

**THE THIRD ARTEFACT: BEYOND FEAR OF STANDING ARMIES AND
MILITARY OCCUPATION, DOES THE THIRD AMENDMENT HAVE
RELEVANCE IN MODERN AMERICAN LAW?**

Note

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I. INTRODUCTION

“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹

The Third Amendment to the United States Constitution stands out only for its almost complete obscurity. That dusty provision has even escaped the notice of ivory tower constitutional scholars, who have published volumes detailing the more notable Amendments in the Bill of Rights spanning subjects from torture to freedom of the press. Even the marginalized Tenth Amendment has fared better in the last two centuries.² Today, if the Third Amendment is

1. U.S. CONST. amend. III.

2. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (describing the Tenth Amendment as “but a truism that all is retained which has not been surrendered”); see

mentioned beyond the very specific context of the Intolerable Acts and the quartering of British imperial soldiers in Boston before the outbreak of the War for Independence,³ it is often in some theoretical litany of achievements of the Anglo-American legal tradition that has come to be called “Whig History.”⁴ As the quartering of soldiers in private homes has fallen into disfavor, interest in the Third Amendment has faded since the aftermath of the American Revolution, remaining largely as a civil rights honorable mention guaranteeing a theoretical restraint on tyranny. By explaining the historical and philosophical underpinnings of the Third Amendment, this Note explores modern applications for a largely forgotten amendment that has become regarded as the “Leviticus⁵ of the Bill of Rights.”⁶

II. HISTORICAL CONTEXTS

Perhaps the Third Amendment was created by the eighteenth-century mind for the immediate problems of that bygone era more so than the other nine amendments of the Bill of Rights and, thus, has little relevance in the highly evolved American Republic of today. Indeed, the Amendment was drafted largely in response to concerns regarding the military abuses of the British Empire a few years prior,⁷ but even the quartering of imperial soldiers occurred in a larger historical context. Fear of a standing army had been a traditional English political apprehension inherited by the founding generation, possibly even explaining the Third Amendment’s placement immediately subsequent to the Second,⁸ which trumpets the importance of a “well regulated

also United States v. Sprague, 282 U.S. 716, 733-34 (1931) (stating that the Tenth Amendment “added nothing to the [Constitution] as originally ratified . . .”).

3. See generally PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 225 (W.W. Norton & Co. ed. 1991) (1972) (noting that the Intolerable Acts were a series of laws, including The Boston Port Bill, the Administration of Justice Act, the Massachusetts Government Act, and the Quebec Act, passed by the Parliament of Great Britain in 1774 in response to the Boston Tea Party, which, among other grievances, enraged colonists by forcing them to billet imperial soldiers in their private homes).

4. Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 210 (1991).

5. Leviticus is the third of the five books of the Pentateuch and describes the correct rituals for sacrificial offerings and includes a litany of prohibitions on various types of sexual behavior, unclean foods, and arcane rules regarding the sanctity of the Jewish tabernacle. See generally *Leviticus*.

6. Josh Dugan, Note, *When is a Search Not a Search? When it’s a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555, 557 (2009).

7. Horwitz, *supra* note 4, at 211.

8. See David B. Kopel, *It Isn’t About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1341 (1995).

Militia, being necessary to the security of a free state”⁹ However, as will be demonstrated in the subsequent portion of this Note, concerns about military interference in civilian private life have returned. In the twenty-first century one may not have to wear combat boots and a helmet to be a soldier.

A. Quartering Troops and Standing Armies: The English Experience

Blackstone, noting the antiquity of the English *fyrð*¹⁰ militia system, wrote: “It seems universally agreed by all historians that [K]ing Alfred fast settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers”¹¹ Thus, the English militia dates back long before the foundation of the modern English, or later British, state, and the militia was long a source of ancient pride even to the English peasantry, “a critical element in their development of government under law.”¹² However, in the years after the Norman Conquest, the new monarchy found itself in need of professional soldiers to fight feudal wars of conquest in France and to suppress rebellions along the borders of Wales and Scotland.¹³ However, the militias, more useful in defensive wars where the militiamen fought on their own soil to protect their homeland, were never eliminated. As the abuses of the professional soldiers—including quartering—grew tiresome, fondness for the traditional militia increased. Professional royal armies became increasingly associated with high taxation and government oppression.¹⁴ By the end of the seventeenth century, a series of constitutional crises, including the military dictatorship of Oliver Cromwell¹⁵ and the Glorious Revolution,¹⁶

9. U.S. CONST. amend. II.

10. *See generally* 1 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 91 (Cassell & Co. 1956) (describing the *fyrð*, a local militia system used for defense in pre-Conquest Saxon England).

11. William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History* 35 AM. J. LEGAL HIST. 393, 396 (1991) (citing 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 410 (RJ. Burn 9th ed. 1780)); *see generally* CHURCHILL, *supra* note 7, at 93 (discussing King Alfred's use of the *fyrð*).

