentration (BAC) or alcohol concentration (AC) is above a prescribed level (4). A statute that provides for summary revocation or suspension by an administrative agency (e.g., Department of Motor Vehicles, Department of Public Safety) is called an "administrative per se" statute. A similar statute that provides for summary license revocation by a judicial officer is a "judicial per se" statute.

Both administrative per se and judicial per se statutes allow quick and certain action against the drunken driver. Further, both statutes provide sanctions that are in addition to and not in lieu of criminal penalties. The administrative statute is the focus of this report since all but one of the states that have adopted summary revocation have done so via an administrative per se law (the only state with a judicial per se

statute is North Carolina). Issues addressed in this report, however, pertain to summary license revocation in general and thus apply to both types of statutes.

As indicated above, an administrative per se statute provides for the revocation or suspension of a driver's license through an automatic administrative process if a driver has a BAC above a specific level. In states having such a statute, the BAC level ranges from 0.08 to 0.15 for drivers of legal drinking age. Most of these states have simply merged the statute with their existing implied consent law. Every state has an implied consent law whereby a driver on the public roads is deemed to have given consent to a blood, breath, or urine test if a police officer has probable cause to administer such a test. The driver may refuse the test; however, refusal carries with it a penalty specified in the statute (generally forfeiture of the driver's license). As a result of the merger of administrative per se and implied consent laws, therefore, drivers by implication consent to forfeit their licenses if their BACs are equal to or above a prescribed level or if they refuse the chemical analysis. Appendix A gives the mandatory licensing actions upon test refusal in the fifty states, the District of Columbia, and Puerto Rico as of January 1, 1988.

In 1976, Minnesota became the first state to enact an administrative per se statute. To date, twenty-one states and the District of Columbia have enacted administrative per se statutes (Alaska, Arizona, Colorado, Delaware, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, West Virginia, Wisconsin, and Wyoming). Appendix B gives the mandatory licensing actions under the various administrative per se statutes as of January 1, 1988. The statutes vary but typically provide for seizure of the license by police officers upon a test result of 0.10 BAC. The officer then issues a temporary license, which is valid for a short period of time during which the licensee can request a hearing. The suspension or revocation is generally automatic in the absence of a request for a hearing. The hearing itself is usually limited to an inquiry into probable cause to test, the driver's refusal, or the test results.

The primary benefit of such a statute is the swift and certain imposition of penalties for drunken driving. Administrative license revocation circumvents delays common to the criminal justice process because the license is seized by the arresting officer (as an agent of the administrative body) with the driver having recourse to a post-deprivation hearing. Consequently, the administrative per se statute has the potential to immediately remove some high-risk drivers from the roads.

A second benefit of an administrative per se statute is that it is more likely to deter drunken drivers than the present Virginia scheme. In Deterring the Drinking Driver, Ross explained that the level of deterrence "is a function of the perceived certainty, severity, and swiftness or

celerity of punishment in the event of violation of the law" (5). Statistics demonstrate that an administrative per se statute increases the certainty of punishment upon arrest. In 1986, Minnesota revoked the licenses of over 99 percent of its DUI arrestees, whereas Virginia revoked or suspended the licenses of only 63 percent of its DUI arrestees. Furthermore, celerity of punishment would increase under an administrative per se scheme because most statutes impose revocation within one week of the offense. Given the nature of the criminal justice process, it may be months before a license is revoked in Virginia today. Thus, an administrative per se law would theoretically afford a better cognitive link between the illegal DUI offense and its consequences.

THE PROBLEM IN VIRGINIA

Drunken driving in the Commonwealth of Virginia has, over the years, caused thousands of deaths, a tremendous number of injuries, and an exorbitant amount of damage to property. It is estimated that in 1987 alone, the total economic loss in Virginia attributable to alcohol-related accidents was more than $276 million (6). Moreover, the annual economic loss has been increasing over the past few years.

In 1987, there were 18,878 alcohol-related crashes (7). Of these, 378 were fatal crashes, which represented 41.7 percent of all fatal crashes for the year. The number of deaths was 418, which represented 40.9 percent of the total number of traffic fatalities for the year (8). These absolute numbers represent serious losses to the Commonwealth.

Particularly disturbing is the number of young people aged 18 to 40 whose lives are lost or who are injured in alcohol-related crashes in Virginia. In 1987, 289 people in this category were killed, and 11,126 were injured in such accidents (9). When one considers that this age category represented almost 70 percent of the alcohol-related fatalities and almost 75 percent of the alcohol-related injuries, the magnitude of the problem becomes evident.

Furthermore, it is clear that the criminal justice system alone has not been able to handle the problem of drunken driving in Virginia. According to the latest statistics, over the past three years, approximately 20 percent of those arrested for DUI violations have walked away without a conviction or punishment of any kind (10). Moreover, the great length of time between arrest and conviction has significantly reduced the celerity of punishment in Virginia. An administrative per se statute would help in swiftly and surely removing drunken drivers from the road, thereby promoting and improving highway safety.

LEGAL ISSUES

The following is a discussion of the legal issues that might be raised in connection with an administrative per se law. Despite the fact that the U.S. Supreme Court has yet to rule on the constitutionality of an administrative per se statute, the analysis of these legal issues indicates that such a law, if properly drafted, could withstand any constitutional challenges posed.

Due Process

In Bell v. Burson, 402 U.S. 535, 539 (1971), the U.S. Supreme Court ruled that a driver's license is an entitlement that may be taken away by the state only according to procedures that meet the due process standards of the Fourteenth Amendment. Generally, in order to satisfy the requirements of due process, a hearing is necessary prior to the deprivation of an entitlement. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

In Bell, the Court held unconstitutional a Georgia statute that required an uninsured motorist involved in an accident to post security to cover the amount of damages claimed by the aggrieved parties. Id. at 543. The defendant in Bell was involved in an accident in which a girl rode her bicycle into the side of his automobile. He did not post security for damages claimed by the girl's parents. Id. at 537. At the administrative hearing, his offer to prove that he was not liable for the accident was rejected, and he was given thirty days to post security or else lose his license and vehicle registration. Id. at 538. The U.S. Supreme Court held that before the state could suspend the petitioner's license, procedural due process required a determination of whether there was a reasonable possibility of a judgment being rendered against him as a result of the accident. Id. at 540. The Court stated:

> [I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.

Id. at 542 (emphasis added).

Therefore, in certain situations, (namely "emergencies"), the U.S. Supreme Court has allowed property to be seized without a pre-deprivation hearing. See Ewing v. Mytinger & Casselberry, 339 U.S. 594, 599-600 (1950) (summary action by state permissible in seizure of mislabelled drugs); see also Fahey v. Mallonee, 332 U.S. 245, 253 (1947) (summary action by state permissible in regulation of savings and loan); Adams v. City of Milwaukee, 228 U.S. 572, 584

(1913) (summary action by state permissible in regulation of sale of milk); North American Cold Storage v. City of Chicago, 211 U.S. 306, 315 (1908) (summary action by state permissible in seizure of spoiled food). Compliance with due process standards is not strictly a function of the private interest involved but rather a comparison of the weights of the public and private interests. Further, in Wolff, the Court stated:

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by the governmental action.

418 U.S. at 560. According to this reasoning, an administrative per se statute would not violate due process standards despite the fact that the deprivation of the license occurs prior to a hearing. Due process would be guaranteed by a post-deprivation hearing within a reasonable time.

