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THE ABYSS FROM WHICH THERE IS NO RETURN: THE THIRD AMENDMENT PRECLUDES NSA'S SECTION 215 PROGRAM

> *We must know, at the same time, that capability at any time could be turned around on the American people, and no American would have any privacy left such is the capability to monitor everything—telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology . . . . I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision so that we never cross over that abyss. That is the abyss from which there is no return.*
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> – Senator Frank Church, *Meet the Press*, August 17, 1975[1]

INTRODUCTION

After Edward Snowden revealed the National Security Agency's[2] dragnet surveillance program under section 215 of the USA PATRIOT Act,[3] the national conversation about the government's role in the security of the nation changed overnight. Conversations about the legality of government intrusions into our private lives, coupled with the budding realization that what we as U.S. citizens had understood to be private no longer was, led to a fundamental shift in our understanding of the relationship between the government and private life. Glenn Greenwald, one

[1] *Available at* https://www.youtube.com/watch?v=YAG1N4a84Dk.

[2] The National Security Agency will hereinafter be referred to as NSA.

[3] 50 U.S.C. § 1861 (2016) [hereinafter "215 program" or "section 215"].

of the journalists whom Snowden had contacted, recently pointed out in the wake of the Mossack Fonseca Panama Papers leak that what is shocking about these revelations is that these seemingly-illegal programs are arguably justified by a legal framework.[4] Like the practices exposed by the Panama Papers,[5] the section 215 bulk surveillance program that Snowden revealed was "legal," inasmuch as its proponents claimed to be following a statute.[6] Whether or not that is true, the 215 program is impermissible under the Third Amendment to the United States Constitution.

This paper will set forth several reasons that a Third Amendment attack on section 215 should succeed even though the Supreme Court has never put the Third Amendment at the center of a decision. It will also explain how section 215 exposes U.S. persons to exactly the kind of intrusion into private lives that the Framers considered impermissible, and why First and Fourth Amendment claims have failed to engender a meaningful change to section 215's metadata collection program.

There have been many high-profile challenges to the legality of NSA's clandestine surveillance programs. Perhaps the most notable are the cases *Clapper v. Amnesty International*

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[4] Glenn Greenwald, *A Key Similarity Between Snowden Leak and Panama Papers: Scandal is What's Been Legalized*, THE INTERCEPT (Apr. 4, 2016, 5:52 AM), https://theintercept.com/2016/04/04/a-key-similarity-between-snowden-leak-and-panamapapers-scandal-is-whats-been-legalized/.

[5] Martha M. Hamilton, *Panamanian Law Firm Is Gatekeeper to Vast Flow of Murky Offshore Secrets*, THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), https://panamapapers.icij.org/20160403-mossack-fonseca-offshore-secrets.html.

[6] Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA's 215 Program*, 12.2 Colo. Tech. L.J. 309, 321 (2014).

USA,[7] and *Jewel v. NSA*.[8] The Supreme Court dismissed the plaintiffs' claims in *Clapper* primarily because it held that the alleged targets of surveillance lack standing to sue in the first place.[9] In that case, Amnesty International, a human rights-oriented non-governmental organization, sued NSA for collecting Amnesty's metadata. The Supreme Court held that Amnesty had not adequately proved that it had been the target of NSA surveillance, and therefore that it could not proceed on its claims.[10]

According to the Electronic Frontier Foundation, "[i]n *Jewel v. NSA*, EFF is suing the NSA and other government agencies on behalf of AT&T customers to stop the illegal[,] unconstitutional[,] and ongoing dragnet surveillance of their communications and communications records."[11] The plaintiffs' theory is that NSA, in concert with AT&T and other telecommunications companies, violated the First and Fourth Amendments of the U.S. Constitution.[12] They claim these violations occurred when AT&T shared customer information with the NSA. In February of this year, the district court judge granted a motion to lift a stay of discovery, which had been barred since 2008.[13]

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[7] 133 S. Ct. 1138 (2013).

[8] *Jewel v. NSA*, 4:08-cv-04373, *available at Jewel v. NSA Case Page*, https://www.eff.org/cases/jewel (last visited Mar. 7, 2016).

[9] *Clapper*, 133 S. Ct. at 1155.

[10] *Id.*

[11] *Jewel*, *supra* note 8.

[12] *Jewel* Complaint, Sept. 18, 2008, ECF No. 1, *available at* https://ia801302.us.archive.org/34/items/gov.uscourts.cand.207206/gov.uscourts.cand.207206.1.0.pdf.

[13] *Jewel* Order Granting Mot. to Lift Stay of Disc., Feb. 19, 2016, ECF No. 340, *available at* https://www.eff.org/files/2016/02/19/jewel_order_lifting_discovery_stay.pdf.

There has yet to be a case brought to the Supreme Court, or any Federal Courts of Appeal, that alleges NSA's dragnet programs have violated a person's right to privacy under the Third Amendment. The Amendment says: **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.**[14] I argue that the goal of this Amendment is to protect the privacy of personal spaces. Only one court has decided on the merits of the Third Amendment. In *Engblom v. Carey*,[15] the Second Circuit held that officers of the National Guard, who were called upon to act as prison guards because the actual guards were striking, were soldiers for the purpose of the Amendment and therefore the prison guards could not be compelled to house the National Guard in their on-site quarters.[16] Despite the lack of other precedent, the NSA's omnipresence through its surveillance under the 215 program is precisely the kind of intrusion into privacy that the Framers contemplated.

I. NSA & THE THIRD AMENDMENT IN HISTORICAL CONTEXT

A. *Historical Importance of the Third Amendment*

The Third Amendment bears study. As then-student Josh Dugan pointed out in a 2009 Georgetown Law Journal article, it is unwise not to "question the prevailing orthodoxy that holds

[14] U.S. CONST. amend. III.

[15] 677 F.2d 957 (2d Cir. 1982).

[16] *Id.*

it is safe to ignore or disregard one-tenth of what many people believe to be the most important political document ever written."[17]

The Founders were concerned with the quartering of soldiers, but they were certainly not the first people to complain about the practice. The first recorded use of quartering soldiers in civilian homes "appears in the charter granted to London by Henry I in 1131."[18] *Piers Plowman*, one of the greatest works of Middle English, written in the late 14th century,[19] described a "man [who] complained of having lost his wife, barn, livestock, home, and the maidenhood of his daughter to solders" quartered in his home.[20]

In *Miller v. U.S.*,[21] Justice Brennan limited the government's right to enter a private home. In doing so, he quoted William Pitt, Earl of Chatham,[22] to explain the Castle Doctrine: "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

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[17] Josh Dugan, *When is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 Geo. L.J. 555, 560 (2009) (investigating in significant depth why the founders thought it was so important to include the Third Amendment).

[18] Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 Wm. & Mary Bill Rts. J. 117, 118 (1993).

[19] *About Piers Plowman*, PIERS PLOWMAN ELECTRIC ARCHIVE (June 7, 2014), http://piers.iath.virginia.edu/about/piersPlowman.html.

