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CAPSIZED BY THE CONSTITUTION: CAN WASHINGTON STATE FERRIES MEET FEDERAL SCREENING REQUIREMENTS AND STILL PASS STATE CONSTITUTIONAL MUSTER?

David J. Perkins

Abstract: In response to the threat of international terrorism, the United States Coast Guard has issued new regulations requiring every ferry operator to begin screening passengers and vehicles for dangerous items. These new regulations will force Washington State Ferries (WSF), the agency responsible for operating the State’s ferry system, to either begin screening passengers and vehicles or face a possible shutdown. Compliance, however, poses problems for WSF because of privacy protections under the Washington State Constitution. Article I, section 7 of the state constitution contains an explicit protection of privacy. This section provides broader protections from warrantless searches by state actors than similar protections found in the Fourth Amendment of the United States Constitution. Apparently recognizing that article I, section 7 would not permit physical searches of vehicle interiors and trunks, WSF has proposed an alternative screening plan that would rely on non-intrusive technology or dogs to screen vehicles. This Comment argues that the use of these alternative screening methods will also be an unconstitutional, warrantless search under article I, section 7. Such searches will not satisfy any of the exceptions to this provision’s warrant requirement, and will make the searches unconstitutional intrusions into the private affairs of the ferry passengers. Despite its best efforts to find a compromise, WSF may still be faced with the choice between non-compliance with the federal regulations and violating its passengers’ constitutionally protected privacy rights.

Washington State Ferries (WSF) operates the largest ferry system in the United States.1 WSF describes itself as a “maritime highway” that carries 20,000 passengers each day.2 The ferry system consists of twenty-nine vessels and twenty ferry terminals.3 Additionally, WSF is the only practical means of transportation—and the sole means of commercial transport—between the mainland and populations living on Vashon Island and the San Juan Islands.4

WSF now faces a dilemma. New maritime security regulations5 issued by the U.S. Coast Guard as part of the nation’s “multi-front war

1. WASH. STATE FERRIES, AN INTRODUCTION TO THE LARGEST FERRY SYSTEM IN THE NATION 2 (2003).
2. Id. at 2.
3. Id. at 1.
4. Id. at 2.
against global terrorism require WSF to begin screening passengers and vehicles for dangerous items by June 30, 2004. All commercial ferry operators must develop a security plan that includes “a reasonable examination” of passengers and vehicles to ensure that no “dangerous substances and devices” are present. Any operator that fails to comply by the June 30, 2004 deadline faces the possible shutdown of its ferry operations.

Complying with these requirements, however, presents significant legal problems for WSF. Absent a warrant or an exception to the warrant requirement, opening and inspecting vehicle interiors and trunks would violate article I, section 7 of the Washington State Constitution. Article I, section 7’s explicit protection of privacy is broader than the similar protections of the Fourth Amendment of the U.S. Constitution. Under article I, section 7, warrantless searches are unconstitutional absent special circumstances.

Noting the protections of the state constitution, WSF has proposed an alternative, less intrusive screening plan to meet federal security requirements. Instead of opening vehicle interiors for inspection, this plan relies on the use of non-intrusive technology or dogs to screen vehicles. However, despite the less intrusive nature of this alternative plan, these methods will result in the same constitutional problems as opening and inspecting each vehicle compartment.

This Comment argues that WSF’s proposed screening plan violates article I, section 7 of the Washington State Constitution. As WSF may have recognized, physical inspections of vehicle trunks and interiors would constitute searches under the state constitution, triggering the protections of article I, section 7. However, WSF’s proposed use of non-intrusive technology or dogs will similarly constitute a search under

7. 33 C.F.R. § 104.115.
8. Id. § 101.105.
12. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”).
14. Id.
16. Id. at 3.
Washington law. These searches will not satisfy any of the "jealously and carefully drawn" exceptions\textsuperscript{17} to the state constitution's warrant requirement under article I, section 7. Despite WSF's efforts to find a constitutionally acceptable method of screening vehicles, its current proposal will not satisfy either the requirements of the new federal maritime regulations or the protections of the state constitution.

Part I of this Comment provides an overview of the privacy protections of article I, section 7 of the Washington State Constitution, as well as the specific protections afforded to automobiles. Part II discusses the factors used by the Supreme Court of Washington to determine whether the use of technology or dogs is a search under article I, section 7. Part III describes the new federal maritime regulations and WSF's proposal to comply with these regulations. Finally, Part IV argues that WSF's use of non-intrusive technology or dogs to screen vehicles will constitute a search and will trigger the protections of article I, section 7. Part IV further argues that these searches will not satisfy any of the exceptions to the warrant requirement and will be an unconstitutional intrusion into the passengers' private affairs. Part V concludes that a constitutional challenge to WSF's plan under article I, section 7 will likely succeed, unless the court creates a new exception to the warrant requirement for minimally intrusive searches where the threat from terrorists is severe.

I. CITIZENS HAVE A PRESUMPTIVE RIGHT TO BE FREE OF WARRANTLESS SEARCHES UNDER ARTICLE I, SECTION 7

Article I, section 7 of the Washington State Constitution explicitly provides for a right to privacy that protects individuals from warrantless searches of their persons, homes, and vehicles. The provision states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."\textsuperscript{18} The Supreme Court of Washington has interpreted this section to create a body of jurisprudence independent from the Fourth Amendment to the U.S. Constitution.\textsuperscript{19} The protections of article I, section 7 are broader than those of the Fourth Amendment;\textsuperscript{20} the state protections prohibit warrantless searches unless justified by one

\begin{itemize}
  \item \textsuperscript{17} State v. Hendrickson, 129 Wash. 2d 61, 70, 917 P.2d 563, 568 (1996).
  \item \textsuperscript{18} WASH. CONST. art. I, § 7.
  \item \textsuperscript{20} Hendrickson, 129 Wash. 2d at 70 n.1, 917 P.2d at 567 n.1.
\end{itemize}
of the recognized exceptions to the warrant requirement\textsuperscript{21} and include a historically recognized expectation of privacy in motor vehicles.\textsuperscript{22}

A. Article I, Section 7 Provides a Broader Right to Privacy Than the Similar Protections Afforded by the Fourth Amendment