Eldridge Analysis

In Mathews v. Eldridge, 424 U.S. 319, 349 (1976), the U.S. Supreme Court reversed a Fourth Circuit ruling and allowed a state agency to summarily suspend disability payments to the respondent. The recipient of benefits in Eldridge contended that he was wrongly deprived of relief. However, after the state agency charged with monitoring the relief program consulted with the recipient's physician, it suspended payments. The Court cited several reasons for allowing the suspension of benefits before an administrative hearing could be held. First, the individual had potential sources of temporary income from both private sources and government assistance programs. Id. at 342. Second, the decision whether to discontinue disability benefits turned on the unbiased medical reports by an examining physician. Id. at 344. Third, the state agency's procedures included safeguards against mistakes and allowed individuals the opportunity to respond to the decision maker. Id. at 345. Fourth, the additional financial cost and administrative burden associated with requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would be substantial. Id. at 347. Finally, the Court stated that the prescribed procedures not only provided the recipient with an effective process for asserting his claim in an administrative action but also assured him the right to a hearing before the termination became final. Id. at 349.

The Court's analysis in Eldridge essentially rested on a balancing test. In order to determine those situations in which a state may

summarily deprive one of an entitlement, several factors must be weighed. The Court thus summarized its analysis:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Particularly illustrative of the Eldridge analysis are two cases in which the Court squarely addressed the issue of summary license revocation: Mackey v. Montrym, 443 U.S. 1 (1979), and Dixon v. Love, 431 U.S. 105 (1977). In Love, the defendant's license was revoked pursuant to an Illinois statute that mandated license revocation after a specific number of traffic offenses within a prescribed time period (i.e., a point system). 431 U.S. at 107. In Montrym, the defendant's license was revoked pursuant to the Massachusetts implied consent statute that provided for summary revocation of the licenses of DUI arrestees who refused to submit to a chemical analysis test. 443 U.S. at 19. The Court cited several reasons for upholding summary revocation in these instances, but the pervading concern was highway safety. Id.

An administrative per se statute promotes highway safety by mandating summary revocation for those who fail the BAC test and for those who refuse to submit to the test. An administrative per se statute allows the removal from the highways of those drivers who are presumably more dangerous than drivers who simply refuse to take the test; it removes those drivers who have been proven to be drunk. Because the U.S. Supreme Court recognized a state's interest in preserving highway safety in Montrym and Love, and the interest served by an administrative per se statute is the same as the interest served in Montrym and Love, an administrative per se statute is not violative of the Constitution.

A. Private Interest

The first step of the Eldridge balancing test is to identify the nature and weight of the private interest that will be affected by the government's action. 424 U.S. at 335. In Montrym and Love, the private interest affected was the license to operate a motor vehicle. Montrym, 443 U.S. at 11; Love, 431 U.S. at 113. In particular, the private interest was the driver's post-arrest possession of his

license pending a hearing. The U.S. Supreme Court has recognized that a driver's license is a substantial interest because a state is unable to make a driver whole for any personal inconvenience or economic hardship suffered because of erroneous deprivation. Montrym, 443 U.S. at 11.

One factor that should be considered in determining the weight of the private interest is the duration of the deprivation; in this case, the duration of the revocation. Id. at 12. The Court found that the private interest in Love was actually more substantial than the private interest in Montrym because the Illinois statute in Love allowed a one-year revocation and the Massachusetts statute in Montrym permitted only a ninety-day revocation. Montrym, 443 U.S. at 12. Hence, the longer the revocation period, the more substantial is the private interest involved.

A second factor in determining the weight of the private interest is the availability of hardship relief. Id. An example of hardship relief in a summary revocation case is the issuance of a restricted license that allows the arrestee to continue to drive to and from work. In Love, the Court noted that the provision for hardship relief lessened the extent to which the private interest was affected. 431 U.S. at 114 n.10. However, the Massachusetts statute in Montrym did not provide for such hardship relief. 443 U.S. at 12. In essence, the availability of hardship relief would help mitigate the effects of a delay in a post-deprivation hearing.

The final factor in determining the weight of the private interest involved is the length of time between the deprivation and the opportunity for a hearing. The Court in Montrym interpreted a Massachusetts statute to provide for an immediate "walk-in" hearing. Id. In Love, a period of twenty days between the revocation and the opportunity for a hearing was sufficient to meet the requirements of due process. 431 U.S. at 115. However, during this twenty-day period, the arrestee was afforded hardship relief. It is uncertain from the case law exactly what period of time between license revocation and a hearing constitutes a violation of due process. However, it is implied in Montrym and Love that in order to lessen the weight of the private interest affected, the period between the revocation and the opportunity for a hearing should be as short as possible. Montrym, 443 U.S. at 12. This would be especially true if the statute did not provide the arrestee with some form of hardship relief.

B. Risk of Erroneous Deprivation

The second step of the Eldridge test is to consider the risk of erroneous deprivation of "interests through the procedures used, and

the probable value of additional or substitute procedural safeguards." Eldridge, 424 U.S. at 335. When the summary license revocation was based on prior traffic convictions (i.e., a point system), the Court held that the facts were not in dispute and that any opportunity to dispute them had been waived. Love, 431 U.S. at 114. If the facts were disputed, the Court would consider whether the procedures followed in the determination of the basic facts were sufficiently reliable to justify a delay in resolving issues of credibility and conflicts in the evidence. Montrym, 443 U.S. at 15. In Montrym, the Court upheld the procedural sufficiency of an affidavit from the arresting officer endorsed by a third person and the chief of police in determining whether the arrestee had refused to submit to a breath test. Id. at 16. In this case, the State of Massachusetts had minimized the risk of error in refusal determination by holding the reporting officer personally liable for any abuse of discretion. Id. Similarly, the risk of error in the BAC determination could be minimized through strict controls on the administration of chemical tests.

The due process clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectable property interest be so comprehensive as to preclude any possibility of error. Id. at 13. When prompt post-deprivation review is available for the correction of any administrative error, the U.S. Supreme Court has generally required no more than that the post-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be. Id. "Procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." Eldridge, 424 U.S. at 344. Further, even when disputes as to the facts do arise, the Court has held that the risk of error inherent in the statute's initial reliance on the representations of the reporting officer is not so substantial as to require the state to stay the revocation pending the outcome of a hearing. Montrym, 443 U.S. at 15.

C. Government's Interest

The third step of the Eldridge balancing test is to identify the government's interest in summary revocation and the administrative and fiscal burdens associated with substitute procedures. 424 U.S. at 335. The government's interest in summary license suspension is the preservation of the safety of the highways. As noted previously, the Bell Court specifically exempted emergency situations from the usual due process requirements. 402 U.S. at 542. In Montrym and Love, the Court implied that highway safety could be considered an emergency situation. Montrym, 443 U.S. at 17; Love, 431 U.S. at 114-15.

In Montrym, the Court held that the state's interest in removing drunken drivers from the highways was at least as justifiable as the summary seizure of mislabelled drugs or the destruction of spoiled foods. 443 U.S. at 17 (citing Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); North American Cold Storage v. City of Chicago, 211 U.S. 306 (1908)). The Court held that the state's interest would be undermined if a high-risk driver were to continue driving during the period between the arrest and the hearing. Montrym, 443 U.S. at 18. The dissent in Montrym argued that the revocation of an arrestee's license was not an emergency when compared to the confiscation of tainted poultry in North America Cold Storage. Id. at 25-26. The summary suspension of the licenses of DUI arrestees is an "emergency," however, because of the danger in allowing arrestees to continue driving.