[20] Bell, *supra* note 18, at 123.

[21] 357 U.S. 301 (1958); *see also Wilson v. Arkansas*, 514 U.S. 927, 931–32, n.2 (1995) (acknowledging the "common law generally protected a man's house as his castle of defense and asylum," and that the knock-and-announce rule at issue in *Miller* was a protection of this right and a limit on government intrusion from as early as 1275) (internal citations omitted).

[22] Sometimes known as "Pitt the Elder."

of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"[23] There are several references to the Castle Doctrine throughout English history,[24] and the concept exists in the U.S. today.[25]

The controversial and oppressive practice of quartering continued throughout English history. The Declaration of Independence is not the first revolutionary document to attribute the revolt or opposition in part to quartering. In fact, throughout the 17th and 18th centuries there were petitions and listings of grievances and laws all written in an effort to curb the repugnant practice of quartering soldiers in private homes.[26]

The Bill of Rights is far from the first document to protest the compelled quartering of troops. All throughout the Federalist Papers there are references to the Colonists' general distrust

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[23] *Miller v. U.S.*, 357 U.S. at 307 (acknowledging the sanctity of the private home was protected in the common law as early as 1461) (internal quotations omitted).

[24] Quotes from Sir Edward Coke, 1644 ("For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and the house is his safest refuge]"); Henri Estienne, 1581 ("youre house is youre Castell"); and Richard Mulcaster, 1581 ("He is the appointer of his owne circumstance, and his house is his castle") are available at http://www.phrases.org.uk/meanings/an-englishmans-home-is-his-castle.html (last visited May 27, 2016).

[25] *Miller*, 357 U.S. at 306–07.

[26] *See, e.g.* THE 1628 PETITION OF RIGHT ("And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people.") *available at* http://www.constitution.org/eng/petright.htm; THE ANTI-QUARTERING ACT OF 1679 ("noe officer military or civil nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers upon any subject or inhabitant of this realme . . . without his consent . . . .") *available at* http://bit.ly/1Tkiu7F; THE BILL OF RIGHTS, 1689 (regarding James II "quartering soldiers contrary to law."); THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("For quartering large bodies of armed troops among us [and] For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States").

of standing armies, and the subsequent quartering that inevitably followed.[27] In fact, the practice of quartering, as considered by the Framers, "expansively refer[s] to a practical and substantial intrusion that threaten[s] the legitimacy of government and the rule of law."[28] Dugan argued that the fact that soldiers were not allowed inside civilian homes during peacetime, but could be used to enforce civil law during wartime, helps us to "make sense of the Amendment's place in the larger constitutional scheme, creating a strong division between civil and military power."[29]

While each Amendment in the Bill of Rights is unique and self-contained, the order in which the Amendments are listed also adds to the meaning of each. The Third Amendment, which explicitly constrains military power, comes directly after the Second Amendment, which discusses "well-regulated militias"[30] and before the Fourth Amendment, which constrains law enforcement's intrusion into the lives of private citizens.[31] The Fifth Amendment is also a substantial constraint on the government's ability to invade one's private thoughts, restricting the government's ability to compel a civilian to "be a witness against himself."[32]

The Third Amendment's placement between the limitation of military power and the protection of an individual's privacy and autonomy suggests its applicability to both issues. Like the Second Amendment, the Third Amendment refers to soldiers. Like the Fourth and Fifth

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[27] Dugan, *supra* note 17, at 558 (citing *Patrick Henry's Objections to a National Army and James Madison's Reply* (June 16, 1788), *in* 2 The Debate on the Constitution 695, 697, 699–700 (Bernard Bailyn ed., 1993)).

[28] *Id.* at 558.

[29] *Id.* at 559.

[30] U.S. CONST. amend. II.

[31] U.S. CONST. amend. IV.

[32] U.S. CONST. amend. V.

Amendments, it protects a person's right to be free from government intrusion into areas of private life.

Whereas the Fourth Amendment seeks to protect people from actual behavior (i.e. unreasonable searches), the Third Amendment seeks to protect people from the mere presence of a potential searcher.[33] When a soldier is quartered, one's entire home is within that soldier's view, even when the soldier is not looking for anything. But the intrusion is even greater than that. When an unwelcome stranger is present in one's household, it is the *presence itself* that is objectionable. No further intrusion is necessary in order for the privacy of the home to be violated.[34]

B. *NSA Operations Merit Third Amendment Scrutiny*

The NSA should be considered a military body which may be quartered in violation of the Third Amendment. There are two reasons why the Third Amendment should govern the National Security Agency, just as it governs the Army.[35] First, NSA has a substantially similar mandate to the U.S. military, with similar targets. Second, NSA has the same structure as the Armed Forces, and its work primarily supports the armed forces.

The military protects the country from foreign threats. This is in contrast to law enforcement officers, who enforce the domestic laws. Much like the military's foreign directive, section 215 purported to focus NSA's attention outside the U.S. borders as well. Section 215

[33] Under the Fourth Amendment's Plain View doctrine, there is no search when an officer observes something from a place where they are legally entitled to be. Under the Third Amendment, the quartering itself may be enough to establish a violation.

[34] Bell, *supra* note 18.

[35] *The Intolerable Acts: American Revolution*, PORTLAND STATE UNIVERSITY COLLEGE OF URBAN & PUBLIC AFFAIRS, http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Intolerable_Acts.pdf (The Third Amendment was a response to the Quartering Acts of 1765 and 1774, which were called the "Intolerable Acts" by American revolutionaries).

permits requests for the production of information "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[36] Thus, the 215 program seeks to obtain data: to gather foreign intelligence and protect the country from foreign threats, just like more traditional branches of the armed forces. NSA and more traditional military bodies also often target the same individuals.

Second, Professor Schmidt argued that CIA should be considered a military body subject to the Third Amendment.[37] NSA has a very similar structure to CIA and other military bodies. The CIA is responsible to the President through the Director of Central Intelligence and accountable to Congress's intelligence oversight committees.[38] Thus, the CIA has the general framework of the traditional military. The CIA is part of the executive branch with the President at the top of the hierarchy, just as the President, as Commandeer-in-Chief, sits atop the armed forces."[39] "The Director of Central Intelligence 'coordinat[es] the nation's intelligence activities and correlat[es], evaluat[es] and disseminat[es] intelligence [that] affects national security.'" Because, CIA and NSA have a substantially similar structure and historical relationship to the Army, NSA should also be subject to the Third Amendment, under Schmidt's reasoning.

NSA's history is one that parallels and intersects with the military history of the U.S. in the twentieth century. It was created to aid the U.S. in the war effort and played a role in both World

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[36] 50 U.S.C. § 1861(1).

[37] Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered In Your House During a War on Terrorism, Iraq or North Korea?*, 48 St. Louis U. L.J. 587, 590 (2004).

[38] The National Security Act of 1947 created the CIA. The National Security Act, 61 Stat. 495 § 102 (1947).

[39] Schmidt, *supra* note 37, at 596 (internal citations omitted).

