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Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq or North Korea?

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COULD A CIA OR FBI AGENT BE QUARTERED IN YOUR HOUSE DURING A WAR ON TERRORISM, IRAQ OR NORTH KOREA?

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I. INTRODUCTION

After the September 11, 2001 terrorist attacks against the United States, the United States-led coalition of nations commenced a "War on Terrorism." Part of the effort to defeat terrorism included swift and potentially longstanding threats to civil liberties cast in the ideal of providing national security.[1] Many ordinary law-abiding citizens hesitate before questioning these measures, particularly in light of the measures' promise of national security.

About a year and a half into the War on Terrorism, the United States and a minor contingent of supporting nations commenced a war against Iraq in order to disarm Iraq's alleged prohibited weapons of mass destruction and perhaps also to liberate the Iraqi people from a tyrannical regime. Regardless of the wavering reasoning behind the war, combat began on March 19, 2003, and President George W. Bush declared the end of major combat operations on May 1, 2003.[2] The United States continues to occupy Iraq, and its troops have been subjected to consistent guerrilla warfare attacks since May 1, 2003, with more soldiers dying after the end of major combat operations than during major combat.[3]

Increasing threats and mounting tension between the United States and North Korea have existed for months concerning North Korea's alleged nuclear weapons program.[4] A 1994 agreement between the United States and

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1. For an overview of the all the measures used to confront terrorism, see University of Michigan, *America's War Against Terrorism*, *at* http://www.lib.umich.edu/govdocs/usterror.html#freedom (last updated Oct. 2, 2003).

2. *See* CNN.com, *War Tracker: Latest Briefing*, *at* http//:www.cnn.com/SPECIALS/2003/iraq/war.tracker/05.01.index.html (May 1, 2003) [hereinafter *Special Report*].

3. CNN.com, *U.S. Deaths in Iraq Surpass 'End of Major Combat' Total*, *at* http://www.cnn.com/2003/WORLD/meast/08/26/sprj.irq.intl.main/index.html (Aug. 26, 2003).

4. CNN.com, *U.S. Rules Out One-on-One Talks*, *at* http://www.cnn.com/2003/WORLD/asiapcf/east/08/27/nkorea.talks/index.html (Aug. 28, 2003).

North Korea, meant to curb North Korea's nuclear weapons development, has unraveled.[5] North Korea recently reactivated its nuclear weapons program, sparking international concern.[6] North Korea withdrew from the Nuclear Non-Proliferation Treaty and might drop its self-imposed ban on ballistic missile tests.[7] After North Korea expelled international inspectors on December 31, 2002,[8] it informed the Bush Administration that it had enough plutonium to create six nuclear bombs.[9] The Central Intelligence Agency (CIA) also believes North Korea might have already produced two nuclear weapons in the early 1990s.[10] In light of these circumstances, the Pentagon might consider military options[11] if diplomatic efforts, such as talks between the United States, North Korea and four other nations, cannot resolve the crisis.[12]

Suppose that in the course of these three situations[13] the United States suspected that terrorist or military attacks would be launched from terrorist organizations, Iraq, or North Korea. Because the United States is geographically protected by the Atlantic and Pacific oceans, and has relatively friendly and secure neighboring countries, the likelihood of a traditional air, sea or ground attack from terrorists, Iraq or North Korea is unlikely. Instead, a potential biological, chemical or nuclear attack seems more likely. Similar to the attack by the relatively small group of September 11 terrorists, a few

5. Bill Nichols, *Report: N. Korea Suspected of Having 2nd Nuclear Plant*, USA TODAY, July 21, 2003, at 5A.

6. CNN.com, *North Korea: Nuclear Tension*, *at* http://www.cnn.com/SPECIALS/2003/nkorea (last visited Nov. 4, 2003).

7. *See* CNN.com, *Timeline: North Korea's Nuclear Weapons Development*, *at* http://www.cnn.com/ 2003/WORLD/asiapcf/east/08/20/nkorea.timeline.nuclear/ (Aug. 20, 2003).

8. David E. Sanger, *North Korea Says: It Has Made Fuel for Atom Bombs*, NEW YORK TIMES, July 15, 2003, at 1.

9. *Id*. *See also* Nichols, *supra* note 5.

10. Sanger, *supra* note 8. *See also* Nichols, *supra* note 5.

11. Sanger, *supra* note 8.

12. Thomas Omestad, *The Art of the Deal*, U.S. NEWS & WORLD REPORT, Sept. 1, 2003, at 21, 22.

13. The United States deployed approximately two hundred troops to Liberia on August 14, 2003. Jeff Koinange, *The Marines Have Landed*, *at* http://www.cnn.com/2003/WORLD/africa/08/14/otsc.koinange/index.html (Aug. 14, 2003). That deployment, which Congress did not authorize, sent troops to act in a peacekeeping capacity to stabilize the country embroiled in internal fighting. *Id*. By August 24, 2003, this force of Marines had left Liberia to return to ships sailing near the coast. CNN.com, *150 Marines Leave Liberia*, *at* http://www.cnn.com/2003/WORLD/africa/08/24/liberia.marines/index.html (Aug. 24, 2003). The troops were not sent to engage in a limited or formal war *against* an enemy or a prospective enemy, and they remained there for only ten days; therefore, that deployment is not a subject of this article. For a discussion of the presidential power to deploy troops abroad, see Robert F. Turner, *Separation of Powers in Foreign Policy: The Theoretical Underpinnings*, 11 GEO. MASON. L. REV. 97, 114 (1988) (noting that "short of declaring or launching a war against another state, the president has complete discretion to deploy whatever Army the Congress makes available as he deems necessary to protect the security of the [United States]").

individuals could conduct such a catastrophic attack. Those individuals, like the September 11 terrorists, could already be residing and working within an American community.

If the United States had information about those individuals, an effective way to investigate them would be to watch them constantly. In fact, dozens of "Islamic extremists" were under Federal Bureau of Investigation (FBI) surveillance in 2003, and the FBI was also "closely monitoring known members of other terrorist organizations."[14] A logical way to perform such surveillance would be to quarter CIA and FBI agents in homes within the community in which the suspected terrorists or enemy soldiers reside. The United States could then observe the suspects non-stop, from as close a vantage point as possible.

Alternatively, what if CIA and FBI agents' personal residences, offices and other government buildings were subjected to terrorist or military threats, leaving agents with no place to live or work? At that point, could CIA or FBI agents be quartered in your house? While this measure, as well as the quartering scenario described above, could be successful, it would also appear to affect one of the treasured, albeit rarely invoked constitutional rights of citizens. This right is the Third Amendment's prohibition against nonconsensual quartering of soldiers in a person's house during peacetime or wartime (although nonconsensual quartering can occur during wartime through a manner prescribed by law).[15]

Part II of this article examines the text of the Third Amendment of the United States Constitution. The Third Amendment states: "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."[16] Initially, the amendment seems straightforward. During peacetime no soldier may be quartered in a house without the owner's consent. The same is true during wartime; however, in wartime, a law may be enacted setting standards for how soldiers may be quartered in houses. The difficulty arises in determining whether CIA and FBI agents are "soldiers" and whether the United States is in a period of "wartime."

This article will show that the broad meaning of the term "soldier" encompasses both CIA and FBI agents. Furthermore, it will show that many of those agents perform multiple military functions similar to that of traditional soldiers.

14. CNN.com, *FBI Readies Home Front for Wartime*, *at* http://www.cnn.com/2003/US/03/17/fbi.war/index.html (Mar. 17, 2003) [hereinafter *FBI Readies Home Front for Wartime*].

15. *See* U.S. CONST. amend. III.

16. *Id.*

Regarding what constitutes wartime, Article I, Section 8, Clause 11 of the Constitution authorizes Congress to declare war.[17] Following that mandate, Congress passed the War Powers Resolution describing when the President may introduce the armed forces into hostilities or situations where hostilities are imminent.[18] This article describes how "war," under both the Constitution and the War Powers Resolution, can exist under its ordinary meaning without Congress making a formal declaration of war. However, to convert the legal status of the nation from peacetime to wartime, a formal declaration of war is required. Thus, the Third Amendment's text prevents compelled quartering of soldiers until Congress declares war. Because Congress has not declared a war on terrorism, Iraq or North Korea, compelled quartering of soldiers cannot take place.

Part III of this article provides a historical understanding of the Third Amendment. Although the Third Amendment has rarely been applied to legal issues since its ratification, its historical underpinnings date back at least to the early 1600s in Great Britain. In Great Britain and in the American colonies, compelled quartering of soldiers took place. Consistent, forthright opposition to the quartering took place as well, which led to the Third Amendment's ratification. The citizen protest, while directed at traditional soldiers, opposed the government's actions of quartering one of its agents in a house; thus, the specific type of military agent quartered is not dispositive of the citizen sentiment. Finally, the founding period debate regarding whether the United States should have a standing army in peacetime shows a consistent citizen distrust of the government's force and power. Consequently, a Third Amendment jurisprudence must follow the principle *against* the compelled quartering of soldiers and the subordination of the military to the people, thus protecting the citizenry from the compelled quartering of CIA or FBI agents today.

Part IV of this article discusses prior cases reviewing the Third Amendment. The only case directly interpreting the Third Amendment is *Engblom v. Carey*.[19] In *Engblom*, striking prison officials were allowed to proceed on a Third Amendment claim against the governor of New York based on the state's quartering of National Guardsmen in the officials' on-site residences during a strike.[20] While the Court did not focus on the meaning of "soldier" or "wartime," its silence was golden. Specifically, the Court did not mention the Cold War, which at the time was an ongoing political conflict between the United States and the Soviet Union. Thus, the Court could not have viewed the public policy oriented Cold War as constituting wartime. The

17. U.S. CONST. art. I, § 8, cl. 11.
18. 50 U.S.C. §§ 1541-1548 (2000).
19. 677 F.2d 957 (2d Cir. 1982).
20. *Id.* at 958-59.

Court did, however, broadly interpret the term "Owner" in the Third Amendment;[21] thus, the terms "soldier" and "wartime" should also be broadly interpreted. This leads to an affirmance of the textual and historical conclusion that CIA and FBI agents cannot be quartered in a citizen's house without the owner's consent unless Congress declares war and subsequent quartering is prescribed through law.

Part V of this article examines two specific areas of constitutional law that are analogous to the Third Amendment. The Fourth Amendment protects the people from unreasonable governmental searches and seizures.[22] That amendment stringently protects the home from government intrusion, as well as prevents numerous types of agents from effectuating such searches and seizures. Thus, the Third Amendment must also strongly protect the home from a wide range of government agents who are considered soldiers, such as CIA or FBI agents. The right to privacy also supports a civil-liberties-friendly Third Amendment jurisprudence. The right to privacy was formed partially because of the Third Amendment's civil rights protections.[23] Therefore, if the Third Amendment established part of the foundation for the right to privacy, then Third Amendment jurisprudence must continue to favor citizen privacy over the compelled quartering of soldiers. Consequently, compelled quartering of CIA and FBI agents cannot occur in a War on Terrorism, Iraq or North Korea until Congress declares war, and thereafter, the quartering is prescribed through law.

In contemporary constitutional disputes, there is a tremendous amount of material to sort through.[24] While legal sources interpreting the Third Amendment are scant compared with other Bill of Rights provisions, there is sufficient material available to understand the Third Amendment. We have the amendment's text, a wealth of historical materials, a case from the modern era and analogous areas of the law.[25] It is the goal of this article to make more clear the meaning of the Third Amendment.

II. THE THIRD AMENDMENT'S TEXT

The Constitution's Preamble states that the people "ordain and establish" the Constitution.[26] Therefore, "before [the Constitution] tells us anything else,

21. *Id.* at 962.

22. U.S. CONST. amend. IV.

23. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also infra* notes 496-505 and accompanying text.

24. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 169-70 (2003).

25. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 165 (1990).

26. U.S. CONST. pmbl.

it tells us why we should sit up and take notice [of it]."[27] Specifically, the Constitution declares itself the supreme law of the land and requires judges to support it through oath or affirmation,[28] thereby declaring itself "king."[29] We must remember that the *words* of the Constitution have been authoritatively adopted.[30] Consequently, a constitutional analysis begins with the "constitutional text speaking to [the] precise question."[31] In other words, "the text itself is an obvious starting point of legal analysis."[32] As Akhil Reed Amar put it: "[i]s it even possible to deduce the spirit of a law without looking at its letter?"[33]

A. Why the Third Amendment's Text Must Start the Analysis

When analyzing the Third Amendment, this article will begin with the Third Amendment's text. It provides: "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."[34] Because there is little Third Amendment precedent to address, a return to the amendment's text is not a lofty goal, but a necessary starting point when analyzing it. "The absence of any case law directly construing [the amendment] presents a serious interpretive problem;"[35] thus, the amendment's language and analogous areas of law must be analyzed.[36] Because of the lack of material analyzing the amendment's text, its words bear more importance here. Even for those who usually eschew an amendment's text to a footnote with the bulk of the analysis involving doctrinal precedent, the text must be confronted here to fairly address the amendment. Few established principles or standards exist beyond the Third Amendment's text, therefore the text must be studied and explained to establish a subsequent legal methodology for it.

This is an appropriate analytical paradigm because "it is always possible in [] constitutional discourse to appeal behind . . . [doctrinal precedent] to the document itself, to challenge current wisdom" with what the Constitution

27. Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34 (2000).

28. U.S. CONST. art. VI, cl. 2.

29. Amar, *supra* note 27, at 33.

30. Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

31. Printz v. United States, 521 U.S. 898, 905 (1997). *See also* John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 17 (1999) (noting the Supreme Court should start its analysis with an amendment's words, not with "implicit principles").

32. Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998).

33. *Id.*

34. U.S. CONST. amend. III.

35. Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982).

36. *Id.*

commands.[37] Although the text of the amendment holds special importance, "a technical and literal reading" of it must be rejected.[38] A wholly textualist form of jurisprudence provides the weakest restraints and is an inappropriate invitation to creativity because broadly phrased terms allow one to use those provisions in whatever way desired.[39] We must also remember the Third Amendment was written in a world with a political language distinct from our own.[40] In order to translate the Third Amendment's meaning into terms relevant in our modern political world, we need to trace its meaning through history, case law and analogous area of the law. Therefore, this article's analysis begins with and conforms to the Third Amendment's text, for "supplementing [the analysis with] judicial opinions, legal writings and other relevant information is acceptable as long as [they conform to] the text."[41]

B. Rejecting Original Intent to Evaluate the Third Amendment

Because the United States has a written Constitution, we must commit to following its written text, not what we think those who wrote it meant.[42] What legislators believe a law means is irrelevant.[43] Whether we interpret the Constitution or a statute, it is "the original meaning of its text [that is analyzed], not what the original draftsmen intended."[44] "The law *is* what the law *says*, and we should [be content] with reading it rather than psychoanalyzing those who enacted it."[45]

37. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 697 (1987).

38. *Engblom*, 677 F.2d at 962.

39. David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1157 (1998).

40. Powell, *supra* note 37, at 672-73.

41. Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL'Y 85, 100 (2002) [hereinafter Schmidt, *Analyzing the Text of the Equal Protection Clause*].

42. Prince, *supra* note 31, at 7.

43. Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

44. Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

45. Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (citing United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 319 (Jackson, J., concurring)). Not only is intent irrelevant, but, history shows early constitutional interpretation did not focus on the Founders' personal intentions, but on the "original intent" of the sovereign parties to the constitutional compact evidenced through constitutional text and "discerned through structural methods of interpretation." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985). *But see* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 93 (1988) (arguing that the original intent theory emerged soon after the Constitution was ratified).

Therefore, a "court cannot . . . be influenced by the construction placed upon [a law] by individual[s]" involved in its debate and passage because the will of the majority is spoken in the act itself.[46] This means the views of draftsmen, such as Alexander Hamilton, bear no more authority than the views of non-draftsmen, such as Thomas Jefferson, in determining the meaning of the Constitution.[47] As James Madison, a draftsman, stated: "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character."[48] Madison felt that "the legitimate meaning of the Instrument must be derived from the text itself."[49] Thus, he believed the intentions or opinions of those that planned and proposed the Constitution should not be used to interpret the Constitution's meaning.[50]

The debates at the Philadelphia Constitutional Convention were held in secret[51] and the proceedings were not officially preserved and published. Therefore, the original understanding of what occurred there "did not greatly matter."[52] Some members of the Philadelphia convention went as far as recommending the convention's journals be destroyed and its minutes burned.[53]

Similarly, prior drafts of the Third Amendment shed no authoritative light on the final amendment's meaning. "The text's the thing,"[54] so, we should ignore drafting history as opposed to relying on rejected drafts to interpret the final, binding version of the Third Amendment.[55] The only definite fact we know about prior drafts of an amendment or law is that they were rejected. Attempting to string together a series of rejected drafts to determine what the

46. Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). *See also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205 n.31 (1999) (directing attention to "Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 n.† (1998) (noting that Justice Scalia joins in the entire opinion with the exception of a section that discusses and rejects a party's appeal to legislative history); Associates Commercial Corp. v. Rash, 520 U.S. 953, 955 n.[†] (1997) (noting that Justice Scalia joins in the entire opinion with the exception of a footnote which discusses and rejects the use of legislative history in construing the statute at issue)").

47. *Tome*, 513 U.S. at 167 (Scalia, J., concurring).

48. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447 (Max Farrand ed., rev. ed. 1966).

49. *Id.*

50. *Id.* at 447-48.

51. Paul Finkleman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 356 (1989).

52. *Id.* at 353. (citing L.W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 2 (1988)).

53. *Id.* at 353-54.

54. Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 283 (1996) (Scalia, J., concurring).

55. *Id.*

final draft means places rejected versions of an amendment or law in an authoritative position when interpreting the final, binding version. We will never know exactly why changes were made to previous drafts of legislation. The hundreds, if not thousands, of people associated with drafting and ratifying legislation most likely made drafting changes for a multitude of imprecise reasons. Some changes reflect political compromises, some reflect quid pro quo scenarios, some reflect political overtones or the issues of the day and some simply reflect grammatical or structural concerns. Just as we cannot put our finger on the collective original intent behind a law, we cannot definitively determine why each change was made to each draft of eventually-passed legislation.

Even if we were to plunge into an original intent analysis of the Third Amendment, whose intent behind it mattered?[56] Should we consider those involved in the Philadelphia convention only, or should we include the views from those involved in the state ratification conventions as well?[57] More specifically, "do we [consider the intent of] all those who attended the Philadelphia convention, or only those who signed the Constitution?"[58] If we consider the state conventions, do we consider all those who attended or just those who voted for the Constitution?[59] And did all those involved intend the Third Amendment to mean the same thing, and how would we prove any of that?[60] With little or no record available concerning the intent of those involved in enacting the Third Amendment, we must accept that the original intent of the Third Amendment is irrelevant and impossible to determine. In sum, the meaning of the Third Amendment's text, and not anyone's intentions of it, binds us as law.[61]

56. *See* Prince, *supra* note 31, at 13.

57. *Id*.

58. Finkelman, *supra* note 51, at 356.

59. *Id*.

60. *See* Prince, *supra* note 31, at 13. *See also* Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention*," 74 GEO. L.J. 1719, 1721-22 (1986) (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 98–110 (1962) (asserting that the Founders' intentions cannot be ascertained with finality)) (describing the Constitution as not "ratified by a single actor with clear motivations, but by many participants, most of whom left little or no record of their intentions"); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 96 (1987) (explaining that many Founders were in Congress and the ratifying assemblies, speaking at many times).

61. *See generally* Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 44, at 65. Because the Constitution vests the entire Congress with all legislative powers in U.S. CONST. art. I, § 1, the views of a select few in Congress cannot constitute the meaning of a law. *See generally* Scalia, A MATTER OF INTERPRETATION, *supra* note 44, at 35.

C. What is a "Soldier?"

The definition of soldier is not limited to one narrow meaning. A soldier is "one engaged in military service and [especially] in the army".[62] Similarly, a soldier can be "an enlisted man or woman."[63] One engaged in enlisted military service is a soldier, but one need not be engaged in such military service to be a soldier. A soldier can also be "a skilled warrior"[64] or "a militant leader, follower, or worker."[65] Because a soldier can be "a skilled warrior"[66] or "a militant leader, follower, or worker,"[67] a soldier need not be formally linked to the armed services. As such, a broader meaning applies to soldier.

1. Is a CIA Agent a Soldier?

The National Security Act created the CIA in 1947.[68] 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."[69] The CIA is responsible to the President through the Director of Central Intelligence and accountable to Congress's intelligence oversight committees.[70] 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.[71]

The CIA's mission directly relates to military oriented functions. The CIA supports the President, the National Security Council, and all officials who make and execute national security policy by "[p]roviding accurate, comprehensive, and timely foreign intelligence on *national security* topics."[72] Furthermore, the CIA operates to ensure that a "battlefield commander . . .

62. WEBSTER'S NEW COLLEGIATE DICTIONARY 150TH ANNIVERSARY EDITION 1097 (1981) [hereinafter WEBSTER'S]. *See also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1228 (William Morris ed., 1981) [hereinafter AMERICAN HERITAGE] (defining a soldier as one who serves in the army).

63. WEBSTER'S, *supra* note 62, at 1097. *See also* AMERICAN HERITAGE, *supra* note 62, at 1228 (indicating that the meaning of soldier is also an enlisted man or a noncommissioned officer as distinguished from a commissioned officer).

64. WEBSTER'S, *supra* note 62, at 1097.

65. *Id*. *See also* AMERICAN HERITAGE, *supra* note 62, at 1228 (defining a soldier also as an active or loyal follower or worker).

66. WEBSTER'S, *supra* note 62, at 1097.

67. *Id*. *See also* AMERICAN HERITAGE, *supra* note 62, at 1228 (defining a soldier also as an active or loyal follower or worker).

68. Central Intelligence Agency, *About the CIA*, *at* http://www.cia.gov/cia/information/info.html (last modified Jun. 9, 2003) [hereinafter *About the CIA*].

69. *Id*.

70. *Id*.

71. *See* U.S. CONST. art II, § 2, cl. 1.

72. *About the CIA*, *supra* note 68 (emphasis added).

receives the best intelligence possible."[73] To further military-like operations, the CIA created special multidisciplinary centers to address issues such as counterterrorism, counterintelligence and arms control intelligence.[74]

The CIA has separate leadership positions for homeland security intelligence and foreign intelligence. An "Associate Director of Central Intelligence for Homeland Security, Office of the Director of Central Intelligence, ensures the flow of intelligence in support of homeland defense."[75] The CIA also has a Directorate of Operations who "is responsible for the clandestine collection of foreign intelligence."[76] Accordingly, the CIA, as part of its normal operations, transmits intelligence information in order to protect the nation from military attack.[77]

This description of CIA activities might most directly correlate with the job duties CIA or FBI agents would perform in a quartering scenario. The secretive collection of foreign intelligence is exactly what a quartered CIA agent would be doing while investigating a terrorist, Iraqi or North Korean military plot. This type of mental combat, or attempting to defeat an enemy with the mind instead of the fist, is still military-like activity because a federal executive department agent uses his skills and training to defeat an enemy. It is at least the action of a "skilled warrior,"[78] as it requires using highly skilled tactics in a committed, courageous operation. A CIA agent, heavily trained in intelligence gathering and surveillance, is a skilled servant of the Executive Branch, just as an infantryman is a highly trained member of the armed forces of the Executive Branch. Finally, CIA agents committed to preventing another terrorist or military attack are dedicated and courageous warriors just like traditional infantrymen putting their bodies in front of an enemy bullet.