12. *See* Fields & Hardy, *supra* note 11, at 401.

13. *Id.* at 398.

14. *Id.* at 400.

15. Cromwell assumed control of the English “republic” during a temporary dissolution of the monarchy following the English Civil Wars of the 1640s. *See generally* 2 Churchill, *supra* note 10, at 219, 227.

led to adoption of the English Bill of Rights—a conservative charter of liberties that reaffirmed the so-called “ancient rights and liberties”¹⁷ of the English nation.¹⁸ The English Bill of Rights condemned standing armies but failed to specifically outlaw quartering.¹⁹ However, this was remedied almost immediately by the passage of the Mutiny Act, which prohibited the quartering of soldiers in private homes without the consent of the property owner.²⁰ British fears regarding quartering stretched beyond the simple nuisance of rowdy soldiers lodging in private homes and encompassed concerns regarding standing armies, an issue of constitutional dimensions. The links between quartering, standing armies, and military brutality were so intertwined that, in British court cases, the term quartering was used so broadly as to “describe where soldiers were stationed and where they conducted an array of activities, not just where they lived.”²¹

B. Colonial Apprehensions

Meanwhile, across the Atlantic, the people of Britain’s American colonies, too, became increasingly proud of their locally elected legislatures, British global imperial successes, and their rights as Englishmen. Thus, identifying themselves as transatlantic Englishmen,²² the American colonists were also acutely aware of the causes of the Glorious Revolution and the rights that, in its aftermath, had been reaffirmed to all Englishmen.²³ Furthermore,

16. The Glorious Revolution of 1688 was a largely bloodless coup in which the Catholic king, James II, was overthrown and replaced by his Dutch Protestant brother-in-law, William of Orange following a constitutional settlement with the English Parliament. *See generally id.* at 316-25.

17. ENGLISH BILL OF RIGHTS OF 1689, THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/england.asp (last visited Nov. 3, 2013).

18. Fields & Hardy, *supra* note 11, at 404.

19. ENGLISH BILL OF RIGHTS OF 1689, *supra* note 17.

20. Horwitz, *supra* note 4, at 210.

21. *See* Dugan, *supra* note 6, at 561.

22. EDMUND MORGAN & HELEN MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 35 (3d ed. 1995) (noting that James Otis, a notable Revolutionary Boston Patriot, drew up a statement of colonial rights stating that “the English Common Law entitled the colonists to the same rights as Englishmen in England” and that the Massachusetts Legislature approved of the notion and sent word to London of the same; *see also id.* at 111 (quoting the declarations of the Stamp Act Congress, “[t]hat his Majesty’s Liege Subjects in these Colonies, are entitled to all the inherent Rights and Liberties of his Natural born Subjects . . . [in] Great Britain.”).

23. *See* MAIER, *supra* note 3, at 29, 46-47, 123 (noting that the English Whig tradition viewed the Glorious Revolution as the “central event” in British History; the Whig tradition influenced colonial views of history and the manner in which colonial

few of the ancient English constitutional rights were as well known to the American colonists as the traditional disdain for standing armies.²⁴ The political leaders in the colonies railed against the armies lodged there during the events leading up to armed rebellion of 1775, particularly after the passage of the Intolerable Acts in the aftermath of the Boston Tea Party. Among the most detested laws were the Quartering Acts of 1765²⁵ and 1774, provisions perceived as ruthless that authorized, for the first time, the quartering of British Regulars in private homes.²⁶ Famously, Patrick Henry in his “Give Me Liberty or Give Me Death” speech called the oppressive British fleet and armies “the last arguments to which kings resort.”²⁷ Samuel Adams, an anti-imperial political agitator in Boston, where British troops had been garrisoned, wrote in response to the first Quartering Act that quartering soldiers among the “body of a city” could not be justified even in the name of maintaining peace and order, and that “military maxims . . . [would] soon eradicate every idea of civil government.”²⁸ Thus, colonists’ understanding of English history and tradition regarding the relationship between quartering and standing armies, particularly in the preceding century, could now be applied to their own experience; clashes with heavy-handed imperial authorities convinced many of the colonists that restrictions on the quartering of soldiers and “maintain[ing] . . . constitutional liberty” were linked.²⁹ Some of the colonists, like their English forebears, felt abused by the unchecked power of the sword unleashed among their peaceful cities. This backlash, in turn, threatened to subvert civil government, as Adams suggests. But the traditional, if less lofty, concern about the drunken, bawdy common soldiery vandalizing private residences and interfering with civilian family life continued to have currency as well.

radicals conducted anti-government resistance but, as American interest in Whig ideals increased, the charm of those same ideals began to fade in England).

24. Earl F Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 147 (2006).

25. Fields & Hardy, *supra* note 11, at 415 (describing the Quartering Act of 1765, which in contrast to the latter act, only required the colonists to bear some of the costs of supplying the soldiers, and if there was insufficient space in the barracks, to house the British Soldiers in public lodging, like inns and pubs).