Wars.[40] The NSA supports the military by providing intelligence support for foreign operations conducted by the military, the National Security Council, the intelligence community, and certain foreign allies.[41] Whereas some may once have thought it a stretch to call NSA's operatives "soldiers," given this brief history of the agency it would now appear to be a stretch to consider NSA as a separate entity, distinct from the military.

II. THE SECTION 215 METADATA DATABASE VIOLATES THE THIRD AMENDMENT

To bring a Third Amendment claim, a plaintiff does not need to be a citizen; they only need to be a "U.S. person."[42] Much like the better-known Fourth and Fourteenth Amendments, the Third Amendment's guarantee extends to citizens and also legal permanent residents and certain kinds of corporations.[43]

I argue that U.S. persons who have had their metadata collected under section 215 may bring a Third Amendment claim against the Government. The goal of this paper is to show how a

[40] The organization that eventually became NSA was created three weeks after the U.S. declared war against Germany in 1917. For a time, the NSA was even incorporated into the Department of the Army. During World War II it was called the Signal Security Agency, and after the war it became the Army Security Agency and was placed under the Director of National Intelligence. The agency that is now NSA was, for a time, actually a branch of the Army. In December of 1952 President Harry Truman issued a classified memorandum augmenting National Security Council Intelligence Directive 9, creating the Agency as it is known today as a separate entity. *Records of the National Security Agency/Central Security Service*, NATIONAL ARCHIVES, http://www.archives.gov/research/guide-fed-records/groups/457.html.

[41] NSA Customers & Partners, NATIONAL SECURITY AGENCY & CENTRAL SECURITY SERVICE (May 3, 2016), https://www.nsa.gov/what-we-do/customers-and-partners/.

[42] 50 U.S.C. § 1861(1).

[43] 50 U.S.C. § 1801(i).

case might be brought and won based on the allegation of a violation of the Third Amendment in the 21st Century.

A. *Standing, or What is the Third Amendment Claim Exactly?*

Standing is recognized when a court determines that the plaintiff is the correct person to bring the suit in the first place. First, the would-be plaintiff must demonstrate injury-in-fact. Next, they must show that the injury in question is fairly traceable to the defendant's challenged action. Finally, the injury alleged by the plaintiff must be one that could be redressed by a favorable judicial decision.[44] Section 215 provides for investigations "to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[45] Subsection 2(B) of 50 U.S.C. section 1861 restricts those investigations by providing "[a]n investigation conducted under this section shall not be conducted of a United States person solely upon the basis of activities protected by the first amendment [*sic*] to the Constitution of the United States."[46] Thus, for example, a U.S. person who can show their First Amendment protected activities were the basis for targeted surveillance under section 215 will have standing to sue for a violation of their Freedom of Speech.

Where a person can show they were targeted by NSA, they will have standing to sue under a theory of governmental deprivation of their Third Amendment right. Here, a person can use title 42 of the U.S. code, section 1983 to bring a civil suit against the government for deprivation of

[44] *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) ("[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.").

[45] 50 U.S.C. § 1861(1).

[46] 50 U.S.C. § 1861(2)(B).

their rights.[47] Regarding whether there is injury, and whether a favorable ruling could redress the injury, a 1983 claim would allege that the violation of the Third Amendment *is itself* injurious, and the redressability is injunctive relief in the form of shutting down NSA's 215 program.

B. *Elements of the Amendment*

The text of the Third Amendment guarantees "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."[48] Because *Engblom* is the only federal appellate case to have decided an issue based on the substance of the Third Amendment, it provides a starting point for analyzing the elements of a Third Amendment claim.

i. What is a Soldier?

The District Court in *Engblom* began its analysis with the *Soldier* question. It found that "the [National] Guard is the modern day successor to the Militia reserved to the states by Art. I, s 8, cls. 15, 16 of the Constitution, and members of that organization must be considered 'soldiers.'"[49] Unfortunately, this is as far as the court's analysis went on this element. On appeal, the Second Circuit added only that it agreed with the district court's analysis.[50] The courts clearly

[47] The text of section 1983 reads, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[48] U.S. CONST. amend. III.

[49] *Engblom v. Carey*, 522 F. Supp. 57, 65 (S.D.N.Y. 1981) (*rev'd on other grounds*, 677 F.2d 957 (2d Cir. 1982)).

[50] *Engblom*, 677 F.2d at 961 ("We agree with the district court's conclusion that the National Guardsmen are "Soldiers" within the meaning of the Third Amendment.").

decided that the *Soldier* question did not merit full analysis, presumably because a member of the National Guard clearly qualified.

In 2004, Professor C. J. Schmidt discussed the risk that, if the U.S. engaged in warfare against Iran, North Korea, or the omnipresent-yet-amorphous "terrorism," agents and operatives from the CIA or FBI could be quartered in civilian homes.[51] "The difficulty," Schmidt argued, "arises in determining whether CIA and FBI agents are 'soldiers' and whether the United States is in a period of 'wartime.'"[52] Schmidt argued that the CIA's structure and purpose is similar to the military, and that members of both the CIA and the military are "soldiers" for the purpose of the Third Amendment.[53]

In the "new military" of the 21st century, "the definition [of *Soldier*] would certainly include cyber agents, military personnel who are paid to hack and disrupt another country's software and hardware and to protect our own."[54] Schmidt argued that the government has a strong incentive to surveil suspected terrorists, and that there is likely no better way to control their behavior than to quarter an FBI agent in their homes.[55]

Schmidt and Dugan argued that a normative approach should be used: a soldier is what a soldier does. Friedland also contended that a soldier is what a soldier does, and the term must be

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[51] Schmidt, *supra* note 37.

[52] *Id.* at 589.

[53] *Id.* at 596.

[54] Steven I. Friedland, *The Third Amendment, Privacy, and Mass Surveillance*, THE WAKE FOREST LAW REVIEW (Feb. 16, 2013), http://wakeforestlawreview.com/2014/02/the-third-amendment-privacy-and-mass-surveillance/.

[55] Schmidt, *supra* note 37, at 589.

broadly inclusive to keep up with the evolving nature of military combat.[56] As Schmidt said, "[i]f FBI agents perform soldier-like duties, then they are soldiers."[57] Further, the term "soldier" should include people who are not strictly soldiers, such as commissioned officers in the Army, and any member of the Navy, Air Force, and Marine Corps, including people who never see combat, such as clerks and administrative staff.[58] In *Engblom*, the National Guard were soldiers because they were under the control of the Governor of New York.[59] In both cases, Butler argued, the subject in question is not a soldier *per se*, but their soldier-ness is determined by looking at the level of control the military is able to exert over them.

NSA, likewise, is not made up of soldiers *per se*. Instead, one must look to the level of military control exerted over NSA. As discussed above, part of NSA's mission is to support the armed forces.[60] NSA does not lead, but rather follows, the direction of the military, and thus should fall under the term "soldier" according to Professors Schmidt and Friedland's categorizations.

