THE ORIGIN OF ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION

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I. INTRODUCTION

For approximately sixty years, the Washington State Supreme Court deemed the protections afforded by article I, section 7 of the Washington State Constitution and the Fourth Amendment of the federal Constitution as "in substance the same," [1] despite the obvious difference in the language of the two provisions. Article 1, section 7 of the state constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." [2] In contrast, the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and

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1. State v. Gibbons, 118 Wash. 171, 184, 203 P. 390, 395 (1922); *see also* State v. Fields, 85 Wash. 2d 126, 130, 530 P.2d 264, 286 (1975).

2. WASH. CONST. art. I, § 7.

particularly describing the place to be searched, and the persons or things to be seized."[3]

However, in the 1980 case *State v. Simpson*, the Washington Supreme Court began to give effect to the significant disparity in language between the two provisions.[4] The court, guided by the plain language of article I, section 7, and evidence that the framers of the Washington Constitution (framers) rejected a proposal to adopt the language of the Fourth Amendment, determined that article I, section 7 provides greater protection to Washington residents than its federal counterpart.[5] Following *Simpson*, the Washington Supreme Court unleashed a series of opinions affirming this proposition, with each successive case citing to *Simpson* and the cases that followed.[6] By the late 1990s, the Washington Supreme Court had confidently declared, "[i]t is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment."[7]

To be sure, a constitutional analysis begins with the text, and for most purposes, should end there as well.[8] But a proposition that has little support in Washington case law from the first ninety years of statehood can hardly be deemed self-evident. This is particularly true given that the Washington Supreme Court has made little effort to ascertain the intent of the framers beyond that made in *Simpson.* Indeed, the court in *State v. Ringer* essentially threw up its hands before even attempting such an inquiry when it declared that "[u]nfortunately, history provides little guidance to the intention of the framers when they chose the specific language of Const. art. 1, § 7."[9]

This Article will demonstrate that history does in fact provide guidance to the intention of the framers when they rejected the language of the Fourth Amendment and adopted the unique language of article I,

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3. U.S. CONST. amend. IV.

4. State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980). *State v. Hehman* marked Washington State Supreme Court's first explicit departure from federal Fourth Amendment jurisprudence, but the court did so based on public policy grounds. 90 Wash. 2d 45, 47, 578 P.2d 527, 529 (1978).

5. *Simpson*, 95 Wash. 2d at 178–79, 622 P.2d at 1205 (citing THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, 497 (B. Rosenow ed. 1962)) [hereinafter JOURNAL].

6. *See, e.g.*, State v. Myrick, 102 Wash. 2d 506, 510, 688 P.2d 151, 153 (1984) (citing State v. Chrisman, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); *Simpson*, 95 Wash. 2d 170, 622 P.2d 1199.

7. State v. Parker, 139 Wash. 2d 486, 493, 987 P.2d 73, 78 (1999); State v. Ferrier, 136 Wash. 2d 103, 111, 960 P.2d 927, 931 (1998); State v. Hendrickson, 129 Wash. 2d 61, 69 n.1, 917 P.2d 563, 567 n.1 (1996).

8. State *ex rel.* Gallwey v. Grimm, 146 Wash. 2d 445, 460, 48 P.3d 274, 281 (2002).

9. *Ringer*, 100 Wash. 2d at 691, 674 P.2d at 1243.

section 7.[10] Contrary to the *Ringer* court's assertion, federal and state case law, legal academic articles, and newspaper articles from the late nineteenth century and early twentieth century provide a wealth of information from which the rationale behind the framers' decision to choose the specific language in article I, section 7 can be hypothesized.

Part II of this Article summarizes what is currently known about the development of article I, section 7 at the Washington State Constitutional Convention. Part III will argue that the framers chose the language in article I, section 7, in part, as a result of a salient issue before federal courts between 1881–1897: whether, and to what extent, Congress may authorize a legislative or executive body to compel witnesses to testify, to produce documents, and to find a party in contempt for failing to do so.[11] Part III-A discusses why the framers likely chose broad terms such as "disturbed" and "invaded," as opposed to the Fourth Amendment's reference to "search and seizure." Part III-B demonstrates that rapid advances in technology and the public's increasing concerns about privacy led to the framers' choice of "private affairs" for article I, section 7 as opposed to "persons . . . papers, and effects." Part III-C suggests that, by "authority of law," the framers likely meant disturbances of residents' private affairs conducted under the authority of a statute or common law principle. Finally, Part IV examines the implications of the unique language in article I, section 7, including whether Washington has a constitutionally mandated exclusionary rule and whether there are any limitations on the legislature and court's ability to authorize disturbances of residents' private affairs.

II. DEVELOPMENT OF ARTICLE I, SECTION 7 AT THE STATE CONSTITUTIONAL CONVENTION

As several Washington Supreme Court opinions have suggested, there is very little information available in the *official* records of the State Constitutional Convention indicating why the framers rejected the language of the Fourth Amendment and used the unique language in article

10. The language was unique until 1910 when the Arizona State Constitutional Convention adopted article I, section 7 verbatim for its own declaration of rights. *See* ARIZ. CONST. art. II, § 8. Records from the Arizona Convention reveal only that the Committee on Preamble and Declaration of Rights examined Washington's Declaration of Rights and decided to recommend it to the Committee of the Whole with only minor alterations. Each provision was proposed to the Committee of the Whole individually, and the committee adopted article I, section 7 without debate. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, 658–59 (J. S. Goff ed. 1991).

11. *See* United States v. Boyd, 116 U.S. 616 (1886); Kilbourn v. Thompson, 103 U.S 168 (1881); *In re* Pac. Ry. Comm'n, 32 F. 241 (N.D. Cal. 1887).

I, section 7.[12] The federal government's appropriation of funds to the convention was insufficient to cover the cost of transcribing several court reporters' shorthand notes of speeches and arguments.[13] These notes were either lost or destroyed.[14] The Secretary of State did preserve the minute book from the convention, which was published in 1962 as the *Journal of the Washington State Constitutional Convention* (*Journal*).[15]

By examining the official *Journal* and local newspaper coverage of the state convention, it is possible to determine who changed the language of article I, section 7 and approximately when that change was made.[16] The first proposal to adopt the language of the Fourth Amendment came as a component of a proposed constitution that had been prepared by W. Lair Hill, a prominent lawyer in both Oregon and California.[17] Mr. Hill's proposed constitution was printed in the *Morning Oregonian* shortly before the convention,[18] was placed on the desk of each delegate at the start of the convention, and was a considerable influence on the framers.[19]

Just after the start of the convention, on July 11, 1889, Delegate Allen Weir, an editor and Republican from Port Townsend,[20] submitted to the convention a preamble and bill of rights based largely on the provisions contained in Mr. Hill's proposed constitution.[21] Article I, section 7 of Mr. Weir's submission (proposed section 7) contained the text of the Fourth Amendment.[22] That same day, the proposal was referred to the Committee on Preamble and Bill of Rights (Rights Committee).[23]

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12. *See, e.g.*, State v. Simpson, 95 Wash. 2d 170, 178, 622 P.2d 1199, 1205 (1980); *Ringer*, 100 Wash. 2d at 698, 674 P.2d at 1247.

13. *See* JOURNAL, *supra* note 5, at vii.

14. *Id.*

15. *Id.*

16. The Washington Supreme Court has, on numerous occasions, used the *Journal* in conjunction with newspaper accounts of the convention to determine the original intent of the framers. *See, e.g.*, Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 485, 90 P.3d 42, 49 (2004).

17. *See* JOURNAL, *supra* note 5, at v.

18. MORNING OREGONIAN, July 4, 1889, at 9.

19. JOURNAL, *supra* note 5, at v.

20. *Men of Washington—Facts About the Members of the Convention—Their Occupations and Politics*, MORNING OREGONIAN, July 16, 1889, at 2 [hereinafter *Members of the Convention*].

21. *See* JOURNAL, *supra* note 5, at 50–53, 497; MORNING OREGONIAN, July 12, 1889, at 2.

22. *See* JOURNAL, *supra* note 5, at 51.

23. MORNING OREGONIAN, July 12, 1889, at 2. The Rights Committee consisted of seven members: C.H. Warner (Chairman), a miller and Democrat from Colfax; Gwin Hicks (Secretary), a Democrat from Tacoma; Geo Comegys, a stockman and Republican from Oakesdale; Francis Henry, a lawyer and Democrat from Olympia; Frank M. Dallam, an editor and Republican from Davenport; J.C. Kellogg, a doctor and Republican from Seattle; and Lewis Sohns, a banker and Republican from Vancouver. JOURNAL, *supra* note 5, at 19; *see also Members of the Convention*, MORNING OREGONIAN, July 16, 1889, at 2.

The first sign that the Rights Committee was considering significant changes to proposed section 7 was on July 12, 1889, when the *Tacoma Daily Ledger* reported that in the days to follow, "[p]rovisions will be made to prevent searching the residence of a private citizen without due process of law."[24] However, the language of proposed section 7 stayed consistent with the Fourth Amendment until at least July 16, 1889.[25]

Between July 16, 1889, and July 25, 1889, there is little evidence regarding the activities of the Rights Committee in connection with proposed section 7. However, the change in language must have been made as a result of debates within the Rights Committee itself because it does not appear that any proposal to change the language of proposed section 7 came from the Committee of the Whole.[26] On July 25, 1889, Rights Committee Chairman Warner presented the final proposal of the bill of rights to the Committee of the Whole, which included section 7 in its present form.[27] Although there was some debate over the wording of several other provisions, the Committee of the Whole adopted article I, section 7 without debate on July 29, 1889.[28]

III. THE ORIGINS OF THE UNIQUE LANGUAGE IN ARTICLE I, SECTION 7

Between July 16 and July 25, 1889, the Committee of the Whole spent a significant amount of time formulating the articles establishing the judicial and executive branches.[29] Thus, while the Rights Committee was considering changes to the language of proposed section 7, it was also contemplating the power of each branch of government and the power of each branch with respect to the other branches. Based on the

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24. *The Bill of Rights—Other Provisions To Be Inserted,* TACOMA DAILY LEDGER, July 13, 1889, at 4. The *Ledger* reported that the Rights Committee was "following closely California's constitution." *Id.* However, that document's search and seizure provision is virtually identical to the Fourth Amendment. *Compare* U.S. CONST. amend. IV *with* CAL. CONST. art. I, § 13.

25. *Work in Committees—Proposed Bill of Rights,* SEATTLE POST-INTELLIGENCER, July 17, 1889, at 1; *Synopsis of the Bill of Rights in Advance For "Globe" Readers,* TACOMA MORNING GLOBE, July 17, 1889, at 1.

26. JOURNAL, *supra* note 5, at 497; *see Committee Reports, Etc.*, MORNING OREGONIAN, July 18, 1889, at 1; *Reports from Committees,* SPOKANE FALLS REVIEW, July 19, 1889, at 1.

27. *See* JOURNAL, *supra* note 5, at 497; *The Bill of Rights*, MORNING OREGONIAN, July 26, at 1–2.

28. *See* JOURNAL, *supra* note 5, at 154; *The Bill of Rights Adopted*, TACOMA DAILY LEDGER, July 30, 1889, at 4; *The Bill of Rights—The Committee Will Report Back the Troublesome Preamble*, TACOMA MORNING GLOBE, July 30, at 1.