26. *See id.* at 416.

27. Martin, *supra* note 24, at 149.

28. Dugan, *supra* note 6, at 563.

29. Horwitz, *supra* note 4, at 211.

C. The Early Republic and the Passage of the Third Amendment

After the War for Independence came to its successful conclusion and a new and more powerful central government was proposed to replace the Articles of Confederation, debates began regarding the need for limits on the power of the new federal government.³⁰ The fear of standing armies was widely held, reinforced by the events of the war. Thus, the adoption of an anti-quartering provision was “relatively uncontroversial.”³¹ But there were minor hiccups, including attempts during the Philadelphia Convention to severely limit congressional authority to create any standing army at all.³² The Third Amendment, like the entire Bill of Rights, was ultimately a compromise necessary to allay the concerns of the Anti-Federalists³³ and, thus, facilitate the passage of the 1787 Constitution. The Anti-Federalist Patrick Henry exemplified the common opinion that the quartering issue and standing armies were inextricably linked, stating, “[O]ne of our first complaints, under the former Government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain.”³⁴ While the issues were undoubtedly historically linked, more pragmatic Founders realized that, though the Bill of Rights must contain an anti-quartering provision to assuage fears deriving from quartering abuses before and during the war, a standing army could not be outlawed or the young republic would risk destruction at the hands of a larger and better disciplined foreign military.³⁵

30. See William A. Aniskovich, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1325-26 (1989) (“The most common argument advanced for a bill of rights at the Founding was the need to secure individual rights from intrusion by the national government.”).

31. Horwitz, *supra* note 4, at 211.

32. Fields & Hardy, *supra* note 11, at 422 (discussing Elbridge Gerry and his desire to limit congressional power to further restrict congressional appropriations for armies and navies to a single year, while fellow delegate George Mason desired to include cautionary language about the dangers of such forces).

33. Aniskovich, *supra* note 30, at 1325 (“Anti-Federalist writers provided the strongest and most prolific defense of a bill of rights in the period leading up to its adoption [A] bill of rights was the *sine qua non* for securing the ratification of the new Constitution in several state conventions.”).

34. Dugan, *supra* note 6, at 567; see also Horwitz, *supra* note 4, at 211.

35. See Fields & Hardy, *supra* note 11, at 423 (quoting James Madison’s defense of congressional military power in the new constitution: “[Patrick Henry] says that one ground of complaint, at the beginning of the revolution, was, that a standing army was quartered upon us. This is not the whole complaint. We complained because it was done without the local authority of this country. . . . If inimical nations were to fall upon us when defenseless, what would be the consequence? Would it be wise to say, that we should have no defense?”).

Once the Third Amendment was submitted to Congress there were few attempts to challenge it, though there was an effort to expand the amendment's coverage such that quartering was absolutely forbidden, even in time of war, regardless of congressional authorization. This change was soundly defeated based on the logic that, especially in wartime, it "ought not to be put in the power of an individual to obstruct the public service."³⁶

Hence, like their English forebears of a century prior, the new American government was forced to embrace the inevitability of a standing army.³⁷ Though the Third Amendment's prohibition on quartering arose largely due to a fear of the tyranny such armies could wreak, the Third Amendment evidently stopped short of prohibiting them altogether, and the issue disappeared from American political discourse despite repeated entreaties by George Washington that Congress organize the state militias into some workable level of uniformity.³⁸ As calls to arrange a national citizen army were ignored by Congress it became clear that "[t]he ideological assumptions of revolutionary republicanism would no longer play an important role in the debate over the republic's military requirements."³⁹

As a permanent professional military institution came to be accepted in the United States in the early nineteenth century, "[T]he standing army issue would no longer be able to draw off the symbolic energy of those who might otherwise have turned to the Third Amendment to support their fears of the military or to insist that only a people's militia comported with Republican principles [I]nstead, the Third Amendment came to be read literally as confined to its precise terms, not as connected to some more general principles involving standing armies."⁴⁰

III. MODERN APPLICATIONS

Despite the early significance of quartering grievances, in all of subsequent American history only a handful of court cases have involved the Third Amendment in any way. Several attempts to dredge up the little-used

36. Horwitz, *supra* note 4, at 212 (quoting Roger Sherman); *see also* Fields & Hardy, *supra* note 10 at 425.

37. *See* Fields & Hardy, *supra* note 11, at 410 (discussing English acceptance of a standing army in the years after the Glorious Revolution).

38. *See id.* at 427.

39. *Id.* at 428.