The Geneva Conventions apply to and protect NSA operatives as combatants, which strongly suggests they are soldiers.[61] It also provides clarity to an analyzing court that may find

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[56] Friedland, *supra* note 54.

[57] Schmidt, *supra* note 37, at 604.

[58] Alan Butler argued that, in English anti-quartering common law, military horses that were in "actual service" would violate the anti-quartering law if a stable was compelled to house them. Alan Butler, *When Cyberweapons End Up on Private Networks: Third Amendment Implications for Cybersecurity Policy*, 62 Am. U. L. Rev. 1203, 1233 n.208 (2013).

[59] *Id.* at 1233.

[60] *See supra* Part I-B.

[61] *See* Francisco Forest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 Sask. L. Rev. 347, 362–63 & nn.59 & 60 (2001) (discussing the non-derogability of the laws of war reflecting *jus cogens*, or "peremptory law that binds all nations at all times.").

itself confronting a political question. If international humanitarian law treats NSA operatives as soldiers, the U.S. should as well because the U.S. must follow international humanitarian law. There is a distinction made during wartime between combatants and non-combatants. This distinction is acknowledged in international humanitarian law and the Geneva Conventions.[62] Article 52 of the First Protocol to the Geneva Conventions defines who and what may and may not be targeted during wartime in two sentences: "Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined" later in the Article.[63] Military objectives are "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage," which includes human beings. Because NSA, its mission, and its operatives all fit within the definition of a military objective, they must all be considered legitimate military objectives. The law of war, or *jus in bello*, is made up of concepts that are old enough and renowned enough to rise to the level of *jus cogens*,[64] which means the U.S. need not ratify the laws enumerated in Protocol I in order to be subject to them.

[62] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52, June 8, 1977, 1125 U.N.T.S. 3, (defining legitimate military targets) *available at* http://www.refworld.org/docid/3ae6b36b4.html. (U.S. has signed, but not ratified, this treaty).

[63] *Id.* at art. 52 par. 1.

[64] *Jus Cogens* "is a Latin phrase that literally means 'compelling law.' It designates norms from which no derogation is permitted by way of particular agreements." Anne Lagerwall, *Jus Cogens*, Oxford Bibliographies (May 29, 2015), http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml.

Soldiers exist in peacetime as well as wartime, and are not defined by their relationship to an ongoing conflict. The U.S. engages in asymmetrical combat. Its advantages are in training, technology, and signals intelligence, which is provided largely by NSA.[65] If an attack on an NSA operative would "make an effective contribution to military action," and if that attack "offer[ed] a definite military advantage," then an attack to destroy or neutralize the NSA operative is a legitimate military objective.[66] Further, because NSA's surveillance is ongoing, and the military objectives of the U.S. are ongoing, the Geneva Conventions would treat NSA agents as combatants. All of this means that NSA, its operatives, and its leaders are all "soldiers" under the Third Amendment.

Schmidt, Dugan, and Friedland all maintained that the executive signals intelligence agencies like NSA are close enough to being military without actually being called "military," that they should be included under the Third Amendment's coverage.[67] This argument is compelling, and a judge presented with these arguments should agree.

ii. What is Time of Peace? Concomitantly, What is Time of War?

It is difficult to know whether we are currently at war, but it is necessary to conduct the proper analysis under the Third Amendment. There is a specific set of procedures that the U.S. must follow in order to find itself "at war" or "in wartime," not least of which is that Congress must declare it to be so.[68] But because of the Reagan-era politics of branding, the term "war" has

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[65] *What Defines the Intelligence Role of NSA/CSS?*, National Security Agency/Central Security Service, https://www.nsa.gov/about/faqs/sigint-faqs.shtml#sigint3.

[66] Protocol I, *supra* note 62.

[67] Schmidt, *supra* note 37.

[68] Although the U.S. has not followed these procedures to declare formal war, until Congress amends the Constitution this is the law that exists.

lost a lot of its meaning. The U.S. has waged a "war on drugs," a "war on poverty," and, now, a "war on terror."

On October 14, 1982, President Ronald Reagan declared illicit drugs to be a threat to national security. Naturally, he declared war on them.[69] And even though in that same year Reagan used the phrase "war against terrorism,"[70] the concept of a global "war on terrorism" only truly began shortly after September 11, 2001. Mere days after the attacks, President George W. Bush first used the phrase "war on terrorism," in an ill-advised comment that also included the word "crusade."[71] While President Bush got bad press for the use of the word "crusade" because of its terrible historic context in the Middle East, it was the "war on terrorism" phrase that has actually led to the most damage to the Middle East, North Africa, and Central Asia.

Merely because the U.S. is engaged in a war against terrorism does not imply that the U.S. is engaged in the type of war the Framers contemplated. In fact, that the U.S. is entrenched in asymmetrical warfare in the Middle East and have been for the past fifteen years, with no end in sight to the occupation or our unapologetic imperialism and neo-colonialism, is itself indicative that this country is not "at war" for the purposes of the Third Amendment. The U.S. is not "at war," and therefore section 215 is barred by this element, as well as others. Even though war looks different today than it did 250 years ago, there are still specific guidelines that relate to the U.S. and its military engagements. For example, the U.S. Constitution entrusts the power "to declare

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[69] Andrew Glass, *Reagan Declares 'War on Drugs,' October 14, 1982*, POLITICO (Oct. 14, 2010), http://www.politico.com/story/2010/10/reagan-declares-war-on-drugs-october-14-1982-043552.

[70] Alexandra Silver, *How America Became a Surveillance State*, TIME (Mar. 18, 2010), http://content.time.com/time/nation/article/0,8599,1973131,00.html.

[71] Peter Ford, *Europe Cringes at Bush 'Crusade' Against Terrorists*, CHRISTIAN SCIENCE MONITOR (Sept. 19, 2001), http://www.csmonitor.com/2001/0919/p12s2-woeu.html.

War" to the legislature.[72] In 1973, Congress passed a complementary law called the War Powers Resolution,[73] drawing out specific times and circumstances when the President may "introduce the armed forces into hostilities or situations where hostilities are imminent."[74] The Framers wanted the Legislature, not the Executive, to have the power to shift the legal status of the United States between peacetime and wartime.[75] Each time, for example, the constitutionality of the Vietnam War was challenged, the challenge was denied; however, "no court supported unilateral presidential war-making. Instead, the courts required and found some form of congressional authorization for the undeclared Vietnam War."[76] Some may argue that the Authorization for Use of Military Force Against Terrorists[77] grants the President warlike powers to such a degree that it should be understood as a Congressional declaration of war. The fact that the AUMF was passed in 2001, however, means exactly the opposite: rather than declare war, Congress decided instead to grant the President certain powers without triggering other aspects of law, such as is found in the Third Amendment.

The Armed Forces are engaged in warlike activities, certainly, but this is post-war colonialism, not all-out warfare. The U.S. is engaged in counterterrorism, asymmetrical combat,

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[72] U.S. CONST. art. I § 8, cl. 11.

[73] 50 U.S.C. §§ 1541–1548.