The Supreme Court of Washington has interpreted the text and history of the Washington State Constitution's article I, section 7 as affording a broader right to privacy than that protected by the Fourth Amendment to the U.S. Constitution.\textsuperscript{23} In \textit{State v. Gunwall},\textsuperscript{24} the Supreme Court of Washington adopted six nonexclusive factors for courts to consider in determining whether a provision of the state constitution affords more protections than its federal counterpart.\textsuperscript{25} Applying those factors to article I, section 7, the court held that in certain circumstances this section provides broader protections than the Fourth Amendment.\textsuperscript{26} The court concluded that the framers of the state constitution intended to provide an explicit protection of privacy, not merely protection from unlawful searches and seizures, as evidenced by the significant textual differences between the state and federal provisions and the legislative history of article I, section 7.\textsuperscript{27}

In the years immediately following the \textit{Gunwall} decision, Washington courts would not address article I, section 7 contentions unless the parties adequately briefed the \textit{Gunwall} factors.\textsuperscript{28} This adequate briefing requirement led to a number of cases in which Washington courts only addressed rights under the Fourth Amendment.\textsuperscript{29} Despite this initially inconsistent application, the court now considers it a matter of well-

\begin{footnotes}
21. Id. at 70, 917 P.2d at 568.
22. Id. at 70 n.1, 917 P.2d at 567 n.1.
25. These six factors are: (1) the textual language of the Washington State Constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in the structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Id. at 61–62, 720 P.2d at 812–13.
26. See id. at 63–67, 720 P.2d at 814–15; \textit{see also infra} Part I.D (providing examples of situations where article I, section 7 provides broader protections than the Fourth Amendment).
\end{footnotes}
settled law that article I, section 7 provides broader protections than the Fourth Amendment.³⁰

B. Warrantless Searches Performed by State Actors Are Per Se Unreasonable and Violate Article I, Section 7

An alleged violation of article I, section 7 must satisfy two requirements. First a “search” must occur.³¹ The Supreme Court of Washington has defined a search as an “intru[sion] into a person’s ‘private affairs.’”³² Under article I, section 7, the court defines the boundaries of “private affairs” by a traditional, objective standard, not the individual’s subjective perception of the intrusion.³³ Specifically, the right to privacy includes “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”³⁴ This definition contrasts with the Fourth Amendment standard, which recognizes searches only in situations where individuals have both a reasonable and subjective expectation of privacy.³⁵

Second, the search must be performed by a state actor.³⁶ Normally, for the purposes of article I, section 7, a state actor is a law-enforcement officer.³⁷ However, other state employees acting in their official capacities can also be deemed state actors.³⁸ For example, Washington courts have held that the actions of a tax appraiser,³⁹ a city building inspector,⁴⁰ a public utility district’s treasurer-comptroller,⁴¹ and school

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³³ See Young, 123 Wash. 2d at 181, 867 P.2d at 597.
³⁴ Id. (quoting State v. Myrick, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)) (internal quotations omitted).
³⁵ See id. (noting differences between private affairs inquiry under article I, section 7 and the reasonable expectation of privacy under the Fourth Amendment).
³⁷ See id.
³⁸ Id.
⁴¹ See Maxfield, 133 Wash. 2d at 337, 945 P.2d at 199.
officials are searches by state actors that trigger the protections of article I, section 7.

Absent one of the six recognized exceptions, warrantless searches performed by state actors are "per se unreasonable" under article I, section 7. The Supreme Court of Washington first applied the per se unreasonable rule to warrantless searches approximately thirty years ago. Under this rule, warrantless searches are presumed to be impermissible, and the prosecution bears the burden of showing that these searches fall within an exception to the warrant requirement.

C. Washington Courts Permit Warrantless Searches Under Six Exceptions to the Warrant Requirement

The Supreme Court of Washington recognizes six "jealously and carefully drawn" exceptions to the general rule that warrantless searches are per se unreasonable under article I, section 7. These six exceptions are: (1) searches incident to a valid arrest; (2) inventory searches; (3) plain view; (4) investigative stops; (5) consent; and (6) exigent circumstances. Under article I, section 7, the court does not recognize an exception for circumstances where a threat to public safety may outweigh individual privacy rights. Washington case law has further defined and limited these exceptions to the warrant requirement. A search incident to arrest only applies during the arrest process and is generally limited to searches for weapons or destructible evidence. Inventory searches are limited to

43. Maxfield, 133 Wash. 2d at 337, 945 P.2d at 199.
44. See infra Part I.C.
46. Id. at 70-71, 917 P.2d at 568.
47. Id. at 70, 917 P.2d at 568.
48. Id. Interpreting the Fourth Amendment, the Supreme Court of Washington has applied a "community caretaking" exception to allow evidence obtained by police encounters involving emergency aid and routine checks on health and safety where these encounters were completely divorced from any criminal investigation. However, the court did not address if these actions violated article I, section 7 because the parties had not properly briefed the Gunwall factors. State v. Kinzy, 141 Wash. 2d 373, 385 n.33, 5 P.3d 668, 675 n.33 (2000). The court has not recognized the community caretaking exception in the article I, section 7 jurisprudence.
49. Hendrickson, 129 Wash. 2d at 71, 917 P.2d at 568.
50. See infra Part I.C.3.
instances where officers need to precisely catalog property taken into custody to defend against claims of theft and vandalism.\(^5\) The plain view exception only allows for a warrantless visual search where officers "(1) have a prior justification for the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the item as contraband."\(^5\) The investigative stop is an exception that allows law-enforcement officers to briefly detain persons for questioning if the officers reasonably suspect these persons of criminal activity.\(^5\) The remaining two exceptions, consent and exigent circumstances, require a more detailed explanation.

I. Consent Must Be Given Voluntarily To Satisfy the Consent Exception

Coerced or involuntary consent does not satisfy the consent exception to the warrant requirement.\(^5\) Washington courts have struck down consent searches where the method employed to obtain consent was coercive.\(^5\) For example, in State v. Ferrier,\(^5\) the Supreme Court of Washington struck down "knock and talk" procedures in which heavily armed law-enforcement officers entered a suspect's home and asked for consent to search.\(^5\) The court held that this "show of force" was "inherently coercive," and any subsequently obtained consent was invalid.\(^5\)

Additionally, the Supreme Court of Washington has determined that requiring patrons to consent to searches as a condition of admission to a public event constitutes impermissible coercion.\(^6\) In Jacobsen v. City of Seattle,\(^6\) the court found coercion where admission to a rock concert was conditioned on consent to pat down searches.\(^6\) The court rejected