In Montrym, the Court held that a state's interest in safety is substantially served by the summary suspension of the driver's licenses of those who refuse to submit to a chemical analysis. Id. at 19. First, the Court stated that summary revocation serves as a deterrent to drunken driving. Id. Second, the Court held that the implied consent statute effectuates a state's interest in obtaining reliable evidence. Id. Third, summary revocation allows the prompt removal of high-risk drivers from the road. Id. at 18. The Court determined that the state's interest outweighed the individual's interest. Id. at 18-19.

Similarly, an administrative per se statute actually furthers the interests of the state by facilitating the attainment of the objectives outlined in Montrym. It would undermine highway safety to allow those who fail the BAC test to continue driving. Moreover, the shorter the period of time between the offense and the sanction, the more likely that potential offenders would appreciate the severity of the sanction and link the sanction to the offense. Thus, an administrative per se statute is analogous to an implied consent statute.

Alternative procedures (i.e., pre-suspension hearings, a stay of revocation pending a hearing) would undermine the state's interest in preserving the safety of its highways. The incentive to delay arising from the opportunity for a pre-suspension hearing would generate a sharp increase in the number of hearings sought and would therefore impose a substantial administrative and fiscal burden on the state. Love, 431 U.S. at 114; Montrym, 443 U.S. at 18. In Montrym, the Court concluded that the compelling interest in highway safety justifies a state's summary suspension of a driver's license pending a prompt post-suspension hearing. 443 U.S. at 19.

This prong of the Eldridge balancing test was also used to justify summary revocation in Barry v. Barchi, 443 U.S. 55 (1979). The Court in Barry upheld the constitutionality of a statute that provided for the summary suspension of a horse trainer's license upon a showing that a horse handled by the trainer had been drugged. Id. at 63. The Court stated that horse trainers are afforded all the process that is due them when the state summarily suspends their license on the basis of a post-race urinalysis. Id. at 65. However, the Court did require that the post-suspension hearing be prompt. Id. at 66. The Court recognized that the suspension of the trainer's license was severe in that it deprived him of his livelihood. Id. As in Montrym, however, the Court indicated that the state had a strong interest in preserving the integrity of the racing system and that the state's interest outweighed the individual's interest. Id. at 65.

Double Jeopardy

Because a drunk driver may be punished criminally as well as administratively, an offender is seemingly punished twice for the same act. The constitutional prohibition against double jeopardy, however, applies only to double criminal sanctions for the same conduct. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235-6 (1972). States that allow summary license action address the potential double jeopardy problem by differentiating between criminal punishment and the civil nature of administrative sanctions. In one New York case, a defendant was convicted of driving while ability-impaired, for which the criminal court suspended his license. In addition, the Commissioner of Motor Vehicles suspended his license pursuant to a different statute. Both suspensions were upheld in the New York Court of Appeals with the Court stating:

> Each of these proceedings--one, a civil administrative proceeding, and the other, a criminal action--are separate and independent of each other. The outcome of one proceeding is of no consequence in the other. There is no constitutional or statutory prohibition to make the Commissioner's implementation of the statute illegal or unlawful.

Barnes v. Tofany, 27 N.Y.2d 74, 77-78, 261 N.E.2d 617, 619 (1970). The Court went on to state:

> The constitutional prohibitions against double jeopardy and double punishment do not prevent the legislature from enacting and the executive from enforcing civil as well as criminal sanctions for the same conduct. . . . It is apparent that suspension or revocation of the privilege of operating a motor vehicle is essentially civil in nature, having as its aims chastening of the errant motorist, and, more importantly, the protection of the public from such a dangerous individual.

Id. at 261 N.E.2d at 619-20.

The Supreme Court of Minnesota has also emphasized the civil nature of the administrative sanctions:

> We feel it important to again emphasize the essential differences between license revocation under Sec. 169.121, subd. 3, and license revocation under Sec. 169.123, subd. 4. The former is automatically imposed as a criminal penalty upon conviction of a Sec. 169.121 violation. It is triggered by the outcome of a criminal proceeding and is imposed through the judicial system. Revocation under this section is for not less than thirty days.
>
> On the other hand, revocation under the implied consent law is essentially civil in nature. It is imposed administratively by the Commissioner of Public Safety regardless of the outcome of the criminal proceeding arising out of the same incident and is triggered by the refusal to submit to chemical testing.

State v. Mulvihill, 227 N.W.2d 813, 817-18 (Minn. 1975).

Since the sanctions imposed under an administrative per se statute are also imposed administratively and independent of any criminal proceedings arising out of the same incident, the same arguments could be used to support the constitutionality of an administrative per se statute.

STATUTORY RECOMMENDATIONS

An administrative per se statute must be carefully drafted in order to satisfy the constitutional requirements of the Eldridge analysis. Professor John Reese listed several recommendations for the formulation of a summary revocation statute that flow from the Court's Montrym opinion (11).

First, the legislature should clearly state that the government's interest is that of protecting the safety of persons on the highways by quickly removing high-risk drivers. If the statute were instead to address the punitive or deterrent effects of summary revocation, it might not meet the substantial governmental interest test. Second, the statute should provide controls in order to establish a reliable factual basis for pre-hearing revocation (e.g., prompt submission of the reporting officer's affidavit, verification of affidavits by a witnessing officer, frequent inspection of chemical analysis equipment, adequate training of persons administering the test). Such controls would help ensure that licensees were not erroneously deprived of the driving privilege. Third, because notice of deprivation is a requirement of due process, the arrestee should be given notice promptly. The notice requirement is best satisfied if the

arresting officer delivers notice immediately following the driver's failure of the chemical analysis test. Moreover, the notice should inform the arrestee that a post-revocation hearing is available and of the steps that the arrestee must take to obtain such a hearing. A statute that follows these simple guidelines should, in light of the Montrym decision, be upheld as constitutional. A model administrative per se law has been developed by and is available from the National Highway Traffic Safety Administration.

The Minnesota Statute

An example of an operational administrative per se statute is Minn. Stat. §169.123 (1988), which provides that when a peace officer has probable cause to suspect that a person is driving under the influence, he or she may request that the driver submit to a chemical analysis test (breath, blood, or urine). The officer must inform the driver of the consequences of a refusal to submit to the test. The driver does not have the right to consult with an attorney before deciding whether to submit to chemical testing. Nyflot v. Commissioner of Public Safety, 369 N.W.2d 512 (Minn. 1985); Minn. Stat. § 169.123(2)(b)(4) (1988). The administrative penalty for refusing to submit to such a test is license revocation for one year.