[74] Schmidt, *supra* note 37, at 590.

[75] *Id.* at 635.

[76] *Id.*

[77] The Authorization for Use of Military Force Against Terrorists, Pub. L. No. 107–40, 115 Stat. 224 (2001).

and counterinsurgency efforts that I do not think the Founders would have considered to be war.[78] The armed forces exist primarily to fight the wars in which the U.S. engages. Because the U.S. engages almost entirely in asymmetrical warfare, rather than traditional wars like those fought in the 18th Century, modern wars rely less on actual "boots on the ground"[79] and more on having better information and technology than the opponent.

Admittedly, the U.S. is not in a time of peace either. But because the Third Amendment says that no soldiers shall be quartered except in time of war, rather than saying that soldiers can be quartered except in time of peace, the focus must be on the narrow legal definition of war, declared by Congress, rather than encompassing all non-peacetime combat activities.

iii. What Is Quartering?

In *Engblom*, the issue was whether the Third Amendment precluded members of the National Guard from being housed in prison dormitories that prison guards normally occupied. The prison guards, one of whom was Engblom herself, had gone on strike and the National Guard was called in to supplement the positions the prison guards had left open. The prison had housed its guards, but when they went on strike the members of the National Guard were housed in their dormitories. The court held that this violated the Third Amendment rights of the striking prison guards. According to *Engblom*, the guards were "reasonably entitled . . . to a legitimate expectation

[78] Warfare in the 18th Century was defined by gunpowder and guns, and battles often saw rows of riflemen facing one another. *See, e.g.*, *18th Century Warfare Brief*, MILITARY FACTORY (Feb. 5, 2016), http://www.militaryfactory.com/battles/18th_century_warfare.asp ("Soldiers would stand shoulder to shoulder in formation, allowing one line to shoot, kneel and reload while the second line fired over the heads of the first row.").

[79] "Boots on the ground" is a military colloquial term for the physical presence of troops in an active combat situation.

of privacy."[80] This language is remarkably similar to that used in Fourth Amendment analyses. While both Amendments discuss "expectation[s] of privacy,"[81] their analyses differ considerably. The Third Amendment analysis should be a categorical one, satisfying the elements of the Amendment as one would do with a statute, while the Fourth Amendment analysis is a "reasonable" test, which depends on a totality of circumstances.[82]

The question of quartering depends largely on how one views internet traffic. Professor Orin Kerr in his article, *The Problem of Perspective in Internet Law*, discussed two perspectives: the external perspective and the internal perspective. "The problem," Kerr argued, "is that whenever we apply law to the Internet, we must first decide whether to apply the law to the facts as seen from the viewpoint of physical reality or virtual reality."[83] The internal perspective, according to Kerr, "adopts the point of view of a user who is logged on to the Internet and chooses to accept the virtual world of cyberspace as a legitimate construct."[84] One can imagine a person walking around *inside* a computer network. The external perspective, on the other hand, "adopts the viewpoint of an outsider concerned with the functioning of the network in the physical world rather than the perceptions of a user."[85] From the external perspective, all internet traffic is bits

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[80] *Engblom*, 677 F.2d at 963.

[81] *Katz*, 389 U.S. at 361 (Harlan, J. concurring) Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967), provides the current two-part test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." (internal quotations omitted).

[82] *Illinois v. Gates*, 462 U.S. 213 (1983) (overruling the rigid *Aguilar-Spinelli* test in favor of a "totality of the circumstances" test for determining probable cause).

[83] Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 Geo. L.J. 357, 357 (2003).

[84] *Id.* at 359.

[85] *Id.* at 360.

moving along a series of tubes, which the receiving computers then translate into human-readable symbols, images, and sounds.

Where physical soldiers are concerned, there is no distinction between internal and external perspectives. When a soldier is bunking in your living room, there is no ambiguity as to whether they are treading mud into your home. That is to say, the soldier is unambiguously present. When it comes to quartering in the cyber sense, the answer is more ambiguous. The question does not concern *whether* NSA collects metadata under section 215, but rather *where* that collection takes place. If you are inclined towards the internal perspective, you might say collection happens when you press "send" on an email, or place a call on a phone, and you would say it happens at your computer or at your phone, right in front of you. On the other hand, if you are inclined towards the external perspective, you would point out that Google's datacenters are not at your computer, but rather are scattered throughout the world.[86] The collection might have happened there, or it might have happened at NSA headquarters in Ft. Meade, Maryland, or it might have happened at NSA's data center[87] near Bluffdale, Utah.[88] If NSA is present in any of these places, under the external perspective, then nobody has been compelled to quarter anyone or anything. However, if NSA is present in your communications equipment, under the internal perspective, then it does not matter

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[86] *Google Data Centers*, GOOGLE, https://www.google.com/about/datacenters/gallery/#/places (last visited May 26, 2016).

[87] Called "Intelligence Community Comprehensive National Cybersecurity Initiative Data Center." *NSA Utah Data Center*, FACILITIES MAGAZINE (Sept. 14, 2011), *available via the Wayback Machine as it appeared on June 11, 2013, at* https://web.archive.org/web/20130611073337/http://www.facilitiesmagazine.com/utah/buildings/nsa-utah-data-center).

[88] Devin Coldewey, *"Illegal Spying Below": Blimp Flies Over NSA Utah Data Center in Protest*, NBC News (June 27, 2014, 4:02 PM), http://www.nbcnews.com/storyline/nsa-snooping/illegal-spying-below-blimp-flies-over-nsa-utah-data-center-n142916.

what physical infrastructure aided in the transmission or observation of the communication.[89] Under the internal perspective, NSA collects information in the homes of its targets, who are U.S. Persons.

The fact that almost nobody would willingly give a stranger their email password is evidence that we view our communications as private, even when we believe we have "nothing to hide."[90] Under the internal perspective, NSA collects information from the computers and smartphones of its targets, who are U.S. persons. The presence of the collector creates the offense. In the past, soldiers were kept from intruding into people's homes because that intrusion was a violation of people's privacy, not a violation of people's right to have a soldier-free home. People expected to be able to keep their homes, their most private place, out of the view of the government, barring exceptional circumstances. Here, people's most private place is no longer their home. It is their computer. The same things that people would store in the privacy of their home, such as financial and health documentation, are now kept private on a computer. We store the intimacies of our lives on our cell phones too.[91] A person would expect to have a private conversation in their home, but we cannot have such private communications in the presence of a soldier. Similarly, people expect their online correspondence to be private, but this cannot be so while NSA is monitoring.

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[89] Here, infrastructure, such as centrally-located servers, is differentiated from personal equipment, such as cell phones and laptop computers.

[90] Glenn Greenwald, *Spying on Congress and Israel: NSA Cheerleaders Discover Value of Privacy Only When Their Own Is Violated*, THE INTERCEPT (Dec. 30, 2015, 11:02AM), https://theintercept.com/2015/12/30/spying-on-congress-and-israel-nsa-cheerleaders-discover-value-of-privacy-only-when-their-own-is-violated/.