\(^5\) See Terry v. Ohio, 392 U.S. 1, 24 (1968).
\(^5\) See Ferrier, 136 Wash. 2d at 115, 960 P.2d at 933.
\(^5\) Id. at 118–19, 960 P.2d at 934.
\(^5\) Id. at 115, 960 P.2d at 933.
\(^5\) Id. at 670, 658 P.2d at 654–55.
the notion that these searches were consensual despite video evidence showing concert goers willfully and good-naturedly complying with the search requirement. Where admission is conditioned on consent, this consent is coerced and does not satisfy the consent exception to the warrant requirement.64

Under article I, section 7, the Supreme Court of Washington has allowed the notion of implied consent in narrow circumstances. In State v. Curran,66 the court upheld a statute that declared a driver to be "deemed to have given consent" to a blood alcohol test67 if the driver has been arrested and the arresting officer has "reasonable grounds to believe the [driver] had been driving under the influence of intoxicating liquor."68 The court first determined that taking the arrested driver's blood and testing it for evidence of intoxication was a search.69 The court then held that the search was constitutional under a theory of implied consent because there "was a clear indication that [the blood test] would reveal evidence of [the driver's] intoxication."70 The court concluded that this "clear indication" was met by evidence showing that the driver smelled of alcohol and appeared disoriented with watery, bloodshot eyes.71 Thus, although the theory of implied consent appears to broaden the consent exception, the court has only upheld this theory in situations where a law-enforcement officer had a "clear indication" that the search of an arrested suspect would uncover evidence of a crime.

2. The Exigent Circumstances Exception Requires Both Probable Cause and the Impracticality of Obtaining a Warrant

Another exception to the warrant requirement, exigent circumstances, exists when law-enforcement officers can show both probable cause and that obtaining a warrant is impractical because of an immediate need to search for and seize evidence.72 First, the officers must have probable

63. Id. at 674, 658 P.2d at 656–67.
64. See id. at 674, 658 P.2d at 656.
68. Curran, 116 Wash. 2d at 179, 804 P.2d at 561.
69. Id. at 184, 804 P.2d at 564.
70. Id.
71. Id.
cause that the items to be seized are connected with criminal activity and will be found in the place to be searched.\textsuperscript{73} Probable cause is an individualized suspicion, or nexus, between the suspects to be searched and the criminal activity.\textsuperscript{74} For example, in \textit{State v. Counts},\textsuperscript{75} law-enforcement officers used a tracking dog to follow a fleeing suspect to his house.\textsuperscript{76} The Supreme Court of Washington concluded that officers had sufficient probable cause to search the home based on an individualized suspicion that they would find the suspect within.\textsuperscript{77} Second, the officers must show that special circumstances made it impractical for them to obtain a warrant.\textsuperscript{78} The court has found "special circumstances" in situations such as the pursuit of a fleeing suspect\textsuperscript{79} or where evidence may be destroyed.\textsuperscript{80} If the state can show both probable cause and the impracticality of obtaining a warrant, then a warrantless search is permissible under the exigent circumstances exception.\textsuperscript{81}

3. \textbf{Under Article I, Section 7, Washington Courts Do Not Recognize an Exception for Situations Where Strong Public Safety Interests May Outweigh Individual Privacy Rights}

Under article I, section 7, the Supreme Court of Washington does not recognize an exception to the warrant requirement for situations in which the need to curb a threat to public safety can justify warrantless searches. Federal courts have upheld searches at airports\textsuperscript{82} and

\begin{itemize}
  \item \textsuperscript{73} \textit{Id.} at 377.
  \item \textsuperscript{75} 99 Wash. 2d 54, 659 P.2d 1087 (1983).
  \item \textsuperscript{76} \textit{Id.} at 59, 659 P.2d at 1089.
  \item \textsuperscript{77} \textit{Id.} at 59–60, 659 P.2d at 1089–90 (recognizing that the officers had sufficient probable cause to obtain a warrant, but invalidating the warrantless search because the officers were not in "hot pursuit").
  \item \textsuperscript{78} Johnson, \textit{supra} note 72, at 503.
  \item \textsuperscript{79} See \textit{Counts}, 99 Wash. 2d at 60, 659 P.2d at 1090 (recognizing that hot pursuit could create exigent circumstances, but holding that hot pursuit did not exist when suspect fled into home under the observation of law-enforcement officers).
  \item \textsuperscript{80} See \textit{State v. Carter}, 127 Wash. 2d 836, 839–40, 904 P.2d 290, 292 (1995) (holding that exigent circumstances justified search of motel room where an undercover law-enforcement officer bought drugs from a dealer operating out of the room).
  \item \textsuperscript{81} Johnson, \textit{supra} note 72, at 503.
  \item \textsuperscript{82} See \textit{United States v. Skipwith}, 482 F.2d 1272, 1276 (5th Cir. 1973) (holding that searches at airports did not violate the Fourth Amendment where the danger to the public was severe and the metal detector searches used were minimally intrusive).
\end{itemize}
courthouses under the Fourth Amendment by balancing public security, the efficacy of the search, and the degree of intrusion involved. Prior to Gunwall, in the infancy of independent article I, section 7 jurisprudence, the Supreme Court of Washington included "airport and courthouse searches" within its list of exceptions to the warrant requirement but never applied this exception to a specific case. Following Gunwall, however, the court has made consistent reference to only the six exceptions described above when deciding a case under article I, section 7.

D. Washington Courts Recognize a Legitimate Expectation of Privacy in Motor Vehicles and Refuse To Permit Warrantless Searches Absent an Exception to the Warrant Requirement

There is a long-standing history in Washington of recognizing the privacy interests of individuals in their automobiles. As the Supreme Court of Washington said in City of Seattle v. Mesiani, "[f]rom the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." More explicitly, the court declared in State v. Stroud that "a person in possession of a vehicle has a legitimate expectation of privacy under article I, section 7 in the vehicle ... [and] articles within the vehicle which ... are not visible." Accordingly, under Washington law, warrantless searches of motor vehicles, like searches of persons or homes, are per se unreasonable under article I, section 7. The Supreme Court of Washington has struck down several types of warrantless motor

83. See Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972) (holding that searches at courthouses did not violate the Fourth Amendment).
85. See id. at 672, 658 P.2d at 655.
86. See State v. Hendrickson, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996); see also City of Seattle v. Mesiani, 110 Wash. 2d 454, 455-58, 755 P.2d 775, 776-77 (1988) (refusing to create an exception for a situation where sobriety checkpoints were used to curb the public safety danger posed by drunk driving).
87. See Mesiani, 110 Wash. 2d at 457, 755 P.2d at 777.
89. Id. at 456-57, 755 P.2d at 777.
90. 106 Wash. 2d 144, 720 P.2d 436 (1986).
91. Id. at 152, 720 P.2d at 441.
vehicle searches under article I, section 7, including the warrantless search of locked vehicle compartments after the arrest of the owner in *Stroud*\(^{93}\) and the use of sobriety checkpoints in *Mesiani*.\(^{94}\)