40. Horwitz, *supra* note 4, at 213.

amendment have been frivolous.⁴¹ Indeed, only once has the Third Amendment been given significant judicial explication by a federal court.⁴²

*A. The Engblom Decision and Incorporation of the
Third Amendment Against the States*

In *Engblom v. Carey*, the Second Circuit incorporated the Third Amendment against the states, holding that national guardsmen did not need to be “federalized” to be considered “soldiers” for purposes of the amendment.⁴³ The events leading up to the case began with a strike by corrections officers in New York State. In response to the serious threat posed by a lack of security at state prisons, Governor Hugh Carey activated the National Guard to maintain order at the prison. In order to provide the guardsmen with better lodging, prison administrators decided that the Guardsmen should be given rooms previously utilized by the now-striking correctional officers.⁴⁴ The Guardsmen occupied the officers’ rooms and remained there for over a week.⁴⁵

Being the first federal Court of Appeals to fully address the “novel claim” brought under the Third Amendment, the Second Circuit had to make several key determinations about the Third Amendment’s meaning. First, the court had to decide whether the National Guardsmen did, in fact, constitute “soldiers” under the amendment. Though Guardsmen are “state employees under the control of the Governor” except when “federalized,” the court held that they fall under the ambit of the Third Amendment because the Amendment is applicable to the states.⁴⁶

Because of the nature of the plaintiffs’ property interests in their residence, the Second Circuit also had to resolve how to interpret the term “owners” under the amendment. The Court reasoned that “owner” should not be confined to situations of fee simple ownership, as a rigid reading of the amendment would require, but should “extend to those recognized and permitted by society as founded on lawful occupation or possession with a

41. *Engblom v. Carey*, 677 F.2d 957, 959 n. 1 (2d Cir. 1982) (citing *Securities Investor Protection Corp. v. Executive Securities Corp.*, 433 F. Supp. 470, 472 n.2 (S.D.N.Y. 1977) (rejecting claim that a subpoena violates the Third Amendment); *United States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D.Cal.1951) (ignoring defendant’s contention that “the 1947 House and Rent Act . . . is and always was the incubator an hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III.”).

42. *See generally Engblom*, 677 F.2d 957.

43. *Id.* at 961.

44. *Id.* at 960.

45. *Id.*

46. *Id.* at 961.

legal right to exclude others.”⁴⁷ The Second Circuit’s reasoning was based soundly on prior Supreme Court precedent defining the scope of the Fourth Amendment and the right to privacy generally.⁴⁸ Thus, the *Engblom* Court rejected a strict interpretation of the term “owner” because such an interpretation would appear incongruous alongside Fourth Amendment case law.⁴⁹ For instance, a strict interpretation under the Third Amendment would mean the tenant of an apartment would have constitutional protection against unreasonable searches and seizures by the police but none against the quartering of soldiers in his residence during peacetime.⁵⁰

The Second Circuit’s ruling on the applicability of the Third Amendment ultimately had no bearing on the outcome of that case; on remand, the lower court granted summary judgment in favor of the defendant governor on the separate issue of qualified immunity.⁵¹ Because the governor and other state officials did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known”⁵² and because the Third Amendment claim was “novel” and no court had ever been asked “to invalidate as violative of the Third Amendment [a] peacetime quartering of troops,”⁵³ the lower court reasoned that the state was shielded by qualified immunity.

B. Rhetorical Use and Relationship to Other Constitutional Rights

Since the *Engblom* decision there have been no major cases applying the Third Amendment, though there have been a few cases either wholly rejecting a Third Amendment claim⁵⁴ or mentioning it only in passing in order to decide

47. *Id.* at 962.

48. *See generally id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965)(creating broad right to marital privacy); *Jones v. United States*, 362 U.S. 257 (1960) (holding Fourth Amendment protections extend to friends’ apartment)).

49. *Id.*

50. *Id.*

51. *See Engblom v. Carey*, 572 F. Supp. 44, 46-47 (S.D.N.Y. 1983 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (describing *Harlow* as the “most recent pronouncement” of qualified immunity law at the time of the decision), *aff’d*, 724 F.2d 28 (2d. Cir. 1983).

52. *Id.*

53. *Id.* (citing *Engblom*, 677 F.2d at 959).

54. *See Custer County Action Ass’n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001) (rejecting argument that United States military aircraft flying over private property constitutes “quartering soldiers” under the Third Amendment and refusing to further

some broader issue.⁵⁵ Probably the most notable concrete legal development regarding the Third Amendment was a cursory mention by the Supreme Court suggesting that, should the issue arise, the Court might not be opposed to applying the Third Amendment to the states.⁵⁶

As *Engblom* noted with its mention of *Griswold*, most modern applications of the Third Amendment have centered on an abstract use of the text in order to provide secondary support for a broad concept like the right to privacy.⁵⁷ It is certainly feasible that the Third Amendment might have played a greater role in modern constitutional jurisprudence, especially in privacy cases, if constitutional provisions like the Fourth Amendment either did not exist⁵⁸ or were too rhetorically thin to provide the sort of privacy protections against government tyranny the courts or populace desired. For example, Horwitz points out the Third Amendment, instead of being a lesser fragment of a list of rights recited in *Griswold*, might at least obtain the status of the “seemingly innocuous language of the Ninth Amendment, which has produced a constitutional guarantee of privacy in our own time,” if focus were not always on other amendments.⁵⁹ Thus, the million-dollar-question becomes: does the Third Amendment have any relevance beyond oblique references in cases regarding the right to privacy or recitations of Anglo-American libertarian triumphs, or as some vague pillar of principle only feebly reminiscent of the Ninth Amendment?