The CIA's Office of Military Affairs (OMA) corroborates the contention that CIA agents conduct soldier-like operations. OMA is designed to provide deployed armed forces with "the full range of [the] CIA's intelligence and operational support capabilities."[79] OMA has "military detailees from all the uniformed [s]ervices."[80] Thus, the CIA is directly connected with all branches of the armed forces. A military detailee from a uniformed military branch, is as close to a traditional soldier as possible.

More importantly, the OMA internet page contains a handful of pictures equating to a thousand words. The top of the page contains pictures of, from

73. *Id*.
74. *Id*.
75. *Id*.
76. *Id.*
77. *See About the CIA*, *supra* note 68.
78. *See supra* notes 62-67 and accompanying text.
79. Central Intelligence Agency, *OMA at a Glance*, *at* http://*www.cia.gov*/oma/oma.html (last updated Oct. 24, 2002) [hereinafter *OMA at a Glance*].
80. *Id*.

left to right, a stealth bomber, a large ship that appears to be an aircraft carrier, a uniformed man appearing to be in the Marines and uniformed personnel in a tank-like vehicle.[81] Below those pictures appears a picture of four hats of the armed services.[82] These images are undeniably those of soldiers. If the CIA is directly linked with these soldiers in its actions, support and personnel, how can a CIA agent not be a soldier as well? The CIA, through OMA, is inextricably linked with the military and armed services. Consequently, the CIA admits it "is a part of the broader 'military support team.'"[83]

If the CIA provides support for the military and is part of the military team, how can its agents not be soldiers? Certainly military personnel of the Air Force, Army, Marines and Navy are soldiers. Because the CIA is part of that military support team, its agents are also soldiers. OMA's principal business involves soldier-like duties including the following:

> Agency support for military exercises; direct support . . . to the commanders in chief of the major unified commands; support . . . to the major service schools and war colleges; an active training and education . . . program aimed at informing [CIA] officers about unique military needs and explaining to military audiences how [the] CIA can respond to their requirements; . . . [assessing battle damage; assisting in military liaison functions and] ensuring systems interoperability between CIA and military sites.[84]

OMA's duties read like a laundry list of military functions that soldiers perform. OMA has its hands in multiple components of military operations, all requiring and engaging military goals. If the CIA's office is considered the Office of *Military* Affairs, then those agents conducting military duties must be *soldiers* in that capacity. Accordingly, a CIA agent in this context, quartered in a person's house, would meet the definition of a soldier.

Finally, the CIA's role in covert military operations shows its agents are soldiers in that capacity. The CIA "asserted that the [President] has the power to authorize the use of covert paramilitary force."[85] Specifically, Special Counsel to the CIA argued that the President could undertake covert action because of his inherent power to conduct foreign affairs.[86] In fact, the United States became involved in a foreign, "internal civil [war] through the use of private paramilitary forces working under the direction of officers or

81. *Id*.

82. *Id*.

83. *Id*.

84. *OMA at a Glance*, *supra* note 79.

85. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1037 (1986).

86. *Id*. at 1037 n.12 (citing *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings Before the House Select Comm. on Intelligence*, 94th Cong. 1729-34 (1975) (statement of Mitchell Rogovin, Special Counsel to the Director of the CIA)).

employees of the CIA."[87] "In the late 1940's the CIA organized guerrilla operations against several eastern European countries, and between 1953 and 1973 the CIA used paramilitary troops in at least eight major efforts against foreign governments."[88] CIA military operations have occurred in Africa, Asia, Latin America and the Bay of Pigs in Cuba.[89]

The CIA dedicates an entire page on its internet Web site describing its actions in the War on Terrorism.[90] The CIA's description of its activities against terrorism details how the entire agency confronts terrorism on a global scale. In the mid-1980s, then CIA Director William Casey "created the DCI Counterterrorist Center (CTC) [in order to] preempt, disrupt and defeat terrorists."[91] According to the CIA, "CTC's mission is to assist the [CIA Director] in coordinating the counterterrorist efforts of the Intelligence Community" by implementing counterterrorist operations to collect intelligence on and minimize terrorist capabilities, producing in-depth analyses of terrorist groups and coordinating the intelligence community's counterterrorist activities.[92] The CTC "[f]urnishes daily detailed information on terrorist-related intelligence to national-level policymakers from the President through sub-Cabinet level officers and members of Congress."[93] Moreover, it provides intelligence to the State Department for use with foreign governments in order to "thwart terrorism."[94] The CTC also provides warnings of "impending terrorist operation[s] to those who can counter the threat."[95]

The CTC directly supports the military overseas. CTC's direct intelligence support for the military is its highest priority;[96] specifically, the CTC protects the military by determining the modus operandi of terrorists that might operate

87. *Id.* at 1049.

88. *Id*. at 1050 (citing S. REP. NO. 94-2, at 145, 148 (1977); Falk, *CIA, Covert Action and International Law*, SOCIETY, Mar.-Apr. 1975, at 39, 40-41).

89. *Id*. at 1049 n.64 (citing S. KUMAR, CIA AND THE THIRD WORLD (1981); V. MARCHETTI & J. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 113-25 (1974); P. WYDEN, BAY OF PIGS: THE UNTOLD STORY (1979)).

90. *See* Central Intelligence Agency, *The War on Terrorism*, *at* http://www.cia.gov/terrorism/index.html (last updated Jun. 9, 2003). The CIA is also following the North Korea situation. Omestad, *supra* note 12, at 21. The CIA estimates North Korea could produce bomb-ready uranium in mid-to-late 2004. *Id*. The North Korean situation might intersect with the War on Terrorism and the war against Iraq as the CIA concluded North Korea will sell nuclear material to rogue states or terrorists if its nuclear reprocessing succeeds. *Id*.

91. Central Intelligence Agency, *DCI Counterterrorist Center*, *at* http://www.cia.gov/terrorism/ctc.html (last updated Apr. 12, 2002) [hereinafter *DCI Counterterrorist Center*].

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id.*

96. *DCI Counterterrorist Center*, *supra* note 91.

near United States troops, ensuring that the military receives quick and usable intelligence and maintaining direct contact with military intelligence units at all major commands.[97]

Part of the CTC's mission is to pursue major terrorists overseas and help the FBI bring terrorists to justice.[98] The CTC and the FBI "began exchanging senior-level officers to help manage the counterterrorist offices at both agencies."[99] Through this effort, the United States has brought a number of terrorists to justice.[100]

The CIA, working with the FBI, seeks to capture terrorists alive when possible.[101] However, the current Bush Administration prepared a list of terrorist leaders the CIA is authorized to kill "if capture is impractical and civilian casualties can be minimized."[102] Specifically, President Bush provided written legal authority to the CIA to "hunt down and kill the terrorists."[103]

If the CIA performs intelligence, apprehension, analytical and warning actions regarding terrorism while arguing for authority to conduct paramilitary affairs, then it is admitting that it performs military functions. The CTC confronts terrorists and potential terrorists from as many angles as possible. Because President George W. Bush authorized the CIA to capture or kill terrorists, those CIA agents following that mission are conducting military affairs as soldiers. Capturing or killing the enemy is a soldier's basic, fundamental role. Essentially, when the President authorizes a CIA agent to capture or kill an enemy, that CIA agent is a soldier. Any assertion to the contrary would be nonsensical.

The CIA was intricately involved in the war against Iraq even before its beginning. For almost a year before the conflict commenced on March 19, 2003, the CIA was operating under presidential authority to overthrow Iraqi leader Saddam Hussein through covert actions.[104] The CIA had "authority to use lethal force and a two hundred million dollar budget to bring about a change of government."[105] Once again, CIA agents were conducting covert actions of a military nature with presidential authority to kill an enemy. Besides this type of unquestionably soldier-like activity of trying to topple an enemy and kill it, the CIA provided intelligence for the military. On March 19,

97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. James Risen & David Johnston, *Bush Has Widened Authority of CIA to Kill Terrorists*, NEW YORK TIMES, Dec. 15, 2002, at 1.
102. *Id*.
103. *Id*.
104. Walter Pincus et al., *U.S. Thinks it Hit Compound with Hussein Inside*, PHILADELPHIA INQUIRER, Mar. 21, 2003, at A1.
105. *Id*.

2003, before combat started, CIA Director George Tenet and Secretary of Defense Donald Rumsfeld presented President Bush with a plan to launch a strategic strike against a location where Hussein and his top commanders were believed to be.[106] The CIA apparently gained intelligence on Hussein's suspected whereabouts from human intelligence and satellite images.[107] After meeting with Tenet and others and receiving one last intelligence update, President Bush authorized the strategic attack, which occurred at approximately 9:45 p.m. eastern standard time.[108] Therefore, the conflict commenced because of CIA recommendations on where and when to strike Iraq. How much more military and soldier-like can a function be? The strike missed Hussein, and Hussein appeared on Iraqi television shortly after the attack.[109] The CIA continued its military function though, and confirmed it was Hussein, not a body double, appearing on television (but it was unsure if the tape was recorded).[110] On December 14, 2003, United States troops captured Saddam Hussein alive.[111]

This description of CIA agents verifies that those agents who are directly engaged in intelligence gathering, national security or military affairs would be soldiers in a Third Amendment context. Obviously, those would be the type of agents quartered in a house to investigate an enemy. Thus, in that situation, those agents would be soldiers for Third Amendment purposes.

Regarding the general quartering of CIA agents for protection from threatened attacks on their residences and offices, if the type of agent described previously was quartered for general purposes, and not to perform any job function, the agent would still be considered a soldier because of the agent's basic job functions. CIA agents not necessarily linked with national security or military affairs who would be quartered for general residency purposes only, would still meet the textual meaning of soldier. The agents' knowledge and expertise, coupled with their dedication to the United States, makes them both "skilled warriors"[112] and "militant leaders, followers, or workers."[113] Accordingly, under the broad meaning of soldier, CIA agents would be considered soldiers under the Third Amendment. But what of FBI agents?

106. Ron Hutcheson, *Bush Shifted Strategy with Just Minutes to Go*, PHILADELPHIA INQUIRER, Mar. 21, 2003, at A16.

107. Pincus et al., *supra* note 104.

108. Hutcheson, *supra* note 106.

109. William Bunch, *16 Allied Troops Die in Copter Crash*, PHILADELPHIA DAILY NEWS, Mar. 21, 2003, at 5.

110. *Id.*

111. Chris Susan Sachs, *Arrest by U.S. Soldiers—President Still Cautions*, N.Y. TIMES, Dec. 15, 2003, at A1.

112. *See supra* notes 62-67 and accompanying text.

113. *See id.*

2. Is an FBI Agent a Soldier?

The FBI is a field-oriented organization that "provide[s] program direction and support to fifty-six field offices, approximately 400 satellite offices . . ., four specialized field installations, and over forty foreign liaison posts."[114] The FBI has approximately 11,000 special agents and 16,000 other employees who perform professional, administrative, technical, clerical, craft, trade or maintenance operations.[115] About 9,800 employees are assigned to FBI Headquarters and nearly 18,000 are assigned to field installations.[116]

The FBI has an Executive Assistant Director for Counterterrorism/Counterintelligence.[117] The Counterintelligence Division activities include domestic security,[118] and it "consolidates all FBI counterterrorism initiatives."[119] The FBI's full-time counterterrorism contingent is slightly more than 2,000 agents, but an additional 5,000 to 10,000 agents can be shifted to prevent domestic terrorism.[120] Thus, the FBI is countering terrorism or the threat of terrorism. Accordingly, FBI agents rebuffing or preventing terrorism are rebuffing or preventing military attacks. Are not those agents' goals, objectives and mission the same as an enlisted soldier rebuffing and preventing terrorism or an enemy military?

"The National Infrastructure Protection Center (NIPC) and the National Domestic Preparedness Office (NDPO) are assigned to [the Counterterrorism Division]."[121] As the FBI states on its internet site:

> The NIPC serves as the US Government's focal point for threat assessment, warning, investigation, and response for threats or attacks against the United States' critical infrastructures. The NDPO coordinates all federal efforts to assist state and local first responders with planning, training, and equipment needs necessary to respond to a conventional or non-conventional weapons of mass destruction incident.[122]

114. Federal Bureau of Investigation, *General Frequently Asked Questions*, *at* http://www.fbi.gov/aboutus/faqs/faqsone.htm (last visted Nov. 4, 2003).

115. *Id*.

116. Federal Bureau of Investigation, *About Us*, *at* http://www.fbi.gov/aboutus.htm (Dec. 6, 2002).

117. Federal Bureau of Investigation, *FBI Executives*, *at* http://www.fbi.gov/libref/executives/asstmain.htm (last visited Nov. 4, 2003).

118. Federal Bureau of Investigation, *Investigative Programs*, *at* http://www.fbi.gov/hq/area.htm (last visited Nov. 4, 2003) [hereinafter *Investigative Programs*].

119. *Id*.

120. *FBI Readies Home Front for Wartime*, *supra* note 14.

121. *Investigative Programs*, *supra* note 118. The FBI's Executive Assistant Director for Law Enforcement Services oversees the Critical Incidents Response Group, which "deploy[s] investigative specialists to respond to terrorist activities." Critical Incident Response Group, *Mission Statement*, *at* http://www.fbi.gov/hq/isd/cirg/mission.htm (last visited Nov. 4, 2003).

122. *Investigative Programs*, *supra* note 118.

The NIPC and NDPO are specifically designed as national defense organizations underneath the counterterrorism umbrella. If their national defense operations were not labeled under an FBI subdivision, one would presume that an armed forces branch or branches conducted them. Because these operations are military operations, military personnel would naturally be expected to conduct them.

The FBI is directly involved with the War on Terrorism. The media has reported that "FBI Director Robert Mueller and other top FBI officials . . . said their greatest concern is unknown al Qaeda-backed sleeper cells that may be in the United States" ready to commit a terrorist attack.[123] To help prevent such an attack, known Islamic extremists are under FBI surveillance and the FBI is closely monitoring terrorist organization members.[124] On the international scale, "the FBI continues to upgrade its presence and cooperation with other governments" in order to protect United States facilities and interests abroad from attack.[125] To complete this task and pursue suspected terrorists, the FBI stationed agents in forty-five countries.[126] The FBI had some success abroad. Specifically, it arrested a high-ranking member of al Qaeda, Khalid Shakh Mohammed, in the spring of 2003.[127] After the arrest, the FBI tried to disrupt his financial network overseas and gained valuable information from him.[128] The FBI reportedly learned that a suspected al Qaeda terrorist was planning an attack against the United States and it issued a worldwide alert in order to locate him.[129] In August 2003, federal officials arrested an arms dealer trying to sell shoulder-fired, surface-to-air missiles to an undercover customer working for the FBI.[130] Around the same time, a truck bomb exploded at the United Nations headquarters in Iraq.[131] The FBI probe into the attack determined that the explosives were similar to those used by Iraq's armed forces.[132]

123. *FBI Readies Home Front for Wartime*, *supra* note 14. al Qaeda is a worldwide terrorist organization generally considered responsible for the September 11, 2001 attacks against the United States.

124. *Id*.

125. *Id*.

126. *Id*.

127. CNN.com, *Mueller: FBI Interviews Useful to War in Iraq*, *at* http://www.cnn.com/2003/LAW/03/27/fbi.iraqis/index.html (Mar. 27, 2003).

128. *Id*.

129. Shannon McCaffrey, *Suspected al-Qaeda Operative is Sought*, PHILADELPHIA INQUIRER, Mar. 21, 2003, at A23.

130. Cnn.com, *Feds Tell How the Weapons Sting was Played*, *at* http://www.cnn.com/2003/LAW/08/13/arms.sting.details/index.html (Aug. 14, 2003).

131. The New York Times, *FBI: Iraqi Military-Type Explosives Used in Attack*, *at* http://partners.nytimes.com/ref/international/CNN-BOX-ARTICLE.html (last visited Nov. 4, 2003).

132. *Id*.

The FBI is also directly involved in the war against Iraq. The FBI interviewed approximately 10,000 Iraqi citizens and former citizens living in the United States.[133] According to the FBI, the interviews "helped lead the U.S. military to key sites during the war in Iraq."[134] The interviews led to 250 reports that helped American troops locate, in Director Mueller's words, "weapons production and storage facilities, underground bunkers, fiber optic networks, and Iraqi detention and interrogation facilities."[135] The FBI also arrested "more than 100 Iraqis of concern to authorities who are believed to be in the [United States] unlawfully."[136]

If FBI agents perform soldier-like duties, then they are soldiers. In this instance, the overall description of the FBI's specific counterterrorism and security measures are the type of military duties a soldier would perform to combat terrorists or a military enemy. Moreover, the FBI's actions in relation to the War on Terrorism and the war against Iraq verify that thousands of FBI agents perform investigative, preventive, and specific military support functions for the United States. This type of reconnaissance and information-gathering directly in relation to the War on Terrorism and the war against Iraq shows that FBI agents are soldiers in that regard. Essentially, just as a CIA agent quartered in a house to perform intelligence, national security, and military affairs is a soldier, so is an FBI agent when acting in that capacity.

Finally, FBI agents not necessarily linked with intelligence, national security, or military affairs (who would be quartered for general residency purposes only) would still meet the textual meaning of soldier, just as CIA agents in this respect did. Their knowledge and expertise, coupled with their dedication to the United States, makes them both "skilled warriors" and "militant leaders, followers, or workers."[137] Consequently, FBI agents meet the broad meaning of soldier.

133. CNN.com, *FBI: Iraqi Interviews Provided Helpful Info for War*, *at* http://www.cnn.com/2003/LAW/04/17/sprj.irq.ashcroft.mueller/index/html (Apr. 17, 2003).

134. *Id*.

135. *Id*. (internal quotations omitted).

136. McCaffrey, *supra* note 129.

137. *See supra* notes 62-67 and accompanying text. The use of broad meanings of soldier to conclude a CIA or FBI agent meets the textual meaning of soldier exemplifies why this article only uses the text as a starting point in legal analysis. Limiting the evaluation of what soldier means to a broad dictionary definition would eliminate numerous authoritative materials helping determine what a soldier is, which might lead to an incorrect result. Consequently, this article complies with the text and does not eschew other materials, such as history, case law, analogous areas of law or other materials to fully and fairly address the issue of whether a CIA or FBI agent is a soldier.

D. What is "Time of Peace?"

The Third Amendment refers to a prohibition against quartering soldiers "in time of peace."[138] While peace seems to be the controlling term, the amendment's reference to time of peace refers to when peace occurs or a state of peace. Dictionaries containing a definition for "peacetime" best define what the phrase time of peace means because peacetime combines the words within the phrase into one word. Peacetime specifically addresses peace in accord with time, blending the phrase "time of peace" into one cohesive word defining the phrase at issue. Accordingly, the term "peacetime" most accurately conveys the meaning of time of peace in reference to time of peace and time of war.

With that said, it is necessary to define peacetime. It is "a time when a nation is not at war."[139] Therefore, the meaning of peacetime cannot be defined without defining the meaning of war. In fact, war essentially defines peacetime, because peacetime exists when war does not. Accordingly, a further look into what peacetime means can only be done by defining what war means. Once the meaning of war is determined, the definition of peacetime will come to bear. If the United States is at war, then peacetime is not present. On the other hand, if the United States is not at war, then peacetime exists. Peacetime and war, thus, are mutually exclusive terms. One cannot exist with the other. Rather, either war exists or peacetime exists.

E. What is "Time of War?"

While the meanings of soldier and peacetime appear ascertainable through dictionary definitions, the terms war and wartime are more complex. The most appropriate way to define "time of war" is to refer to the meaning of "wartime," just as the term peacetime is the best way to define time of peace. Wartime means "a period during which a war is in progress."[140] Therefore, we have to define war because wartime exists when a war occurs. However, the word war has been, is and will continue to be one of the most difficult words to define in the English language.

As such, war must be evaluated through its own interpretive paradigm. In other words, just as this article examines what the Third Amendment means through its text, history, case law and analogous areas of law, the word war must enter and exit this analytical assembly line in order to ascertain its meaning. While the methodology is based on the same framework of this article, there is one minor change. Because case law provides a historical

138. U.S. CONST. amend. III.

139. WEBSTER'S, *supra* note 62, at 835. *See also* AMERICAN HERITAGE, *supra* note 62, at 963 (defining peacetime as a time of absence of war).

140. WEBSTER'S, *supra* note 62, at 1311. *See also* AMERICAN HERITAGE, *supra* note 62, at 1446 (defining wartime as "[a] period or time of war").

review of what war is, a historical understanding of war and case law defining war are not separate subsections, but a combined subsection discussing the historical understanding of war.

1. The Textual Meaning of War

"The dividing line between a state of war and a state of peace has never been clear."[141] The task of defining war is further exacerbated because it is a word that everyone understands the meaning of, but that "few can definitely define."[142] Asking what war means "is a question so enigmatic[, for example], that [the federal executive and legislative] branches cannot agree . . . on an answer any more specific than the [grand] understatement that an unprovoked attack on American forces on the scale of Pearl Harbor would . . . [cause the President to consider] requesting a declaration of war."[143] To break through this confusion and provide a specific meaning of war it must first be understood in its two contexts—its ordinary meaning found in dictionaries and its legal meaning found in the United States Constitution.

a. The Legal Meaning of War Applies Over its Ordinary Meaning

Unlike the terms soldier and time of peace, war has a textual explanatory reference in the United States Constitution. Article I, Section 8, Clause 11 (the Declare War Clause) states: "Congress shall have Power . . . To declare War."[144] Therefore, an argument exists that a court cannot take judicial notice of a war until Congress, as the war-making body, makes some act or declaration creating or recognizing its existence.[145]

Thus, before war is defined, the question is whether war should be given its ordinary meaning, based on dictionary definitions, or should be given its legal meaning based on the Declare War Clause. On the one hand, the Third Amendment does not mention the Declare War Clause, nor does it refer to a declaration of war. The Third Amendment does not state: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of [*declared*] war, but in a manner to be prescribed by law" or "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor after [*Congress declared*] war, but in a manner to be prescribed by law." Therefore, the ordinary meaning of the key phrase, "time of war," seems to be the textual key to unlocking the word's meaning. The

141. Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 777 (1995).

142. Weissman v. Metro. Life Ins. Co., 112 F. Supp. 420, 421 (S.D. Cal. 1953).

143. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 38 (1991) (citing *Crisis in the Persian Gulf: Hearings and Markup Before the House Comm. on Foreign Affairs*, 101st Cong. 104-05 (1990)).

144. U.S. CONST. art. I, § 8, cl. 11.

145. *Weissman*, 112 F. Supp. at 422.

argument proceeds that if the Constitution's Framers wanted to add the hypothetical language expressed above, they could have, particularly in light of the fact that a federal statute was passed not long after the Constitution was ratified containing that type of language. The Alien Enemy Act[146] authorizes the President to, among other things, remove certain alien enemies "[w]henever there is a *declared war* . . . or any invasion."[147] Thus, the notion is that because Congress expressed that it could premise presidential statutory war-power authority on a *declared* war, the same could have been placed in the Third Amendment if a declaration of war was necessary to constitute a war. That may appear correct, but it is off-point and off-issue, and thus, incorrect.

Here, the legal, constitutional meaning of war is at issue. Because the Constitution speaks to what war is and how it commences, that legal, constitutional meaning of war must be followed to define what war means in a Third Amendment sense. That requires a reasonable reading of two complementary constitutional texts—the Third Amendment and the Declare War Clause. Defining war only through its ordinary meaning would eschew the Declare War Clause and apply the ordinary meaning of a word that has a constitutional explanatory reference. The ordinary meaning of war has its place—in resolving legal issues surrounding the ordinary meaning of war. That, however, is not at issue here.