These rulings starkly contrast with U.S. Supreme Court Fourth Amendment jurisprudence involving searches and seizures of motor vehicles. Under the Fourth Amendment, the U.S. Supreme Court allows law-enforcement officers to search the passenger compartment of a vehicle, and any locked compartments within, after the arrest of the driver.\(^{95}\) Taking a more restrictive stance, the *Stroud* court held that exigent circumstances, such as the possibility that evidence could be destroyed or the vehicle could be driven away, justified a search incident to arrest of the passenger compartment, but did not justify a search of locked vehicle compartments under article I, section 7.\(^{96}\) The court noted that locking a vehicle compartment produced "additional privacy expectations" that were "objectively justifiable."\(^{97}\)

Similarly, while the Supreme Court of Washington prohibits sobriety checkpoints under article I, section 7, these checkpoints are permissible under the Fourth Amendment.\(^{98}\) The U.S. Supreme Court allowed sobriety checkpoints under the Fourth Amendment, reasoning that the public safety benefits of curbing drunk driving outweighed the "slight" intrusion into the rights of law-abiding motorists.\(^{99}\) In contrast, the Supreme Court of Washington struck down sobriety checkpoints under article I, section 7 in *Mesiani*.\(^{100}\) Despite evidence that cataloged the "slaughter on our highways,"\(^{101}\) the *Mesiani* court refused to justify these intrusions based on "an inference from statistics that there are inebriated drivers in the area."\(^{102}\) Instead of adopting a balancing test that weighed the public safety benefit against the intrusion into private affairs, the

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93. *See Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441.
96. *Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441.
97. *Id.*
court limited its inquiry to the traditional exceptions to the warrant requirement.\footnote{103}{See id. at 456–57, 755 P.2d at 776–77.}

Although one Washington State Court of Appeals decision did uphold the warrantless search of all vehicles on a ferry, the court based the holding on the Fourth Amendment, not article I, section 7, and limited it to specific factual circumstances.\footnote{104}{Id. at 458 n.1, 755 P.2d at 777 n.1.} In State v. Silvernail,\footnote{105}{25 Wash. App. 185, 605 P.2d 1279 (1980).} Division I of the Washington State Court of Appeals upheld the search of all vehicles on a ferry.\footnote{106}{Id. at 191, 605 P.2d at 1283.} As two suspects fled the scene of an armed robbery on Vashon Island, a victim overheard a portion of the suspects’ conversation and inferred that they were heading for the Seattle ferry.\footnote{107}{Id. at 186–88, 605 P.2d at 1281.} When the ferry arrived in Seattle, police officers began to search each vehicle on the ferry and discovered weapons and “suspected narcotics” in Silvernail’s vehicle.\footnote{108}{Id. Silvernail was not one of the two armed robbery suspects. He had the misfortune of being on the wrong ferry at the wrong time.} Relying on Fourth Amendment precedent, the Washington State Court of Appeals upheld the search.\footnote{109}{Id. at 190–91, 605 P.2d at 1282–83 (noting the danger or unrestrained roadblock searches, but holding that the search was permissible because of the minimal intrusion of the search and its “reasonable likelihood of success”).} Although the Supreme Court of Washington did not review the case, the high court has subsequently noted the limited scope of the Silvernail opinion. The court declined to extend the Silvernail reasoning in Mesiani and commented that the Silvernail decision was “expressly limited to situations in which there was reliable information that a serious felony had recently been committed.”\footnote{110}{City of Seattle v. Mesiani, 110 Wash. 2d 454, 458 n.1, 755 P.2d 775, 777 n.1 (1988).}

In sum, article I, section 7 provides broader protections from warrantless searches of persons and vehicles than the Fourth Amendment. The article I, section 7 protections include a general prohibition on warrantless searches that is limited by six judicially recognized exceptions. Consent can serve as an exception to the warrant requirement if it is voluntary. Similarly, exigent circumstances can qualify as an exception if the law-enforcement officer performing the search can show that sufficient probable cause existed and that obtaining a warrant was impractical. Washington courts do not recognize an
exception to the warrant requirement where the public safety benefit outweighs an intrusion into private affairs. Finally, the broader protections of article I, section 7 include a historic recognition of an individual’s legitimate expectation of privacy in a motor vehicle.

II. UNDER ARTICLE I, SECTION 7, THE USE OF TECHNOLOGICAL DEVICES OR DOGS MAY BE A SEARCH

Washington courts limit the ability of law-enforcement officers to use technology or dogs to intrude into private affairs. Noting that technology "races ahead with ever increasing speed," eroding expectations of privacy "without our awareness, much less our consent," Washington courts continue to protect traditional privacy rights under article I, section 7.\textsuperscript{111} In certain situations, the courts classify the use of technology or dogs as a search subject to the warrant requirement of article I, section 7.\textsuperscript{112} This classification depends on the vantage point, the level of intrusiveness, and the constitutional protections involved in the use.\textsuperscript{113}

\textit{A. The Use of Infrared Devices To Detect Activity Within a Home Constitutes a Search}

The Supreme Court of Washington has declared that the use of infrared detection devices to observe activities within a home constitutes a search under article I, section 7, and must therefore satisfy one of the exceptions to the warrant requirement.\textsuperscript{114} In \textit{State v. Young},\textsuperscript{115} law-enforcement officers used infrared thermal detection devices to detect excessive heat emanating from a residence suspected of containing a marijuana growing operation.\textsuperscript{116} To determine whether the use of this technology constituted a search under article I, section 7, the court considered three factors: the lawfulness of the vantage point, the intrusiveness of the means used, and the nature of the property

\begin{itemize}
\item \textsuperscript{111} State v. Young, 123 Wash. 2d 173, 184, 867 P.2d 593, 598 (1994).
\item \textsuperscript{113} \textit{Young}, 123 Wash. 2d at 182–84, 867 P.2d at 597–98.
\item \textsuperscript{114} See \textit{id.} at 184, 867 P.2d at 598–99.
\item \textsuperscript{115} 123 Wash. 2d 173, 867 P.2d 593 (1994).
\item \textsuperscript{116} \textit{Id.} at 177–78, 867 P.2d at 595.
\end{itemize}
targeted. Although the law-enforcement officer in *Young* was observing from a lawful vantage point, the court noted that the intrusiveness of the infrared detector allowed officers to "see through the walls" and that the target of the observation was a home. Based on these three factors, the court ruled that the use of technology was an intrusion into both a home and private affairs and was therefore a search under article I, section 7. Because the officers had not obtained a warrant or satisfied an exception to the warrant requirement, the court invalidated this procedure as an unreasonable search.