[91] *Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014) ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.").

Even apart from a Fourth Amendment analysis, courts need to recognize that people have a reasonable expectation of privacy in their private property. Alan Butler argued that, "[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."[92] This includes property that allows people to communicate in ways that place them at risk of being surveilled under section 215. People reasonably expect their private communications to actually be private,[93] and courts should recognize this expectation in the Third Amendment context. Recall that the Framers enacted the Third Amendment because of the repugnant nature of the invasion that quartering involved. Further, the 215 program invades privacy the same way as a physical invasion: With the metadata collection program, the invasion of privacy is arguably greater than quartering a human soldier in a home. The U.S. person does not know whether or not they are actually being surveilled, but the presumption must be that they are.[94] NSA quarters through metadata collection.

[92] Butler, *supra* note 58, at 1230.

[93] *Supra* note 91.

[94] In a response and reply brief in *Obama v. Klayman*, the government argued that Klayman *et al.* had not presented evidence of collection. The government tried to convince the judge that just because customers of Verizon Business Network Services were surveilled under section 215 did not mean Verizon Wireless customers were as well. Further, the government brief never made any affirmative statement that the appellants were wrong in their assertions, just that the appellants had no proof of the secret program that Edward Snowden had revealed less than a week before the original complaint was filed. *Obama v. Klayman*, 1:13-cv-851 (*available at* https://www.eff.org/files/2014/10/22/govt_respponse_reply_brief_klayman_9.19.14.pdf). *See* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Americans Daily*, THE GUARDIAN (June 6, 2013, 6:05 AM), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order; *see also* Complaint, *Klayman v. Obama*, 957 F. Supp. 2d 1, (D.D.C. 2013) (filed June 12, 2013).

iv. What is Consent?

Consent is a complete defense under the Third Amendment, which says no soldier shall "be quartered in any house, without the consent of the Owner."[95] A person can consent to police questioning as well as to a search. In each of these instances, the court looks to the totality of the circumstances.[96] In *Engblom*, the striking prison guards were evicted from their on-location employee housing in order to provide housing for the National Guard who had arrived to take over the prison guards' duties.[97] The prison guards' "residences were used to house members of the National Guard without their consent."[98] The court based its finding, namely, that the National Guard had been quartered without the prison guards' consent, on Engblom's expectation of privacy, stemming from a right to exclude others from her personal property.[99] Communications equipment, a category that includes cell phones and computers, is likewise personal property that the owner or lessor has a right to exclude others from. Internet accounts, such as email and social media accounts, also grant similar rights to exclude to their owners. This right to exclude is presumed, and consent must be given. For example, the Computer Fraud and Abuse Act[100] makes

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[95] U.S. CONST. amend. III.

[96] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 227 (1973) (discussing consent to Fourth Amendment searches); *Davis v. U.S.*, 512 U.S. 452, 461–62 (1994) ("If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.").

[97] *Engblom*, 677 F.2d at 959.

[98] *Id.*

[99] *Id.* at 963 (The court found that the prison guards furnished and paid rent on the rooms, did not maintain separate housing, and during the two years prior to the strike had not lived in any other home. "These factors supporting the existence of a tenancy-type [privacy] interest.").

[100] 18 U.S.C. § 1030.

it a felony for a person to log in to someone else's account, or to create an account after being banned from a site, provided unauthorized account access causes at least $5,000 over a one-year period.[101] This is a statutory right to exclude people from non-physical property. There is no consent to NSA metadata surveillance.[102]

v. Who is the Owner?

The Owner, according to the Third Amendment, is the person against whom the quartering takes place. This is why, under the last section, it is the owner whose consent provides a complete defense to government quartering. In *Engblom* the government attempted to characterize the owner solely as someone who owns the fee simple. However, the court held that "property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[103]

Rather than simply looking to the named relationship of the inhabitant to the property (*e.g.* Tenant/Landlord, Fee Simple Owner/Invitee, etc.) the *Engblom* court looked to the rights themselves as retained by the inhabitants. In *Engblom*, the petitioner was a guard at a state prison. She lived within the premises, and her lodging was conditional upon her employment. However, the court noted that she and her colleagues "could not be deprived of that interest without notice,

[101] *Id.*; *see also, e.g.*, *Facebook v. Grunin*, 77 F. Supp. 3d 965, 972 (N.D. Cal. 2015) (finding that "Grunin intentionally circumvented Facebook's technical measures by impersonating others to obtain Facebook accounts to run ads which were never paid for.").

[102] Implied consent is a legal fiction that allows government actors to not be held accountable. Consent must always be affirmative and explicit.

[103] *Engblom*, 677 F.2d at 962.

a hearing and judicial determination."[104] The court explained that, had the guards possessed a "more substantial tenancy interest, the procedural protections afforded them under state law would be even greater,"[105] thus acknowledging that the guards had procedural protections even though they did not have a "substantial tenancy interest." The interest they did possess, the court said, "reasonably entitled [Engblom and her colleagues] to a legitimate expectation of privacy protected by the Third Amendment."[106]

This broad understanding of ownership directs the court towards a normative analysis rather than a strict legal one. The question to be asked is "do the would-be 'owners' possess rights that suggest they have autonomy over the property in question?" and not "does the law consider the would-be 'owner' to be a legal property holder?" This opens the door to permit new kinds of ownership and relationships to property that may permit users and consumers to exert traditional property rights not only over their computers, but also over their data and personally-identifiable information as well.

The Third Amendment's understanding of what is private should extend far beyond the boundaries of a home, just as the Fourth Amendment turns on an individual's expectation of privacy rather than simply a location-based or property-based analysis. "[T]he American experience with quartering and the Amendment as a whole, especially when read in light of the Fourth Amendment, suggest that the term ['any house'] was meant to cover all areas in which an individual has a right to exclude."[107] Thus, because people have the right to exclude others from

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[104] *Id.* at 963.

[105] *Id.*

[106] *Id.*

[107] Dugan, *supra* note 17, at 581.

their electronic communications equipment and internet accounts,[108] they must be considered the "owner," even if their ownership is not complete.[109] Ownership is not a binary state, and in fact can be a shared interest in anything where someone has the legal right to exclude another person. The broad understanding of what property can be "owned" for the purpose of the Third Amendment includes personal computers and cell phones, as well as software and internet accounts that permit people to create the metadata that section 215 gathers.

vi. What is meant by "Any Manner Prescribed by Law?"

There is no legal framework to permit NSA's metadata collection program *specifically* during time of war. Thus even if the conditions were satisfied to officially shift the legal status of the U.S. into wartime, the 215 program would not be permitted until it was augmented to relate to the legal wartime status of the U.S. Schmidt argued that because it takes a formal Congressional declaration of war to "convert the legal status of the nation from peacetime to wartime," and because "Congress has not declared a war on terrorism, Iraq or North Korea," the "compelled quartering of soldiers cannot take place."[110] Under the Third Amendment, soldiers may be quartered in wartime only "in a manner to be prescribed by law."[111] Even *Engblom* does not

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[108] *Supra* note 100.