C. Natural Disasters, Civil Unrest, and the Third Amendment

The answer, of course, will ultimately lie with the Supreme Court should cases ever arise implicating the Amendment, but scenarios do exist where one could envision the invocation of a practical Third Amendment argument. Because the United States has not witnessed a destructive conflict fought

expand *Engblom* court’s link between Third Amendment, the Right to Privacy and the Fourth Amendment).

55. See *U.S. v. Nichols*, 841 F.2d 1485, 1510 n.1 (10th Cir. 1988) (Logan, J., dissenting) (arguing the framers assumed the English fee system of property law was operating in the United States, and citing Third Amendment as evidence that the founders desired to encourage these notions of property ownership).

56. See *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3034-35 n. 13 (2010) (citing *Engblom*, 677 F.2d at 961).

57. See *Griswold*, 381 U.S. at 484 (discussing how various portions of the Bill of Rights cast “emanations” which form “penumbras” or “zones of privacy”; the Third Amendment’s prohibition on the quartering of soldiers in peacetime is a “facet” of such a zone.).

58. See generally Horwitz, *supra* note 4, at 214.

59. *Id.*

largely on domestic soil since the Civil War in the 1860s, the obvious applications of the Third Amendment have never materialized. However, modern society faces a different set of threats than our eighteenth-century forebears did, so application of the amendment remains a possibility. As *Engblom* illustrated, National Guardsmen may be considered soldiers even when under state control.⁶⁰ In emergency disaster situations, like those that might follow a terrorist attack or a hurricane, the National Guard is generally mobilized to prevent destruction of property and looting, creating a situation ripe for a possible peacetime quartering of troops without the owner's consent, thus implicating the amendment.

Originally, the National Guard was created as part of a compromise between traditional colonial fears regarding standing armies and the need to maintain a well-trained, professional, and national army for modern warfare.⁶¹ Thus, the Constitution grants Congress the power to both "raise and support Armies" and "provide for calling forth the Militia to execute the Laws of the Union."⁶² The Constitution also limits congressional power over the militia, allowing the states to appoint their own officers and dictate their own training "according to the discipline prescribed by Congress."⁶³ It was not until the twentieth century that the National Guard evolved into its modern bifurcated role as a reserve federal army capable of fighting in foreign combat operations and a state force used to provide armed support to state and local authorities during natural disasters or civil unrest.⁶⁴

In the aftermath of Hurricane Katrina, roughly 50,000 National Guardsmen were sent to the Gulf Coast region.⁶⁵ This was the largest domestic troop deployment since the Civil War.⁶⁶ Unfortunately, the response to Katrina was muddled by local, state, and federal authorities, resulting in a confused deployment by the Guard.⁶⁷ With communications infrastructure in disarray in

60. *Engblom*, 677 F.2d at 961.

61. James Stuhltrager, *Send in the Guard: The National Guard Response to Natural Disasters*, 20 NAT. RESOURCES & ENV'T 21 (2006); see also Fields & Hardy, *supra* note 11, at 421-23.

62. U.S. CONST. art. I, § 8.

63. *Id.*

64. Stuhltrager, *supra* note 61, at 21-22.

65. James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J. L & PUB. POL'Y 747, 748 n. 3 (2008) (stating that over 61,000 civilian and military personnel had been dispatched to the Gulf by March 2006); H.R. REP. NO. 109-377, at 202 (2006).

66. H.R. REP. NO. 109-377, at 201.

67. *See id.*

the hurricane's aftermath, the National Guard was forced to overcome logistical difficulties and establish temporary command posts and barracks. There were reports of National Guard units sheltering in hospitals, convention centers, and even a golf course club house.⁶⁸ The National Guard's sheltering in locations like these was instrumental in preventing further looting, violence, and destruction of property,⁶⁹ as when the Guard slept overnight in a shopping mall to prevent looting and burning.⁷⁰

On rare occasions civil strife might also provide opportunities for Third Amendment violations. The 1992 Los Angeles riot stands out as the most prominent event in which federal forces were used to "suppress insurrection."⁷¹ A protracted riot situation might give rise to use of civilian private property to house soldiers during peacetime. Over 6,500 National Guard troops were dispatched during the Los Angeles riots, along with 1,700 federal soldiers from the Army and Marines.⁷² Though the federal response to the riots was criticized for various reasons, including the common complaints about slow and uncoordinated federal responses to emergencies,⁷³ no reports surfaced regarding any activities that could be construed as possible Third Amendment violations by the National Guard or the federal soldiers.