B. *A Dog Sniff May Be a Search if It Intrudes into a Constitutionally Protected Place*

Under Washington law, a dog sniff may constitute a search depending on the object sniffed and circumstances surrounding the sniff. State appellate court decisions have held that a dog sniff does not constitute a search under article I, section 7 if the defendant has no reasonable expectation of privacy in the object being sniffed and the dog sniff is minimally intrusive. In *State v. Boyce*, the court ruled that a dog sniff around the defendant's safety deposit box was not a search under article I, section 7. The *Boyce* court reasoned that the defendant had no expectation of privacy in the bank vault and that it was only minimally intrusive for an officer invited into the bank to use the dog in this manner. The court followed nearly identical reasoning in *State v. Stanphill*, and ruled that a dog sniff of a package at a post office was also not a search. In *State v. Wolohan*, the court held that a dog sniff of a package at a bus terminal was not a search but expressed "grave
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doubts" about extending this ruling to a dog sniff of personal effects on or near a person. This situational approach contrasts with the U.S. Supreme Court's blanket ruling that dog sniffs never constitute a search under the Fourth Amendment.

Although the Supreme Court of Washington has not ruled on these appellate court dog sniff rulings, it has stated that a dog sniff might constitute a search under article I, section 7 in some situations. The court made this statement in Young as part of its discussion of the use of infrared detectors. Without elaborating, the court said that dog sniffs targeted at an object or location that is "subject to heightened constitutional protection" might be searches under article I, section 7.

The Washington State Court of Appeals subsequently applied the Young factors to determine whether a dog sniff outside of a garage was a search under article I, section 7. Relying on the dicta in Young concerning dog searches, the court looked at the lawfulness of the vantage point, the intrusiveness of the means used, and the nature of the property targeted to determine whether a dog sniff was a search. The court stated that the vantage point of the sniff was lawful, but the dog sniff was intrusive because it allowed officers to "see through the walls." Furthermore, the target of the sniff, a garage attached to a home, was subject to higher constitutional protections. The court concluded that the dog sniff of the garage was a search and was unreasonable because the officers had not obtained a warrant or satisfied any of the exceptions to the warrant requirement.

130. Id. at 820 n.5, 598 P.2d at 425 n.5. The court applied the Fourth Amendment because the search took place in Arizona. Id. at 814, 598 P.2d at 422.
131. United States v. Place, 462 U.S. 696, 707 (1983) (holding that a dog sniff of luggage is not a search because it does not require the opening of the luggage, does not expose non-contraband items to public view, and only discloses the presence or absence of contraband, and therefore is limited in both the manner of intrusion and the content of the information revealed).
132. Neither Boyce, Stanphill, nor Wolohan were appealed to the Supreme Court of Washington.
134. Id.
135. Id.
137. See Young, 123 Wash. 2d at 187–88, 867 P.2d at 600–01.
139. Id. at 635, 962 P.2d at 853–54.
140. Id.
141. See id. at 635–37, 962 P.2d at 853–54.
In sum, under Washington law, the privacy protections of article I, section 7 limit the use of technology and dogs to intrude into private affairs. Determining whether the use of a technological device by law-enforcement officers is a search depends on the lawfulness of the vantage point, the intrusiveness of the means used, and the nature of the property targeted. Applying similar factors, the use of dogs may also constitute a search under article I, section 7.

III. WSF PLANS TO USE NON-INTRUSIVE TECHNOLOGY AND DOGS TO SCREEN VEHICLES

WSF is proposing an alternative security program, using non-intrusive technology or dogs, to meet the new security requirements outlined in the National Maritime Security Initiative (NMSI). The NMSI regulations require all ferry operators to search a variable percentage of passengers and vehicles prior to boarding. Perhaps recognizing that the privacy protections of article I, section 7 of the Washington State Constitution would prevent state agents from conducting searches of passengers and vehicles, WSF has submitted an alternative security plan.

A. The NMSI Regulations Require All Ferry Operators To Search a Percentage of Passengers and Their Motor Vehicles and To Deny Passage to Passengers Who Refuse To Consent to These Searches

Pursuant to its power under the Commerce Clause, Congress enacted the Maritime Transportation Security Act of 2002 (MTSA) to

144. Id. § 104.265.
146. Since Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), the U.S. Supreme Court has recognized the authority of Congress to regulate navigable waterways and ports derived from the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. If federal and state regulations of maritime activities conflict, the Court asks whether Congress has left the states any room to impose regulations of their own, not whether Congress has the authority to regulate in this area. See United States v. Locke, 529 U.S. 89, 108 (2000). Congress cannot compel states to enforce or implement federal programs. See Prinz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress could not require local law-enforcement officers to conduct background checks as part of a federal program regulating the interstate sale of firearms even though Congress had the authority under the Commerce Clause to regulate the sales); New York v. United States, 505 U.S. 144, 188 (1992) (holding that Congress could not compel New York to either regulate low-
safeguard the nation’s ports and waterways. International terrorists have already demonstrated their inclination to use the nation’s maritime transportation system to further their attacks. Ahmed Ressam, an Algerian national, was arrested for smuggling bomb making materials from Victoria, British Columbia, to Port Angeles, Washington, aboard a WSF ferry in the spare tire compartment of his rental car. Recognizing that other terrorists could use the United States’ maritime transportation systems to further their goals, the MTSA aims to protect the nation’s ports from terrorist attacks and to prevent their use by terrorists.

To implement the MTSA, the U.S. Coast Guard issued new regulations in the form of the NMSI. These regulations condition continued vessel operation on each vessel operator’s submission and implementation of an acceptable Vessel Security Plan. Any vessel operator failing to comply by June 30, 2004 must cease operations. An acceptable security plan must provide for the “reasonable examination” of a randomly selected percentage of passengers and level radioactive waste in accordance with federal guidelines or take title to the waste). However, Congress does have the authority to directly regulate the states under the Commerce Clause. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985) (holding that the Fair Labor Standards Act applied to states as well as private employers and that there was no state immunity from regulation under the Commerce Clause).