[109] *See, e.g.*, Facebook's Terms of Service, which state that although the user "own[s] all of the content and information [they] post on Facebook," when it comes to "content that is covered by intellectual property rights, like photos and videos (IP content), [the user] specifically give[s Facebook] the following permission . . . : [the user] grant[s Facebook] a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [the user] post[s] on or in connection with Facebook." Facebook Terms of Service, *available at* https://www.facebook.com/legal/terms. *See also*, *Engblom*, 677 F.2d at 963 (stating that the striking prison guards had a legitimate property interest as tenants, not fee simple holders).

[110] Dugan, *supra* note 17, at 590.

[111] U.S. CONST. amend. III.

address this element of the Amendment, except to cite the full text of the Third Amendment in two footnotes.[112] The presence of this element means the Framers wanted to restrict the practice of quartering even further than simply allowing it during wartime and banning it during peacetime. Quartering is so intrusive that the Framers clearly felt that there needed to be a legal framework to restrain the government from abusing its wartime powers. If there were to be quartering during wartime, the practice must be explicitly regulated so as to avoid the very real danger of government tyranny.

III. THE THIRD AMENDMENT'S CATEGORICAL APPROACH BETTER RESTRAINS THE GOVERNMENT THAN THE FOURTH AMENDMENT'S REASONABLENESS TEST

A. *The Reasonableness Test is Inappropriate for the National Security Context*

The language of the Third Amendment is less ambiguous than that of the Fourth Amendment. The Fourth Amendment says:

> The 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 particularly describing the place to be searched, and the persons or things to be seized.[113]

The Fourth Amendment provides a right to be free from *unreasonable* searches and seizures. Reasonableness usually requires a normative analysis. What is reasonable is determined by what is common and accepted in society during a given time frame and cultural moment.[114]

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[112] *Engblom*, 677 F.2d at 959 n.1, 966 n.2.

[113] U.S. CONST. amend. IV.

[114] Harlan, J.'s rule, that the "expectation [of privacy] be one that society is prepared to recognize as 'reasonable'" makes no mention of previous or future societies, and so the inference must be that the analysis of what is reasonable must therefore begin with contemporary society. *Katz*, 389 U.S. at 361.

Even Scalia, an originalist, analyzed what is reasonable using a normative analysis, but he used what was common and accepted in society in the late 18th Century rather than what is common and accepted in the early 21st Century.[115] The Third Amendment is more clear in that there is little risk that courts will bend the normative analysis to their understanding of what they believe the end result should be. The Third Amendment must be read as an element test. The apparent compelling nature of present threats to national security may persuade courts to permit undue intrusions into private life in the name of the greater security under a Fourth Amendment approach. When a court has less discretion as under the Third Amendment, there is less room to permit intrusive government invasion. The Third Amendment offers to relieve courts of this burden.

The Third and Fourth Amendments are separate not because they deal with different kinds of intrusions, but rather because they protect the people from different types of intruders. Naturally, soldiers and police investigators must be restricted by different means. Because police officers *do* have legitimate interests in investigating crimes, the courts must have discretion to determine when such investigations are important enough to overcome the Fourth Amendment's reasonableness hurdle. On the other hand, it is inappropriate for soldiers of any kind to conduct domestic law enforcement investigations, or even to enforce the domestic security. The Armed Forces exist to protect the U.S. from foreign threats to national security, not to protect civilians from one another. Therefore, the 215 program's significant intrusion into the lives of U.S. persons is inappropriate for the purpose for which it was created.

[115] *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 574 (2008) (Scalia, J. "Normal meaning [of the language in the U.S. Constitution] may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.").

Second, the structure of the Third Amendment is different from that of the Fourth. The Fourth Amendment actually names a right,[116] and describes how that right must be protected. On the other hand, the Third Amendment does not explicitly name any right. Instead, it lists conduct that infringes on an implied right—the right to resist military invasions of privacy. By specifying exactly what conduct relates to it, the Third Amendment is much more clear than the Fourth Amendment's.

B. *A Categorical Approach is a More Effective Restraint on Counterterrorism Actions*

Ordinary crime control is not as important to governments as national security. It is easier for governments to control internal populations than it is to predict and avoid foreign threats, even if those foreign threats exist within the national borders. For example, although there is an extremely high violent crime and murder rate in East St. Louis, MO,[117] those charged with ensuring the national security do not treat violent crime or murder as a foreign threat. According to the National Counterterrorism Center, seventeen U.S. private citizens were killed by terrorism in 2011.[118] Fifteen were in Afghanistan, one was in Jerusalem, and one was in Iraq.[119] In that same year, there were 25 murders in East St. Louis.[120] However, the threat to national security is treated by the federal government with more deference than ordinary crime control. This is most apparent

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[116] "The *right* of the people . . . ." U.S. CONST. amend. IV (emphasis added).

[117] *Murder Capitals of America*, NEIGHBORHOOD SCOUT, http://www.neighborhoodscout.com/top-lists/highest-murder-rate-cities/.

[118] Office of the Director of National Intelligence, *NCTC Report on Terrorism for 2011*, NATIONAL COUNTERTERRORISM CENTER, p. 17, *available at* https://fas.org/irp/threat/nctc2011.pdf.

[119] *Id.*

[120] *Crime Rate in East St. Louis*, CITY-DATA.COM, http://www.city-data.com/crime/crime-East-St.-Louis-Illinois.html.

in the amount of money the U.S. spends per life lost in ordinary crime control and in counterterrorism activities. If all other variables are held constant, and the amount of money spent on ordinary crime control is, for the sake of argument, proportionate to the number of lives lost due to ordinary crime, then the amount of money the U.S. spends on counterterrorism and terrorism prevention and response is vastly disproportionate to the number of deaths that are attributable to terrorism.[121]

A terrorist who kills one U.S. private citizen on U.S. soil does more damage to the national security than a murder of that same citizen would harm the rule of law.[122] Because there is not a direct correlation between risk and response, it becomes more difficult to argue against the moving-target-like measures taken to protect the national security. This risk management behavior, as evidenced by disproportionate budget apportionment, apparently depends not on the threat itself, but on the nature of the threat. It is precisely because of this difficulty that a categorical approach to government restraint is preferable to a "reasonableness" test. Shades of gray cannot be constrained by shades of gray. There is no predictability between risk and response to terrorist threats. Restrictions on national security surveillance must be reliable and predictable. This reliability will ensure a lack of arbitrariness, which is beneficial to the public as well as NSA agents. When the government has clear limits and limitations of its power, there is a lower risk of overstepping that power.

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[121] Jan Schaumann, *Everything Is Awful (And You're Not Helping)*, B-SIDES SAN FRANCISCO CONFERENCE (Feb. 29, 2016), slide no. 51, http://www.slideshare.net/jschauma/everything-is-awful-and-youre-not-helping.

[122] The rule of law is harmed when people stop consenting to be ruled by the laws to which they are subject. Laws are not effective if nobody obeys them.