Although the Third Amendment was never raised in the responses to Hurricane Katrina or the Los Angeles riots, situations like these provide opportunities for possible Third Amendment violations. And if the *Engblom* Court's definition of "soldier"⁷⁴ was applied, and the term "house" was not interpreted extremely narrowly,⁷⁵ National Guardsmen boarding on private property without the consent of the owner in peacetime would constitute a violation of the Third Amendment.

68. Rogers, *supra* note 65, at 762.

69. *Id.*

70. *Id.*

71. U.S. CONST. art. I, § 8.

72. *Los Angeles Riots Fast Facts*, CNN.COM, (Sep. 18, 2013, 4:04 PM), <http://www.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/>.

73. See Joseph Florczak, Note, *A Soldier's-Eye View of the Homefront*, 87 NOTRE DAME L. REV. 2191, 2207-08 (2012) (describing the inefficiencies that resulted from "federalization" of the Guard during the Riots).

74. *Engblom*, 677 F.2d at 961.

75. However, when the Third Amendment was passed, Congress rejected a proposed modification to allow billeting in public houses and inns without the consent of the owner, possibly indicating that "house" should also be construed to cover a wide range of "public facilities." Rogers, *supra* note 65, at 769.

D. The Intelligence Gathering Bureaucracy as “Soldiers”

A broad interpretation of the Third Amendment could lend itself to further securing the “rights of the people to be secure in their persons, papers and effects”⁷⁶ against military-specific intrusion beyond what the Fourth Amendment provides. The Third Amendment in its most basic terms applies to “soldiers”⁷⁷ being garrisoned on civilian private property. “Like the Second [Amendment], the Third centrally focuses on the structural issue of protecting civilian values against the threat of an overbearing military.”⁷⁸ Today, the military apparatus of the United States has grown vastly larger than anything imagined in the Early Republic, when the fear of standing armies was still commonplace and technology had not advanced far enough to facilitate the creation of vast intelligence bureaucracies.

If the term “soldier” in the Third Amendment is viewed in a broader context, which is reasonable due to the multifarious role of the modern military, the Amendment might be asserted as a bulwark against overreaching intelligence agencies like the National Security Agency (“NSA”). Two similar but distinctive types of possible Third Amendment violations might emerge due to the actions of these agencies. First, cyber operations, wherein a government agent places harmful files on a personal computer, may lend itself to a Third Amendment analysis. Second, data dredging schemes, like those coordinated by the NSA and famously revealed in 2013 by ex-contractor Edward Snowden,⁷⁹ could also plausibly find themselves at odds with the Third Amendment.

Undoubtedly, “cyber operations” are military endeavors to the extent that U.S. Cyber Command (“USCYBERCOM”) executes or coordinates such operations.⁸⁰ USCYBERCOM was established per a directive issued by the Secretary of Defense in 2009 and works with the NSA to prevent enemy cyber

76. U.S. CONST. amend. IV.

77. U.S. CONST. amend. III.

78. AKHIL AMAR, *THE BILL OF RIGHTS* 59 (Yale University Press); *see also id.* at 47 (explaining the original purpose of the Second Amendment—to give “the people” the means to resist a tyrannical and aristocratic central government employing a mercenary force of vagrants and vagabonds (quoting U.S. Const. pmb1.)).

79. *See* Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, *THE GUARDIAN* (June 9, 2013), <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>.

80. Alan Butler, *When Cyberweapons End Up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 *Am. U. L. Rev.* 1203, 1232 (2013).

threats and possibly engage in cyber counterstrikes.⁸¹ Cyber counterstrikes particularly pose a threat to domestic computer systems because of the difficulty of accurately tracking the original virus or other hacking attempt.⁸² Thus, the government might inadvertently harm a domestic third party by placing corrupted files on that third party's system.⁸³ Importantly for a Third Amendment analysis, USCYBERCOM is directly under the umbrella of the Department of Defense, just like the Departments of the Army and Navy, thus making USCYBERCOM analogous to traditional soldiers. As further evidence of the link between cyber operations and a traditional military role, the Defense Department's cyber operations strategy has called for "[t]reating cyberspace as an operational domain like land, air, sea and space, operating and defending department networks and training. . . . forces for cyber missions."⁸⁴

Cyber counterstrikes, programs like PRISM,⁸⁵ and other wiretapping and data-dredging schemes can be covered by the Third Amendment if the terms "house," "owner," and "quartering" are given an expansive application consistent with modern realities. Textualists, including Justice Scalia, "believe that the text of the Fourth Amendment draws a bright-line distinction between surveillance that penetrates the walls of the home and that which does not," as the Court noted when it declared unconstitutional police thermal imaging of private homes.⁸⁶ Thus, even if the meaning of the words "owner" and "house" are derived from Fourth Amendment case law, as the *Engblom* Court reasoned,⁸⁷ programs like PRISM could still be covered under the Third

81. *Id.* at 1234.