Additionally, federal courts have not exempted states from compliance with federal legislation when the states cannot comply with legislation due to limitations imposed by state constitutions. See North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535–36 (E.D.N.C. 1977) (holding that North Carolina was not exempt from a federal provision requiring states to create a “certificate of need mechanism” in order to receive federal funding for health care, even though the North Carolina constitution prohibited the creation of such a mechanism), aff’d, 435 U.S. 962 (1978). The Califano court reasoned that “[s]imply because one State, by some oddity of its Constitution may be prohibited from compliance [with a federal statute] is not sufficient ground, though, to invalidate a condition which is legitimately related to a national interest.” Id. at 535. The court worried that a state could “thwart the congressional purpose by the expedient of amending its Constitution.” Id.
vehicles for "dangerous substances and devices."\textsuperscript{156} This percentage will increase as the Marine Security level increases.\textsuperscript{157} At the highest security level, operators must screen all passengers and vehicles\textsuperscript{158} even though the U.S. Coast Guard may not be able to identify a certain vessel as a specific target.\textsuperscript{159} Additionally, all vessel operators must post signs stating that "[b]oarding the vessel is deemed valid consent to screening or inspection," and "[f]ailure to consent or submit to screening or inspection will result in denial or revocation of authorization to board."\textsuperscript{160}

\textbf{B. WSF Has Proposed an Alternative Security Program To Satisfy NMSI Requirements}

WSF's proposed alternative security program will vary significantly from the standard screening procedures outlined in the NMSI.\textsuperscript{161} A provision of the NMSI allows vessel operators to submit alternative security programs that satisfy the same screening requirements discussed above but that deviate in their specific screening procedures.\textsuperscript{162} WSF submitted an alternative security plan that will use "non-intrusive technology" and "explosive detection dogs" to screen vehicles.\textsuperscript{163} In a press release explaining this plan, WSF indicated that opening and

\begin{itemize}
  \item \textsuperscript{156} 33 C.F.R. § 104.265(e)(1). The NMSI defines "screening" as "a reasonable examination of persons, cargo, vehicles, or baggage . . . to ensure that dangerous substances and devices, or other items that pose a real danger of violence or a threat to security are not present." \textit{Id.} § 101.105. "Dangerous substances or devices" are defined as "any material, substance, or item that may cause damage or injury to any person, vessel, facility, harbor, port, or waters" and is "unlawful to possess under applicable Federal, State or local law." \textit{Id.}
  \item \textsuperscript{157} \textit{Id.} § 104.265. The Marine Security (MARSEC) level is "set to reflect the prevailing threat environment to the marine elements of the national transportation system." \textit{Id.} § 101.105. MARSEC-1, the lowest level of security, is defined as "the level for which minimum appropriate protective security measures shall be maintained at all times." \textit{Id.} MARSEC-2 is "the level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a transportation security incident." \textit{Id.} MARSEC-3 is the "level for which further specific protective security measures shall be maintained for a limited period of time when a transportation security incident is probable or imminent, although it may not be possible to identify the specific target." \textit{Id.}
  \item \textsuperscript{158} \textit{Id.} § 104.265(g)(1).
  \item \textsuperscript{159} \textit{Id.} § 101.105.
  \item \textsuperscript{160} \textit{Id.} § 104.265(e)(2).
  \item \textsuperscript{161} \textsc{Wash. State Ferries}, \textit{supra} note 15, at 1–3.
  \item \textsuperscript{162} 33 C.F.R. § 104.140.
  \item \textsuperscript{163} \textsc{Wash. State Ferries}, \textit{supra} note 15, at 3. WSF has not specified what types of "non-intrusive technology" it will be using. \textit{See id.}
\end{itemize}
inspecting vehicle interiors and trunks might lead to constitutional challenges. The proposed alternative plan is WSF’s attempt to satisfy both the federal regulatory and state constitutional requirements. Assuming that the U.S. Coast Guard approves WSF’s alternative plan, these new security measures will go into effect by June 30, 2004.

IV. WSF’S PROPOSED PROGRAM WILL BE AN UNCONSTITUTIONAL SEARCH

Despite WSF’s attempt to craft an alternate security plan that complies with article I, section 7, the use of technology and dogs to screen vehicles will still violate the privacy rights of ferry passengers. The use of non-intrusive technology and dogs to ascertain the contents of vehicles at ferry terminals will constitute a warrantless search under article I, section 7. These searches will not satisfy any of the exceptions to the warrant requirement, and will therefore be impermissible under article I, section 7.

A. The Use of Non-Intrusive Technology or Dogs To Screen Vehicles Will Be a Search Subject to the Warrant Requirement of Article I, Section 7

The opening and inspection of a vehicle’s interior and trunk by a state actor constitutes a warrantless search triggering the protections of article I, section 7. WSF’s proposed alternative, the use of technology or dogs to screen vehicles, will also constitute a search. Using technology or dogs, like all other searches by state actors, will be unreasonable per se and unconstitutional under article I, section 7, absent a warrant or one of the exceptions to the warrant requirement.

165. Id.
166. WASH. STATE FERRIES, supra note 15, at 3.
167. See infra Part IV.A.
168. See infra Part IV.B.
169. See infra Part IV.A.1.
170. See infra Part IV.A.2–3.
171. See supra Part I.A–C.
I. *The Opening and Inspecting of Vehicle Interiors and Trunks by State Employees Are Searches Under Article I, Section 7*

As WSF may have suspected,172 the opening and inspection of vehicle interiors and trunks by WSF employees satisfies both requirements of a search under article I, section 7.173 First, the Supreme Court of Washington has held that opening and inspecting the contents of locked vehicle compartments is an intrusion into the private affairs of the vehicle owner.174 Second, the WSF employees performing these screenings are state employees acting in their official capacities. Like other state employees, such as a tax appraiser, a city building inspector, a public utility district’s treasurer-comptroller, and school officials,175 Washington courts will find WSF employees to be state actors as well.