C. *The Third Amendment Restrains National Security Exemptions Left Unrestrained By the Fourth Amendment*

The scope of NSA's mission to surveil foreign threats to the national security fits perfectly into this *Keith* exemption, rendering both the *Katz* line and the *Keith* line of cases inapplicable. The constraints therefore are largely not constitutionally-based. For example, Executive Order 12333 "has been regarded by the American intelligence community as a fundamental document authorizing the expansion of data collection activities."[123] According to NSA's website, EO 12333 allows it "to collect, process, analyze, produce, and disseminate Signals Intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions, and to provide signals intelligence support for the conduct of military operations."[124]

While the Constitution provides a base level of protection, NSA's operations are constrained by laws, regulations, and SIGINT culture, none of which draws directly from the Bill of Rights. The Privacy and Civil Liberties Oversight Board provides some protection,[125] but for those people whose problem with NSA surveillance stems from a general distrust of government, the work of the PCLOB, which is an entity within the federal government, does not provide much relief. Further, the secretive nature of the Foreign Intelligence Surveillance Court, which is just a manifestation of the natural resistance to transparency that is baked into the foreign intelligence community's soul, makes any kind of meaningful internal oversight presumptively untrustworthy.

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[123] Exec. Order No. 12,333, 42 Fed. Reg. 59,941 (Dec. 4, 1981).

[124] *Supra* note 65.

[125] *About the Board*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD, https://www.pclob.gov/about-us.html.

The Court in *Keith*,[126] created a large exemption to the "reasonable expectation of privacy" test from *Katz*.[127] In *Keith*, the court held 8–0 that a warrant was required for domestic electronic surveillance. The case explicitly exempted "the President's surveillance power with respect to the activities of foreign powers, within or without this country" from its warrant requirement.[128] The *Keith* case separates these three areas of enforcement: ordinary crime control, domestic security, and national security. The fact that domestic and national security are separate suggests that domestic security deals with threats that come from within the U.S., while national security must deal with threats that come from foreign powers, whether the threat itself is operating within or without the U.S. territorial borders.[129] As is made clear by *Keith*, the Fourth Amendment entirely covers two out of the three categories, leaving only foreign-based threats to national security, which is the sole category the Third Amendment should be constrained to.

D. *The Government Has Used the Categorical Approach Before*

The government has already used the categorical approach to restrain government overreach, where the threat is great. For example: the U.S. President may only serve two consecutive terms.[130] This is preferable to the "understanding" that existed beforehand, where

[126] *Keith*, 407 U.S. at 308.

[127] *Supra* note 81.

[128] *Keith*, 407 U.S. at 308.

[129] *See* Professor Anthony J. Colangeto, *What Is Extraterritorial Jurisdiction?*, 99 Cornell L. Rev. 1303 (2014) (explaining in detail how States may enforce criminal laws and punishments on acts committed and conceived within and without the State's territory.).

[130] U.S. CONST. amend. XXII.

presidents followed in the traditions of George Washington and Thomas Jefferson.[131] Washington decided not to run for a third term in part because he thought it would result in an improper centralization of power.[132] Jefferson wrote from the White House halfway through his second term, "if some termination to the services of the chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life."[133] Referring to Franklin D. Roosevelt, who died in 1944 during his *fourth* consecutive term as President,[134] Thomas Dewey said in 1944, "four terms, or sixteen years, is the most dangerous threat to our freedom ever proposed."[135] The Twenty-Second Amendment was enacted in response to the very real threat that Dewey saw.[136] The Legislature understood that the power would always be a threat, no matter how American society evolved. Where centralization of Executive power was a very real threat, the Legislature found it necessary to create a rule that would not be subject to evolving mores and expectations of American society.

Much like multi-term presidencies, section 215 poses a very real threat to freedom. There is no effective restraint on NSA surveillance practices writ large, let alone on section 215. The

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[131] *Washington on a proposed third term and political parties, 1799*, GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, http://www.gilderlehrman.org/history-by-era/early-republic/resources/washington-proposed-third-term-and-political-parties-1799.

[132] *Id.*

[133] Thomas Jefferson: Reply to the Legislature of Vermont, 1807. ME 16:293 (*available at* http://famguardian.org/Subjects/Politics/ThomasJefferson/jeff1230.htm).

[134] "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." U.S. CONST. amend. XXII, § 2.

[135] DAVID M. JORDAN, FDR, DEWEY, AND THE ELECTION OF 1944 290 (2011).

[136] *Id.*

Fourth Amendment, through *Katz* and *Keith*, protect people when the government acts under the justifications of ordinary crime control and domestic security enforcement. The Fourth Amendment does not protect people from the government's actions justified by "national security." The Third Amendment is uniquely situated to provide protection against national security surveillance abuses. When the threat is large—especially in cases of terrorism, where the threat is emotional as well—the justification for infringing on civil liberties becomes more compelling to elected officials. This can be most readily seen in the original passage of the USA PATRIOT Act, merely six weeks after the September 11th attacks on the World Trade Center and the Pentagon.[137] That law, in its October 26th, 2001 form, would never have been passed on September 10th, 2001, even though global terrorism was a known threat, and the World Trade Center had been bombed eight years prior. With such a compelling justification, a nuanced approach cannot be enough to constrain the government, because the justification is felt by everyone, including the people charged with enforcing, creating, and protecting the law. In a situation like the one during the months following the September 11th attacks, human fallibility cannot be avoided. This includes humans whose job it is to write laws that protect the country as well as its citizens.

Where human weakness cannot be avoided, it must be circumvented. Section 215 was created in response to the threat of terrorism, and its justifications were accepted by the people who were in power in 2001. This program was and continues to be one of the most significant intrusions into private life that the U.S. government has ever perpetrated.

[137] USA PATRIOT Act, Pub. L. No. 107-56, effective October 26, 2001, 45 days after September 11, 2001.

With a Third Amendment bright line rule, similar to the Twenty-Second Amendment's constraint on Presidents, intrusions like the 215 program can be restrained without the risk of undue emotion. The Third Amendment removes the emotional aspect from the equation, that the people may rely on the consistent rule of law and not have to place their faith in imperfect politicians, no matter how well-meaning.

CONCLUSION

In Shakespeare's King Henry VI, Part II, there is a line that cynical non-lawyers love to quote: "The first thing we do, let's kill all the lawyers."[138] The line is delivered by a person who is considering how to remove the last bastion between the king and tyranny. Lawyers can, and therefore must, use all of the tools at our disposal to dismantle section 215. NSA is illegally collecting U.S. persons' metadata, and cases brought under the First and Fourth Amendments have failed to provide any meaningful restriction on NSA's section 215 capabilities. *Engblom*, the most recent case decided on the merits of the Third Amendment, was decided over thirty years ago, in 1982. Traditional means of government restraint have failed, and we as a community must relinquish our clutch on tradition and use new instrumentalities. The legal profession must overcome its demonstrated aversion to the Third Amendment, or else the U.S. will cross into that abyss from which there is no return.

[138] WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.