If the driver opts to take the test and his or her AC (Minnesota uses AC) is 0.10 or greater, the arresting officer serves notice to the driver on behalf of the Department of Public Safety of the Department's intention to revoke his or her license for ninety days. The officer then seizes the license and issues a temporary license effective for seven days. The seven-day temporary license is issued to allow the reporting officer and the motor vehicle department time to process the revocation. Moreover, for first offenders, this seven-day period allows the driver an opportunity to obtain a restricted license or arrange for alternate transportation during the subsequent revocation period. A first offender may obtain a restricted license if he or she passes the required licensing tests, demonstrates a need for the restricted license, and pays a license reinstatement fee of $150. After either refusal or failure by the driver, the officer sends the license to the Commissioner of Public Safety with a certificate stating that he or she had probable cause to believe that the driver had been driving under the influence and had either refused a chemical analysis test or had an AC of 0.10 or greater. Upon receipt of the certificate, the Commissioner of Public Safety revokes the driver's license for ninety days.

At any time during the period of revocation, the person may request in writing a review of the order of revocation. Within fifteen days of receiving the request, the Commissioner or a designee of the Commissioner must review the order and report the results of the review. In Minnesota, the driver is also entitled to judicial review of the administrative order.

The driver must file the petition for judicial review within thirty days of receipt of the notice of the order of revocation. The Minnesota statute requires that the petition state with specificity the grounds upon which the petitioner seeks review of the order. Minn. Stat. § 169.123 (1988). The filing of the petition does not stay the revocation. Once a revocation order has been administratively reviewed, however, it can no longer be judicially reviewed. Similarly, a judicial review of the order bars a subsequent administrative review.

The North Carolina Statute

The North Carolina statute, N.C. Gen. Stat. § 20-16.5 (1988), provides for a ten-day license revocation based on the arresting officer's reasonable belief that the arrestee was driving while alcohol-impaired and upon chemical test results showing a BAC of 0.10 or greater. The enforcement officer submits a report to a judicial official stating that he or she had probable cause and showing chemical analysis results. If a judicial official determines that there was probable cause, he or she immediately issues a revocation order. If the person is before the judicial official, the notice is served then, and surrender of the license is required. If the person is not before the judicial officer at the time, the clerk of court mails the revocation order. The order is deemed received four days after it is mailed. The revocation is effective as soon as the arrestee is notified; however, the ten-day revocation period does not begin until the arrestee surrenders his license to the judicial official. If the license is not surrendered within five days, the revocation period is extended to thirty days. The arrestee is entitled to a hearing, but the revocation is not stayed pending the hearing. The hearing is conducted by a magistrate unless the arrestee requests a judge. If a judge is not requested, the hearing must occur within three working days of the petition for hearing. If a judge is chosen, the hearing must occur within five days of the petition for hearing. Further, civil action under N.C. Gen. Stat. § 20-16.5 (1988) does not preclude criminal action pursuant to N.C. Gen. Stat. § 20-138.1 (1988). The arrestee is not entitled to judicial review of the civil hearing.

IMPACT OF SUMMARY LICENSE REVOCATION

The most important measure of the effectiveness of summary revocation is its effect on reducing the number of crashes in which alcohol is involved. During the 1980s there has been an overall national decline in alcohol-related crashes and the incidence of drivers with high BACs. There are indications that an administrative per se statute can play a significant role in further reducing alcohol-related fatalities. A report recently published by the Insurance Institute for Highway Safety included a study of the impact of an administrative per se law on the number of alcohol-related fatal crashes (12).

The report concluded that overall, the reduction in alcohol-related fatal crashes attributable to an admistrative per se law was 4.6 percent. Of the three types of laws examined in the report (administrative per se, illegal per se, and first offense mandatory jail/community service), only the administrative per se law resulted in a significant overall reduction (13). Moreover, "[d]uring hours when typically at least half of all fatally injured drivers have a BAC over 0.10 percent, administrative [per se] is estimated to reduce the involvement of drivers in fatal crashes by about 9 percent" (14).

Another study that demonstrated the probable impact of an administrative per se statute was done by the U.S. Department of Transportation. The study, released in 1987, is actually an analysis of the deterrent effects of mandatory license suspension following a criminal conviction for driving while intoxicated (15). Nevertheless, it stands to reason that an administrative per se law, which achieves the same result as license suspension upon conviction, would have similar deterrent effects.

The report examined both the specific and general deterrence of drunken driving. Specific deterrence aims to prevent repeat offenses, whereas general deterrence aims to prevent drunken driving in the population as a whole. In examining general deterrence, researchers used a surrogate measure of alcohol-related crashes (single-vehicle night-time weekend accidents involving male drivers). The study examined the change in alcohol-related crashes following the implementation of a mandatory license suspension law in Wisconsin. Prior to the enactment of the mandatory suspension law, 45 percent of convicted drunk drivers had their licenses revoked. In the first full year under the new law, 100 percent of those convicted of DUI had their licenses revoked. The results of the study showed that following the adoption of the law, alcohol-related crashes decreased by approximately 25 percent. The impact of the law was enhanced by a well-organized publicity campaign (16).

In addition, the report concluded that mandatory license suspension substantially reduced the recidivism of DUI offenders. The results of this study, although pertaining to post-conviction license suspension, nonetheless demonstrated that an administrative per se statute, which is also a mandatory license suspension law, can have a dramatic impact on highway safety.

FEDERAL FUNDING

Title 23, § 408, of the U.S. Code provides three tiers of grants (basic, supplemental, and special) to states that attempt to combat drunken driving through established methods.

Basic Grant

The basic grant has nine requirements (see Appendix C). The first requirement is that a state provide for the "prompt" suspension of a driver's license in alcohol-related traffic offenses. The statute defines a "prompt" suspension as one occurring within forty-five days of arrest. However, the statute does allow a state that has an average time of ninety days between arrest and suspension to submit a plan which shows that the average time will be reduced to forty-five days. At present, Virginia is not in compliance with the "prompt" suspension requirement. Virginia has neither an administrative per se statute nor special procedures to reduce the delays prevalent in the criminal justice process.

The second requirement is that a first offender must have a full, or "hard," license suspension for at least thirty days. A "hard" suspension is one that does not allow restricted or occupational licenses. In Virginia, a first offender receives up to a six-month revocation. However, the revocation may be suspended and a restricted license issued if the defendant participates in and completes an alcohol rehabilitation program. Va. Code § 18.2-27(c) (1988). Thus, the requirement of a thirty-day full suspension is not satisfied.

The third requirement is a one-year license suspension for an offender who has had at least one other offense in the previous five years. Virginia's statute provides that for a second conviction within ten years, the driver's license must be revoked for three years. Va. Code § 18.2-271 (1988).

The fourth requirement addresses the implied consent statute. For a first chemical test refusal, a state must promptly and fully suspend the driver's license for ninety days. For a first test refusal in Virginia, a driver's license may be suspended for six months. Va. Code § 18.2-268(T) (1988). Virginia's statute, however, allows the refusal charge to be dropped if the offender is convicted of driving under the influence. Id. Because this can occur, Virginia does not satisfy this requirement.

The fifth requirement also addresses a state's implied consent law. Section 408 requires that a repeat refusal result in a prompt and full suspension of the driver's license for one year. Current Virginia law provides that for a second chemical test refusal within one year, a driver's license must be suspended for at least one year. Va. Code § 18.2-268(T). Section 408 refers to repeat offenders within a five-year period rather than a one-year period. In order to be in compliance, Virginia would have to amend its definition of "repeat offender" under the implied consent statute.