29. *See, e.g.*, *The Washington Constitution—Makers Hard at Work*, DAILY OREGON STATESMAN, July 23, 1889, at 1; *The New Judiciary*, MORNING OREGONIAN, July 20, 1889, at 1, col. 6.

amount of detail the Committee of the Whole went into in its debates,[30] the members must have been aware of some of the more significant contemporary legal issues relating to the power of government. One such issue that appeared sporadically in the federal courts around the time of the framing of the state constitution was the extent and mechanisms by which each branch could compel a witness to testify before a government body, produce papers and other effects, and find a person in contempt for failing to do so.[31]

This issue first presented itself to the United States Supreme Court in the 1881 case, *Kilbourn v. Thompson.*[32] In *Kilbourn,* the United States House of Representatives passed a resolution forming a committee to inquire into the affairs of Jay Cooke & Company, a debtor to the United States government. As part of its investigation, the Committee, under authority of a House resolution, issued a subpoena for Kilbourn to appear and to produce certain records, papers, and maps relevant to Jay Cooke's transactions. Kilbourn refused. In response, the House found Kilbourn in contempt and issued a warrant directing the sergeant-at-arms to arrest Kilbourn and commit him to custody.[33]

Kilbourn subsequently brought suit for false imprisonment against the House Speaker, members of the Committee, and the House Sergeant-at-Arms.[34] Judgment was initially in favor of the defendants; however, the U.S. Supreme Court remanded the case with respect to the House sergeant-at-arms.[35] The Court concluded that the House (1) does not have "the general power of making inquiry into the private affairs of the citizen"; (2) assumed a power judicial in nature; (3) does have a limited power to imprison a party for contempt in circumstances expressly stated in the Constitution or where it was necessarily implied from the House's constitutional functions and duties; and (4) exceeded its authority by delegating to the Committee the task of conducting an investigation into Kilbourn's private affairs, an investigation which could not result in valid legislation.[36]

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30. *Judiciary Clause—The Constitutional Convention Still Considering It*, SEATTLE TIMES, July 20, 1889, at 1.

31. *See, e.g.*, United States v. Boyd, 116 U.S. 616 (1886); Kilbourn v. Thompson, 103 U.S 168 (1881); *In re* Pac. Ry. Comm'n, 32 F. 241 (N.D. Cal. 1887).

32. 103 U.S. 168 (1881).

33. *Id.*

34. *Id.*

35. Because the resolution and warrant were passed while Congress was in session, the Court concluded that the members of the Committee and House Speaker were immune from suit under the Speech and Debate clause of the federal Constitution. *Kilbourn*, 103 U.S. at 200–05.

36. *Kilbourn*, 103 U.S. at 190, 192, 194–95.

Just five years later, in *United States v. Boyd*,[37] the Court was confronted with an alleged attempt by an executive officer to compel a party to produce certain documents in court. At issue was section 12 of the Customs Act (Customs Act), which declared that any importer who fraudulently imported merchandise with the intent to deprive the United States of lawful duties would be subject to a fine or imprisonment and forfeiture of the goods.[38] With respect to all non-criminal proceedings under section 12, section 5 provided:

> [A]n attorney representing the government . . . may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation he expects to prove; and thereupon the court . . . may . . . issue a notice to the defendant or claimant to produce . . . [the items] . . . [I]f the defendant shall fail or refuse . . . the allegations stated in the said motion shall be taken as confessed. But the owner of said books and papers . . . shall have . . . custody of them, except pending their examination in court as aforesaid.[39]

Although similar procedures had been upheld by numerous lower federal courts,[40] the U.S. Supreme Court found section 5 repugnant to both the Fourth and Fifth Amendments.[41] In its Fourth Amendment analysis, the *Boyd* majority reluctantly acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting."[42] Nevertheless, the majority went to great lengths to demonstrate that the "compulsory production of a man's private papers" authorized by section 5 was "within the scope of the Fourth Amendment" because it "effects the sole object and purpose of search and seizure."[43]

First, the Court observed that searches for and seizures of stolen goods, goods concealed to avoid revenue laws, counterfeit coin, lottery tickets, and gambling implements were reasonable because those

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37. 116 U.S. 616 (1886).

38. *Id.*

39. *Id. at* 619–20 (1886), *abrogation recognized by* Fisher v. United States, 425 U.S. 391(1976).

40. Stockwell v. United States, 23 F. Cas. 116 (Me. 1870) (No. 13,466); *In re* Platt, 19 F. Cas. 815 (S.D.N.Y. 1874) (No. 11,212); United States v. Hughes, 26 F. Cas. 417 (S.D.N.Y. 1875) (No. 15,417); United States v. Three Tons of Coal, 28 F. Cas. 149 (D.C. Wis. 1875) (No. 16,515); United States v. Mason, 26 F. Cas. 1189 (D.C.N.D. Ill. 1875) (No. 15,735); United States v. Distillery No. Twenty-Eight, 25 F. Cas. 868 (D.C. Ind. 1875) (No. 14,966).

41. *Boyd*, 116 U.S. at 622.

42. *Id.*

43. *Id.*

searches and seizures were authorized by common law or statute.[44] On the other hand, the Court found a search for or seizure of a person's private papers for the purpose of obtaining the contents or to use those papers as evidence against the person, was extortion.[45] The Court justified this distinction by noting that in the former case, either the government or the true owner of the goods is entitled to possession of the property, while in the latter, the private party is entitled to possession.[46]

Second, the Court recounted the use of "general" warrants in the colonial era and quoted extensively from the 1765 English case, *Entick v. Carrington*,[47] which was "in the minds of those who framed the Fourth Amendment" and was considered to be "sufficiently explanatory of what was meant by unreasonable searches and seizures."[48] *Entick* involved an action for trespass against government officials who entered the plaintiff's home pursuant to a general warrant, broke open his desk, and examined his papers.[49] In an opinion by Lord Camden, the English high court held that the general warrant at issue was "illegal and void" because: (1) "every invasion of private property, be it ever so minute, is a trespass"; (2) if a trespass has been demonstrated, the trespasser must show some statute or common law principle that justified the intrusion; and (3) the government trespassers could not demonstrate any cases "where the law forceth evidence out of the owner's custody by process."[50] The *Boyd* majority argued that "[t]he principles laid down in this

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44. *Id.* at 623–24. The *Boyd* majority cited, as examples, several additional procedures that were not within the prohibition of the Fourth or Fifth Amendment: (1) "the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection"; (2) "[t]he entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution"; and (3) "examination of a defendant under oath after an ineffectual execution, for the purpose of discovery secreted property or credits, to be applied to the payment of a judgment against him." *Id.*

45. *Id.* at 630.

46. *Id.* at 623. For further discussion of the influence property rights had on the *Boyd* majority opinion, see *id.* at 627–29 (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)); Sanford Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule*, 61 WASH. L. REV. 459, 524–25 (1986); Comment, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 945–60 (1977); Comment, *The Life and Times of Boyd v. United States (1886–1976)*, 76 MICH. L. REV. 184, 184–90 (1977).

47. 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765).

48. *Boyd*, 116 U.S. at 626–27.

49. *Id.*

50. *Id.* at 628–29 (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765)).

opinion . . . reach farther than the concrete form of the case then before the court."[51]

> [T]hey apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life. It is not the breaking of the doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . . [A]ny forcible and compulsory extortion of a man's own testimony or for his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [*Entick*].[52]

Finally, the Court concluded that the civil penalties authorized by the Customs Act were criminal in nature[53] and held that section 5 also violated the Fifth Amendment.[54] The Court was "unable to perceive that the seizure of man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[55] Therefore, the majority concluded that (1) section 5 was unconstitutional and void; (2) the trial court's admission of evidence pursuant to section 5 was erroneous and rendered the proceedings unconstitutional; and (3) consequently, it must reverse the judgment of the district court and remand the case for a new trial.[56]

The concurring opinion in *Boyd*, authored by Justice Miller, argued that section 5 was void as applied because, while the procedure defined in section 5 was in effect a subpoena duces tecum, the penalty for the witness's failure to produce the incriminating papers was to take the allegations of the attorney respecting them as confessed; this would violate the Fifth Amendment's prohibition against compelling a person to be a witness against himself.[57] However, Miller also disagreed with the majority's Fourth Amendment analysis. First, Miller noted that section 5 did not in fact authorize any search because, under the statute, "[n]o order can be made by the court . . . which requires or permits anything more than service of notice on a party to the suit."[58] Nor was any seizure authorized because the party was not required to part with custody of the papers at any time. Finally, Miller noted that while the Framers of the

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51. *Id. at* 630.
52. *Id.*
53. *Id.* at 633–35.
54. *Id.* at 632.
55. *Id.* at 633.
56. *Id.* at 638.
57. *Id.* at 639 (Miller, J., concurring).
58. *Id.*

federal Constitution had their attention drawn to the abuses of power of English authorities under general warrants that "authorized searches in any place for any thing," they intended only to restrain the abuse, "[h]ence it is only *unreasonable* searches and seizures that are forbidden."[59]

Just one year after the *Boyd* decision was rendered, the holdings of *Kilbourn* and *Boyd* intersected in the case *In re Pacific Railway Commission*.[60] This case involved a challenge to an act of Congress that established the Pacific Railway Commission (Railway Commission) to investigate the Central Pacific Railroad Company's use of land it received from Congress as consideration for building a road.[61] Congress authorized the Railway Commission to seek the aid of federal courts when a witness refused to testify or produce documents, and granted the federal courts discretion to order a contemptuous individual to obey the Railway Commission's subpoena, insofar as the subpoena was within the Commission's jurisdiction.[62]

The Circuit Court of California quoted with approval from *Boyd* for the principle that "[a]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime or to forfeit his property is contrary to the principles of a free government":

> The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for the purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government . . . .[63]

In addition, the court cited to *Kilbourn* as evidence of the "right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee."[64] The Court observed

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59. *Id.* at 641 (Miller, J., concurring).

60. 32 F. 241 (C.C.N.D. Cal. 1887).

61. *Id.* at 249, 259–60.

62. *Id.* at 249–50.

63. *Id.* at 251.

64. *Id.* at 250–51. The court began its analysis by making a sweeping statement about the value of the right to "personal security":

> Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers

that the Railway Commission's investigation overreached into the private business of citizens and then concluded that the provision at issue was void because Congress was effectively requiring the federal courts to aid the Railway Commission in its investigation and improperly requiring the judiciary to invoke its power when no case or controversy enumerated in the Constitution existed.[65]

These issues would continue to be discussed in the federal courts throughout the 1890s,[66] but by the time the Rights Committee met in late July 1889, they were likely aware that search or seizure was not the only means by which the government could potentially intrude into the private affairs of individuals. The Rights Committee was thus faced with the question of how to draft a provision using terms that would incorporate the protections of the Fourth Amendment while ensuring the legislature and courts would have the ability to gather information to perform their constitutional functions without prying too far into the private affairs of individuals. *Kilbourn*, *Boyd*, and *In re Pacific Railway Commission*, together with the rapid technological advancement that was taking place in the late nineteenth century, would have a significant impact on what those terms would be.

A. No Person Shall be Disturbed in his Private Affairs, or His Home Invaded, Without Authority of Law

Before the Rights Committee could determine whether or not the language of the Fourth Amendment should be incorporated into Washington's Declaration of Rights, it first had to determine what that language meant. The most logical place for them to look was federal case law interpreting the provision and *Boyd*, decided just three years prior to the convention, was the first opinion from the U.S. Supreme Court that offered an extended analysis of the Fourth and Fifth Amendments.[67] In

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> from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.

Id. at 250.

65. *Id.* at 253–55, 258.

66. *See, e.g.*, I.C.C. v. Brimson, 154 U.S. 447 (1894); *In re* Chapman, 166 U.S. 661 (1897).