Reliance on the ordinary meaning of war provides constitutional interpretive problems. "A text should not be construed strictly . . . or leniently; [instead,] it should be construed reasonably, [in order to entail] all that it fairly means."[148] With the Constitution providing an explanatory provision for the meaning of the word war outside of its reference in the Third Amendment, it is unreasonable to interpret war without reference to that constitutional corollary and similar provisions balancing congressional and presidential war power. Therefore, a purely textualist approach to defining war through its ordinary meaning, thereby ignoring its legal meaning, is not a reasonable construction of war.[149]

146. 50 U.S.C. § 21 (2000).

147. *Id*. (emphasis added).

148. Scalia, *supra* note 44, at 23.

149. If the ordinary meaning of war applied to this issue, the War on Terrorism would not be a war, while the war against Iraq and a possible conflict with North Korea would be a war. Specifically, a war is "a state of usu. open and declared armed hostile conflict between states or nations." WEBSTER'S, *supra* note 62, at 1309. *See also* AMERICAN HERITAGE, *supra* note 62, at 1444 (defining war as a state of open, armed, and often prolonged conflict carried on between nations, states, or parties). It is "a period of such armed conflict." WEBSTER'S, *supra* note 62, at 1309. *See also* AMERICAN HERITAGE, *supra* note 62, at 1444 (defining war as a period of such conflict). A war is also "a state of hostility, conflict, or antagonism." WEBSTER'S, *supra* note 62, at 1309. *See also* AMERICAN HERITAGE, *supra* note 62, at 1444 (defining war as any condition of active antagonism or contention or an active state of conflict or contention). Finally, a war is a "struggle between opposing forces or for a particular end" or "to be in active or vigorous

conflict." WEBSTER'S, *supra* note 62, at 1309. While WEBSTER'S indicates that a war can be an open and declared conflict, the majority of its meaning indicates that war can occur without a declaration. *See supra* notes 142-45 and accompanying text.

At the outset, therefore, the undeclared war against Iraq involving 242,000 United States troops, massive military resources, and numerous casualties meets all meanings of war above, except for those calling for a declaration. CNN.com, *War Tracker: March 19, at* http://www.cnn.com/SPECIALS/2003/iraq/war.tracker/03.19.index.html (Mar. 19, 2003) [hereinafter *War Tracker: March 19*]; *see supra* notes 142-43 and accompanying text. Similarly, a traditional ground, air and sea conflict between the United States and North Korea involving hundreds of thousands of troops, massive military resources and numerous casualties would meet all the meanings of war mentioned previously as well, except those requiring a declaration.

On the other hand, the War on Terrorism does not fit the ordinary meaning of war. First, there is no open and declared armed hostile conflict. While the United States has initiated a War on Terrorism, the conflict is against a thing—terrorism—not a nation, state or organization. Obviously, a thing, such as terrorism, cannot declare anything. A conflict, hostility or antagonism necessarily appears to involve a dispute between two persons, nations, states or organizations. Thus, it appears textually impossible for a conflict, hostility or antagonism to exist in the War on Terrorism because terrorism, a thing, cannot form an opinion, mental state or physical confrontation inapposite to the United States. The declaration of war by some terrorists or a terrorist organization like al Qaeda, the organization generally considered responsible for the September 11, 2001 terrorist attacks, would be insufficient because some terrorists cannot declare something for all terrorists. As time goes on, different actions by different groups can be considered terrorism, and a threat of terrorism, to some degree, will always be present. Thus, as the name shows, the "War on Terrorism" seems to be more of a declared policy war, in a national security sense, like the War on Drugs is a policy war against the evils of drugs. Despite the fact that this conclusion might textually dispose of the question regarding whether a war could exist, given that one participant is only a thing, this article will further analyze if a war can exist against terrorism based on war's meaning incorporating undeclared conflicts.

The conflict between the United States and terrorists has not been open. Instead, it has been secretive and closed. The foundation of the terrorists' success flows from the secretive nature of their whereabouts, training, funding and next form and place of attack. They apparently move from place to place, train from place to place, and attack at different times and places. While some aspects of the War on Terrorism are open, such as legislation, funding, and the commitment of resources, (see supra note 1), many of the United States' efforts are secretive as well. These efforts include the prosecution of individuals in military tribunals, secret immigration proceedings, the detention of combatants in Cuba and certain CIA and FBI intelligence operations. *See supra* note 1.

Next, the War on Terrorism is not a period or state of armed conflict or similar hostilities. The September 11, 2001 terrorist attacks were armed. However, since then, there has not been an armed strike against the domestic United States. The United States quickly unseated al Qaeda and the ruling Taliban government in Afghanistan shortly after the first official United States and allied air strikes there on October 7, 2001. Romesh Ratnescar, *Afghanistan: One Year Later, at* http://www.cnn.com/2002/ALLPOLITICS/10/10/timep.afghanistan.year.later.tm/index.html (Oct. 10, 2003). The United States-led coalition had 11,500 soldiers in Afghanistan on September 1, 2003. Taliban ambush patrols killed eight Afghans. USA Today, *Taliban Ambush Patrols, Killing 8 Afghans, at* http://www.usatoday.com/news/world/2003-09-01-afghan-fighting_x.htm (Sept. 1, 2003). Fortunately only approximately twenty-five American soldiers have died there. Ratnescar, *supra*. Terrorists appear to plan for disputatious bursts of violence, while the United States actively attempts to prevent such attacks. Thus, everyday terrorist

Next, a strict interpretation of the Third Amendment focuses on what is *not* said in the amendment as opposed to what *is* said. The hypothetical examples mentioned previously of language the Third Amendment could contain is not what the amendment contains. While analyzing what an amendment does not contain sheds light on its meaning, a look at what it actually contains is paramount. In this instance, because the amendment was ratified after the Declare War Clause, there may have been no need to mention in it that a declared war had to exist. This is so because the Declare War Clause already existed and explained what war was. Thus, adding further explanatory language in the Third Amendment might have been redundant.

b. Legal Meaning of the Declare War Clause

Article I, Section 8, Clause 11 is the constitutional provision establishing Congress's power to declare war. While a debate exists concerning whether "declare" means "authorize," there is less dispute that a declaration of war alters the legal status of the nation from peacetime to wartime. The War Powers Resolution provides modern legislation describing when Congress authorizes the President to execute the armed forces, thereby furthering Congress's power to determine war powers and wartime state of affairs.

i. Article I, Section 8, Clause 11

This clause states: "Congress shall have Power . . . To declare War."[150] It is subject to differing interpretation. On the one hand, the clause is read (as this author believes is accurate) to mean that only Congress can declare or start a war, absent an emergency situation wherein the President, as Commander-in-Chief of the armed forces,[151] could act unilaterally to defend the United States and protect the states from invasion.[152] On the other hand, the clause is not interpreted as requiring congressional authorization for war, thereby increasing presidential war powers. Fortunately, both sides of the Declare War Clause debate express that a declaration of war formally alters peacetime status to wartime status; thus, a declaration of war is required to change the Third Amendment's peacetime status to wartime. This section begins with the

activity appears to be on the planning and preparation side, while United States activity generally focuses on investigation and prevention. Accordingly, neither the facts of the situation, nor the apparent objectives of either side constitute a time period or state of armed conflict.

150. U.S. CONST. art. I, § 8, cl. 11.

151. U.S. CONST. art. II, § 2, cl. 1.

152. U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." *Id.* *See* Monarch Ins. Co. of Ohio v. Dist. of Columbia, 353 F. Supp. 1249, 1255 (D.D.C. 1973).

argument that a formal declaration is required to begin a war, followed by the counter-argument.

"Declare" is the key word in the Declare War Clause's statement that "Congress shall have Power . . . To declare War."[153] John Hart Ely "understands this language to mean '[a]cts of war must be authorized by Congress.'"[154] Because the language grants Congress the exclusive responsibility "to resolve the necessity and appropriateness of war as an instrument of national policy," the power is nondelegable.[155] In other words, "if the power to initiate hostilities is one of Congress's 'essential legislative functions' it may not be delegated to the President."[156] Therefore, the text reserves to Congress alone the power to pursue "sustained extraterritorial uses of direct force."[157] The President is not granted lawmaking or, more specifically, war-making power.[158] The Constitution proclaims the President as Commander-in-Chief of the Army and Navy,[159] but no war-making power is granted to the President in the Commander-in-Chief Clause.[160] Because the Constitution grants Congress all the powers naturally connected with the power to declare war,[161] except the command power, the President does not have war-making power absent his ability to repel sudden attacks against the United States in an effort to protect its republican form of government and the states from invasion under Article IV, Section 4 of the Constitution.[162] The

153. U.S. CONST. art. I, § 8, cl. 11. *See* Patrick O. Gudridge, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, 50 U. MIAMI L. REV. 81, 82 (1995).

154. Gudridge, *supra* note 153, at 82. (quoting JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 10 (1993)).

155. William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 16 (1972).

156. Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1335 (1984) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (determining Congress cannot abdicate or transfer the essential legislative functions with which the Constitution vested it)).

157. Van Alstyne, *supra* note 155, at 16.

158. *Id*. at 16-17.

159. U.S. CONST. art. II, § 2, cl. 1.

160. Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 41 (1972).

161. *See infra* pp. 174-76.

162. Monarch Ins. Co. of Ohio v. Dist. of Columbia, 353 F. Supp. 1249, 1255 (D.D.C. 1973) (stating that the President has the power under Article IV, Section 4 to use troops or militia to quench a civil disorder). *See also* Berger, *supra* note 160, at 41; Mitchell v. Laird, 488 F.2d 611, 613-14 (D.C. Cir. 1973); CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW NATIONAL POWER AND FEDERALISM: EXAMPLES AND EXPLANATIONS 264 (1998); Edwin B. Firmage, *Rogue Presidents and the War Powers of Congress*, 11 GEO. MASON U. L. REV. 79, 80 (1988) (noting that Congress has complete power to decide on war and peace and the President may respond to sudden attacks without Congressional authorization); William M. Goldsmith, *A New Look at an Old Argument*, 11 GEO. MASON. U. L. REV. 65, 77 (1988) (noting President-made war is justified only in defense of the United States, otherwise Congress should perform its

Commander-in-Chief conducts a war; he does not commence, continue or conclude one.[163] Congress authorizes war; the President commands forces after a declaration of war.[164]

constitutional duties through a small committee drawn from both houses reflecting bipartisan leadership); Rushkoff, *supra* note 156, at 1337 (noting that the President may initiate force in an emergency based on Commander-in-Chief and executive power); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 910 (1994) (noting that declarations are unnecessary to defend the nation from foreign aggression or to repel attack). Some, however, dispute the President's ability to act without a congressional declaration in emergency situations. One commentator went so far as to conclude, "[t]he power of initiating all hostilities belongs to the policymaking branch, the Congress." Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 627 (1972). In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Jackson appeared to overly restrict Presidential power in national emergencies when he stated:

> The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so . . . .

Id. at 649-50 (Jackson, J., concurring). *See also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."). However, Article IV, Section 4 of the Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." U.S. CONST. art. IV, § 4. That text provides specific text-based support for the President to act militarily to protect the United States and its form of government in emergency situations. *See* Sidak, *supra* note 143, at 53. As Justice Clark stated: "[T]he Constitution does grant to the President extensive authority in times of grave and imperative national emergency . . . . As [President] Lincoln aptly said, '[is] it possible to lose the nation and yet preserve the Constitution?'" *Youngstown Sheet & Tube Co*., 343 U.S. at 662 (Clark, J., concurring) (quoting Letter from President Abraham Lincoln to A.G. Hodges (April 4, 1864), *reprinted in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN 66 (Nicolay & Hay ed., 1894)). To limit Presidential over-stepping in confronting a sudden attack, the grant of power to repel sudden attacks on the United States is not to be construed as a presidential power to repel an attack by a foreign nation against another foreign nation. Berger, *supra* note 166, at 51, 65 (citing EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 275, 277 (3d ed. 1948)); Rushkoff, *supra* note 156, at 1343 (citing Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699-701 (1972) (determining that the President can initiate a response to a sudden attack against the United States, but cannot initiate force abroad during crises)).

163. Rushkoff, *supra* note 156, at 1338 (quoting 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed., 1906)).

164. Turner, *supra* note 162, at 905 (citing ELY, *supra* note 154, at 5).

In the exercise of its power, however, Congress need not "declare a total war against one or more nations, contemplating effective occupation of their territory and capitulation by their governments."[165] "Rather, the [Constitution] contemplates congressional . . . declaration of [a] limited war with specifically designated objectives [that] the President may . . . pursue through the [armed forces] once [Congress articulates] that specific declaration and circumscribed objective."[166] Thus, all wars, regardless of their size, and whether or not Congress formally declared them, have to be legislatively authorized.[167] "[T]he determination as to whether circumstances . . . make it necessary and appropriate to engage in war, however limited in scope or objectives, resides solely in Congress subject to no delegation."[168] Therefore, "Congress shall decide whether or not the nation is ready to accept the consequences of committing itself to war."[169] Essentially, we must follow what the Framers wrote in the Constitution and allow Congress to control whether or not the nation goes to war.[170]

Congress, consequently, determines when peacetime ends and wartime commences in a Third Amendment context. Patrick O. Gudridge followed the implications of Ely's view, stating:

> [P]residential use of military force requires a prior congressional declaration of war only if, along with the use of force, the President means to alter the ordinary legal rights of American citizens or other persons who come within the protection of the . . . Constitution. Thus, . . . a presidential military effort accompanied by relocation of United States residents to internment camps, or by a regime of press censorship, would presuppose a declaration of war—or rather, in the absence of such a declaration, these accompaniments might well be unconstitutional.[171]

In other words, "a declaration of war [is] a legislative act[ion] marking a shift in governing law."[172] "The words 'declare war' are an elision of a longer phrase—declare that a state of war exists between the United States and another named state."[173] Only a declaration of war alters the legal status of the

165. Van Alstyne, *supra* note 155, at 17.

166. *Id*.

167. Gudridge, *supra* note 153, at 82 (citing ELY, *supra* note 154, at 3).

168. Van Alystyne, *supra* note 155, at 18. Congress cannot shift the determination to embark upon war to the President by treaty because the House of Representatives does not consent to treaties, thus, the lower house of Congress would be excluded from the decision-making process. *Id*. at 22.

169. J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1425 (1992) [hereinafter Sidak, *War, Liberty, and Enemy Aliens*].

170. Charles Bennett et al., *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 29 (1988).

171. Gudridge, *supra* note 153, at 81.

172. *Id*. at 99.

173. Wormuth, *supra* note 162, at 689.

nation. Consequently, anything short of a declaration of war cannot constitute a shift from peacetime to wartime status under the Third Amendment.

The argument against a declaration of war serving as an authorization for the President to act as Commander-in-Chief is an incorrect textual interpretation. Some base their argument on historical interpretation. For example, John C. Yoo concludes that "[i]nterpreting 'declare' war to mean 'authorize' or 'commence' is [an inappropriate] Twentieth-Century construct[ion of the Declare War Clause that is] inconsistent with the Eighteenth-Century understanding of the [clause]."[174] He contends international scholars of the Seventeenth and Eighteenth Centuries agreed that a declaration of war was unnecessary to begin or to wage a war.[175] Accordingly, he believes "[i]t was clearly understood in the eighteenth century that a 'declared' war was only the ultimate state in a gradually ascending scale of hostilities possible between nations."[176]

However, many sources contradict Yoo's vision. James Madison, a contemporary of the Eighteenth Century, provided a different intellectual vision behind declaring war. He stated: "Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous therefore to enter into a proof of the affirmative."[177] Moreover, Alexander Hamilton described the President's war powers as "nothing more than the supreme command and direction of the [armed] forces."[178] Hamilton noted the power of declaring war appertained to the legislature, not the President.[179] Ely also noted authority exists supporting "the proposition that 'declare war' and 'commence war' were 'synonymous' well before the end of the eighteenth century."[180] In fact, many scholars from the 1500s to the 1700s argued that a declaration of war was unnecessary for defensive actions when a nation is attacked, but generally necessary before a nation undertook offensive military action.[181] Around 1800 there was (and there still is) a difference between the United States defending itself from an invasion or a formal declaration of war from another nation and it going to war with a nation at

174. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 204 (1996).

175. *Id*. at 206. *See also* Bennett et al., *supra* note 170, at 31 (concluding the United States can engage in military operations without a formal declaration of war).

176. Yoo, *supra* note 174, at 205.

177. THE FEDERALIST NO. 41 (James Madison).

178. THE FEDERALIST NO. 69 (Alexander Hamilton).

179. *Id*. *See also* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 497 n.7 (5th ed. 1984) (quoting *Letter from President Abraham Lincoln to William Herndon*, *in* 10 COMPLETE WORKS OF ABRAHAM LINCOLN I 111-12 (Nicolay & Hay ed., 1894) (concluding the Constitution left war-making authority with Congress because no one person should hold the power of bringing war upon the nation)).

180. Gudridge, *supra* note 153, at 82 (quoting ELY, *supra* note 154, at 142 n.21).

181. Turner, *supra* note 162, at 906-10.

peace.[182] Thus, there is a dispute concerning whether or not a declaration of war was unnecessary and did not serve as legislative authorization for the President. It cannot be said, then, that it was clearly understood in the colonial era that declare did not mean authorize for war powers purposes.

Other commentators have listed various potential reasons for Presidential war-making power. One reason is that Congress may only control the President's discretion to use military force abroad by reducing defense funds or impeaching him.[183] Another is that Presidential power to make war abroad need not be based on Commander-in-Chief power, but rather on his executive power under Article II of the Constitution.[184]

Another view supporting presidential war-making inappropriately blurs the line between legislative and executive powers. In order to dismiss the textual command that Congress must authorize war, this view is forced to characterize congressional war authorization as a rigid and mechanical "either/or" logic.[185] Some judicial decisions conjured up intriguing buzz words and phrases that describe constitutional war powers provisions as not providing fields of "black and white,"[186] which leads to the infamous "zone of twilight"[187] wherein both the President and Congress may act. Outside of the President's ability to unilaterally act to defend the nation from an attack,[188] a straightforward, reasonable interpretation of the Constitution shows Congress authorizes war and the President commands the military. This interpretation might not foster unique phrases for legal wordsmiths, but it is an accurate constitutional interpretation.

The debate regarding what declare means in relation to Presidential war-making power is not the specific issue here. Instead, this article focuses on what can change the legal status of the nation from peacetime to wartime under the Third Amendment, which is a question with a more universally accepted answer. Congress has the exclusive province to change the nation from a

182. Wormuth, *supra* note 162, at 626 (quoting United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

183. Rushkoff, *supra* note 156, at 1334 n.25 (1984) (citing J. Terry Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME L. REV. 187, 214-15 (1975)). For a thorough review of how congressional appropriation power for national defense measures affects the President's military capabilities, see Peter Raven-Hansen and William C. Banks, *Pulling the Purse Strings of the Commandeer in Chief*, 80 VA. L. REV. 833 (1994).

184. Rushkoff, *supra* note 156, at 1330. *See also id.* at 1336 (citing Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1775 (1968)).

185. Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 25 (1970).

186. Doe v. Bush, 322 F.3d 109, 110 (1st Cir. 2003) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring)).

187. *Id.* at 110 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring)).

188. *See* U.S. CONST. art. IV, § 4.

"state of peace into a state of war."[189] While Yoo concluded that Congress does not authorize war through a declaration of war, he nevertheless determined that historically a declaration of war notifies citizens of war, thereby altering their legal rights and status.[190] He argued that historically a declaration performs an important function in distinguishing between limited hostilities and an all-out conflict or formal war.[191] Even though he believes that declaration does not authorize war, he recognized that declaring war deals with establishing "the formal, legal relationship between two nations."[192] He found the following early support for this conclusion from Chancellor Kent:

> [S]ome formal public act . . . should announce to the people at home, their new relations and duties growing out of a state of war, and which should equally apprize neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things . . . Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.[193]

Therefore, a declaration of war announces Congress's "judgment that a legal state of war exists."[194] Specifically, Yoo provided an apt summary of how a declaration of war serves as the trigger to alter the nation's legal status from peacetime to wartime. He stated:

> [The] core function of a declaration of war could be thought to "authorize" war by justifying federal wartime policies. Because the declaration of war has a primary domestic effect of notifying the citizens of their new rights and obligations, it grants the government a different standard of conduct in relation to those rights and duties. Thus, a declaration of war would permit the government to treat its citizens in a way that restricted peacetime liberties in favor of a more effective war effort. The Fifth Amendment . . . generally guarantees the right to an indictment or presentment by grand jury for capital crimes, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . . Thus, a declaration of war had a domestic function, which permitted new government actions in light of the changed legal status of its citizens. A declaration of war did not grant permission for executive action abroad, as we would expect of an "authorization" of war, but only set the stage for the exercise of domestic wartime powers, primarily by Congress.[195]

189. Wormuth, *supra* note 162, at 626 (quoting United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D. N.Y. 1806) (No. 16,342)).

190. Yoo, *supra* note 174, at 207.

191. *Id*. at 205.

192. *Id*. at 245.

193. *Id*. at 244-45 (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 53-54 (2d. ed. 1832)).

194. *Id*. at 246.

195. Yoo, *supra* note 174, at 245-46 (internal citations omitted).

Applying Yoo's analysis, a declaration of war would serve a domestic function of notifying the nation that wartime formally exists, thereby alerting the citizenry that the President has increased domestic powers that might infringe upon civil rights. Thus, the declaration establishes a legal foundation for the people, through their elected representatives, to debate the manner in which the compelled quartering of soldiers could take place.

More specifically, in a Third Amendment context this means that peacetime exists until war is declared. Then, and only then, can wartime exist under the Third Amendment. A declaration of war signifies to the citizenry that the legal status of peacetime has formally changed to wartime. Accordingly, compelled quartering of soldiers may only occur after a congressional declaration of war, even though a conflict meeting the ordinary meaning of war might exist before the declaration.

This parallels the Fifth Amendment's peacetime and wartime measures. The Fifth Amendment guarantees an indictment or presentment by a grand jury for capital crimes in peacetime.[196] After a congressional declaration of war, however, the legal status of affairs switches to wartime and the right to indictment and presentment ceases.[197] Thus, under the Third Amendment, only a congressional declaration of war would switch the legal status of the nation to wartime and allow for the compelled quartering of soldiers. Following this methodology will provide a clear and consistent standard to determine when constitutional peacetime protections convert to wartime status under the Third and Fifth Amendments, thus providing a unified constitutional framework.

Without a formal declaration of war, how do the people know when wartime starts? Allowing for the compelled quartering of soldiers without a declaration could raise due process concerns. Without a declaration, how do the people receive notice of a change in the national legal status of affairs from peacetime to wartime? The answer is that Congress starts the wartime clock with a declaration of war and gives the people notice of the legal change in status through a declaration of war.

This procedure satisfies the Third Amendment's law-making requirement for the compelled quartering of soldiers. Recall that compelled quartering of soldiers in wartime is not always constitutionally acceptable—the compelled quartering must occur through a manner prescribed by law.[198] In a federal sense,[199] Congress would have to pass law or laws regulating the quartering of

196. U.S. CONST. amend. V.

197. *Id*.