The sixth requirement is a mandatory sentence of forty-eight consecutive hours of imprisonment or not less than ten days of community

service for a repeat DUI offense within five years. The Virginia Code provides that for a second DUI conviction within five years, an offender may be sentenced to serve one month to one year in prison. Va. Code § 18.2-270 (1988). The offender must serve at least forty-eight hours in jail. Virginia law does not provide for community service in lieu of jail. Further, Virginia does not require that the mandatory forty-eight hours be served consecutively.

The seventh requirement is that a state have an illegal per se law with a per se level no greater than 0.10 BAC. Virginia is in full compliance with this requirement. See Va. Code § 18.2-266 (1988).

The last two requirements are much less objective. They are that a state increase efforts or resources dedicated to the enforcement of alcohol-related traffic laws and that a state increase efforts to inform the public of such enforcement. It seems that Virginia could easily meet these requirements (as indicated in a letter from James L. Nichols, Chief, Alcohol Programs Division, NHTSA, to John Hanna, Deputy Commissioner for Transportation Safety, Commonwealth of Virginia [February 18, 1987]).

If Virginia adopted an administrative per se statute, most of the Section 408 requirements would be met. Although an administrative per se statute is not a specific requirement of Section 408, such a statute would facilitate compliance with the basic grant requirements. States that have an administrative per se statute but do not receive Section 408 monies are usually disqualified because they issue restricted licenses to DUI offenders before the thirty-day hard suspension has expired.

Supplemental Grant

To qualify for a supplemental grant, a state must meet all of the requirements for the basic grant and at least eight of twenty-two recommendations listed in 23 C.F.R. § 1309.6 (1988) (see Appendix D). A supplemental grant entitles the qualifying state to an additional 20 percent of its Section 402 apportionment for fiscal year 1983. To qualify for a supplemental grant in the second and third years, a state must enact in each year two or more of the twenty-two recommendations of Section 408 unless it has already employed fifteen of these recommendations. Thus, if Virginia met the supplemental grant requirements, it would receive up to $1,094,500 per year for three years ($656,700 for the basic grant and $437,800 for the supplemental grant). A provision in Section 408 allows a state 10 percent of its 1983 Section 402 apportionment if it meets at least four of the twenty-two recommendations of Section 408.

Special Grant

A special grant of 5 percent of Section 402 and Section 408 apportionments for the fiscal year 1984 is available to a state if it enacts a statute that meets certain requirements. These requirements are quite rigorous (see Appendix E).

Benefits to Virginia

Section 408 affords Virginia a cost-effective opportunity to strengthen its fight against drunken driving. A basic grant provides a state with 30 percent of the amount apportioned to such a state for fiscal year 1983 under 23 U.S.C. § 402 each year for five years. Virginia's Section 402 apportionment in 1983 was $2,189,000. Thus, Virginia would be eligible to receive $656,700 per year for five years if it met the criteria for a basic grant. In the first year that a state qualifies for a basic or supplemental grant, it is reimbursed for up to 75 percent of the costs of the alcohol traffic safety programs adopted pursuant to 23 U.S.C. § 408. In the second year, a state is eligible to be reimbursed for up to 50 percent of its Section 408 costs. The third year reimbursement is 25 percent of the Section 408 costs incurred. In no year should the reimbursement pursuant to a basic grant exceed 30 percent of the state's Section 402 appropriation, nor should the amount reimbursed under a supplemental grant exceed 20 percent of the state's Section 402 apportionment.

CONCLUSION

An administrative per se statute is an increasingly popular means by which to combat drunken driving. Given the ineffectiveness of the criminal justice system in deterring drunken driving and reducing alcohol-related traffic fatalities, an administrative per se law would benefit the current statutory regime in Virginia. It would bypass much of the delay caused by the criminal justice process without abridging the rights of the individual and would ensure that drunken drivers were quickly removed from the roads.

Yet, this proposed law would be only one step in an overall plan to reduce alcohol-related traffic fatalities and injuries. Such a plan would require the full cooperation of local and state law enforcement authorities. Moreover, driver education, particularly directed to younger audiences, as to the dangers of drinking and driving must be included in the plan. Community awareness of the problem of drunken driving is critical to the success of any plan to reduce alcohol-related fatalities. As a first step in strengthening its fight against drunken driving, however, Virginia should consider adopting an administrative per se statute.

NOTES

1. John H. Reese, "Summary Suspension of Driver Licenses of Drunken Drivers--Constitutional Dimensions," in Reducing Highway Crashes Through Administrative License Revocation (Washington, D.C.: U.S. Department of Transportation, 1986), p. 51.

2. State Laws on Early License Revocation for Driving While Under the Influence, (Washington, D.C.: U.S. Department of Transportation, 1984), p. 1. Licensing actions can take two forms: either revocation (the revokee must apply to have the license reinstated) or suspension (the license is automatically returned to the driver at the expiration of the term of suspension). The terms revocation and suspension are used interchangeably in this report.

3. Id.

4. The phrase "alcohol concentration" may be used instead of "blood alcohol concentration" to eliminate arguments that breath or urine tests are indirect tests of blood alcohol content and therefore unreliable. For the purposes of this report, the phrase "blood alcohol concentration" will be used.

5. H. Laurence Ross, Deterring the Drinking Driver, (Lexington, Mass.: Lexington Books, 1981), p. 9.

6. DMV Crash Facts, 1987.

7. Id.

8. Id.

9. Id.

10. Id.

11. Reese, p. 58.

12. Paul L. Zador, Adrian K. Lund, Michele Fields, and Karen Weinberg, Fatal Crash Involvement and Laws Against Alcohol-Impaired Driving (Washington, D.C.: Insurance Institute for Highway Safety, 1988), p. 3.

13. Id. at p. 33.

14. Id. at p. i.

15. Deterrent Effects of Mandatory License Suspension for DWI Conviction (Washington, D.C.: U.S. Department of Transportation, 1987), p. 2.

16. Id. at pp. iv, 5, 59.

APPENDIX A

Implied Consent Refusal:
Sanctions as of January 1, 1988

Mandatory Minimum License Action:

State	Possible Criminal Sanction	1st Refusal	2nd Refusal	Explanatory Notes
AL	No	S-90 days*	S-1 yr*	*Mandatory suspension may be reduced if the driver is acquitted of the related DWI charge.
AK	Yes	R-90 days	R-1 yr*	*or previous DWI conviction. 3rd refusal or DWI conviction or combination thereof within a certain time frame results in a mandatory 10-yr revocation.
AZ	No	S-1 yr	S-1 yr	
AR	No	S-6 mo	S-1 yr*	*3rd refusal within 3 yr results in a mandatory 2-yr suspension. 4th refusal within 3 yr results in a mandatory 3-yr revocation.
CA	No	S-6 mo	R-2 yr*	*This revocation is for a driver who refuses after having been convicted of a DWI within 5 yr of the refusal. This includes guilty and nolo-contendere pleas to reckless driving in lieu of a DWI charge. There is mandatory revocation for 3 yr if the driver has two DWI offenses within 5 yr of refusal.
CO	No	R-1 yr	R-1 yr	