67. *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1897 (1980). Fourth Amendment cases rarely reached the United States Supreme Court in the nineteenth century, partly because Congress did not grant the Court jurisdiction to hear a criminal defendant's appeal until 1891; Comment, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 952 n.42 (1977) (citing 26 Stat. 826, 827). *But see Ex parte* Jackson, 96 U.S. 727 (1878) ("A federal statute banning lottery information from the mail could not be enforced by federal officers opening letters and sealed packages, unless upon the authority of a warrant. The right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers wherever they may be."). The government could not

fact, there is convincing evidence that the Rights Committee, in selecting the unique language of article I, section 7, intended to adopt the principles and conclusions set forth in the *Boyd* majority opinion while attempting to remedy the *Boyd* majority's tenuous textual and historical analysis of the Fourth and Fifth Amendments.

As Justice Miller's concurring opinion in *Boyd* suggests, the *Boyd* majority's conclusions possibly reach farther than the Fourth Amendment's text and history can support.[68] For example, as Miller notes, it is a stretch to conceptualize a mechanism, such as the one at issue in *Boyd*, whereby a trial court, following a motion by a government attorney, orders another party to a judicial proceeding to produce particular items or papers relevant to the case that would be a "search" within the term's traditional meaning.[69] Furthermore, the text of the Fourth Amendment prohibits only *unreasonable* searches and seizure and does not, as the *Boyd* majority suggested, extend to governmental disturbances outside that context.

By rejecting the Fourth Amendment's reference to "search and seizure," and instead choosing the broad terms "disturbed" and "invaded" for article I, section 7, the Rights Committee likely intended to incorporate the principle that the *Boyd* majority failed to persuasively establish: that the provision applies against "all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of his life."[70] The sheer breadth of the chosen word "disturbed" is perhaps the most revealing clue as to the Rights Committee's intentions. At the time of the framing, "disturbed" meant essentially what it means today, to "interfere with" or "interrupt."[71] The Rights Committee's choice of "disturbed" refutes any argument that article I, section 7 does not apply to the compulsory production of incriminating documents before a governmental body, an argument which Miller's concurring opinion in *Boyd* indicates the Fourth Amendment is susceptible to.[72] The Rights Committee's

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appeal criminal cases until 1907. *The Right to Privacy in Nineteenth Century America*, *supra*, at 1897; Comment, *supra*, at 942 n.42.

68. *See* United States v. Boyd, 116 U.S. 616, 638–41 (1886) (Miller, J., concurring).

69. *Id.* at 640–41 (Miller, J., concurring).

70. *Id.* at 629.

71. *Compare* WEBSTER'S COLLEGIATE DICTIONARY 262 (G. & C. Merriam Co. 1913) *with* Merriam-Webster Online Dictionary, disturb, available at http://www.m-w.com/dictionary/disturb (last visited Mar. 16, 2008).

72. *Boyd* did not suggest that the compulsory production of documents would always be precluded by the Fourth and Fifth Amendments. Rather, the *Boyd* majority suggested that, in criminal proceedings, compulsory production was limited to cases and under circumstances where the parties might be compelled to produce books, writings, or other documents by the rules of proceeding in chancery. *Boyd*, 116 U.S. at 630–32 (citing Judiciary Act of 1789 § 15) ("[O]ne cardinal rule of the

choice of words precludes the possibility that a government entity in Washington State can interfere with the private affairs of an individual without the authority of law.

Similarly, the portion of article I, section 7 prohibiting the invasion of one's home without authority of law was likely meant to emphasize the "sanctity of a man's home," and the prohibition against any physical intrusion into the home and its surrounding areas as opposed to merely search or seizure.[73] As the English high court noted in *Entick*, "every invasion of private property, be it ever so minute, is a trespass."[74] The legal maxim and popular proverb that "a man's house is his castle" had wide application in the nineteenth century.[75] In *The General Principles of Constitutional Law*, Thomas Cooley described the meaning of that proverb: "[E]very man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not against private individuals merely, but against the officers of the law and the state itself, against everything."[76] "[B]ut process issued upon a showing of legal cause for invading it."[77] Official intrusions into the home were narrowly restricted in the interest of privacy and the law erected high walls around the family home and surrounding property by extending criminal penalties and civil remedies for intrusions.[78] Nineteenth century Americans

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court of chancery is to never decree a discovery which might tend to convict the party of a crime, or to forfeit his property."). *Id.* In Washington State, under article I, section 7, compulsory production would be prohibited unless authorized by law, assuming, of course, such production does not violate any other constitutional principle. WASH. CONST. art. I, §§ 3, 7, 9.

73. *Boyd*, 116 U.S. at 629.

74. *Id.* at 627 (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)).

75. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 365 (5th ed. 1883) [hereinafter CONSTITUTIONAL LIMITATIONS]; JOEL P. BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 652 (1866); *Right to Privacy in Nineteenth Century America, supra* note 67, at 1894 (citing BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223) (The law has "so particular and tender a regard to the immunity of a man's house that it [considers] it his castle, and will never suffer it to be violated with impunity")). The principal English authority for this maxim is *Semayne's Case*, 5 Co. Rep. 91 a, 77 Eng. Rep. 195, 196 (1605). *Id.*

76. THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 210 (1880) [hereinafter GENERAL PRINCIPLES]. Cooley notes another "familiar" passage that embodies the common law's protection of an individual's home against government intrusion:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter, but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 365 n.4.

77. Weimer v. Bunbury, 30 Mich. 201, 208 (1874).

78. *Right to Privacy in Nineteenth Century America, supra* note 67, at 1894. *See* Rem. & Bal. Code of 1910 § 2821 – Forcible Entry and Detainer, enacted in 1854:

were so protective of their homes that the courts and public were tolerant of force, often deadly force, in the defense of their dwellings.[79] Thus, in the nineteenth century, the common law provided heightened protection for citizens' homes. By drafting article I, section 7 to prohibit the invasion of an individual's home without authority of law, the Rights Committee likely intended to continue this tradition.

B. Private Affairs

While the state convention as a whole had been subject to criticism for weighing down the constitution with provisions that might be considered legislative, a particular source of pride among the Rights Committee was the concise provisions it drafted, which embraced only the ultimate generalizations of political experience.[80] It is tempting to dismiss the Rights Committee's rejection of the Fourth Amendment's reference to "persons . . . papers, and effects" and its selection of "private affairs" as merely an attempt to draft a more concise provision. However, the Committee had significant reasons for doing so. Due to rapid advances in technology and an expanding governmental presence in peoples' lives, the Rights Committee likely realized that far more than residents' "persons...papers and effects" needed protection and therefore selected the broader phrase "private affairs" for article I, section 7.

In July 1889, the delegates in the Rights Committee were not the only people contemplating how to protect residents' privacy interests. The American public was struggling to adapt to a rapidly changing

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> Every person who shall violently take or keep possession of any house or close with menaces, force, and arms, and without the authority of law, shall be deemed guilty of forcible entry or forcible detainer, as the case may be, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars.

Id.; § 2822 – Trespass upon [E]nclosed Lands, enacted in 1890:

> If any person, other than an officer on lawful business, shall go or trespass upon any [e]nclosed ands or premises not his own, and shall fail, neglect, or refuse to depart therefrom immediately . . . upon the verbal or printed or written notice of the owner or person in lawful occupation of said lands, or premises, such trespass shall be deemed guilty of a misdemeanor. . . .

Id.; *see also* Rem. & Bal. Code of 1910 § 2823—Trespass upon Un[e]enclosed Lands.

79. *See* CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 374 n.4.

> [I]n defense of himself, any member of his family, or his dwelling, a man has a right to employee all necessary violence, even to the taking of life. . . . But a man assaulted in his dwelling is under no obligation to retreat; his house is his castle, which he may defend to any extremity. And this means not simply the dwelling-house proper, but includes whatever is within the curtilage as understood at the common law.

Id. (internal quotations omitted); *see also* GENERAL PRINCIPLES, *supra* note 76, at 211.

80. *Constitutions*, WALLA WALLA WEEKLY STATESMAN, July 22, 1889, at 2, col. 1; *see also The Bill of Rights—Shortest Preamble in Existence Following the California Constitution*, TACOMA DAILY LEDGER, July 13, 1889, at 4, Cols. 1–4.

society and consequently sought greater protection for their privacy interests in both the courts and legislature.[81] The rapid advances in technology taking place in the late nineteenth century, such as the camera, telegraph, and telephone created new methods for invading the private affairs of individuals that were not explicitly protected by existing common law and statutory doctrines or by the Fourth Amendment.[82] For example, in the late 1880s, libel doctrine did not provide protection against the taking of photographs without the subject's knowledge and the subsequent printing of the photos in newspapers.[83] Furthermore, although some states criminalized wiretapping and the disclosure of information by communications operators, there was intense debate regarding whether such statutes also prevented government investigators from demanding the production of telegrams.[84]

In the public's opinion, however, government was also a significant part of the problem. Individuals' private affairs increasingly found their way into public records. For example, the scope of the United States census gradually increased to encompass physical and mental defects, national origin, literacy, diseases, and home mortgages.[85] The increasing intrusiveness of these questions was greeted with a storm of public protest, with Congress enacting a measure to protect the disclosure of such information in 1889.[86] "[T]he 'natural and inalienable right' of everybody to keep his affairs to himself" was also asserted on behalf of the public in opposition to other governmental recordkeeping for the federal income tax and local records of land titles.[87]

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81. *Right to Privacy in Nineteenth Century America, supra* note 67, at 1892.

82. U.S. CONST. amend. IV; Herbert Spencer Hadley, *The Right to Privacy*, 3 NW. U. L. REV. 1 (1895) (Arguments in favor of the "right to privacy" are based on mistaken understanding of authority and no such interest exists except to the extent a person may suffer injury with respect to his or her property or some contractual relation).

83. *Right to Privacy in Nineteenth Century America, supra* note 67, at 1909.

84. *Id.* at 1892, 1901.

85. *Id.* at 1904.

86. *Id.* at 1905 (citing Act of Mar. 1, 1889, ch. 319, §§ 8, 13, 25 Stat. 760).

87. *Id.* at 1906–07 (citing *The Way It Ought Not to Be Collected*, 9 Nation 453 (1869); Cong. Globe, 41st Cong., 2d Sess. 2937 (remarks of Rep. Wood: "[I]nconsistent with the personal liberty of the citizen," the tax "authorizes the assessor to intrude into the household, the private business affairs, the domestic relationship of every individual"); Buck & Spencer v. Collins, 51 Ga. 391 (1874)). The increasingly aggressive tactics of the "yellow press" were also drawing scrutiny from the public and legal academia. *See, e.g*, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *A Laudatory Publication as a Cause of Action*, 4 MICH. L. REV. 284, 285 (1905–1906); *Scandalmongers and Newspapers*, N.Y. TIMES, Sept. 10, 1894, at 4. Even the delegates to the state convention were not immune from attacks by the press, a fact that likely influenced the committee's heightened concern for the "private affairs" of Washington's residents. On the morning of July 16, 1889, the last day it is known with any certainty that the language of proposed section 7 mirrored the Fourth Amendment, Col. J.Z. Moore, a delegate from Spokane who had been accused of being a

The historical context in which the state convention took place suggests that the Rights Committee recognized that, in order to fully protect residents' privacy, they needed to use a general term that would not only cover the tangible items listed in the Fourth Amendment, but also one that would account for interests that were threatened by new technologies. The term "private affairs" was the natural choice. The term was used by courts,[88] government officials,[89] legal academics,[90] and the press[91] in the nineteenth century to refer generally to the "affairs" of an

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Northern Pacific Railroad lobbyist on the front page of the July 13, 1889, *Seattle Times*, arose to address the Committee of the hole. *Lobby Whiskey*, SEATTLE TIMES, July 13, 1889, at 1, col. 2–3; *Mr. Moore Explains—The Whiskey Was for His Private Use*, SEATTLE TIMES, July 17, 1889, at 1 col. 2–5. *Lobby Whiskey*, SEATTLE TIMES, July 13, 1889, at 1, col. 2–3. Moore had the article read to the entire convention and then began a lengthy, blistering attack on the newspaper:

> No man has a higher appreciation than myself of the greatness of the American press. . . . But . . . it (also) may oppress and distress. . . . It does this when it abandons the domain of public transactions and invades the sanctity of private life and individual freedom. The article just read . . . is the result of a confessed espionage upon my private affairs . . . it bases a libel on it, and grossly charges me with being a railroad lobbyist.