2. *The Use of Non-Intrusive Technology To Screen Vehicles Will Also Constitute a Search Under Article I, Section 7*

WSF’s plan to use non-intrusive technology to screen vehicles will still qualify as a search under article I, section 7. The Supreme Court of Washington considered three factors in ruling that the use of infrared detection equipment to search houses for suspected marijuana growing operations constituted a search under article I, section 7: the lawfulness of the vantage point, the intrusiveness of the means used, and the nature of the property targeted.176 The court concluded that although the officers were using the device from a lawful vantage point, the action still constituted a search because the intrusiveness of the device enabled the officers to “see through the walls” to observe private affairs and violated the constitutional protection of the home.177

Under the same analysis, the use of non-intrusive technology to screen vehicles at a ferry terminal will also be a search. The screening at the ferry terminals will be from a lawful vantage point, but WSF will use this technology to “see through” the locked compartments of the vehicles. A vehicle does not have the same level of constitutional protection as a home, but Washington courts have nonetheless

173. *See supra* notes 32–43 and accompanying text.
175. *See supra* notes 38–43 and accompanying text.
177. *Id.* at 183, 867 P.2d at 598.
recognized a strong expectation of privacy in vehicles.\textsuperscript{178} Under article I, section 7, the Supreme Court of Washington has frequently noted the history of a legitimate, and constitutionally protected, expectation of privacy in both vehicles and objects hidden inside.\textsuperscript{179} This expectation of privacy increases when the owner locks items within vehicle compartments.\textsuperscript{180} Applying the \textit{Young} factors, the use of technology from a lawful vantage point to "see into" the compartments of a constitutionally protected vehicle, although less obtrusive than opening and inspecting vehicle compartments, will still be a search under article I, section 7.

3. \textit{The Use of Dogs To Screen Vehicles Will Also Constitute a Search Under Article I, Section 7}

Applying the \textit{Young} factors to dog sniffs, the use of dogs to detect explosives or contraband in motor vehicles will also qualify as a search under article I, section 7. Relying on dicta in \textit{Young} that a dog sniff of an area "subject to heightened constitutional protections" might constitute a search under article I, section 7,\textsuperscript{181} Division I of the Washington State Court of Appeals ruled in \textit{State v. Dearman}\textsuperscript{182} that a dog sniff of a garage was a search.\textsuperscript{183} The \textit{Dearman} court applied the \textit{Young} factors and determined that the dog sniff was from a lawful vantage point outside the garage, but that the sniff allowed the officers to "see through the walls" of the garage, and the garage was constitutionally protected because of its proximity to a home.\textsuperscript{184} The court concluded that this dog sniff satisfied the \textit{Young} factors and was therefore a search.\textsuperscript{185}

Similarly, WSF's proposed use of dogs to screen motor vehicles will constitute a search and trigger the protections of article I, section 7. Like the dog sniff in the \textit{Dearman} case, WSF's proposed dog sniff will be from a lawful vantage point. However, these sniffs will allow WSF

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\textsuperscript{178} \textit{Stroud}, 106 Wash. 2d at 152, 720 P.2d at 441.
\textsuperscript{180} See \textit{Stroud}, 106 Wash. 2d at 152–53, 720 P.2d at 441.
\textsuperscript{181} \textit{Young}, 123 Wash. 2d at 188, 867 P.2d at 600.
\textsuperscript{183} \textit{Id.} at 635, 962 P.2d at 853.
\textsuperscript{184} \textit{Id}.
\textsuperscript{185} \textit{Id}.
\end{flushleft}
employees to see inside vehicles to "ensure that dangerous substances and devices . . . are not present." WSF's use of dogs will produce the same kind of intrusion that existed in the Dearman case.

Finally, Washington courts have continuously recognized a legitimate expectation of privacy in vehicles under article I, section 7. This legitimate expectation distinguishes dog sniffs of vehicles from the previous appellate court decisions holding that dog sniffs were not searches where the owner had no expectation of privacy in the object or location sniffed. Motor vehicles do not share the highest protections afforded to homes. However, the Young court only referred to "heightened constitutional protection" in its discussion of when a dog sniff would be a search, and vehicles should meet this standard. The Supreme Court of Washington has consistently held that article I, section 7 provides a higher level of constitutional protection for vehicles than the Fourth Amendment. The court has noted that these protections increase when the driver locks a vehicle compartment. Thus, the use of dogs to screen motor vehicles will satisfy the Young factors and will constitute a search under article I, section 7.

B. Non-Intrusive Technology and Dog Searches Would Not Satisfy Any Recognized Exception to the Warrant Requirements

Having established that the use of technological devices or dogs will constitute searches under article I, section 7, these searches are per se unreasonable unless they satisfy one of the recognized exceptions to the warrant requirement. This Comment assumes that four of the six exceptions—search incident to arrest, inventory searches, plain view, and investigative stops—would be inapplicable to routine screenings at ferry terminals. Because WSF is not arresting its passengers, or impounding the passengers' vehicles, these screenings would not be

188. See supra notes 122–129 and accompanying text.
193. See Hendrickson, 129 Wash. 2d at 71, 917 P.2d at 568.
searches incident to arrest\textsuperscript{194} or inventory searches.\textsuperscript{195} WSF intends to screen for items inside closed vehicle containers—not just inadvertently discover objects in plain view.\textsuperscript{196} Finally, WSF will not have the reasonable and particularized suspicion necessary to conduct an investigative stop.\textsuperscript{197} If neither of the two remaining exceptions—consent and exigent circumstances—are satisfied, the proposed searches will be unconstitutional under article I, section 7.\textsuperscript{198}

1. \textit{Conditioning Ferry Passage on Consent to Non-Intrusive Technology and Dog Screenings Will Not Satisfy the Consent Exception to the Warrant Requirement}

WSF will not be able to satisfy the consent exception by requiring passengers to consent to searches as a condition of passage on the ferry.\textsuperscript{199} The consent exception requires voluntarily,\textsuperscript{200} uncoerced\textsuperscript{201} consent. Conditioning ferry travel on consent to search is analogous to the rock concert searches struck down by the Supreme Court of Washington in \textit{Jacobsen v. City of Seattle}.\textsuperscript{202} In \textit{Jacobsen}, concert patrons were required to submit to searches as a condition of their admission to the concert.\textsuperscript{203} The court rejected the notion that the rock concert searches were consensual despite video evidence showing

