

Are Your City's Towing Practices Constitutional?

"Community Caretaking" is the New Standard

By Mark Rauch, General Counsel, City County Insurance Services

A police officer orders a vehicle towed or impounded, in accordance with Oregon law. No problem, right? Not so fast! Current towing/impound policies and practices of many law enforcement agencies may be unconstitutional, potentially exposing those agencies to civil liability.

ORS §809.720 authorizes police officers to order vehicles impounded when the officer has probable cause to believe the driver has committed one or more of the following offenses:

- a) Driving while suspended or revoked;
- b) Driving under the influence;
- c) Operating without driving privileges or in violation of license restriction; and
- d) Driving uninsured.

However, based on the federal court analysis discussed below, exercise of that statutory authority violates the U.S. Constitution unless it meets the "community caretaking" exception.

Impounding a Vehicle is a Seizure Without Warrant Within the Meaning of the Fourth Amendment

In *Miranda v City of Cornelius*, 429 F3d 858 (November 2005), the 9th Circuit Court of Appeals made it quite clear that impoundment of a vehicle is a seizure without a warrant within the meaning of the Fourth Amendment. Such an impound is therefore unreasonable unless it fits within the "community caretaking doctrine."

In *Miranda*, a police officer observed an unlicensed driver, Mrs. Miranda, driving a car (her husband was in the passenger's seat teaching her to drive). The officer followed the Mirandas to their home, where they parked in the driveway. The officer ordered the vehicle impounded. Although the impound was clearly authorized by ORS §809.720, the 9th Circuit Court of Appeals nonetheless found it a violation of the Fourth Amendment because it did not fit within the "community caretaking" exception. The court's ruling is best summarized in this excerpt:

"In their 'community caretaking' function, police officers may impound vehicles that 'jeopardize public safety and the efficient movement of vehicular traffic.' Whether an impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officer's duty to prevent it from creating a



hazard to other drivers or being a target for vandalism or theft. A driver's arrest... is not relevant except insofar as it affects the driver's ability to remove the vehicle from a location at which it jeopardizes the public safety or is at risk of loss. But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license. "

The court goes on to say:

"The reasonableness of an impoundment under the community caretaking function ... [depends on] whether the impoundment fits within the authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience."

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City Towing Practices

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Another recent case dealing with this question held that impoundment of a vehicle legally parked on a residential street, two houses away from the driver's residence, was likewise unconstitutional. *United States v Caseres*, 533 F3d 1064 (9th Cir., July 2008).

Other less recent, but still instructive, cases have reached similar conclusions, including the following:

- *United States v Duguay*, 93 F3d 346 (7th Cir., 1996). Impoundment based solely on arrestee's status as driver, owner, or passenger, without regard to whether any traffic congestion, parking violation, or road hazard exists or could be readily eliminated "is irrational and inconsistent with 'caretaking' functions."
- *United States v Pappas*, 735 F2d 1232 (10th Cir 1984) Impoundment was unconstitutional where defendant's car was legally parked on private property and defendant had friends with him who may have been able to take custody of the car.
- *United States v Squires*, 456 F2d 967 (2nd Cir 1972) Impoundment not justified where car was parked in parking lot behind apartment house in which arrestee lived, "which was an appropriate place for it to be," and police officers had no reasonable basis for concluding it was necessary to impound the car to protect it.

Impoundment was found to be justified under the community caretaking doctrine in *Southwick*, 2008 WL 5111144 (D.Or.) where the plaintiff (driver) was cited for driving while suspended and uninsured, the vehicle was pulled to

the side of a public road, and no one could legally drive it since it had no license plates, was unregistered and uninsured.

Community Caretaking Must Apply

As you can see from these cases, the vehicle impound statute can only be constitutionally enforced in circumstances where the fairly narrow community caretaking doctrine applies. CIS recommends review of city towing/impound policies and practice to be sure they are consistent with current case law. The following is an example of what would probably be a constitutionally enforceable policy:

Vehicles are not to be towed and/or impounded under the authority of ORS §809.720 under any of the following circumstances:

- The vehicle is parked on private property on which the registered owner or operator is legally residing, or the property owner does not object to the vehicle being left in the parked location.
- The registered owner and/or a passenger present in the vehicle at the time of the stop have a valid driver's license and are willing and legally able to drive the vehicle at the time.
- The vehicle is legally parked at a time and place where the likelihood of it being subject to theft and/or vandalism is remote and traffic or public safety is not impeded.

Editor's Note: Cities can consult their attorney for further analysis of this issue, or contact one of the CIS staff attorneys for assistance. ■

CIS grants Harrisburg security.



The city of Harrisburg upgraded its skate park security with CIS Risk Management grant funds. City Administrator Bruce Cleeton says, without CIS "***we may have had to put it off for a year or two.***"

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