Mr. Moore Explains—The Whiskey Was for His Private Use, *supra*, at 1 col. 2–5. Moore's passionate speech before the convention was printed verbatim on the cover page of at least three major newspapers in the Northwest. *Id.*; *Mr. Moore Explains*, SPOKANE FALLS REVIEW, July 17, 1889, at 1; *Mr. Moore's Whiskey*, THE MORNING OREGONIAN, July 17, 1889, at 1, col. 6. Moore's defense from the "senseless attack of a Seattle newspaper . . . was listened to carefully, and applauded roundly when completed"; it "created a sensation" at the convention "and made friends for the gentleman." *Mr. Moore's Statement*, THE MORNING OREGONIAN, July 17, 1889, at 2, col. 3.

88. *See, e.g.*, Kilbourn v. Thompson, 103 U.S 168, 190, 195 (1881); *In re* Pacific Railway Comm'n, 32 F. 241, 250, 253 (N.D. Cal. 1887); *In re* Kearns, 64 F. 481, 483 (W.D. Pa. 1894); Long v. Taxing Dist. of Shelby County, 75 Tenn. 134, 139 (1881). Thomas Cooley provided a suitable definition of "private affairs" when he described the protection afforded by the Fourth Amendment outside the home:

> It is justly assumed that every man may have secrets pertaining to his business, or his family or social relations, to which his books, papers, letters, or journals may bear testimony, but with which the public, or any individuals of the public who may have controversies with him, can have no legitimate concern; and if they happen to be disgraceful to him, they are nevertheless his secrets, and are not without justifiable occasion to be exposed.

GENERAL PRINCIPLES, *supra* note 76, at 210.

89. *See, e.g.*, *Right to Privacy in Nineteenth Century America*, *supra* note 67, at 1902 ("Opponents of congressional 'dragnet; subpoenas to telegraph offices invoked the 'rights of private citizens to 'entrust their most sacredly private affairs to the telegraph company under the seal of its confidence against 'the invasion of their privacy by their servants, the House of Representatives.'"). *Id.* (internal quotations omitted).

90. *See, e.g.*, A *Laudatory Publication as a Cause of Action*, MICH. L. REV. 285, 287 (1905–1906); *Recent Case*, 5 VA. L. REV. 710 (1899–1900) (formerly known as the *Virginia Law Register*). Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

91. *See, e.g.*, *Scandalmongers and Newspapers*, N.Y. TIMES, Sept. 10, 1894 at 4; *The Right to Privacy*, N.Y. TIMES, Mar. 15, 1889 at 4.

individual in which "the community has no legitimate concern."[92] The *Boyd* majority alluded to this right when it referred to the "indefeasible right of personal security, personal liberty, and private property."[93] Indeed, it was the *Boyd*'s failure to persuasively argue that the text of the Fourth Amendment protected these broad principles that likely led the Committee to discard the language of that provision.

The Rights Committee recognized that the term "private affairs" would encompass privacy interests threatened by future technological developments. Contrary to the Fourth Amendment, which protects "persons, houses, papers, and effects," article I, section 7 does not focus on protecting the tangible items on which private matters might be recorded, but on an individual's personal affairs themselves.[94] Therefore, while the federal courts were forced to give the Fourth Amendment's language an expansive reading to encapsulate additional privacy interests,[95] the Rights Committee selected a term for article I, section 7 that would always provide broad textual support for the protection of an individual's private affairs.

C. The Authority of Law

The most significant portion of article I, section 7, the phrase prohibiting disturbances and invasions of residents' private affairs and homes conducted "without authority of law," has been described by at least one scholar as the most cryptic.[96] The Washington Supreme Court has grappled with the meaning of this phrase on only a handful of occasions.[97] Although the court has recognized that such authority may be

92. *Equity: Right of Privacy: Injunction to Protect Personal Rights,* 5 CORNELL L. REV. 177 (1919–1920) (formerly known as the *Cornell Law Quarterly*).

93. United States v. Boyd, 116 U.S. 616, 627 (1886).

94. *Compare* WASH. CONST. art. I, § 7 *with* U.S. CONST. amend. IV; *see also* State v. Myrick, 102 Wash. 2d 506, 513, 688 P.2d 151 (1984) ("In contrast [to the Fourth Amendment], the language of WASH. CONST. art. 1, § 7 precludes a 'protected places' analysis and mandates protection of the person in his private affairs.").

95. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351–52 (1967).

96. John Leshy referring to article II, section 8 of the Arizona Constitution, which was taken verbatim from article I, section 7 of the Washington State Constitution. JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 45 (1993).

97. *See* State v. Ladson, 138 Wash. 2d 343, 352 n.3, 979 P.2d 833, 839 n.3 (1999) ("statutory authorization" references a statute authorizing a court to issue a warrant, not a statute dispensing with the warrant requirement); *see also* City of Seattle v. McCready, 123 Wash. 2d 260, 274, 868 P.2d 134, 141 (1994); State v. Salinas, 119 Wash. 2d 192, 202–03, 829 P.2d 1068, 1074 (1992); State v. Fields, 85 Wash. 2d 126, 130–33, 530 P.2d 284, 286–88 (1975) (Rosellini, J., dissenting).

provided by a statute or the common law,[98] it has done so without examining the Rights Committee's rationale for choosing the specific language in article I, section 7. As a result, the court has provided only a partial explanation as to the meaning of the phrase "without authority of law" and occasional disputes over the meaning of this phrase still arise.[99] Because they likely envisioned such disputes, the framers were careful to remind future generations that "[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[100]

If the influence of the "compulsory production" cases on the Rights Committee is recognized, then it is possible to draw two conclusions about the phrase authority of law. First, the "law" referred to in article I, section 7 likely means either a statutory provision or common law principle. The *Boyd* majority opinion, quoting *Entick v. Carrington*, expressly articulated this proposition:

> If he (the government trespasser) admits the fact, he is bound to show . . . some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by *the text of the statute law, or by the principles of the common law.*[101]

This quotation articulates an old principle: the greatest threat to privacy from the government is officials doing their jobs according to their own ideas of how to proceed and that privacy is best safeguarded by adherence to precise and predetermined legal principles.[102]

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98. State v. Gunwall, 106 Wash. 2d 54, 68, 720 P.2d 808, 816 (1986) ("The 'authority of law' required by WASH. CONST. art. 1, §7 . . . includes authority granted by a valid, (i.e., constitutional) statute or the common law.").

99. *See, e.g.*, Ladson, 138 Wash. 2d at 352 n.3, 979 P.2d at 839 n.3. The *Ladson* majority vehemently rejected the dissent's contention that a statute can supply the requisite "authority of law" in place of a warrant.

100. WASH. CONST. art. I, § 32.

101. United States v. Boyd, 116 U.S. 616, 627 (1886) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)) (emphasis added). *See also* WILLIAM CLARK, HANDBOOK OF CRIMINAL PROCEDURE 39 (1895) ("[I]t is well settled that the [Fourth Amendment] does not apply to reasonable arrests without a warrant, authorized either by the common law or by statute.").

102. George R. Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331, 347 (1984–1985). Professor Nock actually quoted a passage from P. POLYVIOU, SEARCH & SEIZURE 9 (1982), which summarizes the principles articulated in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). This same passage was quoted in *State v. Ringer*, 100 Wash. 2d 686, 691, 674 P.2d at 1240 (1983). Thomas Cooley observed in 1883 that "[i]f in the English history we inquire into the original occasion for [the Fourth Amendment], we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into

Of course, as Professor George Nock observed in his 1984 article, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, "[a]fter seventy years of judicial creation of search-and-seizure law from constitutional principles, the idea of entrusting privacy protection to the political process sounds both radical and naive."[103] In fact, Washington State's own history demonstrates that both the judiciary and legislature have, at times, been responsible for the erosion of privacy laws and, at others, for strengthening them. For example, as the Washington Supreme Court candidly documented in *State v. Ringer*, its early decisions engaged in a steady expansion of law enforcement's search and seizure power far beyond "historic foundation"[104] before it began to broaden the protections afforded by article I, section 7 in the early 1980s.[105] For its part, in 1969, the legislature began to expand the number of misdemeanors for which law enforcement officers can make warrantless arrests based on probable cause.[106] However, the legislature also enacted a statute making it a crime for police officers to search a private residence without a search warrant.[107] More recently, the legislature enacted statutes providing broader protection than required under state or federal case law in the areas of electronic eavesdropping and unauthorized voice recording.[108]

By entrusting both the courts and legislature to provide the "law" authorizing disturbances of residents' private affairs, the Rights Committee not only followed long-standing precedent, it also ensured that each branch of government would serve as a check on the other. Moreover, the Rights Committee drafted article I, section 7 in the middle of an era

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the houses and among the private papers of individuals. . . ." CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 365–66.

103. Nock, *supra* note 102, at 347.

104. *Id.* at 348 (citing State v. Ringer, 100 Wash. 2d 686, 692–96, 674 P.2d 1240, 1244–46 (1983)).

105. *See* State v. Myrick, 102 Wash. 2d 506, 510, 688 P.2d 151, 153 (1984); State v. Chrisman, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980)).

106. *See* WASH. REV. CODE § 10.31.100 (2006). This statute has been amended at least 20 times since 1969 and has been expanded to include 24 exceptions, including underage drinking, driving under the influence, violations of protection orders, and situations involving domestic violence. State v. Walker, 157 Wash. 2d 307, 318, 138 P.3d 113, 119 (2006).

107. Laws of 1921, ch. 71, §§ 1–2.

108. Nock, *supra* note 1032, at 348 (citing WASH. REV. CODE § 9.73.030, which makes unlawful the recording of any communication over telephone or radio between two or more individuals, or of any private conversation, without first obtaining the consent of the individuals involved. The statute provides exceptions for news-gathering employees who have prior consent, or who make the recording device obvious and for calls of an emergency nature, such as the reporting of a fire, crime, or other disaster.).

of fervent populism[109] and the framers guaranteed that both the courts and legislature would remain directly accountable to the people by providing for the popular election of legislators[110] and judges.[111] In this manner, the courts, legislature, and the people all serve to ensure residents' private affairs receive sufficient protection.

The second conclusion that can be drawn from the compulsory production cases, particularly *Boyd*, is that, except for in a few very specific situations, "authority of law" meant a government disturbance or invasion conducted pursuant to a valid warrant or subpoena issued by a neutral magistrate or other authorized government entity.[112] According to Cooley's influential treatise, *Constitutional Limitations*,[113] the second clause of the Fourth Amendment, which lists the requirements for a constitutionally valid search warrant, "sufficiently indicates the circumstances under which a reasonable search and seizure may be made."[114] First and foremost, Cooley explained, search warrants are "only to be granted in the cases expressly authorized by law."[115] This means that there must be (1) a law which shall point out the circumstances and conditions under which the warrant may be granted, (2) a court or magistrate

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109. Southcenter Joint Venture v. Nat'l Democratic Policy Comm'n., 113 Wash. 2d 413, 445, 780 P.2d 1282 (Utter, J., concurring) (By 1889, a wave of populism lapped against the shores of Olympia as the constitution was drafted).