82. *Id.* at 1219.

83. *Id.* at 1220.

84. *Id.* at 1208.

85. Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, THE WASHINGTON POST (Jun. 7 2013, 9:57 AM), <http://tinyurl.com/mm3ttqt> (describing PRISM as an NSA and FBI program that taps "directly into the central servers of nine leading U.S. Internet companies, extracting audio and video chats, photographs, e-mails, documents, and connection logs that enable analysts to track foreign targets . . .").

86. Dugan, *supra* note 6, at 586 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (Scalia, J., majority opinion); *see also* *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (Scalia, J., plurality opinion) (using a property rights analysis to hold unconstitutional police acquisition of a warrant based on a prior warrantless search by a drug sniffing about on the front porch of a private home. "[T]he home is first among equals. At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'").

87. *Engblom*, 677 F.2d at 962 ("A rigid reading of the word "Owner" in the Third Amendment would be wholly anomalous when viewed, for example, alongside established Fourth Amendment doctrine, since it would lead to an apartment tenant's being denied a privacy right against the forced quartering of troops, while that same

Amendment because Americans generally read their emails and engage in other online activities from within the privacy of their homes, thus correlating with the phrase “any house.”⁸⁸ As a result, military interception of private correspondence in a manner that once would have required a soldier lodged in a house rifling through residents’ personal belongings may meet both the letter of borrowed Fourth Amendment law and comport with the spirit of the Third Amendment.

The *Engblom* Court’s linking of Third Amendment terms to definitions found within Fourth Amendment case law is reasonable because the Fourth Amendment is one of the Third Amendment’s “closest constitutional relative[s].”⁸⁹ The relationship between the two amendments reflects the founders’ concern about two types of government intrusion into the citizen’s private residence: civil police intrusion and intrusion by the military.

Fourth Amendment jurisprudence could influence interpretation of the Third Amendment phrase, “any house.” At its greatest breadth, the phrase “any house” might “encompass all forms of property that fit within the typical paradigm.”⁹⁰ Yet, stretching the phrase “any house” to include chattel property seems inappropriate and goes far beyond the *Engblom* interpretation. Military electronic interference with mobile devices such as cell phones may have to remain the province of the Fourth Amendment. Of course, with only one significant Third Amendment decision, such suggestions remain highly theoretical. Currently, wiretapping and other government interference with private electronic communications, regardless of the nature of the agency doing the interfering, are evaluated under the Fourth Amendment.⁹¹

The division between the sphere controlled by the Fourth Amendment and that potentially controlled by the Third may lie simply and evenly along the divide between civilian and military coercive power.⁹² The primary distinction between the federal sheriff and the soldier of the late eighteenth century derives from their respective purposes and whom they reported to, whether an officer or general for soldiers, or a magistrate or bureaucrat for the federal

tenant, or his guest, or even a hotel visitor, would have a legitimate privacy interest protected against unreasonable searches and seizures.”).

88. Dugan, *supra* note 6, at 586.

89. Rogers, *supra* note 65, at 771 (arguing that Search and Seizure Clause of Fourth Amendment is the Third Amendment’s “closest constitutional relative.”).

90. Butler, *supra* note 80, at 1230.

91. See *Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (discussing the risk of error if the Court “elaborat[es] too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear”).

92. Dugan, *supra* note 6, at 585.

sheriff.⁹³ Today, the NSA and USCYBERCOM are clearly involved with military operations and national security, as their respective acronyms and abbreviations imply, and are more analogous to the soldiers contemplated by the amendment's authors than to any civil authority. Given the Amendment's restrictions on the military, "[w]hen framed as a right to exclude the military from private property, it is clear that computers, networks, and other systems fall within the scope of the Third Amendment."⁹⁴

As for what many textualists would consider a very liberal interpretation of the term "quartering," a cogent argument can be made suggesting the founders were more motivated by "a large-scale concern about a centralized executive power imposing its will at gunpoint, regardless of the underlying legitimacy of the law"⁹⁵ than by comparatively minor concerns regarding the lodging of the rowdy soldiery on private property. The fear of standing armies shared by most of the founding generation lends formidable support to such an argument. A government that can spy on its citizens and intrude into their private correspondence by the subtlest of means, without heavy-handed military occupation, may ultimately become far more dangerous than any minor tyranny the early United States, or even the British Empire, might have been able to impose.

As we have seen, despite the widespread distaste for standing armies among some early American statesman and Federalists, a standing army became necessary to repel, and later invade, foreign powers. During the Civil War, the standing army replaced the militias in "suppress[ing] insurrections" and "execut[ing] the laws of the Union."⁹⁶ Thus, stretching the term "quartering" so far, given the musings of the triumphant Federalists, especially Madison,⁹⁷ may be inappropriate. Madison said the only real grievance with the pre-revolutionary quartering by British troops was the fact "it was done without the local authority of this country."⁹⁸ Therefore, it is possible that the entire Third Amendment was only a "symbolic concession to republican sympathies" drafted to prevent opposition, particularly from those of an Anti-Federalist bent that wanted to permanently prohibit the existence of a standing army.⁹⁹ However, like the politics of every era, the founding generation's

93. *Id.* at 584-85.