State	Possible Criminal Sanction	1st Refusal	2nd Refusal	Explanatory Notes
CT	No	S-6 mo	S-1 yr*	*Also applies to 1st refusal when there has been a previous DWI conviction. A 3rd refusal or a 2nd plus a DWI results in a mandatory 3-yr suspension. When person refuses a test, the police must hold the license for 24 hr regardless of the number of prior refusals.
DE	No	R-6 mo	R-18 mo*	*3rd and subsequent refusals within 5 yr result in a mandatory 2-yr revocation.
D.C.	No	S-1 yr	S-1 yr	
FL	No	---*	S-18 mo	*Hardship license available.
GA	No	S-6 mo*	S-6 mo*	*If refusal is in connnection with a DWI/homicide charge, there is a mandatory 1-yr suspension.
HI	No	R-1 yr	R-2 yr*	*Driver must undergo assessment for alcohol dependence and the need for treatment.
ID	No	S-180 days	S-180 days	
IL	No	---*	S-90 days	*Judicial driving permit available.
IN	No*	S-1 yr**	S-1 yr**	*Unless there has been a death or serious injury likely to result in death. **May not be mandatory in all cases.
IA	No	R-240 days*	R-360 days	*If the driver pleads guilty to a subsequent DWI charge, a restricted license may be issued for this implied consent violation.
KS	No	---	---	

State	Possible Criminal Sanction	1st Refusal	2nd Refusal	Explanatory Notes
KY	No	---	---	
LA	No	S-90 days	S-545 days	
ME	No	S-90 days*	S-1 yr	*If driver is under 21 and there is probable cause to believe he or she was driving with a BAC greater than 0.02, then there is a 1 yr suspension.
MD	No	---*	---*	*Restricted license is available.
MA	No	S-120 days	S-120 days	
MI	No	---*	S-1 yr	*Hardship license available.
MN	No	---	----	
MS	No	S-90 days*	S-90 days	*Mandatory suspension for 1 yr if there has been a prior DWI conviction.
MO	No	---*	R-1 yr	*Hardship license may be issued.
MT	No	S-90 days	R-1 yr*	*License is seized and forwarded to driver licensing division.
NE	Yes	R-60 days	R-6 mo*	*3rd refusal results in a mandatory 1-yr revocation.
NV	No	R-1 yr	R-3 yr	
NH	No	R-90 days	R-1 yr*	*Or where it is a first refusal with prior DWI. Also special provisions when a probationary license involved.
NJ	Yes	R-6 mo	R-2 yr	
NM	No	R-1 yr	R-1 yr	

State	Possible Criminal Sanction	1st Refusal	2nd Refusal	Explanatory Notes
NY	No	R-6 mo*	R-1 yr	*If the driver is under 21, his or her license will be suspended or revoked for 1 yr or until age 21, whichever is the greater time period.
NC	No	R-6 mo*	R-1 yr*	*Can be lowered to 6 mo if no prior refusal or DWI conviction w/in 7 yr and incident does not involve death or critical injury.
ND	No	R-1 yr	R-2 yr*	*3rd or subsequent refusals result in a mandatory 3-yr revocation.
OH	Yes	---	---	
OK	No	---	---	
OR	No	S-90 days	S-1 yr	Emergency license available.
PA	No	S-1 yr	S-1 yr	
PR	No	---	---	
RI	Yes	S-3 mo*	S-1 yr**	*If driver is under 18, there is a mandatory 6-mo suspension. **3rd refusal within 5-yr period results in a mandatory 2-yr suspension.
SC	No	S-90 days	S-90 days	
SD	No	---	---	
TN	No	---	---	
TX	No	---	---	
UT	No	R-1 yr	R-1 yr	

State	Possible Criminal Sanction	1st Refusal	2nd Refusal	Explanatory Notes
VT	No	S-6 mo	S-18 mo*	*If not w/in 5 yr, mandatory suspension is for only 6 mo. 3rd and subsequent refusals result in a mandatory 2-yr revocation. A previous DWI conviction is considered to be a prior refusal.
VA	No	S-6 mo	S-1 yr*	*Within 1 yr.
WA	No	R-1 yr	R-2 yr	Test may be taken w/o consent in certain cirmcumstances.
WV	No	R-1 yr	R-5 yr*	*3rd refusal results in a mandatory 10-yr revocation.
WI	No	R-30 days	R-90 days	3rd and subsequent refusals w/in 5 yr result in a mandatory 120-day revocation. Previous DWI and Admin. Per Se are considered to be prior refusals.
WY	No	S-6 mo	S-6 mo	

S = suspension; R = revocation.

Source: Data were taken from Digest of State Alcohol-Highway Safety Related Legislation, 6th ed. (Washington, D.C.: U.S. Dept. of Transportation, National Highway Traffic Safety Administration, 1988).

APPENDIX B

Administrative Per Se and Pre-DWI Adjudication Licensing Actions:
Sanctions as of January 1, 1988

State	BAC Level	Mandatory Minimum License Action		
		1st offense	2nd offense*	3rd/Subsequent offense*
AK	0.10	R-30 days	R-1 yr	R-10 yr
AZ	0.10	S-30 days	S-90 days	S-90 days
CA	Pre-DWI adjudication licensing action for persons who have been involved in a DWI related accident and who have had a previous DWI related vehicle homicide conviction.			
CO	0.15	R-1 yr	R-1 yr	R-1 yr
DE	Probable cause of DWI	R-3 mo	R-1 yr	R-18 mo
DC	Sufficient evidence of DWI	---	---	---
IL	0.10	---	S-90 days	S-90 days
IN	0.10	Suspension up to 180 days or until the DWI charges have been disposed of, whichever occurs first.		
IA	0.10	---	R-1 yr	R-1 yr
KY	Alternative pre-DWI criminal adjudication licensing action by the courts if there is probable cause and certain other circumstances are present.			
LA	0.10	S-30 days	S-1 yr	S-1 yr
ME Over 21	0.10	---	---	---
ME Under 21	0.02	---	---	---

State	BAC Level	Mandatory Minimum Licensing Action 1st offense	2nd offense*	3rd/subsequent offense*
MA	Alternative pre-DWI criminal adjudication licensing action by the courts.			
MN	0.10	---	---	---
MS	0.10**	---	---	---
MO	0.13	---	---	---
NV	0.10	---	---	---
NM Over 18	0.10	R-90 days	R-1 yr	R-1 yr
NM Under 18	0.05	R-6 mo	R-1 yr	---
NY	Alternative pre-DWI criminal adjudication licensing action by the courts. Temporary suspension is mandatory for repeat offenders w/in 5 yr.			
NC Judicial Per Se	0.10	R-10 days	R-10 days	R-10 days
ND	0.10	S-30 days	S-1 yr	S-2 yr
OH	Alternative pre-DWI criminal adjudication licensing action by the courts.			
OK	0.10	---	---	---
OR	0.08	S-30 days	S-1 yr	S-1 yr
UT	0.08	---	---	---
WVa	0.10 or driving under the influence	R-90 days	R-5 yr	R-10 yr
WI	0.10	S-15 days	S-15 days	S-15 days
WY	0.10	---	S-90 days	S-90 days

S = suspension; R = revocation.

*Time period between offenses varies. A test refusal under an implied consent statute may also be considered a prior offense under the administrative per se statute.

**Special provisions, procedures.

Source: The data were taken from Digest of State Alcohol-Highway Safety Related Legislation, 6th ed. (Washington, D.C.: U.S. Department of Transportation, National Highway Traffic Safety Administration, 1988).

APPENDIX C

23 U.S.C. § 408. Alcohol Traffic Safety Programs

(a) Subject to the provisions of this section, the Secretary shall make basic and supplemental grants to those States which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol. Such grants may only be used by recipient States to implement and enforce such programs.