198. U.S. CONST. amend. III.

199. The Third Amendment originally only applied to the federal government. *See generally* Lawrence E. Mitchell, *The Ninth Amendment and the 'Jurisprudence of Original Intention'*, 74 GEO. L.J. 1719, 1730 (1986); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment*?, 64

soldiers.[200] Therefore, congressional action is not only contemplated, but required by the amendment. Accordingly, the amendment's text sanctions formal congressional action and, to allow for compelled quartering during wartime, mandates it. Other congressional action, such as a declaration of war, would likewise be appropriate under the amendment. Congressional action, in the form of a declaration of war, to trigger wartime status, squares with the amendment's text. Subsequent lawmaking prescribing the manner in which soldiers could be quartered would necessarily follow the declaration of war. Before the manner in which soldiers could be quartered in wartime is prescribed, Congress would have to declare war to notify the citizenry that wartime supplanted peacetime. After that, Congress could pass legislation prescribing the manner in which the quartering may take place.

In sum, a formal declaration of war vests the President with extraordinary powers in wartime.[201] Regardless of whether one believes war can exist without a declaration,[202] or only through a declaration,[203] there appears to be less debate that peacetime status cannot convert to wartime status without a formal declaration of war, thereby triggering certain statutes and constitutional provisions that vest the President with authority not available in peacetime.[204]

CHI.-KENT L. REV. 239, 245 (1988); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 774 (1994). The amendment now applies against the states as a fundamental right through the judicially created substantive due process clause of the Fourteenth Amendment. *See* Engblom v. Carey, 677 F.2d 957, 960-61 (2d Cir. 1982). This author believes that the Third Amendment, and all other provisions of the Bill of Rights, apply against the states as well, but through the Privileges and Immunities Clause of the Fourteenth Amendment. *See* Schmidt, *supra* note 24, at 177-78. Most states protect their citizens from the compelled quartering of soldiers as well. *See infra* note 418.

200. U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*

201. *See generally* Sidak, *supra* note 143, at 93; Sidak, *War, Liberty and Enemy Aliens*, *supra* note 169, at 1426.

202. *See* Yoo, *supra* note 174, at 206.

203. *See generally* Sidak, *supra* note 143, at 93; Sidak, *War, Liberty and Enemy Aliens*, *supra* note 169, at 1426.

204. *See* Sidak, *supra* note 143, at 69-70; Sidak, *War, Liberty and Enemy Aliens*, *supra* note 169, at 1425-27; Yoo, *supra* note 174, at 207, 245-46. President George W. Bush's authorization for the CIA to kill terrorists defines al Quaeda operatives as "enemy combatants" and "legitimate targets for lethal force." Risen & Johnston, *supra* note 101. President Ford ordered a ban on assassinations, which many feel applies to foreign leaders and civilians, although leaders acting as military officials in a war (such as Saddam Hussein in the war against Iraq) might be a legitimate target in a war. *Id*. This leads to the inevitable complication of a politically declared but legally undeclared war that "blur[s] the distinction between enemy combatants and other nonstate actors." *Id.* (quoting Harold Hongju Koh). This leads to two conclusions. First, the War on Terrorism is not a declared war, but a politically declared war that cannot alter peacetime status to wartime status. Second, the designation of enemy combatants does not create a wartime state of affairs, but merely blurs the water in certain respects.

ii) The War Powers Resolution

While the Declare War Clause is a constitutional provision designating congressional power, The War Powers Resolution,[205] a federal statute, provides another textual source shedding light on what is war. It provides:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[206]

There has been a longstanding debate about the statute's meaning and its constitutional legitimacy.[207] Unfortunately, the federal Executive and Legislative Branches cannot agree on a definition that is essential and elemental to the wise governance of the nation in times of crisis.[208]

The statute establishes that a congressional declaration of war is not the only means available to authorize the President to mobilize the armed forces. The statute allows for troop deployment either through a declaration of war, a statutory authorization or a national emergency.[209] Thus, Congress, by passing the War Powers Resolution over President Nixon's veto,[210] indirectly concluded that a declaration of war is not the only way in which the President could mobilize the armed forces. Thus, any congressional authorization of troop deployment or force does not constitute a declaration of war or a wartime state, as two other mechanisms exist to authorize the use of such force. Obviously, if Congress chose statutory authorization, as opposed to declaring war, then its authorization for military action would fall below a formal declaration of war. Consequently, because war was not authorized in that instance, wartime could not exist. Finally, if the President acted unilaterally in a national emergency, without congressional action, that could not constitute wartime as the President cannot declare war.

The statute provides a logical, constitutional allocation of war powers. A reasonable interpretation of the statute shows that a distinction exists between a declared war and specific statutory authorization for the President to mobilize the armed forces. The statute divides those congressional powers into separate categories. As such, specific statutory authorization for military action, while based on Congress's power to authorize military action, must be viewed as being subsidiary to a formal declaration of war and cannot constitute a wartime

205. 50 U.S.C. §§ 1541-1548 (2000).
206. *Id*. at § 1541(c).
207. See Sidak, *supra* note 143, at 32-35.
208. *Id*.
209. 50 U.S.C. § 1541(c) (2000).
210. MAY & IDES, *supra* note 162, at 264.

state of affairs. Some criticized the resolution because, in their view, it would prevent the President from responding to attacks.[211] However, Section 1541(c) allows the President to act unilaterally in an emergency created by an attack against the United States.[212] This follows Article IV, Section 4 of the Constitution's mandate that the United States protect individual states from invasion.[213]

The War Powers Resolution is a constitutionally accurate summary and application of war powers, thus, it is a perfectly valid act of Congress.[214] Congress does not have to move to assert authority in war powers.[215] The Declare War Clause allocates Congress alone with the authority to declare war. Therefore, Congress's passage of the War Powers Resolution is not a circuitous, constitutionally suspect maneuver.[216] Instead, it is a proper statutory provision based on Congress's ability to enact laws necessary and proper to carry into execution its own enumerated powers and all other powers vested in the United States government or any officer or department thereof.[217]

A congressional declaration of war, as the statute provides, would constitute a conversion from peacetime to wartime and sanction the President to declare a war. However, that authorization does not mean that the declaration serves only as an authorization or that a declaration is the only way to effectuate an authorization of military force. The statute, by allowing for statutory authorization or a national emergency to authorize military action proves that a declaration is not the only manner in which Congress can authorize the President to conduct military affairs short of war.[218]

211. Rushkoff, *supra* note 156, at 1334 (citing Donald E. King & Arthur B. Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 80-81 (1977)). *See also* W. Taylor Reveley III, *The Power of War*, *in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY: AN INQUIRY BY A PANEL OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 116-17 (Francis Wilcox & Richard Frank eds., 1976); Joseph B. Kelly, *Proposed Legislation Curbing the War Powers of the President*, 76 DICK. L. REV. 411, 415-16 (1972) (arguing that the War Powers Resolution is likely unconstitutional because it did not recognize the President's emergency power to repel attacks on foreign allies).

212. 50 U.S.C § 1541(c) (2000).

213. U.S. CONST. art. IV, § 4.

214. *See* Van Alstyne, *supra* note 155, at 26. Similarly, the President cannot use the army against the civilian population, except under the most extraordinary circumstances. *Id*. at 27; 18 U.S.C. § 1385 (2000).

215. *But see* Van Alstyne, *supra* note 155, at 24.

216. *But see id*.

217. *See id.* at 26 (citing U.S. CONST. art. I, § 8, cl. 18). *See also* Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT. L. REV. 131, 140 (1971) (determining Congress, through the Necessary and Proper Clause, can do what is necessary and proper in carrying out functions conferred upon it; thus, if it is necessary to carry out the declare war power by taking measures short of a declaration of war, Congress may do so).

218. Another federal statute, 50 U.S.C. § 21 (2000), authorizes the President to apprehend, restrain, secure, and remove persons fourteen years and older of an enemy nation when there is a

In the end, a bedrock principle of our Constitution is that "the nation cannot be . . . constitutionally committed to a state of war without the positive approval of both houses of Congress."[219] As such, a formal declaration must occur for wartime to be present in a reasonable, not strict, interpretation of the Third Amendment's text.[220] When a declaration occurs, the nation's legal status changes from peacetime to wartime under the Third Amendment.

2. Historical Understanding of "War"

Throughout history, Congress's war-making power has not prevented Presidents from sending the nation's armed forces into hostilities or situations where hostilities were imminent without Congress's approval.[221] "The United States has declared war only five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and World Wars I (1914) and II (1941)."[222] Obviously, those conflicts are considered a war and in a Third Amendment context they would constitute a "time of War" under the amendment. However, the United States has committed military forces into hostilities abroad at least 125 times since the Constitution's ratification.[223]

Early American history shows Congress can declare war, thereby authorizing a formal war or a wartime state of affairs, or it can authorize a limited war that does not rise to the level of a formal war. Either way, Congress controls which status exists—a system that Presidents Adams and Jefferson subscribed to in the nation's beginning.[224]

"declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States." *Id.* Because this statute only comes into effect pursuant to a declared war or defense of an attack, it is not illustrative of the United States' ability to engage in an offensive war absent a congressional declaration of such.

219. Berger, *supra* note 166, at 67 n.242 (quoting CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 66 (1951)).

220. *See* Scalia, *supra* note 44, at 23.

221. Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 79 (1984).

222. Yoo, *supra* note 174, at 177.

223. *Id. See also* Berger, *supra* note 166, at 58 (citing Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Vietnam*, *reprinted in* 75 YALE L.J. 1085, 1101 (1966) (stating there were at least one hundred twenty-five instances in which the President ordered the military to take action or maintain positions abroad without obtaining congressional authorization, starting with the quasi-war with France from 1798-1800); Vance, *supra* note 221, at 79-80 (citing J. Terry Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 88-110, 367-68 (1972)) (stating there were "199 United States military engagements overseas between 1798 and 1972 that occurred without a declaration of war"); Comment, *America in Vietnam: A Model for the Exercise of the War Powers*, 15 J. CONTEMP. L. 253, 258 (1989) (citing FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 142-43 (1986)).

224. *See infra* notes 423-36 and accompanying text.

The *Prize Cases*[225] determined that a war existed without a declaration during the Civil War.[226] However, the Court noted that a civil war could never be declared, that Congress alone can declare war and that Congress and President Lincoln essentially followed constitutional war powers when Congress authorized and funded military action and President Lincoln defended the nation and led the armed forces.[227] The *Prize Cases*' progeny discussed insurance policies of deceased soldiers whose beneficiaries' claimed the deceased passed away during a war under the policy.[228] Therefore, those cases deal with disputes concerning the ordinary meaning of war, not its legal meaning. Accordingly, because they do not concern a legal, constitutional issue, they are irrelevant when determining whether peacetime or wartime exists under the Third Amendment.

Two Supreme Court cases from the mid-Twentieth Century promote the correct legal interpretation of war. The Court established that Congress can declare peacetime in one instance and not in another, and each instance must be analyzed separately.[229] Furthermore, the Court concluded the President could not act unilaterally to seize steel plants without Congress authorizing such a wartime measure.[230]

Finally, modern challenges to the Vietnam War, the Persian Gulf War, and the war against Iraq affirm Congress's role as authorizing war and the President's role as executing such wars.[231] These challenges affirm that the historical understanding of war is that Congress declares war or wartime, and the President can only act outside of defensive military measures after such a declaration. Therefore, the President can only order the compelled quartering of soldiers after a congressional declaration of war and Congress prescribes a manner for their quartering.

a) Early Conflicts and the Construction of War Powers

The quasi-war with France from 1798-1800 gave an early indication of what constituted wartime. In the late Eighteenth Century, the French seized American vessels.[232] Congress did not issue a formal declaration of war, but authorized reprisals at sea against French vessels.[233] Specifically, Congress stated:

225. 67 U.S. (2 Black) 635 (1862).

226. *Id.* at 668.

227. *Id.* at 667-68.

228. *See infra* notes 278-291 and accompanying text.

229. Lee v. Madigan, 358 U.S. 228, 230-31 (1959).

230. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-83 (1952).

231. *See infra* notes 324-50 and accompanying text.

232. Sidak, *supra* note 143, at 80.

233. *Id.* at 56 (citing Act of July 9, 1978, ch. 68, § 1, 1 Stat. 578; Act of June 25, 1798, ch. 60, § 1, 1 Stat. 578. *See also* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND

> [T]he President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas . . . .[234]

The Supreme Court determined the quasi-war with France was a limited, undeclared war.[235] The United States' actions of raising an army, stopping intercourse with France, dissolving a treaty with France, building ships for war and authorizing private ships to fight French ships showed "the degree of hostility meant to be carried on, was sufficiently described without declaring war."[236] However, the Court established a distinction between general wars and limited wars, wherein general wars are akin to congressional declarations of war and limited wars involve military action short of a declaration.[237]

The Court viewed a declared war as "solemn, and . . . of the perfect kind[] because one whole nation is at war with another whole nation . . . and all the rights and consequences of war attach to [the] condition."[238] However, the Court stated that "hostilities may subsist between two *nations*[,] more confined in its nature and extent."[239] The Court's reference to Congress's ability to designate the level of war showed that "Congress is empowered to declare a general war, or [it] may wage a limited war [that is] limited in place, in objects, [and] in time.[240] That power, however, remains with Congress—President Adams undertook "absolutely no independent action" during the quasi-war with France.[241]

The Court did not examine whether a limited war equated to a "time of War" as indicated in the Third Amendment (obviously, a declared war means a time of war is present in a Third Amendment context), as no quartering issue was at hand. However, the Court thoroughly discussed the different types of

DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801 (1966); JAMES ROGERS, WORLD POLICING AND THE CONSTITUTION: AN INQUIRY INTO THE POWERS OF THE PRESIDENT AND CONGRESS, NINE WARS AND A HUNDRED MILITARY OPERATIONS, 1789-1945, at 45-46 (1945); Simeon E. Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 AM. J. INT'L L. 1, 2 (1918).

234. Van Alstyne, *supra* note 155, at 18 (quoting Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578).

235. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800). Currently, a limited war is sometimes referred to as a low-intensity conflict (LIC). *See* Uyeda, *supra* note 141, at 794-95.

236. *Bas*, 4 U.S. at 41.

237. *Id.* at 43.

238. *Id.* at 40.

239. *Id*. (emphasis added). *See also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (concluding that Congress may authorize a limited, undeclared war).

240. *Bas*, 4 U.S. at 43.

241. Berger, *supra* note 166, at 58 n.191.

military conflicts Congress may authorize and their legal ramifications.[242] Yoo described:

> [T]he Court held that Congress had the sole power to decide on the *legal* nature of hostilities: whether they would be "general" or "partial," "public" or "private," "solemn" and "imperfect" or "limited" and "imperfect.". . ."If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."[243]

Shortly after *Bas* Chief Justice Marshall affirmed its holding.

> The whole powers of war being by the [C]onstitution of the United States, vested in [C]ongress, the acts of that body can alone be resorted to as our guides in this enquiry . . . . [C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.[244]

Therefore, if the Constitution vests Congress with the power to initiate a limited or general war,[245] and Congress determines the nature and extent of hostilities, then must not Congress determine when the legal status of the nation changes from peacetime to wartime under the Third Amendment? Congress's ability to authorize a limited or general war shows the graduated scale of conflicts it may sanction. If Congress determines that a limited war exists, its operations and legal ramifications are limited as well. On the other hand, a general war encompasses the full threshold of wartime operations and legal ramifications. Thus, only a general or declared war constitutes a change from peacetime status to wartime status under the Third Amendment. A limited war only operates to meet the partial or limited nature of the war, thereby falling short of invoking a full wartime state of affairs. Congress, sanctioned with war-making power, may make the lone determination if peacetime or wartime exists under the Third Amendment. Only Congress's formal declaration of war changes the legal status of the nation from peacetime to wartime under the Third Amendment.

Almost immediately after the quasi-war with France, Tripoli declared war against the United States in 1801.[246] Tripoli attacked an American vessel,

242. Yoo, *supra* note 174, at 290-94.

243. *Id.* at 294 (quoting *Bas*, 4 U.S. at 43) (emphasis added)). *See also* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (concluding that Presidential authority in an undeclared war is limited to acts Congress authorizes).

244. *Talbot*, 5 U.S. at 28. The distinction between Congress's ability to sanction formal, general war and limited war extended at least until 1886. *See* William Gray v. United States, 21 Ct. Cl. 340 (1886).

245. Wormuth, *supra* note 162, at 690.

246. Berger, *supra* note 166, at 61.

which defended itself, and released the attacker.[247] President Jefferson summarized the event as follows:

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries.[248]

Jefferson's statement shows that the United States may defend itself without Congressional authorization and that only Congress can authorize military action beyond defense from attack. Therefore, he essentially asked Congress to determine whether further offensive military action was appropriate. This humble presidential respect for the Constitution and Congress might not be commonplace today, but it shows offensive war-making authority lies with Congress alone. Thus, Congress alone has the power to determine when the United States enters wartime, thereby supplanting peacetime under the Third Amendment.

Jefferson's deference to Congress to determine when wartime existed continued. In 1805, Spain considered action against the United States concerning Louisiana's boundaries.[249] Jefferson more directly addressed the legal status of the nation. "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force."[250] Once again, early American history shows Congress alone has the power to alter the United States' legal status from peacetime to wartime. If that is the case in a use of force construct, it must likewise be the case in a Third Amendment context. Only a congressional declaration of war switches the peacetime status of the nation to wartime.

b) The Prize Cases

In the *Prize Cases*, the Supreme Court concluded the President could institute a blockade of Confederate ports during the Civil War, and that the right of a prize through capture on the sea of Confederate property was also appropriate because it was considered enemy property.[251] However, the Court instructed that Congress did not have to declare war for the Civil War to literally be considered a war because "[a] *civil war is never solemnly declared*; it becomes such by its accidents—the number, power, and organization of the

247. *Id.*

248. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 327 (James D. Richardson ed., 1900) [hereinafter MESSAGES AND PAPERS].

249. Berger, *supra*, note 166, at 62.

250. MESSAGES AND PAPERS, *supra* note 248, at 389.

251. The Prize Cases (The Amy Warwick), 67 U.S. (2 Black) 635, 671, 675 (1862).

persons who originate and carry it on."[252] While Congress alone can declare war, the Court stated "[i]t cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution."[253] Furthering this point, the Court concluded:

> When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.
>
> . . . .
>
> This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.
>
> . . . .
>
> They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.[254]

Thus, the Court recognized the unique and constitutionally unchartered setting of a civil war wherein a part of the nation engages in war with the Government. As Congress cannot declare war against an individual state or states, a civil war cannot be a declared war. This does not conflict with the Court's holding that the United States, essentially, was at war or in wartime. A civil war appears to be the lone historical exception allowing a wartime state of affairs without a declaration of war.

Furthermore, the Court correctly noted that even in an unprecedented and constitutionally unchartered setting, the President and Congress still acted in accordance with war powers principles. The Court correctly concluded that when a foreign nation initiates a war by invasion, the President is bound to resist force with force.[255] In other words, the President does not initiate war

252. *Id*. at 666 (emphasis added).

253. *Id*. at 668.

254. *Id.* at 666-67, 668-69, 669-70 (emphasis in original). *See also* Graham T. Allison, *Making War: The President and Congress*, 40 LAW & CONTEMP. PROBS., at 86, 91 (Summer 1976) (noting that the Civil War met the ordinary meaning of war).

255. *The Prize Cases*, 67 U.S. at 668.

but is bound to accept the challenge.[256] In considering President Lincoln's acts, we must also consider that "they were triggered by a 'sudden attack' on American soil, the firing upon Fort Sumter, and this [occurred] when Congress was not in session."[257] Thus, Lincoln's actions fit within his duty to protect the republican form of government and the states from invasion under the Constitution.[258] Accordingly, Lincoln's *domestic* defense actions do not create precedent for subsequent presidential resistance to a sudden attack on a *foreign* country without congressional authorization.[259] In fact, the "[N]ineteenth Century . . . offers no example of a President who plunged the nation into war in order to repel an attack on some foreign nation."[260]

The Court also addressed whether Congress technically declared war or whether other congressional action constituted sufficient legislative sanction of the President's conduct during the war. The Court stated:

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.[261]

The Court stated, "By the Constitution, Congress alone has the power to declare a national or foreign war."[262] Moreover, the Court concluded:

> [The President] has no power to initiate or declare a war either against a foreign nation or a domestic [s]tate. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to . . . use . . . military . . . forces . . . in case of invasion by foreign nations, and to suppress insurrection against the government of a [s]tate or of the United States.[263]

Consequently, the Court affirmed that Congress authorizes war, and the President only executes military operations absent the defense of a sudden attack on the United States where the President can act unilaterally.[264] Therefore, the careful constitutional balance of war powers wherein Congress

256. *Id*.

257. Berger, *supra* note 166, at 64 (citing CORWIN, *supra* note 162, at 277).

258. *See* U.S. CONST. art. IV, § 4.

259. Berger, *supra* note 160, at 65 (citing CORWIN, *supra* note 162, at 279-80). *See also* Berger, *supra* note 160, at 51 (noting that a grant of power to "repel suddent attacks" is not a license to repel and attack on Korea); Rushkoff, *supra* note 156, at 1343 (citing Lofgren, *supra* note 162, at 699-701).

260. Berger, *supra* note 160, at 65 (citing Albert H. Putney, *Executive Assumption of the War Making Power*, 7 NAT'L U. L. REV. 1, 1-2 (1927); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968)).

261. The Prize Cases (The Amy Warwick), 67 U.S. (2 Black) 635, 670 (1862).

262. *Id*. at 668.

263. *Id*.

264. *See id.* at 691.

determines the existence of war, with the President only executing it absent an emergency situation, was not only followed in principle during the Civil War, but reaffirmed by the Court. If Congress, the President and the Supreme Court affirmed this paradigm of war powers, even in the most extreme scenario, we must also follow it today.

While President Lincoln, in many respects, followed war powers, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Douglas appropriately rejected President Lincoln's unilateral suspension of the writ of habeas corpus during the Civil War.[265] "[T]he Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom[;] President Lincoln asserted . . . it as an executive function."[266] In 1862, Lincoln unilaterally suspended habeas corpus, which led to the arrest of a Maryland Secessionist, John Merryman.[267] Chief Justice Taney of the United States Supreme Court "issued a writ of habeas corpus commanding the military to bring Merryman before him," which the military refused to follow.[268] Then, Justice Taney "ruled [Lincoln's] suspension of habeas corpus unconstitutional because the writ could not be suspended without an Act of Congress."[269] Lincoln ignored the ruling.[270] Consequently, Congress ratified his action in 1863.[271] Only after the war was habeas corpus fully restored when the Supreme Court ruled that "military trials in areas where the civil courts were capable of functioning were illegal."[272]

While the power to suspend the Writ of Habeas Corpus is not explicitly given to Congress, its placement in Article I, wherein Congress's other powers are found, leads to the inference that it is within Congress's authority. Moreover, current precedent is clear that only Congress can suspend habeas corpus.[273] On the other hand, the Declare War Clause is extremely clear: "The Congress shall have Power . . . To declare War."[274] Accordingly, Congress alone has the power to determine when wartime exists.

265. 343 U.S. 579, 632 n.1 (1952) (Douglas, J., concurring) (citing *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)).

266. *Id.* at 637 n.3 (Jackson, J., concurring). *See also* U.S. CONST. art. I, § 9, cl. 2. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id*.