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\item \textsuperscript{194} A search incident to arrest must be conducted "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car" and is generally limited to searches for weapons or destructible evidence. \textit{Stroud}, 106 Wash. 2d at 152, 720 P.2d at 441.
\item \textsuperscript{195} The rationale for allowing inventory searches is to allow law-enforcement officers to precisely catalog property to defend against claims of theft, vandalism, or negligence. \textit{See State v. Dugas}, 109 Wash. App. 592, 597, 36 P.3d 577, 580 (2001).
\item \textsuperscript{196} The plain view exception will justify a warrantless search where an officer: (1) has a prior justification for the intrusion; (2) inadvertently discovers the incriminating evidence; and (3) immediately recognizes the item as contraband. \textit{See State v. Myers}, 117 Wash. 2d 332, 346, 815 P.2d 761, 769 (1991).
\item \textsuperscript{197} Investigative stops allow law-enforcement officers to briefly detain persons for questioning if the law-enforcement officer reasonably suspects these persons of criminal activity. \textit{See Terry v. Ohio}, 392 U.S. 1, 24 (1968).
\item \textsuperscript{198} \textit{See supra} Part I.C; notes 48–49 and accompanying text.
\item \textsuperscript{199} \textit{See National Maritime Security Initiative, 33 C.F.R. § 104.265(e)(2) (2003); supra} Part I.B.1.
\item \textsuperscript{200} \textit{See supra} note 55 and accompanying text.
\item \textsuperscript{201} \textit{See supra} note 56 and accompanying text.
\item \textsuperscript{203} \textit{See id.} at 669–70, 658 P.2d at 654.
\end{itemize}
patrons cheerfully complying with the search requirement.204 In contrast to the activity at issue in Jacobsen, use of the ferry system is a necessity for 20,000 daily passengers, especially for residents of Vashon Island and the San Juan Islands who commute by ferry between their homes and work places.205 As in Jacobsen, Washington courts are likely to find any consent of ferry passengers invalid because continued use of the ferry system is conditioned on giving this consent.

Additionally, WSF cannot rely on the “implied consent” doctrine to uphold these proposed searches. This limited extension of the consent requirement only applies to instances where there is clear evidence that the search will find evidence of a specific crime.206 In State v. Curran, the Supreme Court of Washington upheld a statute that implied a driver’s consent to a blood alcohol test, but only where there “was a clear indication that it would reveal evidence of [the driver’s] intoxication.”207 WSF will not have a similar indication that the screening of vehicles will uncover evidence of any crime. Instead, WSF will be randomly selecting and screening a certain number of vehicles208 out of over 20,000 daily passengers.209 WSF will have no reason to believe that passengers in every screened vehicle are involved in criminal activity. Consequently, WSF will not be able to use the doctrine of “implied consent” to justify the non-intrusive technology and dog screening of vehicles at ferry terminals.

2. These Searches Will Not Satisfy the Exigent Circumstances Exception Because There Is No Individualized Probable Cause To Search Each Vehicle

Without individualized probable cause to search each vehicle, the WSF’s proposal to use non-intrusive technology or dogs will not satisfy the exigent circumstances exception. Under this exception, the state actor conducting the search must have probable cause to believe that evidence of a crime, in this case terrorism, will be found in the vehicle being searched.210 To establish probable cause, there must be a nexus

204. Id. at 674, 658 P.2d at 656–57.
205. WASH. STATE FERRIES, supra note 1, at 1–2.
207. Id. at 184, 804 P.2d at 564.
208. WASH. STATE FERRIES, supra note 15, at 2.
209. WASH. STATE FERRIES, supra note 1, at 1–2.
between the vehicles searched and the crime of terrorism. The NMSI regulations will require WSF to search randomly selected vehicles—or all vehicles—depending on the threat level. Because these vehicles will not be selected based on any particularized information, they will not have the requisite nexus to terrorism. Without this nexus, no probable cause will exist sufficient to justify these searches under the exigent circumstances exception.

The Washington State Court of Appeals' decision in State v. Silvernail upholding a search of all vehicles on a ferry does not undermine this conclusion. First, the court in Silvernail only considered the protections provided by the Fourth Amendment, not article I, section 7. Second, the Supreme Court of Washington limited the Silvernail decision to "situations in which there was reliable information that a felony had recently been committed," such as when the fleeing suspect was believed to be on a particular ferry. A similar situation will not arise during the proposed screenings at ferry terminals. Even under the highest level of threat, the U.S. Coast Guard recognizes that it may not be able to identify a specific target. Therefore, during normal operations, WSF will not have the kind of "reliable information" to search vehicles on all of its ferries that the Silvernail court used to justify searches on a particular ferry.

3. Despite the Threat to Public Safety Posed by Terrorists, These Searches Will Not Be Permissible Under Article I, Section 7

WSF cannot use the threat of terrorism as an exception to the warrant requirement. Unlike Fourth Amendment decisions upholding searches at airports and courthouses, the Supreme Court of Washington does not recognize an exception to the warrant requirement under article I, section 7 for situations where a threat to public safety is sufficient to justify warrantless searches. The court refers to only the six "jealously
and carefully drawn" exceptions when deciding a case under article I, section 7. In *Mesiani*, the court had the opportunity to create a new exception to allow sobriety checkpoints and curb drunk driving. Although presented with evidence of "slaughter on our highways," the court refused to draw "an inference from statistics that there are inebriated drivers in the area." Before *Gunwall*, the court had acknowledged, but never applied, the balancing test used to justify searches at airports and courthouses where the danger to the public was severe and the intrusion was minimal. However, when confronted with the danger posed by drunk driving, the court rejected the notion of a balancing test exception under article I, section 7, whereby the public safety benefit could outweigh individual privacy rights. Following this precedent, the court is unlikely to "draw inferences" that there are terrorists on a particular ferry and unlikely to allow an inferred threat to public safety to outweigh real violations of privacy rights.

V. CONCLUSION

By June 30, 2004, WSF plans to begin screening vehicles through the use of non-intrusive technology or dogs to avoid a possible shutdown for failure to satisfy the NMSI security requirements. Although WSF is attempting to find a constitutionally and publicly acceptable alternative to physically opening and searching vehicles, ascertaining the contents of vehicles—whether by physical search or dog sniff—is still a search under article I, section 7. Because these searches do not fit any of the exceptions to the warrant requirement, the searches are likely to be unconstitutional.

A constitutional challenge to these screenings, although supported by current article I, section 7 precedent concerning dog sniffs and vehicle searches, will not necessarily be successful. When considering this challenge, Washington courts will be influenced by the changed security concerns following the terrorist attacks of September 11, 2001 and the disastrous possibility of a ferry system shutdown, neither of which were

220. See *Mesiani*, 110 Wash. 2d at 458, 755 P.2d at 777.
present in prior article I, section 7 cases. Ultimately, the courts may modify article I, section 7 jurisprudence to add a new exception for minimally intrusive searches where the threat from terrorists is severe.