(b) No grant may be made to a State under this section in any fiscal year unless such State enters into such agreements with the Secretary as the Secretary may require to ensure that such State will maintain its aggregate expenditures from all other sources for alcohol traffic safety programs at or above the average level of such expenditures from all other sources for alcohol traffic safety programs at or above the average level of such expenditures in its two fiscal years preceding the date of enactment of this section [enacted Oct. 25, 1982].

(c) No State may receive grants under this section in more than five fiscal years. The Federal share payable for any grant under this section shall not exceed--
(1) in the first fiscal year the State receives a grant under this section, 75 per centum of the cost of implementing and enforcing in such fiscal year the alcohol and controlled substance traffic safety program adopted by the State pursuant to subsection (a);
(2) in the second fiscal year the State receives a grant under this section, 50 per centum of the cost of implementing and enforcing in such fiscal year such program; and
(3) in the third, fourth, and fifth fiscal years the State receives a grant under this section, 25 per centum of the cost of implementing and enforcing in such fiscal year such program.

(d) (1) Subject to subsection (c), the amount of a basic grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(1) shall equal 30 per centum of the amount apportioned to such State for fiscal year 1983 under section 402 of this title [23 USCS § 402].
(2) Subject to subsection (c), the amount of a supplemental grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(2) shall not exceed 20 per centum of the amount apportioned to such State for fiscal year 1983 under section 402 of this title [23 USCS § 402]. Such supplemental grant shall be in addition to any basic grant received by such State.
(3) Subject to subsection (c), the amount of a special grant made under this section for any fiscal year to any State which is eligible for such a grant under subsection (e)(3) shall not exceed 5 per centum of the amount apportioned to such State for fiscal year 1984 under sections 402 and 408 of this title. Such grant shall be in addition to any basic or supplemental grant received by such state.

(e) (1) for purposes of this section, a State is eligible for a basic grant if such State provides--

(A) for the prompt suspension, for a period not less than ninety days in the case of a first offender and not less than one year in the case of any repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer;

(B) for mandatory sentence, which shall not be subject to suspension or probation, of (i) imprisonment for not less than forty-eight consecutive hours, or (ii) not less than ten days of community service, of any person convicted of driving while intoxicated more than once in any five-year period;

(C) that any person with a blood alcohol concentration of 0.10 percent or greater when driving a motor vehicle shall be deemed to be driving while intoxicated; and

(D) for increased efforts or resources dedicated to the inforcement of alcohol-related traffic laws and increased efforts to inform the public of such enforcement.

(2) For purposes of this section, a State is eligible for a supplemental grant if such State is eligible for a basic grant and in addition provides for some or all of the criteria established by the Secretary under subsection (f).

(3) For the purposes of this section, a State is eligible for a special grant if the State enacts a statute which provides that--

(A) any person convicted of a first violation of driving under the influence of alcohol shall receive--

(i) a mandatory license suspension for a period of not less than ninety days; and either

(ii) (I) an assignment of one hundred hours of community service; or

(II) a minimum sentence of imprisonment for forty-eight consecutive hours;

(B) any person convicted of a second violation of driving under the influence of alcohol within five years after a conviction for the same offense, shall receive a mandatory minimum sentence of imprisonment for ten days and license revocation for not less than one year;

(C) any person convicted of a third or subsequent violation of driving under the influence of alcohol within five years after a prior conviction for the same offense shall--

(i) receive a mandatory minimum sentence of imprisonment for one hundred and twenty days; and

(ii) have his license revoked for not less than three years; and

(D) any person convicted of driving with a suspended or revoked license or in violation of a restriction due to driving under the influence of alcohol conviction shall receive a mandatory sentence of imprisonment for at least thirty days, and shall upon release from

imprisonment, receive an additional period of license suspension or revocation of not less than the period of suspension or revocation remaining in effect at the time of commission of the offense of driving with a suspended or revoked license.

(f) The Secretary shall, by rule, establish criteria for effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol, which criteria shall be in addition to those required for a basic grant under subsection (e)(1). The Secretary shall establish such criteria in cooperation with the States and political subdivisions thereof, appropriate Federal departments and agencies, and such other public and nonprofit organizations as the Secretary may deem appropriate. Such criteria may include, but need not be limited to, requirements--

(1) for the establishment and maintenance of a statewide driver recordkeeping system from which repeat offenders may be identified and which is accessible in a prompt and timely manner to the courts and to the public;

(2) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while intoxicated;

(3) for the impoundment of any vehicle operated on a State road by any idividual whose driver's license is suspended or revoked for any alcohol-related driving offense;

(4) for the establishment in each major political subdivision of a State of locally coordinated alcohol traffic safety programs which are administered by local officials and are financially self-sufficient;

(5) for the grant of presentence screening authority to the courts;

(6) for the setting of the minimum drinking age in such State at twenty-one years of age;

(7) for the consideration of and, where consistent with other provisions of State law and constitution the adoption of, recommendations that the Presidential Commission on Drunk Driving may issue during the period in which rules are being made to carry out this section; and

(8) for the creation and operation of rehabilitation and treatment programs for those arrested and convicted of driving while under the influence of a controlled substance or for the establishment of research programs to develop effective means of detecting use of controlled substrances by drivers.

(g) There is hereby authorized to be appropriated to carry out this section, out of the Highway Trust Fund, $25,000,000 for the fiscal year ending September 30, 1983, and $50,000,000 per fiscal year for each of the fiscal years ending September 30, 1984, and September 30, 1985. All provisions of chapter 1 of this title that are applicable to Federal-aid primary highway funds, other than provisions relating to the apportionment formula and provisions limiting the expenditures of such funds to Federal-aid systems, shall apply to the funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section and except that sums authorized by this subsection shall remain available until expended. Sums authorized by this subsection shall not be subject to any obligation limitation for State and community highway safety programs.

APPENDIX D

§ 1309.6 Requirements for a Supplemental Grant

(a) To qualify for a supplemental grant of 20 percent of its 23 U.S.C. 402 apportionment for fiscal year 1983, a State must have in place and implement or adopt and implement a license suspension system in which the average time from date of arrest to suspension of a license does not exceed an average of 45 days, and

(b) Have in place and implement or adopt and implement eight of the following twenty-two requirements.
(1) Enactment of a law that raises, either immediately or over a period of three years, the minimum age for drinking any alcoholic beverage to 21. To demonstrate compliance, a State shall submit a copy of its law adopting this requirement.
(2) Coordination of State alcohol highway safety programs. To demonstrate compliance, a State shall submit information explaining how the work of the different State agencies involved in alcohol traffic safety programs is coordinated.
(3) Rehabilitation and treatment programs for persons arrested and convicted of alcohol-related traffic offenses. To demonstrate compliance, a State shall submit a copy of its law or regulation adopting this requirement, and a copy of the minimum standards set for rehabilitation and treatment programs by the State.
(4) Establishment of State Task Forces of governmental and non-governmental leaders to increase awareness of the problems, to apply more effectively drunk driving laws and to involve governmental and private sector leaders in programs attacking the drunk driving problem. To demonstrate compliance a State shall submit a copy of the executive order, regulation, or law setting up the task force a description of how the interests of local communities are represented on the task force.
(5) A Statewide driver record system readily accessible to the courts and the public which can identify drivers repeatedly convicted of drunk driving. Conviction information must be recorded in the system within 30 days of a conviction, license sanction or the completion of the appeals process. Information in the record system must be retained for at least five years. The public shall have access to those portions of a driver's record that are not protected by Federal or State confidentiality or privacy regulations. To demonstrate compliance, a State shall submit a description of its record system discussing its accessibility to prosecutors, the courts and the public and providing data showing that the time required to enter alcohol-related convictions into the system is not greater than 30 days. A State shall also submit information showing that the data is retained in the system for at least 5 years.