267. American Patriot Network, *Did President Lincoln Suspend the U.S. Constitution*?, *available at* http://www.civil-liberties.com/pages/did_lincoln.htm (last visited Nov. 4, 2003).

268. *Id*.

269. *Id*.

270. *Id*.

271. *Youngstown*, 343 U.S. at 632 n.1 (Douglas, J., concurring) (citing Act of Mar. 3, 1863, 12 Stat 755).

272. *See* American Patriot Network, *supra* note 267; *Ex parte* Milligan 71 U.S. (4 Wall.) 2, 121-22 (1866).

273. *See Ex parte* Merryman, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (No. 9,487).

274. U.S. CONST. art. I, § 8, cl. 11.

Lincoln's unconstitutional, unilateral suspension of the writ of habeas corpus is distinct from the Third Amendment's requirements in another way. The Third Amendment allows wartime quartering only through a manner prescribed by law.[275] Thus, Congress is specifically called upon to pass a law or laws regulating the compelled quartering. Accordingly, would not Congress logically be called upon to convert the amendment's peacetime status to wartime status? This is further verified by Congress's power to declare war.[276] All textual signs point to Congress, not the President, as having power to effectuate wartime status under the Third Amendment.

In a Third Amendment context, formal text-based lawmaking trumps principled government action, which is text-based but not text-compliant. Allowing principles and inferences to guide when peacetime converts to wartime subjects the protection to political and judicial whim. Allowing for an informal notice of a change from peacetime to wartime contradicts the Third Amendment's formalistic, law-making requirements. The amendment only allows for wartime compelled quartering through a manner prescribed by law.[277] Therefore, a formal law must be present, even in wartime, for compelled quartering to take place. How then, could an extremely informal designation of war, such as congressional statutory authorization through the War Powers Resolution or a unilateral Presidential offensive characterized as war, trigger the crucial change from peacetime to wartime? If that were the case, then the amendment would allow an informal, implied or inference-based change from peacetime to wartime, but the manner to act upon the wartime authority would still have to be a formal law. This type of constitutional hopscotch from informal change from peacetime to wartime, and formal prescription of how quartering then takes place, would create an illogical and inconsistent procedural and substantive application of the Third Amendment. Surely, that cannot be what the amendment commands.

c) The Meaning of "War" Through Insurance Policies

Many courts came to opposite conclusions concerning whether the United States was at war under the insurance policy terms of soldiers killed in different military-oriented situations. The division occurred because of different interpretations of the meaning of war within the policies. A number of cases held "that an armed conflict is not a war, in the legal or constitutional sense, in the absence of a [congressional] declaration of war."[278] These cases

275. U.S. CONST. amend. III.

276. U.S. CONST. art. I, § 8, cl. 11.

277. U.S. CONST. amend. III.

278. Christensen v. Sterling Ins. Co, 284 P.2d 287, 288-89 (Wash. 1955); Beley v. Pa. Mut. Life Ins. Co., 95 A.2d 202, 205 (Pa. 1953); Harding v. Pa. Mut. Life Ins. Co., 95 A.2d 221 (Pa. 1953) (discussing a similar issue as in *Beley*). *See also* Rosenau v. Idaho Mut. Benefit Ass'n, 145

extend Congress's authority to determine when war exists beyond constitutional issues and into contractual interpretations of private insurance policies.[279] In construing similar clauses that involve "private matters[] unaffected by a public interest," other courts concluded that "courts are free to take judicial notice of the existence of a war although no formal declaration of war has [occurred]."[280] In the end, "[t]he answer [to these disputes] is to be found [in] the scope and meaning of the word 'war.'"[281] Essentially, should war be construed in its legal or ordinary sense?[282]

Obviously, those courts concluding a war can only exist through a congressional declaration would likely support a view that wartime can only exist through a congressional declaration of war. Accordingly, applying those cases here would mean only a congressional declaration of war could alter the peacetime status of the United States to wartime under the Third Amendment.

Furthermore, those cases holding that under an insurance policy, war can be said to exist absent a congressional declaration, also support the view that only Congress can determine when war formally exists. For example, in *New York Life Ins. Co. v. Bennion*,[283] the court followed insurance and contract law principles in determining that a state of war existed under a deceased's insurance policy when the deceased was killed at Pearl Harbor even though Congress did not declare war until the day after Pearl Harbor. The court admitted that "a state of war is a political question, to be determined by the political department of our Government."[284] It follows that Congress determines when wartime exists. In construing the insurance contract, the court determined that if the parties intended war "to mean a state of war . . . commenced only [through] a formal [congressional] declaration," then that

P.2d 227, 230 (Idaho 1944); West v. Palmetto State Life Ins. Co., 25 S.E.2d 475, 477 (S.C. 1943); Savage v. Sun Life Assurance Co. of Canada, 57 F. Supp. 620, 621 (W.D. La. 1944).

279. *See generally Christensen*, 284 P.2d 287.

280. *Id.* at 289 (citing W. Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554 (Tex. 1953) (concluding that an insured killed in Alaska during the Korean War was killed at war); Langlas v. Iowa Life Ins. Co., 63 N.W.2d 885, 888 (Iowa 1954) (concluding that an insured killed in the Korean War was killed at war); Stanbery v. Aetna Life Ins. Co., 98 A.2d 134, 138 (N.J. Super. Ct. Law Div. 1953) (concluding that an insured killed in the Korean War was killed at war); Weissman v. Metro. Life Ins. Co., 112 F. Supp. 420, 425 (S.D. Cal. 1953) (concluding that an insured killed in the Korean War was killed at war); Gagliormella v. Metro. Life Ins. Co., 122 F. Supp. 246, 249-50 (D. Mass. 1954) (concluding that an insured killed in the Korean War was killed at war)). *See also* N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260, 265 (10th Cir. 1946) (concluding that an insured killed at Pearl Harbor was killed at war); Hamilton v. McClaughry, 136 F. 445, 451 (C.C.D. Kan. 1905) (concluding that an insured killed in the Boxer Rebellion in China was killed at war).

281. *Christensen*, 284 P.2d at 288.

282. *Id.*

283. 158 F.2d 260 (10th Cir. 1946).

284. *Id.* at 262.

meaning would have applied.[285] However, the court found that the parties did not "use the word war in the technical sense of a formally declared war."[286] Thus, the court followed the maxim that "words used in insurance contracts . . . are to be construed under their plain, ordinary and popular sense, unless it is evident . . . that the words were intended to have some other special meaning."[287] This led to the court's conclusion that the deceased died as a result of "war or an act incident thereto within the meaning . . . of the insurance policy."[288]

The court affirmed the principles that Congress determines when wartime formally exists and that the word war has an ordinary and legal meaning. The court gave deference to the political form of government to determine when war exists. It recognized that Congress, through the Declare War Clause, has the power to declare war.[289] Thus, it is the Legislative Branch of government that can switch the United States' legal status from peacetime to wartime. Next, the court only concluded war existed because the insurance contract contemplated the ordinary meaning of war, not its legal meaning.[290] If the parties desired war's legal meaning to apply, the court would have followed it and presumably determined that a formal, declared war did not exist until the day after Pearl Harbor. As such, the court deferred to Congress to address the legal issue of whether wartime existed and limited its holding to a conclusion that war existed under the ordinary meaning of war under a private insurance policy.[291]

This condition of war, meeting an insurance policy description, is not the same as that which changes the United States' legal status from peacetime to wartime under the Third Amendment. A condition of war could exist under the word's *ordinary* meaning. That does not, however, signify a change in the *legal* status of the nation from peacetime to wartime. Recovery under an insurance policy complies with war's ordinary meaning within an insurance policy, as the parties understood it to mean, while not affecting whether wartime existed in a Third Amendment sense. The determination of whether war, within its ordinary meaning, existed under an insurance policy is thus distinct from determining if wartime exists under a constitutional amendment that protects against compelled quartering of soldiers. As such, those cases concluding that war exists without a congressional declaration for insurance policy purposes does not provide any precedential support under the Third

285. *Id*. at 264.
286. *Id*. at 265.
287. *Id*.
288. *Bennion*, 158 F.2d at 265.
289. *Id*. at 265-66.
290. *Id.* at 265.
291. *Id.* at 265-66.

Amendment for concluding wartime can exist without a congressional declaration of war.

d) Mid-Twentieth Century Interpretation of Legal War Powers

In *Lee v. Madigan*,[292] the issue arose of when World War II ended. The United States declared war against Germany, Italy, and Japan in 1941.[293] The Court provided the appropriate factual summary of when World War II concluded. It stated:

> The Germans surrendered on May 8, 1945, the Japanese on September 2, 1945 . . . The President on December 31, 1946, proclaimed the cessation of hostilities, adding that 'a state of war still exists.' . . . The war with Germany terminated October 19, 1951, by a Joint Resolution of Congress and a Presidential Proclamation. And on April 28, 1952, the formal declaration of peace and termination of war with Japan was proclaimed by the President.[294]

In *Lee*, the Court had to decide if a "time of peace" existed on June 10, 1949, when a member of the army allegedly engaged in conspiracy to commit murder.[295] Under Article of War 92, if peacetime existed, he could not be tried by a court-martial.[296] The Court determined that the United States was in peacetime on June 10, 1949, four years after World War II hostilities ceased, even though Congress had not yet officially declared peacetime.[297] The Court discussed how to evaluate the term "time of peace" in different contexts. The Court stated:

> We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved. Congress in drafting laws may decide that the [n]ation may be 'at war' for one purpose, and 'at peace' for another . . . . The problem of judicial interpretation is to determine whether 'in the sense of this law' peace had arrived. Only mischief can result if those terms are given one meaning regardless of the statutory context.[298]

Following the Court's holding, the Third Amendment must be considered in its context; it must be construed within the circumstances of this article's scenario. To do otherwise would be akin to specifically engaging in the danger the Court warned against—giving the amendment's terms one meaning regardless of their context. Instead of a universal interpretation of peacetime, the Court relied on how civil rights would be impacted by allowing a court-

292. 358 U.S. 228 (1959).
293. Yoo, *supra* note 174, at 177.
294. *Lee*, 358 U.S. at 230 (citations omitted).
295. *Id.* at 229.
296. 10 U.S.C. § 1564 (1946).
297. *See Lee*, 358 U.S. at 236.
298. *Id.* at 230-31 (citation omitted).

martial to occur for an alleged crime committed four years after hostilities ceased. The Court provided:

> We cannot readily assume that the earlier Congress used 'in time of peace' in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. We will not presume that Congress used the words 'in time of peace' in that sense. The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War.[299]

Therefore, under *Lee*, following a rigid methodology to interpret "time of peace" is eschewed by a case-by-case analysis, while Article 92's impact on common sense and civil rights must be taken into account. In that sense, *Lee* supports reading the Third Amendment in its own light; a light that directly affects treasured civil rights. The Declare War Clause,[300] the early history of limited wars, and the judicial and executive agreement that Congress controls commencing war verify that declarations of war are necessary to alter the nation's legal status of affairs. As such, common sense would also indicate that peacetime converts to wartime under the Third Amendment only when Congress declares war.

Youngstown Sheet & Tube Co. v. Sawyer[301] provided a persuasive restriction on presidential power to alter peacetime status to wartime, thereby affirming Congress's authority in that regard. The Court concluded that President Truman was not within his constitutional power when he ordered the federal government to take possession of and operate the nation's steel mills absent congressional legislation during the Korean War.[302]

In 1950, communist North Korea invaded anti-communist South Korea,[303] which led to the Korean war and United States involvement.[304] President Truman launched the United States into the war without congressional authorization. A dispute exists as to whether Truman consulted with Congress before acting. Some characterize Truman as unilaterally starting the war[305] or launching the United States into war without consulting Congress.[306] Other commentators defended Truman, concluding that he either consulted and

299. *Id*. at 236.

300. U.S. CONST. art. I, § 8, cl. 11.

301. 343 U.S. 579 (1952).

302. *Id*. at 582-83, 585.

303. Search Beat, *Korean War History Guide: A Short History of the Korean War*, *at* http://history.searchbeat.com/koreanwar.htm (last visited Nov. 4, 2003).

304. Bickel, *supra* note 217, at 134.

305. *See* ELY, *supra* note 154, at 10, 53; *see also* Wormuth, *supra* note 162, at 648 (stating that President Truman initiated an unauthorized entry into the Korean War).

306. ROBERT LECKIE, THE WARS OF AMERICA 858 (1968), *cited in*, Turner, *supra* note 162, at 950.

informed Congress before going to war, even though Congress did not pass a formal resolution,[307] or that his independent actions might have been an appropriate response to an emergency.[308] The latter fails as the President's unilateral power to respond to emergencies does not extend to defending foreign nations from attack.[309]

President Truman argued he was acting under his authority as Commander-in-Chief to prevent an emergency resulting from the nation-wide strike at the steel mills.[310] The Court appropriately concluded that a state of war did not exist because Congress did not declare war, much like the Court looked to Congress's actions to determine the legal status of the quasi-war with France.[311] The Court recognized that Congress alone has the power to decide if a legal state of war existed to justify President Truman's actions.[312] Therefore, the Court determined that Truman's seizure of property was unconstitutional because the nation was not formally at war,[313] as a declaration of war is the only constitutional way in which the nation can formally be at war.[314] Thus, the Court "correctly held that the President could not usurp Congress' domestic authority" to determine when, legally, a wartime state exists.[315] Consequently, the Court upheld the principle that a declaration of war had important domestic effects, such as notifying the people and authorizing Presidential wartime power.[316]

Justice Jackson's concurring opinion, if read quickly, might appear to contradict the conclusion that only a formal declaration of war alters the legal status of the nation from peacetime to wartime. He concluded that "[n]othing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration."[317] Jackson qualified his state of war proclamation by stating it is unnecessary "to consider the legal status of the Korean enterprise to discountenance argument based on it."[318] Moreover, while he assumed the

307. Turner, *supra* note 162, at 949-56.

308. Bickel, *supra* note 217, at 134-35.

309. *See* Berger, *supra* note 160, at 51, 65; Rushkoff, *supra* note 156, at 1343. Although the War Powers Resolution was not in effect before the Korean War, it provides another current source limiting unilateral Presidential military action to attacks against the United States, its territories or possessions and their armed forces. 50 U.S.C. § 1541(c) (2000).

310. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-83 (1952).

311. Yoo, *supra* note 174, at 301.

312. *Id*.

313. *Youngstown*, 343 U.S. at 611.

314. *Id*.

315. Yoo, *supra* note 174, at 301.

316. *See id*.

317. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

318. *Id*. at 643.

United States was at a war de facto,[319] he did not determine if the conflict was a war de jure. Regardless of Jackson's unsubstantiated claim that a state of war can exist without a declaration, his qualification of that remark and his ultimate holding validated that a formal declaration of war is needed to alter peacetime status to wartime status. Jackson concluded that the President could not "vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[320] "[M]ilitary powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history."[321] In other words, Jackson determined the power to authorize domestic military power lies in Congress, the legislative body, and the power to execute those laws lies with the President, the executive body.

The Constitution's policy, according to Jackson, is "that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[322] Consequently, Jackson provided direct support for, at least, congressional authorization of wartime in a Third Amendment context. Specifically, he said:

> [I]n many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third 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." Thus, even in war time, his seizure of needed military housing must be authorized by Congress.[323]

Therefore, if Congress must authorize compelled quartering of soldiers in time of war, they must also authorize the time of war. Because only wartime status allows for compelled quartering of soldiers, a congressional authorization of a limited war would not rise to the level of a formal, general war, and thus wartime would not exist. Because wartime would not exist, Congress would not have the subsequent ability to enact legislation authorizing the quartering of soldiers, and the President could not order such quartering to take place.

e) Modern Undeclared Wars and Challenges to Presidential Authority

Congressional authorization for the undeclared Vietnam War led courts to uphold its constitutionality. That conflict obviously met the ordinary meaning

319. *Id*.

320. *Id*. at 642 (discussing President Jefferson's message to Congress concerning his ordering of American fleet into a naval battle with Tripoli without Congress's sanction).

321. *Id*. at 644.

322. *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

323. *Id*. (quoting U.S. CONST. amend. III).

of war as well.[324] Although, as we already know, the crux of the inquiry in determining whether a wartime state of affairs existed is if Congress declared war or not, Congress did enact the Tonkin Gulf Resolution,[325] which authorized President Johnson to commit forces in Vietnam. This was not a declaration of war, but rather an authorization for a large-scale limited war. Claims that the Tonkin Gulf Resolution somehow created a de facto declaration of war are easily refutable because it was subsequently repealed.[326] Unfortunately, the war continued and extended to Cambodia in 1970 and Laos in 1971, without consultation with Congress.[327]

The constitutionality of the Vietnam War was repeatedly challenged.[328] In each case, the challenge was denied, but no court supported unilateral presidential war-making. Instead, the courts required and found some form of congressional authorization for the undeclared Vietnam War.[329] The form of authorization for the informal war was within Congress's discretion—it did not

324. United States military involvement in Vietnam extended from 1961 to 1975. The History Place, *The Vietnam War*, *at* http://www.historyplace.com/unitedstates/vietnam (last visited Nov. 4, 2003). More than 58,000 Americans were killed in action, more than 300,000 were wounded in action, more than 2,000 were considered missing in action, and more than 700 were captured in action. *Casualties—US vs NVA/VC*, *at* http://www.rjsmith.com/kia_tbl.html (last modified Jan. 23, 2000). Approximately 1,100,000 North Vietnamese were killed in action, and more than 600,000 were wounded in action. *Id*. *See also* Allison, *supra* note 254, at 91 (noting that the Vietnam War met the ordinary meaning of war).

325. Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). One commentator concluded that the Tonkin Gulf Resolution could not authorize military action because it did not identify an enemy state; it only allowed troops to "repel armed attack against the forces of the United States." Wormuth, *supra* note 162, at 690 (quoting Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964)). A debate exists as to whether Congress constitutionally authorized the Vietnam War. Some say the war was unconstitutional. *See generally* David C. Wright, *America in Vietnam: A Model for the Exercise of the War Powers*, 15 J. CONTEMP. L. 253 (1989). However, an argument exists that Congress authorized the Vietnam War through resolution, tying troop commitments to treaty requirements and military appropriations. *Id.* at 257.

326. Berger, *supra* note 160, at 67.

327. *Id*. at 67 n.249.

328. DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973); Orlando v. Laird, 443 F.2d 1039, 1040 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26, 28 (1st Cir. 1971); Drinan v. Nixon, 364 F. Supp. 854, 855-56 (D. Mass. 1973).

329. Massachusetts v. Laird, 451 F.2d at 34 (concluding that Congress approved the prolonged, undeclared Vietnam War because it did not claim conflicting authority and steadily supported the war); Orlando v. Laird, 443 F.2d at 1042 (concluding that Congress met the test of authorizing or ratifying the Vietnam War through the Tonkin Gulf Resolution by appropriating billions of dollars for the war and expanding selective service). *Cf. Da Costa*, 471 F.2d at 1152 (concluding that a soldier's challenge to the military's tactical decisions to mine ports and harbors in North Vietnam and continue air strikes was a political question the court did not have power to hear).

have to formally declare war.[330] Furthermore, unilateral Presidential war-making was appropriately limited to responding to attacks and addressing grave emergencies.[331] While the courts went too far in concluding that unilateral Presidential war-making beyond emergency situations was an issue Congress and the President shared, the courts still maintained that Congress must authorize or ratify that action.[332] Therefore, congressional power to authorize war-making was indirectly sustained. Congressional control over determining a wartime state would also follow that mantra.

Similar to the Vietnam War, Congressional authorization for the undeclared Persian Gulf War against Iraq in 1991 led courts to uphold its constitutionality. On August 2, 1990, Iraq invaded Kuwait, and then President George H. W. Bush ordered "the deployment of the largest American combat force since the Vietnam War six days later."[333] In November 1990, "[President] Bush ordered a virtual doubling of the 230,000 troops in the Persian Gulf."[334] On January 12, 1991, Congress passed a joint resolution that approved the use of force against Iraq when the President determined and reported to Congress that all diplomatic avenues were exhausted.[335] The word war did not appear in the content of the Iraq Resolution, but rather only appeared in the title of the War Powers Resolution.[336] The Iraq Resolution never said, "A state of war will hereby be declared to exist if Iraq does not comply with the various United Nations Security Council resolutions."[337] "[T]he United Nations Security Council passed Resolution 678, [demanding] that Iraq unconditionally withdraw from Kuwait by January 15, 1991."[338] On January 17, 1991, the United States initiated "Operation Desert Storm with over 1,400 air sorties against [Iraq]."[339] On February 24, 1991, the United

330. *Drinan*, 364 F. Supp. at 859-60.

331. *Id*. at 859 (citing *Mitchell*, 488 F.2d at 613-14).

332. *See id*. (citing Massachusetts v. Laird, 451 F.2d at 33). *See also* Orlando v. Laird, 443 F.2d at 1042.

333. Sidak, *supra* note 143, at 29; *see also* George Bush, Address to the Nation Announcing the Deployment of United States Armed Forces to Saudi Arabia, II PUB. PAPERS 1107 (Aug. 8, 1990).

334. Sidak, *supra* note 143, at 29; *see also* Letter to Congressional Leaders on the Deployment of Additional United States Armed Forces to The Persian Gulf, II PUB. PAPERS 1617 (Nov. 16, 1990) [hereinafter Letter to Congressional Leaders].

335. Sidak, *supra* note 143, at 31; *see also* Adam Clymer, *Congress Acts to Authorize War in Gulf; Margins Are 5 Votes in Senate, 67 in House*, N.Y. TIMES, Jan. 13, 1991, at A1.

336. Sidak, *supra* note 143, at 45.

337. *Id*. at 47.

338. *Id*. at 29; *see also* Letter to Congressional Leaders, *supra* note 334, at 1617.

339. Sidak, *supra* note 143, at 31 (citing Andrew Rosenthal, *U.S. and Allies Open Air War on Iraq, Bomb Baghdad and Kuwaiti Targets; "No Choice" But Force, Bush Declares*, N.Y. TIMES, Jan. 17, 1991, at A1); *see also* Statement on Allied Military Action in the Persian Gulf, I PUB. PAPERS 42 (Jan. 16, 1991).

States commenced a ground invasion of Kuwait and liberated the country three days later along with securing an Iraqi pledge to comply with United Nations Security resolutions.[340]

Leading up to the conflict, fifty-three members of the House of Representatives and one Senator sought a preliminary injunction preventing President Bush from conducting the Persian Gulf War without a declaration of war in *Dellums v. Bush*.[341] The court denied the preliminary injunction because it was not ripe for decision.[342] Nonetheless, the court stated, "if the [Declare] War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress."[343] Moreover, the court stated:

> If the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand.[344]

The court's plain and accurate reading of the Declare War Clause indicates that only Congress can authorize war. If Congress does not authorize a war and the President nevertheless commences a war, then that war would be unconstitutional. While *Dellums* does not discuss the Third Amendment, if Congress alone has the ability to declare war and the President cannot make war on his own volition, then must not Congress declare war to alter the legal status of the United States from peacetime to wartime? That conversion can only be accomplished through a formal declaration of war and not through informal congressional authorizations. Therefore, if the President could execute the compelled quartering of soldiers without a congressional declaration of war, even if Congress prescribed a manner for the quartering, that execution would directly contradict *Dellums*' principle that Congress alone decides whether or not to declare war. Allowing the President to execute a wartime power, such as the compelled quartering of soldiers in citizens' houses, without Congress declaring war, would disregard *Dellums* and create a constitutional inconsistency that would allow the President to execute the compelled quartering of soldiers as a wartime measure regardless of whether Congress declared war or not.