110. WASH. CONST. art. II, §§ 5–6.

111. *Id.* art. IV, §§ 3, 5.

112. *See* GENERAL PRINCIPLES, *supra* note 76, at 209–13; CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 365–74; BISHOP, *supra* note 75, §§ 613–669.

113. *See* United States v. Boyd, 116 U.S. 616, 625, 629 (1886) (citing CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 368–69). Around the time of the framing, the Territorial and State Supreme Court also cited to Cooley's CONSTITUTIONAL LIMITATIONS as persuasive authority. *See e.g.*, Lim v. Territory of Washington, 1 Wash. 156, 160, 24 P. 588, 588 (1890); Owsley v. Oregon R. & N. Co., 1 Wash. 491, 494–95, 20 P. 782, 783–84 (1889); Harland v. Territory of Washington, 3 Wash. Terr. 131, 144–46, 13 P. 453, 458 (1887).

114. GENERAL PRINCIPLES, *supra* note 76, at 210. *But see* CLARK, *supra* note 101, at 39 ("It has been contended that [the Fourth Amendment] renders all arrests unlawful except upon a warrant so issued; but it is well settled that the provision does not apply to 'reasonable arrests without a warrant, authorized either by the common law or by statute.'").

115. CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 369 (emphasis added). The *Boyd* majority also interpreted the Fourth Amendment to mean that those searches and seizures that were authorized by either the common or statutory law were "reasonable." *See Boyd*, 116 U.S. at 622–24. At the time, search warrants were commonly allowed to search for and seize stolen goods, goods smuggled into the country in violation of the revenue laws, implements of gaming or counterfeiting, lottery tickets, prohibited liquors, prohibited books and papers, and for powder or other explosive and dangerous material. CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 372. Search warrants were also occasionally provided for by statute for books and papers of a public character, retained from their proper custody; females supposed to be concealed in houses of ill-fame; children enticed kept away from parents or guardians; concealed weapons; counterfeit money, and forged bills or papers. *Id.* at 372 n.1.

empowered by the law to grant it, and (3) an officer to whom it may be issued for service.[116] Furthermore, Cooley noted a particularized description of the place to be searched and persons or items to be seized and probable cause must be demonstrated to a court or magistrate.[117]

Washington State and Territorial law around the time of the framing are in accord with *Boyd* and Cooley. The territorial and state legislatures passed specific acts pointing out the circumstances under which a warrant may be granted. For example, acts were passed authorizing warrants to issue, to search for, and to seize property that had been stolen, embezzled, or obtained by false pretence;[118] counterfeit or spurious coin, forged instruments, or tools, machines, or materials prepared or provided for making them;[119] any unlawful gaming apparatus;[120] for fowls, birds, dogs, or other animals used or preparing to be used for fighting exhibitions,[121] and for the arrest of a defendant for whom an indictment was found or an information filed.[122] In addition, the legislature authorized magistrates to issue such warrants,[123] upon "reasonable" or "good" cause,[124] and sheriffs, deputy sheriffs, constables, and police officers to execute them.[125]

Of course, in certain circumstances, warrantless arrests were also authorized by statute or the common law at the time of the framing, though there was disagreement among American jurisdictions and

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116. GENERAL PRINCIPLES, *supra* note 76, at 210.

117. *Id.*

118. *See* Bal. Code § 7010; Code of 1881 § 967.

119. Bal. Code § 7011(1); Code of 1881 § 968(1); Laws of 1854, p. 100, § 1.

120. Bal. Code § 7011(2); Code of 1881 § 968(2); Laws of 1854, p. 101, § 2.

121. Bal. Code § 7404; Laws of 1893, ch. 27, § 5.

122. Bal. Code § 6865; *see also* Laws of 1891, p. 54, § 41.

123. A "magistrate" was defined as "an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime." Bal. Code § 4690; Laws of 1891, p. 91, § 1. The following officers were magistrates: the justices of the supreme court, superior judges, justices of the peace, and all municipal officers authorized to exercise the powers and perform the duties of a justice of the peace. Bal. Code § 4691; Laws of 1891, p. 91, § 2.

124. Some early State and Territorial statutes referred to "reasonable" or "good" cause instead of probable cause. *See, e.g.*, Bal. Code § 7011(1); Bal. Code § 7404. Cooley used the terms "reasonable cause" and "reasonable cause for suspicion" in his treatises as interchangeable with "probable cause." *See* CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 369. A number of terms were used in the late nineteenth century to describe the standard for the issuance of a search warrant or for an arrest were considered to be interchangeable with "probable" cause. *See, e.g.*, FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE, §§ 5, 8–9 (8th ed. 1880) ("reasonable ground" and "reasonable ground of suspicion" are "convertible" with "probable cause"); BISHOP, *supra* note 75, §§ 638–39 (1866) ("reasonable and proper cause" and "reasonable suspicion").

125. *See* Bal. Code § 507 (Among sheriffs' duties was to "execute all warrants delivered to him for that purpose by other public officers, according to the provisions of particular statutes"); *see also* Laws of 1893, ch. 27, § 5.

commentators on the extent of that authority.[126] At the very least, it was well-settled that the common law authorized law enforcement officers to conduct a warrantless arrest (1) for a felony or a misdemeanor amounting to a "breach of the peace"[127] committed in his presence; [128] (2) based on "probable" or "reasonable" cause that a felony has been committed;[129] and, (3) according to some scholars, on probable cause to believe a breach of the peace offense has been committed.[130] In addition, some scholars observed that the common law authorized officers to make a warrantless arrest for any offense committed in their presence, including misdemeanors, while others contended that this power must be granted by statute.[131] Washington courts followed the former approach.[132]

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126. CLARK, *supra* note 101, at 38–46; WHARTON, *supra* note 124, §§ 8–17; BISHOP, *supra* note 75, §§ 621–643. *See also* GENERAL PRINCIPLES, *supra* 76, at 213. The party who conducted a warrantless arrest had the burden of justifying it: "whoever makes one must show that the exceptional case existed which would justify it." *Id.* at 213.

127. CLARK, *supra* note 101, at 40–41. As Clark notes, "breach of the peace" was a generic term used to describe a variety of offenses:

> It must be remembered that fighting, rioting, etc., is not necessary to constitute a breach of the peace. A breach of the peace is 'a violation of public order—the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace. The term 'breach of the peace' is generic, and includes riotous and unlawful assemblies, riots affray, forcible entry and detainer, the wanton discharge of firearms so near the chamber of a sick person as to cause injury, the sending of challenges and provoking to fight, going armed in public without lawful occasion in such manner as to alarm the public, and many other acts of a similar character.

Id.

128. *Id.*; GENERAL PRINCIPLES, *supra* note 76, at 213; BISHOP, *supra* note 75, §§ 627, 640.

129. CLARK, *supra* note 101, at 41–42; GENERAL PRINCIPLES, *supra* note 76, at 213. BISHOP, *supra* note 75, §§ 625, 638, 640.

130. WHARTON, *supra* note 124, §§ 8–9; (For a past offense, the power to conduct a warrantless arrest is limited to cases of felony and breaches of the peace.); *see also* SAMUEL MAXWELL, A PRACTICAL TREATISE ON CRIMINAL PROCEDURE 11 (1896). A peace officer could also make arrests without warrant when municipal by-laws were violated in his presence. GENERAL PRINCIPLES, *supra* note 76, at 213.

131. *Compare* CLARK, *supra* note 101, at 43, 43 n.101 (1895) ("At common law, the right of an officer to arrest on another's accusation, or on his own suspicion only, is limited to cases of felony; the statutes of many states allow an officer to arrest without a warrant for any public offense committed in his presence, including misdemeanors.") *with* WHARTON, *supra* note 124, §§ 8–9 ("[F]or all offenses committed in the presence of an officer, the power to arrest the offender exists."). Bishop also indicated that a warrantless arrest could be made for certain low grade offenses committed in an individual's presence: "[a]n arrest of an offender by a private person, for any crime prejudicial to the public, seems to be justifiable." BISHOP, *supra* note 75, §§ 626, 630. Bishop cited as an example that,

> [a]ny private person may arrest a common notorious cheat, going about in the country with false dice, and being actually caught playing with them. . . . [R]estraining the private persons from arresting them without a warrant from a magistrate would be consequently prejudicial, because it would give them an opportunity of escaping, and continuing their offenses without punishment.

The right of law enforcement officers to conduct warrantless arrests was either defined or enlarged by statute in many jurisdictions at the time of the framing; [133] in most instances, this meant statutes authorizing warrantless arrests for (1) breach of the peace offenses after they have been committed;[134] and (2) misdemeanors other than breaches of the peace, committed in an officer's presence.[135] In a few states, there were statutes allowing arrests without a warrant for certain misdemeanors on information received from others.[136] In Washington, for instance, the legislature passed an 1893 act authorizing officers to conduct misdemeanor arrests of persons found engaged in the abuse of children, animals, fowl, or birds or upon oral complaint by any officer or member of a humane society or society for the prevention of cruelty to animals.[137]

Warrantless searches and seizures were also tolerated in the late nineteenth century, usually by virtue of the common law.[138] In the late nineteenth century, courts allowed warrantless searches of the person of an arrestee when incident to lawful arrest.[139] However, the exception was limited to personal property found in the possession of a person when he was arrested and that (1) was apparently used in the commission of the crime; (2) was obtained by the crime; (3) could be used to commit violence or effect an escape; or (4) could used as evidence against the accused.[140] The arresting officer could not confiscate money unless there

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BISHOP, *supra* note 75, § 626; *see also* BISHOP, *supra* note 75, § 630 ("Whenever the circumstances of a case would justify a private person in making an arrest without a warrant, they will equally justify a constable, sheriff, or watchman.").

132. State v. Llewellyn, 119 Wash. 306, 310, 205 P. 394, 396 (1922) ("Arrests for misdemeanor may be lawfully made without a warrant when the offense is committed in the presence of the arresting officer.")

133. CLARK, *supra* note 101, at 39; BISHOP, *supra* note 75, § 641.

134. *See* CLARK, *supra* note 101, at 42–43.

135. *Id.* at 40 n.88, 43, 43 n.101–02; BISHOP, *supra* note 75, § 641 n.1; JOSEPH BEALE, JR., A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 21 (1899) ("By statute the power of peace officers to arrest without a warrant is often extended to all misdemeanors committed in their presence. Such statutes do not permit an arrest for a misdemeanor not actually committed in the presence of the officer.").

136. CLARK, *supra* note 102, at 43 n.101; (citing Jacobs v. State, 12 S.W. 408 (1889); *Ex parte* Sherwood, 15 S.W. 812 (1890)).

137. Laws of 1893, ch. XXVII, § 1, 2, 8, 9; *compare* Laws of 1893, ch. XXVII, § 9 *with* WHARTON, *supra* note 124, § 8 ("cruelty to an animal, though a statutory misdemeanor, is not such an offense as authorizes arrest without a warrant.").

138. BISHOP, *supra* note 75, §§ 651–64.

139. State v. Ringer, 100 Wash. 2d 686, 691–92, 674 P.2d 1240, 1243–44 (1983) (citing Weeks v. United States, 232 U.S. 383 (1914); State *ex. rel.* Murphy v. Brown, 83 Wash. 100, 105–06, 145 P. 69, 71 (1914); Dillon v. O'Brien, 20 L.R. Ir. 200, 316–17 (Ex. D. 1887); Leigh v. Cole, 6 Cox Crim. L. Cas. 329, 332 (Oxford Cir. 1853)); *see also* BISHOP, *supra* note 75, §§ 667–69 (1866); CLARK, *supra* note 101, at 71.