(6) Establishment in each major political subdivision of a locally coordinated alcohol traffic safety program, which involves enforcement, adjudication, licensing, public information, education, prevention, rehabilitation and treatment and management and program evaluation. In small States, local coordination may be demonstrated by showing that the interests of the local communities are recognized and coordinated by the State program. To demonstrate compliance, a State shall submit a description of the number of programs, type of programs and percentage of the State population covered by such local programs.

(7) Prevention and long-term educational programs on drunk driving. To demonstrate compliance, a State shall submit a description of its prevention and education program, discussing how it is related to changing societal attitudes and norms against drunk driving with particular attention to the implementation of comprehensive youth alcohol traffic safety program, and the involvement of private sector groups and parents.

(8) Authorization for courts to conduct pre- or post-sentence screenings of convicted drunk drivers. To demonstrate compliance, a State shall submit a copy of its law adopting this requirement and a brief description of its screening process.

(9) Development and implementation of State-wide evaluation system to assure program quality and effectiveness. To demonstrate compliance, a State shall provide a copy of the executive order, regulation or law setting up the evaluation program and a copy of the evaluation plan.

(10) Establishment of a plan for achieving self-sufficiency for the State's total alcohol traffic safety program. To demonstrate compliance, a State shall provide a copy of the plan. Specific progress toward achieving financial self-sufficiency must be shown in subsequent years.

(11) Use of roadside sobriety checks as part of a comprehensive alcohol safety enforcement program. To demonstrate compliance, a State shall submit information showing that it is systematically using roadside sobriety checks. In addition, a State shall provide a copy of its regulation or policy authorizing the use of roadside checks.

(12) Establishment of programs to encourage citizen reporting of alcohol-related traffic offenses to the police. To demonstrate compliance, a State shall submit a copy of its citizen reporting guidelines or policy and data on the degree of citizen participation, e.g., number of citizen reports and the number of related arrests. A State can provide the necessary data based on a statistically valid sample.

(13) Establishment of a 0.08 percent blood alcohol concentration as presumptive evidence of driving while under the influence of alcohol to demonstrate compliance, a State shall submit a copy of its law adopting this requirement.

(14) Adoption of a one-license/one record policy. In addition, the State shall fully participate in the National Driver Register and the Driver License Compact. To demonstrate compliance, a State shall submit a copy of the order, regulation or law showing the State is a

member of the Driver License compact and has adopted a one-license/one-record policy, and is participating in the National Driver Register.

(15) Authorization for the use of a preliminary breath test where there is probable cause to suspect a driver is impaired. To demonstrate compliance, a State shall submit a copy of its law adopting this requirement.

(16) Limitations on plea-bargaining in alcohol-related offenses. To demonstrate compliance, a State shall submit a copy of its law or court guidelines requiring that no alcohol-related charge be reduced to a non-alcohol-related charge or probation without judgment be entered without a written declaration of why the action is in the interest of justice. If a charge is reduced, the defendant's driving record must reflect that the reduced charge is alcohol-related.

(17) Provide victim assistance and victim restitution programs and require the use of a victim impact statement prior to sentencing in all cases where death or serious injury results from an alcohol-related traffic offense. To demonstrate compliance, a State shall submit a description of its victim assistance and restitution programs, and its use of victim impact statements.

(18) Mandatory impoundment or confiscation of license plates/tags of any vehicle operated by an individual whose license has been suspended or revoked for an alcohol-related offense. Any such impoundment or confiscation shall be subject to the lien or ownership right of third parties without actual knowledge of the suspension or revocation. To demonstrate compliance a State shall submit a copy of its law adopting this requirement.

(19) Enactment of legislation or regulations authorizing the arresting officer to determine the type of chemical test to be used to measure intoxication and to authorize the arresting officer to require more than one chemical test. To demonstrate compliance, a State shall submit a copy of its law adopting this requirement.

(20) Establishment of liability against any person who serves alcoholic beverages to an individual who is visibly intoxicated. To demonstrate compliance, a State shall submit a copy of the law or court decision of a State's highest court establishing that liability.

(21) Use of innovative programs. To demonstrate compliance a State shall submit a description of its program and an explanation showing that the program will be as effective as any of the programs adopted to comply with the other supplemental criteria.

(22) Rehabilitation and treatment programs for those arrested and convicted of driving under the influence of a controlled substance or research programs to develop effective means of detecting use of controlled substances by drivers. To demonstrate compliance with the rehabilitation and treatment portion of this criterion, a State shall submit a copy of its law or regulation adopting the requirement and a copy of the minimum standards set for these programs by the State. To demonstrate compliance with the research portion of this criterion, a State shall submit a description of its drugged driving research program and the research plan.

(c) To qualify for a supplemental grant of 10 percent of its 23 U.S.C. 402 apportionment for fiscal year 1983, a State must:
(1) Have in place and implement or adopt and implement a license suspension system in which the average time from date of arrest to suspension of a license does not exceed 45 days; and
(2) Have in place and implement or adopt and implement four of the twenty-two requirements specified in paragraph (b) of this section.

(d) To qualify for a supplemental grant for a second and a third year, a State must:
(1) Show that it has increased its performance of each of the requirements it adopted in the prior year, and
(2) Adopt two more requirements from paragraph (b) of this section for each subsequent year, except that a State does not have to implement more than a total of fifteen criteria.

APPENDIX E

§ 1309.7 Requirements for a Special Grant

To qualify for a special grant of five percent of its 23 U.S.C. 402 and 408 apportionment for fiscal year 1984, a State must have in place and implement or adopt and implement a statute which provides that:

(a) Any person convicted for a first violation of driving while intoxicated shall receive:
(1) A mandatory license suspension for a period of not less than ninety days; and
(2)(i) An assignment of one hundred hours of community service to be completed within three months; or
(ii) A mandatory minimum sentence of imprisonment for forty-eight consecutive hours;

(b) Any person convicted of a second violation of driving while intoxicated within five years after a conviction for the same offense shall receive:
(1) A mandatory minimum sentence of imprisonment for ten days to be served in no less than 48 consecutive hour segments within a ninety day period from conviction; and
(2) A mandatory license revocation for not less than one year;

(c) Any person convicted of a third or subsequent violation of driving while intoxicated within five years after a prior conviction for the same offense shall receive:
(1) A mandatory minimum sentence of imprisonment for one hundred and twenty consecutive days; and
(2) A mandatory license revocation of not less than three years; and

(d) Any person convicted of driving with a suspended or revoked license or in violation of a restriction due to a driving while intoxicated conviction shall receive:
(1) A mandatory sentence of imprisonment for thirty consecutive days; and
(2) Upon release from imprisonment, and an additional period of license suspension or revocation for not less than the period of suspension or revocation remaining in effect at the time of commission of the offense of driving with a suspended or revoked license.