Next, if Congress could informally authorize or ratify a President's unilateral order to quarter soldiers, then precedent would be set allowing the

340. Sidak, *supra* note 143, at 32.
341. 752 F. Supp 1141, 1143 & n.1 (D.D.C. 1990).
342. *Id*. at 1152.
343. *Id*. at 1144 n.5.
344. *Id*. at 1145.

President to undertake formal wartime measures regardless of whether Congress declared war. This would essentially eliminate any reason for Congress to formally declare war, as its informal authorization for such measures would constitute an equally effective legal sanction as a declaration of war. We must remember informal authorizations and exceptions to the formality of the Declare War Clause must be just that—they cannot usurp the clause's actual formal, textual command.

Essentially, the Persian Gulf War provides a modern view of how Congress tends to declare war without declaring war. It informally declares war by "enact[ing] a statute or resolution intentionally styled as something other than a declaration of war, such as a 'limited' declaration of war."[345] "Congress did so in its Iraq Resolution of January 12, 1991, which purported to authorize the war that President Bush subsequently ordered [and executed] against Iraq."[346] The Iraq Resolution's text, however, did not formally declare war on Iraq.[347]

While certain members of Congress described the Resolution as essentially equivalent to a declaration of war for authorization purposes,[348] then House Speaker Thomas Foley said a formal declaration of war was not made "because there is some question about whether we wish to excite or enact some of the domestic consequences of a formal declaration of war-seizure of property, censorship, and so forth."[349] While this statement appears to support this article's position that only a formal declaration of war triggers a wartime state wherein the President may diminish many rights, such as the Third Amendment's protection against the compelled quartering of soldiers, this article will eschew it because original intent is an improper interpretive mechanism.[350]

In short, we do not need legislators' alleged intent to determine that the Iraq Resolution did not constitute a declaration of war. The Resolution's text did not declare war, thus no declaration was made. Accordingly, Congress only authorized a limited war with Iraq and did not sanction a formal, declared war. Therefore, the nation's peacetime legal status remained, and wartime did not exist under the Third Amendment.

345. Sidak, *War, Libety and Enemy Aliens, supra* note 169, at 1425.

346. *Id*.

347. *Id*. at 1425 (citing Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992)); Sidak, *supra* note 143, at 43-48.

348. Sidak, *War, Liberty and Enemy Aliens*, *supra* note 169, at 1425-26.

349. *Id*. at 1426.

350. *See supra* notes 42-61 and accompanying text.

f) A Challenge to President George W. Bush's Authority to Wage War Against Iraq

Before the war against Iraq, "[a] group of [United States] soldiers, parents of soldiers and six [members of the United States House of Representatives] filed a lawsuit to stop [President George W. Bush] from launching [the] war against Iraq without a [congressional] declaration of war."[351] "The lawsuit [sought] an immediate injunction against [President] Bush and Defense Secretary Donald Rumsfeld to prevent them from launching an invasion [against] Iraq."[352] The lawsuit contended a congressional resolution of October 16, 2002[353] "did not specifically declare war and unlawfully ceded the decision to [the President]."[354] The District Court concluded the lawsuit presented a non-justiciable political question, and therefore it dismissed the complaint.[355] In reference to the plaintiffs' claim that Congress did not declare war, the Court found that Congress expressly endorsed the President's use of the military against Iraq through Congress's October 16, 2002 resolution.[356] Thus, the court indirectly sanctioned congressional authorization for a limited war against Iraq.

The First Circuit Court of Appeals affirmed the District Court's decision.[357] The First Circuit concluded the dispute was not ripe for consideration and the appropriate recourse for plaintiffs' challenge lay with the political branches of government.[358] While the opinion might have leaned too far towards allowing presidential war-making, it nevertheless accurately concluded that the October 2002 resolution constituted congressional authorization for the war against Iraq.[359] Accordingly, Congress's power to authorize limited or formal war was, to a degree, followed. As expected, the Court did not address what constituted a formal, wartime state of affairs.

351. CNN.com, *Suit Challenges Bush War Authority*, *at* http://www.cnn.com/2003/LAW/02/13/anti.war.lawsuit.ap/index.html (Feb. 14, 2003) [hereinafter CNN.com, *Suit Challenges Bush War Authority*].

352. *Id*.

353. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 [hereinafter Authorization I].

354. CNN.com, *Suit Challenges Bush War Authority*, *supra* note 351.

355. Doe v. Bush, 257 F. Supp. 2d 436, 437 (D. Mass. 2003).

356. *Id*. at 440 (memorializing the court's order and memorandum issued in open court, following hearing on February 24, 2003).

357. Doe v. Bush, 322 F.3d 133, 144 (1st Cir. 2003).

358. *Id*.

359. *Id*.

3. Analogous Constitutional Provisions to the Declare War Clause

The full balance of war powers indicates that Congress authorizes war, while the President executes war. Congress may "declare [w]ar,"[360] "may raise and support [a]rmies,"[361] may "provide and maintain a [n]avy,"[362] may "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces,"[363] issue "[l]etters of [m]arque and [r]eprisal,"[364] call up the militia,[365] organize, arm, and discipline the militia[366] and make "rules concerning [c]apture on [l]and and [w]ater."[367] Finally, in relation to Congress's powers, "[n]o [m]oney shall be drawn from the Treasury, but in [c]onsequence of [a]ppropriations made by [l]aw."[368] Because these powers connect with the power of declaring war, Congress must also have the power to determine when war exists.[369] On the other hand, "[t]he President [is the] Commander in Chief of the Army and Navy of the United States, and of the [m]ilitia of the several states."[370] Also, "[t]he United States shall guarantee to every [s]tate in [t]he Union a [r]epublican [f]orm of [g]overnment and, shall protect each state against [i]nvasion."[371]

These provisions create a constitutional system wherein Congress controls every conceivable war-making or war-authorizing power, while the President commands the armed forces when Congress authorizes their use and defends the nation from attack in emergency situations. Congress decides if an army or navy exists.[372] How could the President control whether wartime exists if he does not control whether a military force exists to effectuate a war? Congress further controls the military's funding and regulation and decides if private individuals can conduct military operations for the United States by granting them commissions, or letters of marque and reprisal.[373] The President is left only to command any force provided. In fact, the President may not

360. U.S. CONST. art. I, § 8, cl. 11.

361. U.S. CONST. art. I, § 8, cl. 12.

362. U.S. CONST. art. I, § 8, cl. 13.

363. U.S. CONST. art. I, § 8, cl. 14.

364. U.S. CONST. art. I, § 8, cl. 11.

365. U.S. CONST. art. I, § 8, cl. 15.

366. U.S. CONST. art. I, § 8, cl. 16.

367. U.S. CONST. art. I, § 8, cl. 11.

368. U.S. CONST. art. I, § 9, cl. 7.

369. Memorandum of Law in Support of Plaintiffs' Motion For a Preliminary Injunction, Doe v. Bush, 323 F.3d 133 (1st Cir. 2003), *available at* http://news.findlaw.com/cnn/docs/iraq/doebush21303mol.pdf (Feb. 13, 2003).

370. U.S. CONST. art. II, § 2, cl. 1.

371. U.S. CONST. art. IV, § 4; Symposium, *Foreign Affairs and the Constitution: The Roles of Congress, The President, and The Courts: The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 19 (1988).

372. *See* U.S. CONST. art. I, § 8, cls. 12-13; U.S. CONST. art. I, § 9, cl. 7.

373. Lobel, *supra* note 85, at 1041.

commence any action except a defense against an attack, an emergency situation where states are subject to invasion or their republican form of government is threatened.[374] Thus, in a constitutional system where essentially all war-making and war-authorizing power lay with the Congress, the power to declare a wartime state must also lay with Congress. Essentially, Congress is required to "*initiate* hostilities, not simply [to] act to override unilateral [Presidential] action through the use of the funding power."[375] This creates a consistent, logical balance of war powers. Naturally then, reading Congress's power to declare war as a power to declare a wartime status meets the analogous war powers present in the Constitution.

4. Is Wartime Present in the War on Terrorism, Iraq or North Korea?

These three conflicts reiterate the modern view that a formal declaration of war is unnecessary for a President to conduct military affairs, but congressional authorization is needed for the President to conduct military operations short of a formal war.[376] Congress passed two resolutions—one after the September 11, 2001 terrorist attacks and one in October 2002 concerning Iraq. The first resolution authorizes the President to use force against terrorists.[377] The second resolution authorizes the President to use force against Iraq.[378] Neither resolution mentions North Korea and no military conflict has occurred with North Korea. At the outset, therefore, war cannot be present with North Korea. Thus, compelled quartering of CIA or FBI agents could only potentially take place during a future war against North Korea. The War on Terrorism and the war against Iraq need further review.

a) Is Wartime Present in the War on Terrorism?

Congress authorized President Bush to conduct a limited war in the War on Terrorism.[379] The Congressional Resolution does not declare war, but rather provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by

374. *See* U.S. CONST. art. IV, § 4.

375. Lobel, *supra* note 85, at 1079.

376. David C. Wright, Comment, *America in Vietnam: A Model for the Exercise of the War Powers*, 15 J. CONTEMP. L. 253, 258 (1989) (citing Rushkoff, *supra* note 156, at 1772; Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles*, 44 S. CAL L. REV. 461, 465 (1971)).

377. Authorization I, Pub. L. No. 107-40, 115 Stat. 224 (2001).

378. Authorization II, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

379. For a review of the history and facts of the War on Terrorism, see *supra* note 1.

> such nations, organizations or persons . . . . Consistent with [] the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of []the War Powers Resolution . . . . Nothing in this resolution supercedes any requirement of the War Powers Resolution.[380]

The Resolution does not declare a war on terrorism or any nation or foreign government. It only authorizes the use of "all necessary and appropriate force."[381] The Resolution does not declare war, nor does it mention the word war, except for its reference to the *War* Powers Resolution. The War Powers Resolution, as discussed earlier, authorizes the President to use force through "(1) a declaration of war, (2) specific statutory authorization," or (3) defense of the United States.[382] Congress chose not to declare war. Instead it provided "specific statutory authorization" for President Bush to use force against terrorists.[383] Thus, the Resolution cannot be considered a declaration of war. Therefore peacetime, in reference to the War on Terrorism, remains the legal status of the United States. The United States is not at wartime under the Third Amendment, and compelled quartering of CIA and FBI agents cannot take place under the meaning of war during the War on Terrorism.

b) Is Wartime Present in the War Against Iraq?

At the conclusion of the Persian Gulf War in 1991, "Iraq agreed to United Nations Security Resolution 687, which required [it to stop developing] nuclear, biological, and chemical weapons, destroy all existing weapons . . . and their delivery systems, and allow United Nations weapons inspections."[384] "Iraq . . . repeatedly . . . breach[ed] this agreement . . . [and] ended cooperation with the inspections program in 1998."[385] "[T]he United States and other nations . . . enforced a no-fly zone near the Kuwaiti border and . . . launched missile strikes against Iraq."[386] In 1998, Congress passed a joint resolution stating, "Iraq is in material and unacceptable breach of its international obligations, and . . . the President is urged to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations."[387] Also in 1998, Congress passed the Iraq Liberation Act, which authorized assistance for "'Iraqi democratic opposition organizations,' and declared that it should be

380. Authorization I, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224-25 (2001).
381. *Id*. at § 2(a), 115 Stat. at 229.
382. 50 U.S.C. § 1541(c) (2000).
383. Authorization I, Pub. L. No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001).
384. Doe v. Bush, 323 F.3d 133, 135-136 (1st Cir. 2003).
385. *Id*. at 136.
386. *Id*.
387. *Id*. (quoting Pub. L. No. 105-235, 112 Stat. 1538, 1541 (1998)).

United States policy to remove . . . Saddam Hussein from power."[388] The Act specifically limited the use of military force by stating it should not "be construed to authorize or otherwise speak to the use of United States Armed Forces."[389] None of the aforementioned congressional enactments declare war against Iraq or authorize the use of force against Iraq. To the contrary, Congress specifically precluded such an authorization, and emphasized that the Constitution and federal laws, which obviously include the Declare War Clause and the War Powers Resolution, should be followed.

In September 2002, "President Bush called for a renewed effort to demand Iraqi disarmament and indicated . . . military force would be necessary if diplomacy" failed.[390] Iraq allowed weapons inspectors into the country, but did not comply with prior United Nations resolutions.[391] In October 2002, Congress authorized President Bush to conduct a limited war against Iraq. The congressional Resolution did not declare war, but rather provided:

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.
>
> . . . .
>
> Consistent with [] the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of [] the War Powers Resolution . . . . Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.[392]

Just as the Resolution against terrorism did not declare war, the Iraq Resolution did not declare war against Iraq. It only authorized President Bush to "defend the national security"[393] and "enforce all relevant United Nations . . . resolutions."[394] And just like the Resolution against terrorism, the Iraq Resolution's authorization of force provisions does not mention the word war, except for its reference to the *War* Powers Resolution. In fact, the Iraq

388. *Id*. (quoting Iraq Liberation Act of 1998, Pub. L. No. 105-338, §§ 3, 4, 112 Stat. 3178, 3179 (1998)).

389. *Doe*, 322 F.3d at 136 n.3.

390. *Id*.

391. *Id*.

392. Authorization II, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (2002); *see* S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002) (declaring Iraq in material breach of its obligations and offering it a final opportunity to comply with disarmament obligations), *available at* http://www.un.org/Docs/scres/2002/sc2002.htm (last visited Nov. 4, 2003).

393. Authorization II, Pub. L. No. 107-243, §3(a)(1), 116 Stat. 1498, 1501 (2002).

394. *Id*.

Resolution's War Powers Resolution provisions in sections 3(c)(1) and 3(c)(2) follow the Resolution against terrorism's War Powers Resolutions provisions in Section 2(b)(1) and 2(b)(2), verbatim.[395] Thus, both resolutions chose not to declare war. Instead they both granted "specific statutory authorization" for the President to use force.[396] Thus, the Iraq Resolution, like the Resolution against terrorism, cannot be considered a declaration of war.[397]

On March 19, 2003, the United States commenced military action against Iraq.[398] On May 1, 2003, President Bush stated major combat operations were over,[399] which essentially constituted a preliminary American victory, as the Iraqi leadership was no longer in control of the country. Since then, however, sporadic guerilla warfare-like attacks have been launched against United States soldiers.[400]

Peacetime, in reference to the war against Iraq, remains the legal status of the nation. Since the start of combat, Congress has not repealed or amended the Iraq Resolution, nor has it declared war against Iraq. Accordingly, the United States is not at wartime under the Third Amendment. Compelled quartering of CIA or FBI agents could not take place in a war against Iraq under the meaning of war.

Because this article only starts and complies with the text, it will proceed to analyze the historical understanding of the Third Amendment, Third Amendment jurisprudence and analogous areas of the law.[401]

III. HISTORICAL UNDERSTANDING OF THE THIRD AMENDMENT

A historical understanding of the Third Amendment can support, but not carry, a Third Amendment analysis. History shows what happened over time concerning quartering of soldiers and how the founding era dealt with the

395. *Id*.; Authorization I, Pub. L. No. 107-40, § 2(b), 115 Stat. 224, 224 (2001).

396. Authorization II, Pub. L. No. 107-243, § 3(c), 116 Stat. 1498, 1501 (2002); Authorization I, Pub. L. No. 107-40, § 2(b), 115 Stat. 224, 224 (2001).

397. The Preamble of the Iraq Resolution refers to the "war on terrorism." Authorization II, Pub. L. No. 107-243, pmbl., 116 Stat. 1489, 1500 (2002). However, that reference does not declare a war on terrorism, nor does it propose to supplant the Resolution against terrorism. The categorization of a "war on terrorism," like the categorization of the last three undeclared wars the United States prosecuted as war (the Persian Gulf War, the Vietnam War, the Korean War), does not create a congressional declaration of war. Instead, they are simply ways of identifying certain conflicts, just like the "War on Drugs" identifies multiple efforts to combat the nation's drug problem.

398. *War Tracker: March 19*, *supra* note 149. Two hundred forty two thousand United States troops were present at the war against Iraq's commencement. *See id*.

399. *See Special Report*, *supra* note 2.

400. *See* CNN.com, *U.S. Deaths in Iraq Surpass 'End of Major Combat' Total*, *at* http://www.cnn.com/2003/WORLD/meast/08/26/sprj.irq.intl.main/index.html (Aug. 26, 2003).

401. *See, e.g.*, Schmidt, *Analyzing the Text of the Equal Protection Clause*, *supra* note 41, at 100.

issue. Therefore, history can help illustrate why the Third Amendment was adopted. It can also provide persuasive material for how the amendment should be interpreted. History cannot, however, define what the Third Amendment means. Its text should do that. In this instance, however, with little to examine through case law, history provides a more important role in determining the Third Amendment's meaning. History can help extract the doctrinal principles that the Third Amendment's text has infrequently initiated. Fortunately, there is an abundance of historical material providing a continuum of consistent values concerning compelled quartering of soldiers in citizens' houses. The resistance to the compelled quartering of soldiers occurred over centuries, with the emphasis being more against the action of government agents being quartered in a house than against the specific individual quartered. The nation's founding debate regarding whether a standing army should even exist shows citizen distrust for the soldiery. It supports a civil rights friendly reading of the Third Amendment.

A. The History of Quartering Soldiers

The protection against compelled quartering of soldiers in citizens' houses dates back at least to 1628. "The English Petition of Right of 1628 [stated] that '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 . . . .'"[402] The Petition of Right's mention of mariners, alongside soldiers, shows a prohibition against more than just soldiers, but other military oriented government agents quartered in a house as well. A mariner is "one who navigates or assists in navigating a ship."[403] Mariners are considered seamen or sailors.[404] From a historical view, this verifies this article's textual conclusion that a soldier, as the Third Amendment indicates, does not just mean a traditional infantryman. This early prohibition against compelled quartering of soldiers provides an equivalent quartering prohibition against traditional members of a Navy. As flying was not yet invented, and thus no Air Force existed, one can conclude that there was no way in which a prohibition against pilots, airmen, or a like term was possible.[405] If such a military force existed, it presumably appears it would

402. 1791-1991 THE BILL OF RIGHTS AND BEYOND 28 (1991) [hereinafter BILL OF RIGHTS AND BEYOND]; *see also* 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413. "The petition of right moreover enacts, that no soldier shall be quartered on the subject without his own consent." *Id.* (citation omitted).

403. WEBSTER'S, *supra* note 62, at 697; *see also* AMERICAN HERITAGE, *supra* note 62, at 799 (defining a mariner as "one who navigates a ship").

404. WEBSTER'S, *supra* note 62, at 697; *see* AMERICAN HERITAGE, *supra* note 62, at 799 (defining a mariner as "a sailor or seaman").

405. The Constitution authorizes only the President as Commander-in-Chief of the Army and Navy. U.S. CONST. art. II, § 2, cl. 1. However, a reasonable interpretation of the clause, as well

have been subjected to the same quartering prohibition, just as soldiers and mariners were. Accordingly, history shows a broad military quartering prohibition, which emphasizes the citizenry's right against compelled quartering as the thrust of the protection, not necessarily the type of person that is quartered.

Therefore, any review of the Third Amendment's historical development must start with a broad notion of the protection in regard to which types of persons can be prevented from being quartered. Thus, the English Petition of Right's principle and the Third Amendment's historical foundation are preserved through modern theory and application. To foster a narrow interpretation of soldier within the Third Amendment would contradict the broader mandate of the English Petition of Right. This would eliminate the historical context that the protection formed. That is an unacceptable historical view of the Third Amendment.

The Third Amendment's "historical origins [are also] rooted in the English Bill of Rights of 1689."[406] The English Bill of Rights provided that the King had "endeavoured to subvert . . . the laws and liberties of [the] kingdom . . . [b]y raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law."[407] Britain's failure to recognize the rights of its citizens regarding compelled quartering permeated through British and colonial American history. One commentary noted:

> As a result of the overthrow of James II and the creation of the Bill of Rights of 1689, the power of the crown to raise and deploy military forces was severely curtailed during the 18th century. Britain's failure to apply the same restraints in dealing with the American colonists helped lead to the American Revolution.[408]

Under "the Quartering Act of 1765, the British Parliament required American colonists [to pay for] the feeding and sheltering [of] British troops stationed" in the colonies.[409] The Act authorized the quartering of soldiers in inns, livery stables and ale houses if there was insufficient room for them in their barracks.[410] The Boston Pamphlet of 1772 protested quartering of soldiers by stating, "introducing and quartering standing armies in a free

as common sense, leads to an obvious conclusion that the President is the Commandeer-in-Chief of the Air Force and the Marines. Incidentally, that scenario exemplifies why a wholly textualist interpretation of the Constitution is inappropriate. It could lead to an absurd result such as the President not being granted command control over the Air Force or Marines.

406. Engblom v. Carey, 677 F.2d 957, 966 (2d Cir. 1982) (*Engblom II*) (Kaufman, J., concurring in part and dissenting in part).

407. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 269 (1999).

408. BILL OF RIGHTS AND BEYOND, *supra* note 402, at 28.

409. *Engblom II*, 677 F.2d at 967 (Kaufman, J., concurring in part and dissenting in part).

410. *Id*. at 967 (citation omitted).

country in times of peace without the consent of the people . . . is, and always has been deemed a violation of their rights as freemen."[411]

This pronouncement shows the enduring historical prohibition against compelled quartering of soldiers. The Boston Pamphlet emphasized that the practice was at all times a violation of the rights of freemen. This natural-rights-like position against compelled quartering shows an unyielding stance against it, no matter when and where it occurred, and no matter what form of government or rights existed. Accordingly, the Boston Pamphlet enunciated the dominant ideological thought of the era—that the government could not infringe upon certain natural rights.[412] Even with the colonial protest, the quartering acts continued. This increased the tension between colonists and the British government, as Judge Kaufman explained in *Engblom II*:

> The Quartering Act of 1774, one of the "Intolerable Acts" the British Parliament enacted as tensions heightened following the Boston Tea Party, authorized much more intrusive intervention. Apparently, before the Revolution, the City of Boston provided barracks for British troops only on an island in Boston Harbor from which the soldiers could not move quickly to the City in the event of an uprising or disturbance by the colonists. To remedy this strategic disadvantage, the Quartering Act of 1774 authorized the British commanders to quarter their troops wherever necessary, including the homes of the colonists.[413]

The Quartering Act "fed ancient fears of billeting a standing army among civilians."[414] The gradual colonial resistance came to a climax with the signing of the Declaration of Independence. The resistance directly protested the British military presence by stating "the King 'has kept among us, in times of peace, Standing Armies without the consent of our legislatures.'"[415] Subsequently, the Third Amendment formed from the English Bill of Rights, the Virginia Convention Bill of Rights, the Maryland Majority, the state of New Hampshire, the New York Bill of Rights, and the North Carolina Bill of

411. BILL OF RIGHTS AND BEYOND, *supra* note 402, at 28.

412. *See* David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee*, 16 S. ILL. U. L.J. 313, 326 (1992); *see also* Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 599 (1991) (citing 5 THE FOUNDERS' CONSTITUTION 395-99 (Philip B. Kurland & Ralph Lerner eds., 1987)).