140. CLARK, *supra* note 101, at 71; BISHOP, *supra* note 75, §§ 667–69.

was reason to believe it was connected with the supposed crime as its fruits or as the instruments with which the crime was committed.[141]

The common law authorized officers to enter a home (1) occupied by an accused, provided there was probable ground to believe the accused was there, to conduct a lawful arrest; and (2) when there was an affray or breach of the peace in the home.[142] Several additional exceptions to the warrant requirement existed that were similar to their modern counterparts, including hot pursuit,[143] the emergency exception, [144] and the plain view exception.[145]

Finally, it is critical to note that, unlike the Fourth Amendment, the protection afforded by article I, section 7 is not limited to preventing search or seizure conducted without the authority of law. Article I, section 7 also prevents legislative bodies from asserting "the general power of making inquiry into the private affairs of the citizen,"[146] while at the same time granting them the ability to get the information they need to fulfill their constitutional functions. Indeed, while the Rights Committee might have recognized that *Kilbourn* and *In re Pacific Railway Commission* will "stand for all time as a bulwark against the invasion of the right

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141. CLARK, *supra* note 101, at 71 ("To take away the party's money in such cases is to deprive him of the lawful means of defense."); BISHOP, *supra* note 75, § 669 (internal quotations omitted).

142. *See* CLARK, *supra* note 101, at 53–54. The officer need not have seen the felony committed; he may act on information from someone else who did see it. *Id.* at 54. In misdemeanor cases other than breach of the peace, such as where unlawful gaming is going on in a house or intoxicating liquors are being sold in violation of the law, an officer cannot break open the door and enter a home without a warrant. *Id.* at 54. *See also* WHARTON, *supra* note 124, §§ 18–20.

143. GENERAL PRINCIPLES, *supra* note 77, at 211:

> When it is certain that a treason or felony has been committed, or a dangerous wound given, and the offender being pursued takes refuge in his own house or the house of another, the doors of the dwelling may be forced for the purpose of arresting the person if that person known to be therein after a proper demand of admittance has been refused.

Id.; *see also* BISHOP, *supra* note 75, §§ 652, 660.

144. "Upon a violent cry of murder in a house, any person may break open the door to prevent the commission of a felony, and may restrain the party threatening, till he appears to have changed this purpose." BISHOP, *supra* note 75, § 660. "When an affray is made in a house, in the view or hearing of a constable, he may break open the outdoor in order to suppress it." *Id.* §§ 652, 660. "In all cases it is absolutely necessary that a demand of admittance should be made, and be refused before outer doors may be broken." *Id.* § 660.

145. State v. Llewellyn, 119 Wash. 306, 309–10, 205 P. 394, 395–96 (1922) (Where officers lawfully entered a saloon open to the general public and observed the defendant unlawfully disposing of intoxicating liquor, their entry, seizure of the articles, and arrest of the defendant were lawful. "Once in the place, the officers were justified in taking cognizance of the fact that a crime was being committed by the defendant. The evidence thereof was before their very eyes; it took no search to find it.").

146. Kilbourn v. Thompson, 103 U.S 168, 190 (1881).

of the citizen to protection in his private affairs,"[147] those cases were also potentially a significant hindrance on the legislature's ability to gather information. Just eight years after the state convention, the U.S. Supreme Court would note the "difficulties under which the two Houses have labored, respectively, in compelling witnesses to disclose facts deemed essential to taking definitive action."[148]

By authorizing disturbances with authority of law, the Rights Committee provided the state legislature with the ability to authorize the committees of either house to require witnesses to testify and to produce documents necessary for the legislative branch to fulfill its constitutional functions. Immediately following the framing, the legislature started doing just that with an 1895 statute providing for the taking of testimony in legislative proceedings and the compulsory production of pertinent documents; that statute is still in effect.[149]

At the time of the state convention in 1889, it must have seemed doubtful to the Rights Committee whether such a statute would withstand scrutiny under the limits on the legislature's ability to compel testimony and the production of documents established in *Kilbourn* and *In re Pacific Railway Commission's*. In fact, the U.S. Supreme Court would not find a similar federal statute constitutional until eight years after the state convention.[150] By authorizing the legislature to provide the requisite authority of law, the Rights Committee ensured that the legislative branch would be able to get the information it needed and helped Washington's courts avoid the confusion over the issue of legislative and judicial compulsory production that the federal courts experienced.[151]

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147. *In re* Pacific Railway Comm'n, 32 F. 241, 253 (N.D. Cal. 1887).

148. *In re* Chapman, 166 U.S. 661 (1897).

149. Laws of 1895, ch. 6, §§ 1–17 (codified at WASH. REV. CODE §§ 44.16.010–.170 (2006)):

> Sec. 1. Every chairman or presiding member of any committee of either the senate or house of representatives, or any joint committee . . . which, by the terms of its appointment, shall be authorized to send for persons and papers, shall have power, under the direction of such committee, to issue compulsory process for the attendance of any witness within the state whom the committee may wish to examine.
>
> Sec. 11. A person who, being duly summoned to attend as a witness before either house of the legislature or, or any committee joint committee thereof, refused or neglects, without lawful excuse, to attend...shall be punished as for contempt. . . .
>
> Sec. 12. A person who, refuses to be sworn or affirmed . . . or to produce . . . any material and proper books, papers, and documents, in his possession or under his control, shall be punished as for contempt. . . .

Id.

150. *In re* Chapman, 166 U.S. 661, 671–72 (1897).

151. *See, e.g., id.*; I.C.C. v. Brimson, 154 U.S. 447 (1894); United States v. Boyd, 116 U.S. 616 (1886); Kilbourn v. Thompson, 103 U.S 168 (1881); *In re* Pac. Railway Comm'n, 32 F. 241 (N.D. Cal. 1887). *See also* Whitcomb's Case, 120 Mass. 118 (1876).

At the same time, the Rights Committee wisely ensured that any disturbance of a resident's private affairs could only be authorized by the common law or by statute, as opposed to the order at issue in *Kilbourn*, which was made only by House resolution.[152] The Rights Committee also likely realized that, in passing any law authorizing a disturbance of an individual's private affairs for the purpose of a legislative investigation, the legislature would be constitutionally limited to inquiring into only those matters sufficient to discharge its legitimate functions.[153] Finally, the simple phrase "without authority of law," is a short, simple, and clear statement of the principle the Rights Committee meant to articulate.

IV. THE IMPLICATIONS OF THE UNIQUE LANGUAGE IN ARTICLE I, SECTION 7

A. Washington's Constitutionally Mandated Exclusionary Rule

The most striking implication resulting from the Rights Committee's reliance on compulsory production cases in drafting article I, section 7 is a constitutionally mandated exclusionary rule. The origin of Washington's independent exclusionary rule has already been well documented in Sanford Pitler's article, *The Origin Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy.*[154] Pitler describes how, under the "convergence" theory,[155] first articulated in *Boyd* and applied by the State Supreme Court in *State v. Gibbons*,[156] the right of an individual not to give real or physical evidence against themselves in a criminal prosecution under article I, section 9 mandates exclusion from all criminal proceedings evidence that law enforcement obtained in violation of article I, section 7.[157] Pitler's article is worthy of further discussion, but first, a brief explanation of convergence theory is in order.

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152. *Kilbourn*, 103 U.S 168.

153. *See In re Chapman*, 166 U.S. at 671–72; Robinson v. Fluent, 30 Wash. 2d 194, 202, 191 P.2d 241, 245 (1948).

154. Pitler, *supra* note 46.

155. The term "convergence" theory has been used by the U.S. Supreme Court and academics to describe *Boyd's* theory about the relationship between the Fourth and Fifth Amendments in the search and seizure context. *Id.* at 522–23; *see also* Andresen v. Maryland, 427 U.S. 463, 473 n.6 (1976).

156. 118 Wash. 171, 203 P. 390 (1922).

157. *See* Pitler, *supra* note 46, at 515–25 (citing State v. Gibbons, 118 Wash. 171, 184–88, 203 P. 390, 395–96 (1922)).

Convergence theory, which was a creation of the *Boyd* majority, postulated that in the context of search and seizure, the Fourth and Fifth Amendments "run almost into each other":

> For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in criminal cases to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth. And we have been unable to perceive that the seizure of a man's books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.[158]

The *Boyd* majority believed that any evidence obtained as a result of an unreasonable search or seizure was functionally the same as compelling that person to give evidence or be a witness against himself.[159] Because a person could not be compelled to testify or give physical evidence against himself, the *Boyd* majority concluded, admission of unconstitutionally obtained evidence in any criminal proceeding was "erroneous and unconstitutional."[160]

Of course, *Boyd's* sweeping interpretation of the Fifth Amendment's text does not withstand a critical analysis, and subsequent U.S. Supreme Court decisions have limited the scope of the Fifth Amendment and overruled *Boyd's* convergence theory.[161] But this does not change the significant affect *Boyd* had on the intent of the Rights Committee in 1889. Looking to *Boyd*, the Committee explicitly rejected the Fifth Amendment's language, "nor shall (any person) be compelled in any

158. United States v. Boyd, 116 U.S. 616, 633 (1886) (emphasis added).

159. *Id.* at 630, 633.

160. *Id.* at 638. The *Boyd* majority reversed the judgment of the Circuit Court and remanded the case with directions to award a new trial. *Id.*

161. *See* Adams v. New York, 192 U.S. 585 (1904); *see also* Pitler, *supra* note 46, at 517 n.308 (citing Schmerber v. California, 384 U.S. 757 (1966) (Fifth amendment privilege covers compulsion of testimonial or communicative evidence only, not real or physical evidence, and therefore compulsory blood alcohol level tests do not violate the Fifth amendment); Fisher v. United States, 425 U.S. 391, 397 (1976) (Fifth Amendment protects person asserting privilege only from compelled self-incrimination and consequently the contents of business records are not privileged because they are created voluntarily without compulsion); Andresen v. Maryland, 427 U.S. 463, 472 (1976) (the continued validity of the broad statements contained in [*Boyd*] has been discredited by later opinions); United States v. Doe, 465 U.S. 605 (1984) (O'Connor, J., concurring) (*Boyd* convergence theory is dead; the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind)).

criminal case to *be a witness* against himself... ," in favor of the language currently found in article I, section 9, "[n]o person shall be compelled in any criminal case to *give evidence* against himself...."[162]

Pitler suggests that the Rights Committee took the "give evidence" language in article I, section 9 directly from the *Boyd* majority's discussion of convergence.[163] But it is also likely that the Committee followed the search and seizure section of Thomas Cooley's treatise, *Constitutional Limitations*,[164] which was relied upon by the *Boyd* majority. Cooley observed that a search warrant could not be issued to "invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction":[165]

> The fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment—that *no person shall be compelled in a criminal case to give evidence against himself*—would also forbid such seizure.[166]

Thus, Cooley, like the *Boyd* majority, saw the seizure of evidence obtained without either a search warrant authorized by statute or any type of probable or reasonable cause that contraband was located at a suspected location as functionally identical to compelling a person to give evidence against himself in violation of the spirit of the Fifth Amendment. The fact that the Rights Committee adopted the italicized portion of Cooley's proposition almost verbatim in article I, section 9 suggests that they intended for the article to prohibit such seizures.