94. Butler, *supra* note 80, at 1230.

95. Dugan, *supra* note 6, at 562-63.

96. *See* U.S. CONST. art. I. § 8.

97. Madison was a Federalist in the sense he supported the passage of the 1787 Constitution and an end to the Articles of Confederation; however he was not as much of a nationalist as Hamilton, and was often a staunch advocate of states' rights, ultimately becoming a Jeffersonian. *See* AMAR, *supra* note 78, at 4.

98. Horwitz, *supra* note 4, at 211 (quoting James Madison).

99. *Id.* at 212.

political ideologies were neither uniform nor monolithic. Thus, though the founders may have disagreed over the potency of the Third Amendment, the ideas behind the amendment were important enough to early Americans to be codified in the Bill of Rights.¹⁰⁰ And along with its kindred amendment, the Second,¹⁰¹ the Third Amendment remains a key restraint on government tyranny through military oppression.

“[I]t is likely that cyber operations could constitute quartering to the extent that they involve intruding into and placing files on a private system.”¹⁰² Moreover, the definition of the term quartering today does not differ particularly from its meaning in the eighteenth century, save that, presently, files are quartered on home computers, instead of soldiers in home bedrooms.¹⁰³ Furthermore, computer hacking is easily analogized to trespass.¹⁰⁴ Acquisition of private correspondence like emails, Internet search history, or downloaded movies for military or anti-espionage purposes would once have required physical seizure of documents or items from within a person’s home, a clear trespass.¹⁰⁵

The usefulness of a Third Amendment analysis is unquestionable in regards to greater protection of private information from the federal government; no Fourth Amendment¹⁰⁶ reasonableness test¹⁰⁷ need be applied

100. The Bill of Rights was created to assuage Anti-Federalist concerns regarding a powerful and elitist centralized government imposing a tyranny. *See generally* AMAR, *supra* note 70, at 10-17.

101. AMAR, *supra* note 78, at 59, 62-63 (discussing relationship of the Third Amendment to the Second and also the Fourth Amendment).

102. Butler, *supra* note 80, at 1232.

103. *See id.* at 1231-32.

104. *Id.* at 1230.

105. “In law, ‘trespass’ has a well ascertained and fixed meaning, embracing every infraction of a legal right that is a wrong against the right of possession. Thus, the term ‘trespass’ in its broadest sense means any act that exceeds or passes beyond the bounds of any rights that have been legally granted, any invasion of the interest in exclusive possession of property.” 87 C.J.S. *Trespass* § 1.

106. “The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . .” US CONST. amend. IV (emphasis added).

107. *See Katz v. United States*, 389 U.S. 347, 360-61(1967) (Harlan, J., concurring) (holding that a telephone booth, like a private home, is a place in which a person has a reasonable expectation of privacy and thus Fourth Amendment protection against electronic government eavesdropping); *but see Katz* 389 U.S. at 363-64 (1967) (White, J., concurring) (“We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer,

to Third Amendment violations, nor would a Third Amendment analysis be concerned with the host of exceptions¹⁰⁸ contained within Fourth Amendment jurisprudence. Simply a “categorical test” would be required focusing on the basic fact of whether the wiretapping was done in time of peace or war and, if done in war, whether it was “done in a manner. . . prescribed by law.”¹⁰⁹ With the increasing reach and scope of both American military intelligence and the abstract globe spanning so-called wars of the digital age, a Third Amendment analysis might provide a better safeguard against military encroachment on fundamental privacy interests.

IV. CONCLUSION

The titular question posed by this Note can be answered neither affirmatively nor negatively. Suffice to say, possible National Guard abuses during natural disasters seems a more likely avenue to drag the dusty Third Amendment out of legal obsolescence than a liberal interpretation that might effectively indict the dubious practices of the American intelligence establishment. However, the Amendment’s application against the federal intelligence bureaucracies that have spread like kudzu in the years since the Second World War may be the far more pressing concern in this age of high resolution cameras, data dredging, and remote-controlled drones. A Third Amendment analysis of data dredging and the hacking of personal computers would require debate and action by Congress,¹¹⁰ instead of leaving such hidden, unbridled power in the hands of the Executive Branch. The Third Amendment need not be relegated to the status of forgotten artefact but can be a powerful tool in securing the liberties of the people, if only the courts would so use it.

the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”).

108. *See id.* at 357.

109. Dugan, *supra* note 6, at 586; U.S. CONST. amend. III.

110. The Third Amendment absolutely prohibits quartering in peacetime and requires quartering to be done “in a manner prescribed by law” if done during the course of a war. U.S. CONST. amend. III.