413. *Engblom II*, 677 F.2d at 967 (Kaufman, J., concurring in part and dissenting in part); *see also* BILL OF RIGHTS AND BEYOND, *supra* note 402, at 28 ("The Quartering Act authorized colonial governors to open uninhabited buildings for the use of soldiers whenever they saw fit."); William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 25 (1992) (noting that one of the Intolerable Acts authorized the quartering of soldiers in private homes of the colonists).

414. BILL OF RIGHTS AND BEYOND, *supra* note 402, at 28.

415. *Engblom II*, 677 F.2d at 967 (Kaufman, J., concurring in part and dissenting in part).

Rights.[416] "[A]fter casting off the yoke of colonial rule," the Third Amendment passed as part of the Bill of Rights.[417] Similar provisions were passed in many state constitutions and exist to this day alongside the Third Amendment.[418]

416. LEVY, *supra* note 407, at 264. It is not this author's belief that prior drafts of the Third Amendment, or any amendment for that matter, shed authoritative light on interpreting the amendment itself. *See supra* note 55 and accompanying text. However, for historical purposes only, a progression of the amendment's text follows: "That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct." LEVY, *supra* note 407, at 277. Next, James Madison proposed, "No Soldiers shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law." LEVY, *supra* note 407, at 282. The amendment reported by the Select Committee stated, "No soldiers 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." LEVY, *supra* note 407, at 285. The House of Representatives passed the amendment as, "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." *See* LEVY, *supra* note 407, at 288. The amendment was passed in the Senate in almost the exact same form. The only change was a comma added after the word "house." LEVY, *supra* note 407, at 292.

417. *See Engblom II*, 677 F.2d at 966 (Kaufman, J., concurring in part and dissenting in part).

418. Most state constitutions have a provision mirroring the Third Amendment. Specifically, twenty-four state constitutions have provisions paralleling the Third Amendment. *See* ALA. CONST. art. I, § 28; CONN. CONST. art. I, § 17; DEL. CONST. art. I, § 18; HAW. CONST. art. I, § 18; ILL. CONST. art. I, § 21; IND. CONST. art. I, § 34; IOWA CONST. art. I, § 15; KAN. CONST. § 14; ME. CONST. art. I, § 18; MD. CONST. art. 31; MASS. CONST. pt. I, art. XXVII, § 28; MICH. CONST. art. I, § 8; NEB. CONST. art. I, § 18; NEV. CONST. art. I, § 12; N.H. CONST. pt. I, art. 27; N.J. CONST. art. I, ¶ 16; N.Y. CONST. art. II, § 7; N.C. CONST. art. I, § 31; OHIO. CONST. art. I, § 13; OR. CONST. art. I, § 28; PA. CONST. art I, § 23; R.I. CONST. art. I, § 19; TENN. CONST. art. I, § 27; TEX. CONST. art. I, § 25. Two state constitutions combine language paralleling the Third Amendment's text with language preventing a standing army in peacetime. *See* ARIZ. CONST. art. II, § 27; WASH. CONST. art. I, § 31. Ten state constitutions combine language paralleling the Third Amendment's text with language placing military power subordinate to civil power. *See* ALASKA CONST. art. I, § 20; COLO. CONST. art. II, § 22; IDAHO CONST. art. I, § 12; MO. CONST. art. I, § 24; MONT. CONST. art. II, § 32; N.M. CONST. art. II, § 9; OKLA. CONST. art. II, § 14; S.D. CONST. art. VI, § 16; UTAH CONST. art. I, § 20; WYO. CONST. art. I, § 25. Four state constitutions combine language paralleling the Third Amendment's text with language preventing a standing army in peacetime and language placing military power subordinate to civil power. *See* ARK. CONST. art. II, § 27; CAL. CONST. art. I, § 5; KY. CONST. § 22; N.D. CONST. art. I, § 19. The South Carolina Constitution combines language paralleling the Third Amendment's text with language preventing a standing army in peacetime, language placing military power subordinate to civil power and language paralleling the Second Amendment. *See* S.C. CONST. art. I, § 20; *see also* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed"). The West Virginia Constitution combines language paralleling the Third Amendment's text with language preventing a standing army in peacetime, language placing military power subordinate to civil power and language preventing civilians from being tried or punished in military court. *See* W. VA. CONST. art. III, § 12. Eight states, Florida, Georgia, Louisiana, Minnesota, Mississippi,

The historical progression of what we now consider Third Amendment fears forms a principle of citizen dissolution of being compelled to keep and support soldiers in their homes. The historical evolution of this citizen statement has been remarkably clear and unwavering over centuries. Moreover, the sentiment never appears to focus on the specific type of soldier or army personnel. While the amendment grew largely out of fear of undue influence by the military, a responsible analysis of the amendment must not stop there.[419] One of the Third Amendment's purposes was to provide civilian control of the military, however, John Hart Ely noted that "there is obviously something else at stake, a desire to protect the privacy of the home from prying government eyes, to say nothing of the annoyance of uninvited guests. Both process and value seem to be involved here."[420] History shows the complaint causing citizen fear, angst and protest is the compelled quartering of government military agents, not the specific type of agent quartered. If the type of agent quartered was the key principle, and not the action of compelled quartering, then the historical record would not emphasize why traditional soldiers, as opposed to the action of the compelled quartering, drew the citizenry's fury. The long record seems devoid of that emphasis, which indicates the colonial protest and subsequent constitutional protection is against the compelled quartering of government military agents in the citizenry's houses. Because the military was much more rudimentary in nature during the colonial period, and because there were no sophisticated Executive Branch agencies like the CIA or FBI present, the citizenry of that time could not launch protests against such agencies. CIA and FBI agents, many of whom perform multiple military duties easily matching the ordinary meaning of soldier, are the type of prying government eyes and uninvited guests the Third Amendment was designed to protect against. Thus, to not apply the Third Amendment's prohibitions against CIA or FBI agents would be to ignore the amendment's historical context, outlook and purpose.

This historical progression of resisting British quartering of soldiers in houses shows a consistent aversion toward quartering of soldiers. The quartering was part of a series of actions that pushed the colonies to the breaking point, thereby leading to the Declaration of Independence and eventually the Constitution and the Bill of Rights, including the Third Amendment. To advance a Third Amendment jurisprudence that would almost eradicate the amendment's protections would fly in the face of the historical developments that led to the colonists' break from British rule and the subsequent formation of the United States. A current constitutional

Vermont, Virginia, and Wisconsin do not have a constitutional provision paralleling the Third Amendment.

419. JOHN HART ELY, DEMOCRACY AND DISTRUST 95 (1980).

420. *Id.*

interpretation cutting across the reasoning behind the development of a particular right and the overall scheme of the Constitution invalidates the right itself. Such interpretation destroys a layer of the Constitution through inappropriate means. If the people decide to amend or repeal the Third Amendment, even in light of its place in historical order, it would be permissible.[421] Without that step, however, a historical understanding of the Third Amendment shows a strong citizen rebuttal toward compelled quartering of soldiers.

History shows the colonists resisted the *action* of having a government military agent quartered in their home without their consent. The colonists objected to providing shelter and food to these soldiers. The emphasis was not on the specific type of government military agent the colonists despised; rather, the colonists despised the duty of providing shelter and food to these soldiers as well as being forced to shelter unwanted, and potentially prying, government eyes. If the British required compelled quartering of other government military agents in houses wherein the owner would have to provide free shelter and food, the colonial resistance probably would have been the same.

Finally, as shown above, many CIA and FBI agents perform numerous military operations making them soldiers. These agents perform activities very similar to that of a traditional soldier from the colonial era.[422] Thus, even if the type of government military agent was dispositive in Third Amendment interpretation, a CIA or FBI agent quartered in a house to advance these military duties while combating a terrorist, Iraqi, or North Korean enemy would meet the criteria of a soldier from a historical lens. CIA or FBI agents only meeting the broadest ordinary meanings of soldier, and not the more traditional meanings, would still be the type of prying and powerful government agent the broad historical prohibition opposed. Accordingly, either type of CIA or FBI agent would be subjected to Third Amendment standards.

B. The Debate Regarding Standing Armies

Not only did the quartering of soldiers draw ire from citizens through British and colonial history, the issue of whether there should even be a standing army, or a standing army in peacetime, was a poignant point of debate during the forming of the United States and the enactment of the Constitution.[423] A review of the historical sentiment in favor and against

421. *See* U.S. CONST. art. V.

422. *Id.*

423. As stated earlier, debates and drafting history are irrelevant when analyzing a law. However, exploring the historical circumstances and general philosophical backdrop to a particular issue is an appropriate area to explore in understanding a law.

standing armies shows the citizenry's sentiment toward a military presence. It sheds light on how the Third Amendment should be interpreted. This does not mean that this author believes that original intent now matters. The Constitution speaks to standing armies. The language controls that provision—its drafters' intentions are irrelevant when interpreting its meaning.[424] However, to understand the historical understanding and philosophical backdrop of the Third Amendment, historical commentary and documents on how the citizenry felt about governmental military power in peacetime provides persuasive material on how the Third Amendment should be interpreted in order for it to correlate with the Constitution's other provisions dealing with military power and civil liberties. In other words, if history shows that the citizenry was skeptical about allowing a standing army in peacetime because of its threat to civil liberties, then the Third Amendment's similar provisions for protecting civil liberties against the soldiery should align with that sentiment, not contradict it.

There was a significant citizen sentiment against the mere presence of standing armies, particularly in peacetime. The citizen aversion to the British Military presence was eloquently expressed in the Declaration of Independence, which contended, "the King 'has kept among us, in times of peace, Standing Armies without the consent of our legislatures.'"[425] Anti-federalists felt that the federal legislature's power to raise and support armies during peacetime and wartime, and its power to control the militia, consolidated government and destroyed liberty.[426] Six of the original states expressed serious concern about standing armies. The Pennsylvania and North Carolina constitutions stated, "as standing armies in time of peace are *dangerous to liberty*, *they ought not to be kept up*."[427] New Hampshire, Massachusetts, Delaware, and Maryland's state constitutions provided, "standing armies are dangerous to liberty, and ought not to be raised or kept up *without the consent of the legislature*."[428] These statements focused on the standing army's *threat to liberty*. The soldiers' power fostered fear in some of the citizenry. However, that does not mean soldiers, in and of themselves,

424. Therefore, this article will not consider commentary made during the debate regarding standing armies at the Philadelphia Convention. That debate is accounted for in the text of Article One, Section Eight of the Constitution. *See* U.S. CONST. art. I, § 8.

425. Engblom v. Carey, 677 F.2d 957, 967 (2d Cir. 1982) (*Engblom II*) (Kaufman, J., concurring in part and dissenting in part). Great Britain criticized standing armies as well, before the American Revolution, by stating "the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law." THE FEDERALIST NO. 26 (Alexander Hamilton) (emphasis in original). Thus, one may say that the American people received "a hereditary impression of [the] danger to liberty from [the presence of] standing armies" in peacetime. *Id*.

426. THE ANTI-FEDERALIST PAPERS, "Brutus," Essay I.

427. THE FEDERALIST NO. 24 (Alexander Hamilton) (emphasis added).

428. *Id*. (emphasis in original).

were the citizenry's concern. It was what the soldiers could do, namely destroy liberty, that concerned them. If another government military agent had similar power, the citizen fear would be the same. Government agents, in today's world, capable of the potential destruction of liberty must be equally scrutinized alongside the traditional army. CIA and FBI agents, with powerful military, intelligence, and investigative authority, would be the type of liberty-threatening governmental presence the citizenry would have resisted. Applying the same scrutiny to them as the colonists did to the standing army would ensure the citizen voice opposing threats to liberty will be heard as loudly as it was during the Founding era and before.

Supporters of a standing army advocated a limited role out of fear of governmental oppression of rights. As the essay of "Brutus" described:

> As standing armies in time of peace are dangerous to liberty, and have often been the means of overturning the best constitutions of government, *no standing army, or troops of any description whatsoever*, shall be raised or kept up by the legislature, except so many as shall be necessary for guards to the arsenals of the United States, or for garrisons to such posts on the frontiers, as it shall be deemed absolutely necessary to hold, to secure the inhabitants, and facilitate the trade with the Indians: unless when the United States are threatened with an attack or invasion from some foreign power, in which case the legislature shall be authorised to raise an army to be prepared to repel the attack; provided that no troops whatsoever shall be raised in time of peace, without the assent of two thirds of the members, composing both houses of the legislature.[429]

This anti-federalist stance against "troops of any description whatsoever,"[430] and a requirement that a two-thirds majority assent to raising a standing army in peacetime, exemplifies the broad dismay and distrust for government military forces and their agents.[431] Because sophisticated intelligence and investigative executive branch agencies such as the FBI and CIA were not present at that time, the anti-federalist sentiment against any troops and the federalists' cautionary support of the military verifies a sizeable citizen rebuttal existed to a wide range of government military entities, not just traditional soldiers.

On any scale, James Madison, from a federalist perspective, warned that a standing military was "an object of laudable circumspection and precaution."[432] He argued the nation "will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be

429. THE ANTI-FEDERALIST PAPERS, "Brutus," Essay X.

430. *Id.*

431. *Id.*

432. THE FEDERALIST NO. 41 (James Madison).

inauspicious to its liberties."[433] Further cautionary federalist advocacy for the standing army came from Alexander Hamilton, who stated:

> [T]he people are in no danger of being broken to military subordination. The laws are not accustomed to relaxations, in favor of military exigencies—the civil state remains in full vigor, neither corrupted nor confounded with the principles or propensities of the other state. The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery: They view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances, may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.[434]

The Constitution eventually codified Congress's ability to raise a standing army, subject to many limitations, presumably to appease those anti-federalists opposed to a standing army and following a cautionary federalist advocacy paradigm of such forces Hamilton and others advanced. Specifically, the Constitution provides:

> Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . . To provide and maintain a Navy; . . . to make Rules for the Government and Regulation of the land and naval Forces; . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[435]

Hamilton believed the clause forbidding "the appropriation of money for the support of an army for any longer period than two years [is] a precaution . . . [that] will appear to be a great and real security against the keeping up of troops without evident necessity.[436] Accordingly, while the federalist position appeared to prevail in the Constitution's textual grant to Congress to undertake many war-making and war-authorizing powers, even those who supported Congress's powers in that regard cautioned against the power of a standing army.

The issues of whether a standing army should exist, and if so, if it should exist during peacetime, are not exactly on point with the issue of when and

433. *Id.*

434. THE FEDERALIST NO. 8 (Alexander Hamilton).

435. U.S. CONST. art. I, § 8, cls. 1, 12-16.

436. THE FEDERALIST NO. 24 (Alexander Hamilton).

how compelled quartering of soldiers can take place. Those issues, however, do shed light on how to handle constitutional issues when governmental military powers and citizen rights intersect. If there was a serious intellectual debate on whether or not a standing army should even exist, then there were serious concerns about the powers of that army. With proponents of a standing army limiting its power and cautioning against its might, there appears to be a strong sentiment against military powers and an equally strong sentiment in favor of civil rights. If such sentiments existed, it would seem inconsistent with the ideals that built the United States to then advance a Third Amendment jurisprudence that would substantially heighten the powers of the military over civil rights. The level of civil skepticism in abdicating power to the military would, thus, promote similar civil skepticism against allowing a member of that military to be quartered in a citizen's house without the citizen's consent. Consequently, the Third Amendment must be viewed in accord with the relevant historical vision of how the citizenry and a standing army would interact. To that end, a broad reading protecting citizen rights and a narrow reading advancing government power in the Third Amendment would be consistent with the historical underpinnings of the national debate surrounding the military's power. A historically sufficient reading of soldier would encompass CIA and FBI agents as soldiers, while limiting the compelled quartering of them to particular circumstances—those in which Congress formally declares war, and a law is enacted describing how quartering may take place.

IV. THIRD AMENDMENT JURISPRUDENCE

Engblom v. Carey, the one case realistically construing the Third Amendment, viewed it as protecting civil rights and deterring government infringement upon such rights.[437] In that case, striking correction officers were evicted from their on-site residences in order to quarter National Guardsmen.[438] The New York Governor "activated the New York National Guard . . . to perform security-related functions at state prison facilities" when the statewide correction officers' strike took place.[439] The court quickly announced the death of Third Amendment legal analysis by stating, "[a]side from the lower court's opinion in this case[,] there are no reported opinions involving the literal application of the Third Amendment."[440] The court

437. *See* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (*Engblom II*).

438. *Id.* at 958-59.

439. *See* Engblom v. Carey, 522 F. Supp. 57, 59 (S.D.N.Y. 1981) (*Engblom I*), *rev'd on other grounds*, 677 F.2d 957 (1982).

440. *Engblom II*, 677 F.2d at 959 n.1 (citation omitted).

appropriately eschewed a few prior opinions as "far-fetched, metaphorical applications" of the Third Amendment.[441]

The issue in *Engblom II* turned on whether the on-site residences of the corrections officers were "houses" under the Third Amendment. Therefore, the opinion did not address the crucial components of this article—what are "soldiers," what is "time of peace" and what is "time of war." However, because the court reversed a grant of summary judgment that dismissed the striking correction officers' Third Amendment claim, the court had to at least minimally address those issues in order to determine a Third Amendment claim could proceed. Moreover, the court's analysis, while focused on the home aspect of the Third Amendment, established a context in which the amendment's terms are to be interpreted and applied. Thus, by analogy, the manner in which "home" was analyzed should be applied to the manner in which "soldier," "time of peace," and "time of war" should be analyzed.

The court glanced at the meaning of soldier when it concluded that it "agree[d] with the district court's conclusion that the National Guardsmen are 'Soldiers' within the meaning of the Third Amendment."[442] The District Court provided little analysis when it stated "the [National] Guard is the modern day successor to the Militia reserved to the states by Art. I, [§] 8, cls. 15, 16 of the Constitution, and members of that organization must be considered 'soldiers.'"[443] A more in-depth analysis might not have been necessary as National Guardsmen appear to be enlisted military personnel similar to that of traditional soldiers.

In this respect, the court's analysis of what house and owner mean are more relevant than what it concluded soldier to mean with respect to this article. House and owner do not have a fixed meaning in relation to the correction officers who resided in on-site facilities. Thus, the court, similar to this article, had to apply a somewhat unique factual scenario to the Third Amendment's text. *Engblom II* had to determine whether or not a correction officer who lived on an on-site facility was the owner of a house.[444] This article determines whether a CIA or FBI agent who is quartered in a house is a soldier, and when and how a War On Terrorism, Iraq, or North Korea constitutes a time of war.

441. *Id.* (citing Sec. Investor Prot. Corp. v. Executives Sec. Corp., 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977) (concluding that a subpoena does not violate the Third Amendment); Jones v. Sec'y of Def., 346 F. Supp. 97, 100 (D. Minn. 1972) (concluding that army reservists' duty to work a parade did not create an incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers on the people in violation of the Third Amendment)).

442. *Engblom II*, 677 F.2d. at 961.

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

444. *Engblom II*, 677 F.2d at 959.

Engblom II follows a "text-starting" and "broad-finishing" method in determining that correction officers who lived in facility-owned residences could be owners of houses within the context of the Third Amendment. The court initially noted that the definition of house, "a structure intended for human habitation[,] . . . readily encompasses the various modern forms of dwelling."[445] The court rejected a "rigid reading of the word 'Owner' in the Third Amendment."[446] It stated:

> [It] 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 tenant, or his guest, or even a hotel visitor, would have a legitimate privacy interest protected against unreasonable searches and seizures.[447]

Accordingly, the court determined that "property-based privacy interests protected by the Third Amendment are not limited . . . to those arising out of fee simple ownership but extend to those recognized and permitted by society [because they are] founded on lawful occupation or possession with a legal right to exclude others."[448]

Applying the *Engblom II* court's reasoning to the issue in this article, if the Third Amendment protects against compelled quartering of soldiers, which includes National Guardsmen, it protects against the quartering of CIA or FBI agents. *Engblom II* commands a broad reading of the Third Amendment's terms.[449] While National Guardsmen might, on the surface, share more similarities with traditional soldiers than with CIA or FBI agents, the similarities between CIA or FBI agents and traditional soldiers in reference to their duties against enemy military operatives or terrorists are very similar. CIA or FBI agents quartered in a house would be acting as arms of the federal government, just as enlisted soldiers represent the federal government. Their purpose or duty would be to protect American citizens against enemy military attacks. The only real distinction would appear to be that certain CIA or FBI agents who do not perform military-oriented duties, could be quartered. This distinction, however, is not controlling in a Third Amendment context. The text and history show a broad, enveloping protection from government intrusion. CIA and FBI agents would be subjected to Third Amendment

445. *Id.* at 962 n.11.

446. *Id*. at 962.

447. *Id*. (citing Jones v. United States, 362 U.S. 257 (1960) (concluding a person in friend's apartment where narcotics were found was subjected to an unconstitutional search)); United States v. Agapito, 620 F.2d 324, 333-35 (2d Cir. 1980) (concluding that hotel room occupants enjoy Fourth Amendment protection); United States v. Bell, 488 F. Supp. 371 (D.D.C. 1980) (concluding an apartment tenant enjoys Fourth Amendment protection).

448. *Id.* at 962.

449. *Engblom II*, 677 F.2d at 962.

prohibitions even if their duties were less military-oriented. *Engblom II's* expansive reading of owner creates precedent requiring an expansive reading of soldier. Consequently, CIA and FBI agents, both powerful and skilled Executive Branch agents, just like traditional soldiers, would meet the meaning of soldier under the Third Amendment jurisprudence *Engblom II* established.

We must also remember that the Third Amendment does not enunciate a prohibition against compelled quartering of soldiers in houses based upon the soldiers' duty. Instead, there exists a blanket prohibition. Regardless of whether reconnaissance, combat, or mere residence is taking place because of the quartering, a non-consenting house owner during peacetime may refuse to allow a soldier to be quartered in his house.

Finally, *Engblom II's* lack of analysis of "soldier," "time of peace," and "time of war" helped evaluate those terms. The court assumed peacetime existed because it allowed the Third Amendment claim to proceed when the National Guard occupied the homes of on-site state correction officers even though the quartering was not prescribed through law. Nowhere in the opinion does the court discuss whether or not peacetime or wartime is present, if Congress declared war, or if Congress or the state legislature prescribed a manner by law regarding how soldiers were to be quartered. Obviously, if wartime were present, a manner prescribed by law to quarter soldiers would trump an owner's disapproval of soldiers staying in his home. The absence of this discussion regarding peace or war infers that a time of peace existed. A factual question existed as to whether a soldier was quartered in a home without consent of its owner. Thus, a Third Amendment claim survived because in time of peace, an owner must consent to the quartering of a soldier in his home. Further discussion would be necessary if war existed, at least to mention that no manner prescribed by law existed to authorize the quartering of soldiers without an owner's consent.

As such, it appears the court did not believe the Cold War at that time between the United States and the Soviet Union, constituted a war. Presumably, the court felt this way because either the Cold War did not meet the ordinary meaning of war, or Congress failed to declare or authorize war against the Soviet Union. The Cold War was "a state of . . . rivalry existing between the Soviet and American blocs of nations following World War II."[450] This rivalry, or any cold war rivalry for that matter, is "a state of political tension and military rivalry between nations, *stopping short of actual full-scale war*."[451] This is important concerning the potential for compelling quartering of soldiers during the War on Terrorism. First, as this article showed previously, the War on Terrorism is not between two nations, but rather between a nation (United States) and anyone committing, supporting, or aiding

450. AMERICAN HERITAGE, *supra* note 62, at 260.

451. *Id.* (emphasis added).

terrorism.[452] Therefore it is not a cold war. Second, even if a War on Terrorism somehow constitutes a cold war, *Engblom II's* silent rejection of the Cold War as a time of war creates precedent that public-policy oriented conflicts do not constitute a time of war under the Third Amendment. This follows the meaning of a cold war as a conflict not reaching a full-scale war. Finally, the War against Iraq is much more than a tense, political conflict. It is a military conflict between two nations, wherein major combat operations took place for more than a month. Thousands of people have died.[453] A possible military conflict against North Korea, involving numerous troops and weapons, would constitute much more than political tension and military rivalry as well. *Englom II*'s Cold War silence would not guide us on the status of that potential conflict.