A second topic from Pitler's article that is worthy of further analysis is the Washington Supreme Court's initial refusal to fully accept the

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162. JOURNAL, *supra* note 5, at 498; ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION—A REFERENCE GUIDE 23 (2002). Despite this evidence, the State Supreme Court has interpreted the two provisions as providing identical protections. State v. Easter, 130 Wash. 2d 228, 235, 922 P.2d 1285, 1289 (1996); State v. Earls, 116 Wash. 2d 364, 374–75, 805 P.2d 211, 216 (1991); State v. Foster, 91 Wash. 2d 466, 473, 589 P.2d 789, 794–95 (1979); State v. Moore, 79 Wash. 2d 51, 55–56, 483 P.2d 630, 633–34 (1971).

163. Pitler, *supra* note 46, at 519.

164. United States v. Boyd, 116 U.S. 616, 629 (1886) (citing CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 365).

165. CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 371. Cooley then goes on to list the purposes for which search warrants were typically authorized by statute or the common law, for example, to search for stolen goods, implements of gaming or counterfeiting, prohibited liquors, etc. *Id.* at 372.

166. *Id.* at 371 n.5 (emphasis added). *Compare id. with* WASH. CONST. art. I, § 9.

Boyd convergence theory.[167] In the 1905 case of *State v. Royce*, a police detective acting on his own suspicions that Royce had stolen a typewriter, arrested Royce, took him to the police station and searched him, discovering a pawn ticket for the typewriter.[168] A few days later, the typewriter was reported stolen and the State charged Royce with burglary.[169] At trial, the State admitted the pawn ticket over Royce's objection, and he was subsequently convicted.[170]

Royce appealed his conviction to the Washington Supreme Court and, relying on *Boyd*, argued that by taking the pawn ticket from his person, his right to be free from unreasonable search and seizure was violated, thereby compelling him to produce testimony against himself.[171] The court rejected that argument, citing *State v. Nordstrom*[172] and *State v. Burns*,[173] two cases in which the searches at issue took place *after* the defendants had been lawfully arrested.[174] The court observed that, "in a criminal action, articles, personal effects, or money, taken from the person of a defendant, might be offered in evidence against him."[175] Without acknowledging article I, sections 7 or 9, the court relied upon several

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167. *See* State v. Royce, 38 Wash. 111, 116–18, 80 P. 268, 270–71 (1905); Pitler, *supra* note 46, at 467.

168. *Royce*, 38 Wash. at 112–13, 80 P. 268 at 269.

169. *Id.* at 113, 80 P. 268 at 269.

170. *Id.* at 112, 114, 116, 80 P. 268 at 268–70.

171. *Id.* at 116, 80 P. 268 at 270.

172. 7 Wash. 507, 35 P. 382 (1893). As further evidence Washington's residents believed that article I, sections 7 and 9 embodied the *Boyd* convergence theory is that, in this case, decided just four years after the framing, the appellant framed his argument in the form of the *Boyd* convergence theory: "Appellant complains of the admission of the boots and socks in evidence on the ground that they were obtained by an unreasonable search of his person, and that it was a method of compelling him to give evidence against himself." *Id.* at 509–10. The court rejected the appellant's argument because "it has never been held that personal effects of every kind could not be taken from the *person of a prisoner* and used upon his trial for what they may be worth as criminating evidence." *Id.* at 510 (emphasis added). In other words, the argument failed because the search of the appellant following his arrest was lawful and, therefore, did not violate article I, section 7. *Id.*

173. 19 Wash. 52, 52 P. 316 (1898).

174. *See Nordstrom*, 7 Wash. at 509, 35 P. at 383 ("These articles were taken from appellant's person upon his arrest and were retained by the sheriff to be used as evidence; the boots because it was claimed that they fitted the tracks, and the socks because they were muddy. No force whatever seems to have been used by the officers in getting possession of these things, but they were taken from the prisoner in the course of the usual search of his person, upon his arrival at the jail."); *see also Burns*, 19 Wash. at 55, 52 P. at 317. Another noteworthy aspect of the *Nordstrom* case is that, shortly after the framing, Nordstrom, like Royce, framed his argument in the form of *Boyd's* convergence theory. *See Nordstrom*, 7 Wash. at 509–10, 35 P. at 384 ("Appellant complains of the admission of the boots and socks in evidence on the ground that they were obtained by an unreasonable search of his person, and that it was a method of compelling him to give evidence against himself . . . .").

175. State v. Royce, 38 Wash. 111, 116, 80 P. 268, 270 (1905).

out-of-state cases to distinguish *Boyd* on the facts.[176] In *Boyd*, the court argued that the trial court compelled the claimants to produce the evidence against themselves, while in *Royce*, "the courts exercised no compulsion whatsoever to procure evidence from the defendants."[177] The court then affirmed the common law rule regarding illegally obtained evidence: "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue."[178]

The *Royce* court's reluctance to apply the *Boyd* convergence theory is almost forgivable. As Pitler notes, at the time the *Royce* opinion was rendered, the *Boyd* decision faced widespread criticism: other state supreme courts almost universally rejected the *Boyd* convergence theory.[179] Furthermore, just one year prior to *Royce*, in *Adams v. New York*,[180] the United States Supreme Court, consisting of almost an entirely new membership,[181] essentially repudiated *Boyd* by (1) declaring that the "weight of authority as well as reason" supported the common law rule;[182] (2) limiting *Boyd* to instances where a court specifically ordered the defendant to affirmatively produce evidence;[183] and (3) noting that the Fifth Amendment's protection was limited to protecting a criminal defendant from *testifying* against himself.[184]

It would be another seventeen years before the Washington Supreme Court would again directly address the *Boyd* convergence theory.[185] By that time, much had changed. Prohibition, at both the state and federal level, significantly increased the amount of contact law

176. *Id.* at 116–17, 80 P. 268 at 270.

177. *Id.* at 117, 80 P. 268 at 270 (quoting Gindrat v. People, 138 Ill. 103, 111 (1891)).

178. *Id.*, 80 P. 268 at 270; *see also Gindrat*, 138 Ill. at 111 (quoting 1 GREENLEAF ON EVIDENCE § 254a (Redfield's ed.)).

179. *See* Pitler, *supra* note 46, at 467 (citing 4 J. WIGMORE, EVIDENCE § 2264 (2d ed. 1923)). Prior to 1914, at least two state courts adopted the *Boyd* rule and rejected the common law rule. *See* Pitler, *supra* note 46, at 467 n.45 (citing State v. Slamon, 50 A. 1097, 1098 (1901) (convergence theory invoked to suppress letter seized during search pursuant to warrant authorizing search for stolen goods)); State v. Sheridan, 96 N.W. 730, 731 (1903) (allowing a defendant to be convicted on illegally seized evidence would "emasculate the constitutional guaranty, and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures.").

180. Adams v. New York, 192 U.S. 585 (1904).

181. *See* Members of the Supreme Court of the United States, http://www.infoplease.com/ipa/A0101281.html (last visited Mar. 16, 2008).

182. *Adams*, 192 U.S. at 594 (citing 1 GREENLEAF ON EVIDENCE § 254a).

183. Pitler, *supra* note 46, at 467 (citing *Adams*, 192 U.S. at 598).

184. *See Adams*, 192 U.S. at 597–98.

185. *See* State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

enforcement officials were having with the public.[186] Also, the U.S. Supreme Court resurrected what would become known as the "exclusionary rule"[187] in the 1914 case, *Weeks v. United States*,[188] holding that a trial court committed prejudicial error by denying the application of an accused for the return of letters obtained by law enforcement in violation of the Fourth Amendment and then permitting the State to use those letters at trial.[189] In 1921, the U.S. Supreme Court reintroduced *Boyd's* convergence theory and its view of the Fifth Amendment as prohibiting an individual from being the unwilling source of incriminating evidence, whether that evidence is in the form of testimony at trial or is the product of an illegal search, in *Gouled v. United States*.[190] By the mid-1920s, fifteen states and the federal courts had adopted the exclusionary rule and it was quite natural for scholars to speak of the Fourth and Fifth Amendments as providing protection against "compelled self-incrimination" when discussing search and seizure law.[191]

At the time of its decision in *State v. Gibbons*, in 1922, the Washington Supreme Court did not face the strong opposition to *Boyd* that the court faced seventeen years earlier in *Royce*. With *Boyd*'s broad interpretation of the Fourth and Fifth Amendments and convergence theory in favor in the federal courts and a growing number of state courts,[192] the *Gibbons* court quoted "from both the Federal and state constitutions to show that these guaranties are in substance the same in both ...."[193] Relying upon the series of U.S. Supreme Court cases approving of the exclusionary rule and *Boyd* convergence theory, the court concluded that, by allowing evidence obtained in violation of article I, section 7 into a criminal proceeding, the trial court compelled Gibbons to produce

186. Pitler, *supra* note 46, at 469.

187. The exclusionary rule provides that, in a criminal prosecution, evidence unlawfully seized must be excluded from the proceedings. State v. Fisher, 145 Wash. 2d 209, 230 n.100, 35 P.3d 366, 377 n.100 (2001).

188. 232 U.S. 383 (1914).

189. *Id.* at 398.

190. Gouled v. United States, 255 U.S. 298, 303–06 (1921); *see also* Amos v. United States, 255 U.S. 313, 315–16 (1921).

191. ASHER L. CORNELIUS, THE LAW OF SEARCH AND SEIZURE § 4–8 (1926).

192. *Id.* § 7 (1926) ("there has been a steady drift of authorities towards the exclusion doctrine in recent years.").

193. State v. Gibbons, 118 Wash. 171, 184, 203 P. 390, 395 (1922). Thus, when the Washington Supreme Court stated that the guarantees in article I, sections 7 and 9 and the Fourth and Fifth Amendments are "in substance the same," it was referring to the broad interpretations of those amendments given by specific U.S. Supreme Court cases of the late 1800s and early 1900s. *See id.* at 184–87 (citing Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298, 303–06 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383, 398 (1914); Boyd v. United States, 116 U.S. 616 (1886)).

evidence against himself, violating article I, section 9, and thereby erring.[194] The court thus rejected the common law rule it embraced in *State v. Royce*, and recognized the principles the Committee articulated by using the unique language in article I, sections 7 and 9.[195]

B. Constitutional Limitations

An analysis of the available historical materials suggests that there are significant constitutional limitations on both the judiciary and the legislature's ability to provide the law authorizing disturbances of residents' private affairs or invasions of their homes. But these limitations are not provided for in article I, section 7 itself. While the plain language of article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations,"[196] the plain language of the provision also does not set forth constitutionally prescribed minimum standards such as the Fourth Amendment's reasonableness and probable cause requirements.

On the other hand, the provisions of Washington's Constitution, including the Declaration of Rights, are "mandatory, unless by express words they are declared to be otherwise."[197] Thus, any statute or common law principle is necessarily subject to the provisions in the Declaration of Rights and other constitutional principles. These constitutional principles, in addition to the political process and the common law, limit the legislature and court's ability to authorize disturbances of residents' private affairs or invasions of their homes.

First, having drafted article I, sections 7 and 9 to incorporate the principles of the *Boyd* majority and Cooley, the Rights Committee likely intended for article I, section 9 to act as an additional limitation on government intrusions. As Cooley noted regarding the "spirit" of the Fifth Amendment, which the Committee meant for article I, section 9 to embody, a warrant may not be obtained for the *sole purpose* of obtaining evidence that may be used against him, except in those instances

194. *See Gibbons*, 118 Wash. at 184–89, 203 P. at 395–96.

195. Nevertheless, the detriment to society's interest in law enforcement resulting from the exclusionary doctrine's "proscription of what is concededly relevant evidence," must have weighed heavily on the minds of the early state supreme courts. Colorado v. Connelly, 479 U.S. 157, 166 (1986). Following *Gibbons*, the court began to manipulate search and seizure requirements and, eventually, expanded the scope of the search incident to arrest exception to the warrant requirement beyond its historical justification or precedent, in part, to avoid the exclusion remedy. Pitler, *supra* note 46, at 476–78.

196. State v. Parker, 139 Wash. 2d 486, 493, 987 P.2d 73, 78 (1999) (quoting State v. White, 97 Wash. 2d 92, 100, 640 P.2d 1061, 1070–71 (1982)).

197. WASH. CONST. art. I, § 29.

authorized by the legislature, for instance, for stolen goods or implements of counterfeiting.[198] Thus, article I, section 9, would seem to encompass the requirements of express statutory authorization for magistrates to issue warrants for a particular purpose and some type of "probable" or "good" cause requirement.[199] In addition, a statute such as the one at issue in *Boyd*, whereby a government attorney may make a motion to require the defendant to produce in court incriminating private books, invoices, and papers, or the allegations of the attorney respecting them are taken as confessed, would be prohibited by article I, section 9.[200]

Second, article I, section 3, the state due process clause,[201] also restricts the ability of the courts or legislature to authorize intrusions into the private affairs of residents. At the time of the framing, some state supreme courts held that their own state due process clauses placed limitations on the extent to which warrantless arrests could be made.[202] Also, it is well established that the due process clause of the Fourteenth Amendment prohibits unreasonable searches and seizures.[203] Based on the longstanding tradition of prohibiting such searches and seizures and pervasiveness of the warrant requirement in American jurisprudence, the Washington Supreme Court could draw a similar conclusion with respect to the state due process clause.

In fact, a newspaper account during the crucial days the Committee was revising the language of article I, section 7 suggests that the Rights Committee was considering incorporating the "due process of law" language directly into the provision. The *Tacoma Daily Ledger* reported on

198. CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 371 n.5, 371–72.

199. Article I, section 9 also necessarily protects an individual from being compelled in any criminal case to be a witness against himself, as provided by the Fifth Amendment. *See* State v. Duncan, 7 Wash. 336, 342, 35 P. 117, 119 (1893) (Anders, J., concurring). Several early state supreme court cases discuss the protections afforded by article I, section 9. Perkins v. North End Bank, 17 Wash. 100, 78 P.1019 (1904); State v. Washing, 36 Wash. 485, 78 P. 1019 (1904); State v. Melvern, 32 Wash. 7, 72 P. 489 (1903); State v. O'Hara, 17 Wash. 525, 50 P. 477 (1897); State v. Duncan, 7 Wash. 336 (1893). *See also* CONSTITUTIONAL LIMITATIONS *supra* note 75, at 371 n.5, 371–72, 386–88.

200. Boyd v. United States, 116 U.S. 616, 621–22 (1886).

201. "Due process" and "the law of the land," meant that life, liberty, and property were to be held under the protection of the general rules that govern society. State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910) (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 502 (7th ed. 1903)); *see also* CONSTITUTIONAL LIMITATIONS, *supra* note 75, at 432–39.

202. 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE, 72 (10th ed. 1918). Some courts held that their state due process clauses prohibited arrests without a warrant, except for felonies and for breaches of the peace committed in the presence of an officer. *Id.* (citing *In re* Way, 1 N.W. 1021 (1879); Pinkerton v. Verberg, 44 N.W. 579 (1889); State v. Hunter, 11 S.E. 366 (1890)). Other states authorized warrantless arrests for misdemeanors committed in the presence of an officer. *Id.*

203. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

July 13, 1889, that in the following days, "[p]rovisions will be made to prevent searching the residence of a private citizen without due process of law."[204] The Committee, however, chose to draft a separate due process clause, undoubtedly because it realized that, by drafting a separate clause, the clause would necessarily govern any laws authorizing the disturbance of residents' private affairs and the potential denial of life, liberty, or property in other contexts.

Third, the nature of the legislative power itself serves as protection against overreaching. *Kilbourn* and its progeny indicate that "no person can be punished for contumacy as a witness (or is required to testify) before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire," such as those matters enumerated in the Constitution.[205] Fifteen years later, in the case *In re Chapman*, the U.S. Supreme Court upheld a statute allowing a Senate committee to summon witnesses and compel the production of documents in an investigation regarding whether certain Senators had made improper investments.[206] The Court distinguished *Kilbourn* by noting that the Senate has the constitutional authority to punish its members for disorderly behavior, expel members, and the inherent power of self protection and the questions posed to the witness were not overly intrusive. The legislature, the Court stated, must have the "constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence *to enable the respective bodies to discharge their legitimate functions*."[207]

Many years after the framing, in *Robinson v. Fluent*, the Washington Supreme Court elaborated on this principle:

> [T]he powers of committees are not restricted to investigations upon matters pertinent to legislation only. Legislative committees may be created to investigate into any subject legitimately within the

204. *The Bill of Rights—Other Provisions To Be Inserted,* TACOMA DAILY LEDGER, July 13, 1889, at 4, col. 1.

205. Kilbourn v. Thompson, 103 U.S 168, 190 (1881).

206. *In re* Chapman, 166 U.S. 661 (1897).

207. *Id.* at 671–72 (emphasis added). Of course, the federal government is a government of enumerated powers and Washington State's government is vested with general powers. Thus, the reach of the federal legislature to inquiry is necessarily limited by the powers enumerated in the Constitution, the Necessary and Proper Clause, and the Bill of Rights. Therefore, the scope of matters for which the state legislature could potentially authorize a disturbance of the private affairs of an individual in order to obtain information necessary to discharge its legitimate functions is much larger.

> scope of the functions, powers, and duties of the legislature, and to secure information necessary to the proper discharge thereof.[208]

Such a power does not include, as the U.S. Supreme Court noted in *Kilbourn*, the "general power of making inquiry into the private affairs of the citizen."[209]

Fourth, the separation of powers serves to prevent the legislature from utilizing the courts to further legislative investigatory commissions by compelling individuals to testify and produce documents, as in *In re Pacific Railway Commission*. Finally, the protections afforded by the Fourth Amendment have been held to apply against the states through the due process clause of the Fourteenth Amendment, including (1) the prohibition of unreasonable searches or seizures, (2) the requirements for a constitutionally valid warrant, and (3) the exclusionary rule, as defined by the federal courts.[210]

Therefore, while the Washington Supreme Court is correct to observe that article I, section 7 is a two-step analysis when a search or seizure is challenged for being conducted without the authority of law, a three-step analysis is necessary when the legislature or courts have authorized a disturbance or invasion: (1) whether a person's private affairs were disturbed or home invaded; (2) whether the invasion or disturbance was authorized by law; and (3) if so, whether the law authorizing such action violates any other constitutional principle such as due process, compelling a defendant to give incriminating evidence against himself, separation of powers, or the Fourth Amendment made applicable to the states by virtue of the Fourteenth Amendment. In this way, significant constitutional limitations still exist to ensure that resident's privacy interests are sufficiently protected.

V. CONCLUSION

When the seven men comprising the Rights Committee were charged with drafting a state declaration of rights in July of 1889, they were asked to do so in a time of rapid change, technologically, socially, politically, and legally. The broad language that the Rights Committee, framers, and ratifying public eventually chose for article I, section 7 was a clear response to these changes, particularly the rapid advances in technology and attempts by the government to compel witnesses to testify

208. Robinson v. Fluent, 30 Wash. 2d 194, 202, 191 P.2d 241, 245 (1948).

209. *Kilbourn*, 103 U.S at 190.

210. Mapp v. Ohio, 367 U.S. 643 (1961).

and produce documents for various governmental bodies as demonstrated by *Kilbourn*, *Boyd*, and *Pacific Railway Commission*.

By mandating that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," the framers ensured the provision would apply to all governmental interferences with residents' private affairs, not merely searches and seizures. The framers' choice of "private affairs" was probably due to the advent of new technologies such as the camera and telephone and the need to protect far more than simply tangible items including houses, persons, papers, and effects. Any article I, section 7 analyses, therefore, must focus on a person's personal affairs themselves, as opposed to engaging in a "protected areas" analysis, as the U.S. Supreme Court once used for the Fourth Amendment.

If the influence of *Boyd* and *Entick* is recognized, then the provision permitting government disturbances that are authorized by law refers to a statute or common law principle. Under this arrangement, the framers ensured that each branch of government will ensure that residents' private affairs receive sufficient protection and serve as a check on the other. The provision also enables the legislature to authorize legislative or administrative committees to require witnesses to testify and to produce documents necessary for those bodies to fulfill their constitutional functions. Consequently, the framers left no doubt about whether the legislature has the authority to summon witnesses and compel the production of documents, avoiding similar questions that arose regarding Congress's authority in the 1880s.

At the time of the framing, the "authority of law" ordinarily meant a valid warrant or subpoena, though common law exceptions for warrantless searches and seizures did exist. Legislation in 1893 authorizing officers upon oral complaint to conduct a warrantless arrest of persons who engaged in cruel acts towards children, animals, fowl, or birds, a misdemeanor arrest which could not be made at common law, demonstrates that the framers likely conceived of a greater legislative role in governing disturbances of residents' private affairs than the courts have traditionally accepted. Thus, while the protection that article I, section 7 provides is undoubtedly broader, it is also somewhat more malleable than the protection provided by the Fourth Amendment. However, significant constitutional restraints such as the state due process clause and article I, section 9 limit the extent to which the authority of law may be provided.

Finally, the broad language the Rights Committee chose for article I, sections 7 and 9, the latter of which mirrors the description of the

"spirit" of the Fifth Amendment found in both the *Boyd* majority opinion and Cooley's *Constitutional Limitations*, suggests that the framers intended to incorporate the conclusions of the *Boyd* majority into the provisions. The *Boyd* majority believed that the government's use of evidence obtained in violation of the Fourth Amendment was functionally identical to compelling a defendant to give evidence (or testify) against himself in violation of the Fifth Amendment.[211] The *Boyd* majority deemed any such proceeding "erroneous and unconstitutional."[212] Washington, therefore, has a constitutionally mandated exclusionary rule.

The Washington Supreme Court observed in *State v. Gibbons* that the protections afforded by the Fourth Amendment and article I, section 7 were "in substance the same."[213] It made this statement during the early 1920s, after the U.S. Supreme Court resurrected the sweeping conclusions of the *Boyd* majority. By the time the court reiterated this proposition in 1975, the U.S. Supreme Court had rejected *Boyd* and equating the meaning of the two provisions was no longer justified. In *State v. Simpson*, the Washington Supreme Court took an important first step toward recapturing the original meaning of article I, section 7; it acknowledged the stark difference between its language and that in the Fourth Amendment, and then engaged in an independent analysis of the provision.[214] But a truly principled analysis also requires a close examination of the rationale behind the framers' decision to adopt the unique language in article I, section 7.

Looking back at the available historical evidence to determine the original intent of the framers, it is clear that they drafted a provision that can stand the test of time. The broad language in article I, section 7 will always require that official interferences with the private affairs of residents are governed by precise and predetermined legal principles. But by allowing for disturbances made with the authority of law, the framers also allowed future generations to play a role in shaping their privacy rights, provided the relevant constitutional limitations are respected. Consequently, it is not hard to imagine the framers looking at Washington's present residents, legislators, judges, and justices and asking them what value they place on privacy today.

211. Boyd v. United States, 116 U.S. 616, 634–35 (1886).
212. *Id.* at 638.
213. 118 Wash. 171, 184, 203 P. 390, 394 (1922).
214. 95 Wash. 2d 170, 177, 622 P.2d 1199, 1205 (1980)