V. CONSTITUTIONAL PRINCIPLES ANALOGOUS TO THE THIRD AMENDMENT

The Fourth Amendment and the right to privacy parallel the Third Amendment's protection against compelled quartering of soldiers in peacetime. The Fourth Amendment's prohibition against unreasonable searches and seizures[454] establishes a strong protection of citizen's homes from such searches and broadly interprets the type of government agents prohibited from conducting unreasonable searches.[455] Thus, Fourth Amendment principles support a vehement protection of the home from government intrusion in a Third Amendment context and cast a wide net against the type of persons attempting to be quartered in homes. The right to privacy protects citizens' fundamental and personal rights from government intrusion. As the Third Amendment helped form this protection of privacy in homes from government intrusion, it should follow that the privacy principles and guidelines are contained within the broader right to privacy.

A. Fourth Amendment Jurisprudence

The Fourth Amendment protects against unreasonable searches and seizures. It provides:

> 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.[456]

452. *See supra* note 149.

453. NPR, *War in Iraq: Caualites of Conflict*, *at* http://www.npr.org/news/specials/iraq2003/pow.html (last visited Nov. 4, 2003). Seven to nine thousand Iraqi civilians have also died. *Id*.

454. U.S. CONST. amend. IV.

455. *See id*.

456. *Id*.

The Fourth Amendment, contrary to the Third Amendment, triggered a plethora of interpretive materials. These materials shed light on how constitutional protections against government intrusion upon such rights, particularly upon those protected rights within the home, are construed. The Fourth Amendment's text and subsequent case law announce a strong protection of the home from government intrusion. The amendment's search and seizure prohibitions are at its zenith when government action occurs within the home.[457] The Fourth Amendment's protections only apply to searches by government agents.[458] However, Fourth Amendment jurisprudence broadly defines government agents,[459] thereby protecting citizens from an array of persons conducting unreasonable searches.

1. The Protection of the Home

"'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"[460] "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment."[461] Therefore, the essence of the Fourth Amendment is the concept of appreciating the "sanctity of a person's house."[462] "Without question, the home is accorded the full range of Fourth Amendment protections."[463] Thus, one's home "has ordinarily [been] afforded the most stringent Fourth Amendment protection."[464] The home is the clearest example of an area where citizens have a reasonable expectation of privacy.[465] Consequently, "one's reasonable expectation of privacy in [his] home is entitled to unique sensitivit[ies] from federal courts."[466] One sensibility is that

457. Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970).

458. *See* Sibron v. New York, 392 U.S. 40, 65-66 (1968).

459. *Id.*

460. Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972)). *See also* United States v. Daly, 937 F. Supp. 401, 407 (E.D. Pa. 1996); Walls v. Giuliani, 916 F. Supp. 214, 220-21 (E.D.N.Y. 1996).

461. *Dorman*, 435 F.2d at 389.

462. State v. Diaz, 607 A.2d 439, 443 (Conn. App. Ct. 1992) (citing Warden v. Hayden, 387 U.S. 294 (1967); State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Guertin, 461 A.2d 963 (Conn. 1983)).

463. Lewis v. United States, 385 U.S. 206, 211 (1966) (citing Harris v. United States, 331 U.S. 145, 151 n.15 (1947); Amos v. United States, 255 U.S. 313 (1921)).

464. United States v. Bellina, 665 F.2d 1335, 1340 (4th Cir. 1981) (citing United States v. Martinez-Fuerte, 428 U.S 543, 561 (1976)). *See also* State v. Riggs, 400 S.E.2d 429, 435 (N.C. 1991) ("[A] private residence is the most highly protected of all places under the Fourth Amendment . . . .").

465. Ayeni v. CBS Inc., 848 F. Supp. 362, 366 (E.D.N.Y. 1994).

466. United States v. Reed, 572 F.2d 412, 422 (2d Cir. 1978). *See* State v. Platten, 594 P.2d 201, 205 (Kan. 1979) (citing *Martinez-Fuerte*, 428 U.S. 543). The Fourth Amendment applies against the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961). This author believes that the Fourth Amendment applies against the states, as well as the rest of

a warrantless search inside a home is presumed to be unconstitutional.[467] "The right of police officers to enter into a home . . . represents a serious governmental intrusion into one's privacy."[468] It was just that type of governmental intrusion that the Fourth Amendment was designed to restrict by the general requirement of a judicial determination of probable cause before a search or seizure could take place.[469] "When a citizen withdraws into the sanctuary of the home, a governmental intrusion into that sanctuary . . . requires a high level of justification."[470]

The Third and Fourth Amendment protections against government intrusion into the sanctity of the home should compliment, not contradict each other. The Third Amendment protects against compelled quartering of government soldiers in a home,[471] while the Fourth Amendment prevents unreasonable searches and seizures by government officials in a home.[472] The Fourth Amendment and the Third Amendment are synonymous in this context. Because the Third Amendment follows a similar principle as the Fourth Amendment, its interpretation in this respect should follow Fourth Amendment interpretation. Advancing a Third Amendment methodology in accordance with the Fourth Amendment fosters legal consistency requiring homes to be constantly given great protection against government intrusion. To allow the Fourth Amendment to provide the most stringent protections against government entry into the home while leaving the Third Amendment as an open floodgate for compelled quartering of soldiers would create an inconsistent legal principle in two successive constitutional amendments that focus on similar rights. This type of topsy-turvy legal paradigm cannot stand. It would only serve to establish an unbalanced system of constitutional rights wherein a government soldier could be quartered in a home at the mere sniff of an armed conflict, while a search and/or seizure of that very home could not occur absent a warrant, supported by probable cause, and signed by a neutral

the Bill of Rights, through the Privileges and Immunities Clause of the Fourteenth Amendment. Schmidt, *supra* note 24, at 177-78. *See also* U.S. CONST. amend. XIV; Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring); Amar, *supra* note 27, at 123-24; Sanders, *supra* note 199, at 777; Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219, 223 (1992).

467. Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 795 (N.D. Ill. 1994) (citing Payton v. New York, 445 U.S. 573, 586 (1980)); *see also* People v. Hassan, 624 N.E.2d 1330, 1337 (Ill. App. Ct. 1993) (concluding that any search or seizure within a home without a warrant is considered presumptively unreasonable under the Fourth Amendment).

468. Commonwealth v. Forde, 329 N.E.2d 717, 722 (Mass. 1975).

469. *Id*.

470. Baith v. State, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991); *see also* Silverman v. United States, 365 U.S. 505, 511 (1961) (concluding that the Fourth Amendment's core is the right to retreat into one's own home and be free from unreasonable governmental intrusion).

471. U.S. CONST. amend. III.

472. U.S. CONST. amend. IV.

magistrate (unless one of the narrow exceptions to the warrant requirement applied).

This notion also follows *Engblom II*'s lead when it concluded an apartment tenant must be considered an owner under the Third Amendment. To hold otherwise would create a constitutional inconsistency wherein an apartment tenant would be denied a privacy right against the compelled quartering of troops, while that same tenant, his guest or even a hotel visitor, would have a legitimate privacy interest protected against unreasonable searches and seizures.[473] If the home is to be protected, it must be protected in its entirety. If a person's house is truly his castle,[474] its sanctity cannot be upheld in one context if it is eradicated in another.

2. The Broad Meaning of Government Agent

Fourth Amendment jurisprudence also provides guidance on how to interpret the term soldier in the Third Amendment. Fourth Amendment protections were "designed to protect the citizenry from abuse of power by the sovereign."[475] The amendment's protections have been broadly interpreted to protect against "unreasonable intrusions on the part of all government agents."[476] The amendment applies to governmental searches "whether or not the 'police' conduct the search."[477] Therefore, the Fourth Amendment "applies with equal force to executive, legislative, and judicial action."[478] The amendment's applicability has extended to conservation officers,[479] fire inspectors,[480] firefighters,[481] a uniformed and armed city housing authority patrolman with authority to enforce penal statutes and regulations,[482] railroad policeman with the power of arrest,[483] transit officials,[484] public school

473. Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982) (*Engblom II*).

474. United States v. Reed, 572 F.2d 412, 422 (2d Cir. 1978).

475. United States v. Williams, 527 F. Supp. 859, 862 (S.D.N.Y. 1981); *see* Warden v. Hayden, 387 U.S. 294, 301 (1967); Silverman v. United States, 365 U.S. 505, 511 (1961); Boyd v. United States, 116 U.S. 616, 630 (1886) (concluding that the Fourth Amendment is intended to protect the sanctity of the home and the privacies of life).

476. Sibron v. New York, 392 U.S. 40, 65-66 (1968).

477. Smyth v. Lubbers, 398 F. Supp. 777, 787 (W.D. Mich. 1975).

478. Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953); *see also* Swann v. City of Dallas, 922 F. Supp. 1184 (N.D. Tex. 1996) (concluding that Fourth Amendment protection might extend to health, fire or building inspectors whose purposes may be to locate and abate suspected public nuisance or to perform routine periodic inspections).

479. Richard v. Indiana, 482 N.E.2d 282, 285 (Ind. Ct. App. 1985).

480. Schultz v. Alaska, 593 P.2d 640, 642 (Alaska 1979).

481. State of Washington v. Bell, 737 P.2d 254, 257 (Wash. 1987).

482. Dyas v. Super. Ct. of L.A. County, 522 P.2d 674, 680 (Cal. 1974).

483. United States v. Belcher, 448 F.2d 494, 497 (7th Cir. 1971).

484. Burka v. N.Y. City Transit Auth., 739 F. Supp. 814, 819 (S.D.N.Y. 1990).

officials,[485] informants,[486] off-duty police officers acting as security guards,[487] off-duty police officers in general,[488] airport security personnel,[489] and hotel employees.[490]

More importantly, the specific person or persons conducting a search or seizure is not determinative of whether the Fourth Amendment applies. Instead, the amendment "applies to a search whenever the government participates in any significant way in [the] total course of conduct."[491] Therefore, the actions of the person or persons involved in the search, as opposed to the type of person effectuating the action, are paramount. The facts of each search and seizure are the crucial component of the analysis. Different persons can be government agents at different times for Fourth Amendment purposes. Their behavior surrounding the search and seizure shows whether the search amounted to one performed on or behalf of the government. Thus, "courts have engaged in a two prong analysis of 'allegedly' private searches, . . . separately analyzing the search aspect apart from the actual seizure in order to determine whether there was sufficient governmental participation in either aspect to require [F]ourth [A]mendment protection."[492]

The Fourth Amendment's broad interpretation of government agents provides protection against searches and seizures that would otherwise violate the evidentiary and procedural standards set forth in the amendment. Thus, the core component within the Fourth Amendment is the citizenry's right to be free from these government actions. Allowing the government to find

485. *In re* Doe VIII v. New Mexico, 540 P.2d 827, 831 (N.M. Ct. App. 1975); Commonwealth v. Carey, 554 N.E.2d 1199, 1201 (Mass. 1990) (concluding that school administrators are government actors and that Fourth Amendment strictures apply to their conduct); State of Arizona v. Serna, 860 P.2d 1320, 1323 (Ariz. Ct. App. 1993) (concluding that public high school security personnel were state actors).

486. OKC Corp. v. Williams, 461 F. Supp. 540, 551 (N.D. Tex. 1978).

487. United States v. Dansberry, 500 F. Supp. 140, 145 (N.D. Ill. 1980) (concluding "where private security personnel assert the power of the state to make an arrest or to detain another person for transfer to custody of the state" the Fourth Amendment is applicable).

488. Smith v. State, 623 So. 2d 382, 385 (Ala. Crim. App. 1993) (concluding that off-duty police officer, acting like an on-duty police officer, had to comply with the Fourth Amendment).

489. United States v. Doe, 61 F.3d 107, 109 n.3 (1st Cir. 1995) (concluding that non-government personnel at airport security checkpoints implicates Fourth Amendment protections because of extensive administrative directives by the Federal Aeronautics Administration); United States v. Vigil, 989 F.2d 337, 339 (9th Cir. 1993) (concluding that a security guard's operation of a metal detector at an airport was state action subject to Fourth Amendment protections).

490. United States v. Reed, 15 F.3d 928, 932 (9th Cir. 1994) (concluding that a hotel employee's warrantless search of room was government action because the police acted as lookouts for him and his motivation for the search was to gather proof of drug trafficking, rather than to ensure that hotel property was not damaged).

491. United States v. Davis, 482 F.2d 893, 897 (9th Cir. 1973).

492. United States v. Haes, 551 F.2d 767, 770 (8th Cir. 1977).

somebody else to do its dirty work in order to skirt the Fourth Amendment essentially eliminates Fourth Amendment protections. Therefore, a broad interpretation of government agents is required to ensure that the Fourth Amendment provides full protection against unreasonable searches and seizures.

Applying this methodology to the Third Amendment means that the protection against the compelled quartering of soldiers cannot be restricted to a narrow interpretation, such as a protection against only enlisted soldiers. A narrow view of soldier would allow the government to violate Third Amendment protections by simply disguising its compelled quartering activity under the title of another government employee, while still reaching its desired result of forcing the compelled quartering of a government agent in one's home. The Third Amendment should parallel the Fourth Amendment in order to create a consistent and ideologically similar framework in two consecutive constitutional amendments that provide similar protections.

To prevent the government from sidestepping Third Amendment protections, a narrow view of soldier must be eschewed for an expansive view of the term. Because the Fourth Amendment applies to all government agents in order to protect the citizenry from the abuse of the sovereign, the Third Amendment should follow an analogous analytical scheme. This is not to say that the Third Amendment applies against any government agent. That would essentially delete the term soldier in the amendment and replace it with government agent. Only the people, through their representatives, can alter a constitutional amendment.[493] The Fourth Amendment's text, which does not specifically state who cannot institute unreasonable searches and seizures,[494] allows for protection against any legislative, executive or judicial agents used to effectuate unconstitutional searches and seizures.[495] Because the Third Amendment's text refers to a protection against a soldier, then only a broad view of soldier can be applied. In this instance, CIA and FBI agents are Executive Branch employees with military, national security, intelligence or investigative duties that are sufficiently similar characteristics and powers to that of traditional soldiers. CIA and FBI agents specifically engaged in military, national security, and intelligence actions regarding terrorist, Iraqi, or North Korean foes meet a narrow definition of soldier as they are acting to defeat or defend against an enemy in a military-oriented confrontation. Those CIA and FBI agents completing different functions still maintain a power and responsibility flowing from the Executive Branch (under the supervision of the President). Those agents, acting to some degree in a law enforcement or investigative nature, provide the government with information, which, if

493. *See* U.S. CONST. art. V.

494. *See generally* U.S. CONST. amend. IV.

495. Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953).

inappropriately used, could lead to it unconstitutionally infringing upon the citizenry's rights. This type of governmental abuse, caused through Executive Branch agents, is exactly the type of abuse the Third Amendment protects against.

B. The Right to Privacy

The right to privacy is part of the unenumerated fundamental rights contained in the Due Process Clause of the Fourteenth Amendment. The Clause prevents any state from depriving any person of "life, liberty, or property, without due process of law."[496] Even though the Due Process Clause's text focuses only on the process by which life, liberty, or property may be taken, numerous cases interpreted the clause as containing substantive rights that are generally immune from state regulation.[497]

The right to privacy took full shape in *Griswold v. Connecticut*.[498] *Griswold* held a Connecticut statute forbidding the use or assistance in the use of contraceptive devices violated the right to privacy.[499] The Court found that "[v]arious guarantees [in the Constitution] create[d] zones of privacy," such as the right of association in the First Amendment, *the right to prohibit the quartering of soldiers in homes in times of peace in the Third Amendment*, the right to be free from unreasonable search and seizures under the Fourth Amendment, and the right against self-incrimination in the Fifth Amendment, and the Ninth Amendment.[500] Specifically, *Engblom II* concluded "[t]he Third Amendment was designed to assure a fundamental right to privacy."[501] If the Third Amendment was designed to assure privacy and helped to form the right to privacy, then Third Amendment jurisprudence must advance citizen privacy against government intrusion. To advance the contrary would limit privacy. Therefore, a legal jurisprudence broadly protecting the home follows an encompassing definition of soldier, and the requirement that only a formal

496. U.S. CONST. amend. XIV.

497. Bowers v. Hardwick, 478 U.S. 186, 191 (1986). The Fifth Amendment's Due Process Clause prevents the federal government from depriving any person of "life, liberty, or property without due process of law." U.S. CONST. amend. V. Despite the clause's procedural imperative, it has also been interpreted to have substantive content. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (determining that the Fifth Amendment Due Process Clause contains an equal protection component paralleling the Fourteenth Amendment's Equal Protection Clause).

498. 381 U.S. 479 (1965).

499. *See id*. at 485-86.

500. *Id*. at 484.

501. Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982) (*Engblom II*) (citing *Griswold*, 381 U.S. at 484; Poe v. Ullman, 367 U.S. 497, 552 (1961) (Douglas, J., dissenting); *Poe*, 367 U.S. at 549 (Harlan, J., dissenting)). S*ee also* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (concluding that the penumbras of the Bill of Rights (of which the Third Amendment is a part) helped form a zone of privacy allowing a woman to terminate a pregnancy)).

congressional declaration of war triggers wartime status under the Third Amendment.

A brief review of the Third Amendment shows it strongly favors citizen privacy over government action. It is rather straightforward. The privacy of the citizens in their houses is protected from government intrusion absent wartime situations and subsequent legislative action prescribing the manner in which that privacy may be infringed.[502] However, the Third Amendment's text does not codify narrow rules, but instead involves a broader principle.[503] The right not to have the government put its agents in one's home makes little sense without some presupposed right not to have the government regiment every detail of what one does in the home.[504] Therefore, the Third Amendment's purpose of protecting citizen privacy in their homes from compelled government quartering of soldiers fosters an indelible privacy-oriented right. To effectuate that principle from the Third Amendment's text means that a Third Amendment jurisprudence must advance that privacy principle.[505]

The historical understanding and structure of the Bill of Rights exemplifies that the Third Amendment is an integral part of a constitutional scheme protecting civil liberties and civil rights from government intrusion. The Third Amendment codifies a constitutional right that certainly invokes individual privacy protection. Therefore, because the Third Amendment is an integral protection in an overall web of liberty, it would take quite a lot to pierce it and remove its place within the Bill of Rights. While this author disagrees with the *Griswold* majority's substantive due process methodology, this author would still conclude the Third Amendment is a proper source to evaluate if a right to privacy exists, or if a privacy-oriented unenumerated right exists. Thus, the Third Amendment is considered an authoritative privacy protection against government action.

502. U.S. CONST. amend. III.

503. *See* Tribe, *supra* note 61, at 71.

504. *Id*.

505. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. It creates a right of privacy. *See* Schmidt, *supra* note 24, at 176; *see also Griswold*, 381 U.S. at 491-92 (Goldberg, J., concurring) (noting that the conclusion, that the right of privacy in marriage does not exist because it is not explicitly mentioned in the Constitution, violates and gives no meaning to the Ninth Amendment). Instead of evaluating the Third Amendment as part of the Bill Rights to determine if it helps form a right to privacy under the Due Process Clause of the Fourteenth Amendment, the Court should evaluate the Third Amendment to help determine if a unenumerated right to privacy existed under the Ninth Amendment. *See* Schmidt, *supra* note 24, at 217-18.

VI. CONCLUSION

Concluding that a CIA or FBI agent is a soldier and that the United States is not in wartime until a congressional declaration, complies with the Bill of Rights' civil rights protections and its affirmative rebuttal of government infringement upon such rights. The ordinary meaning of war and its legal meaning are quite different. The ordinary meaning of the word should be used to evaluate it in its ordinary construct, such as whether war exists under an insurance policy. On the other hand, the legal meaning of war, which defines a wartime state, applies when a legal, constitutional issue of when a time of war exists under the Third Amendment. This analysis provides a reasonable interpretation of the Third Amendment because the legal meaning of war in one constitutional text, the Third Amendment, parallels another legal meaning of it in another constitutional text, the Declare War Clause. This leads to the conclusion that a declared war alone alters the United States' legal status from peacetime to wartime.

American Presidents showed scrupulous respect for Congress's authority to authorize military action for a century after independence.[506] Presidents Jefferson and Adams deferred to Congress to authorize military action in early American conflicts. In the Twentieth Century, neither President Wilson in World War I nor President Roosevelt in World War II sent troops to engage in hostilities on foreign soil until Congress declared war.[507] Essentially, "only since 1950 have Presidents [asserted] . . . authority to commit the armed forces to full scale and sustained warfare."[508] This presidential assertion, however, does not constitute a constitutional amendment. Congress still maintains the power to declare war.[509] Only the people, through their representatives, can amend the Constitution.[510] Congress cannot divest itself of its powers and transfer them to the President.[511] A necessary component of separation of powers is that one branch cannot abdicate its power to another branch.[512] Even powers that are essentially dormant are not lost.[513] The history of the legal meaning of war shows that Congress, not the President, controls when the nation is in peacetime or wartime. As Congress controls all war-making and war-authorizing power and the President only commands forces when Congress authorizes their use, absent defense of a sudden attack or

506. Doe Pls.' Memorandum at 3 (citing ELY, *supra* note 154, at 147 n.54).
507. Berger, *supra* note 160, at 68.
508. *Id*. at 67.
509. U.S. CONST. art. I, § 8, cl. 11.
510. U.S. CONST. art. V.
511. Berger, *supra* note 160, at 68-69.
512. *Id*. at 68.
513. *Id*. at 68-69.

emergency,[514] Congress must also authorize when the nation is formally in a wartime state for Third Amendment purposes.

The Third Amendment is part of the Bill of Rights.[515] The Third Amendment's protections, like the rest of the Bill of Rights, ensure civil rights for the citizenry against government action. Elaborating the Third Amendment's textual meaning in light of the Bill of Rights' surrounding context, portrays an amendment advancing civil liberty within the home against government action.[516] The Third Amendment is in the midst of numerous similarly protected liberties within the Bill of Rights.[517] These provisions must be viewed as a shield for the citizenry against oppressive government conduct. To interpret the Third Amendment in a way in which the protections it contains are rendered null and void would contradict the Bill of Rights' civil rights scheme. Essentially, that view would create a Bill of Rights minus one. A Third Amendment reading of that kind would place the amendment out of step with the remainder of the Bill of Rights.

In the end, whether the Third Amendment is viewed as containing "concrete and specific dispositions"[518] or as a foundation for "a periphery within which a . . . more capacious elaboration of . . . rights and freedoms . . . would remain possible and . . . likely,"[519] it is a constitutional provision with a meaning that announces a presumption against the compelled government quartering of soldiers in a citizen's house. The "[C]onstitution is supposed to produce workable government, [therefore], . . . [r]esults that are particularly awkward, in the absence of evidence to the contrary, were probably not intended."[520] The erosion of an amendment within the Bill of Rights places a hole in the protective umbrella those amendments create. One hole in the

514. *See* Bickel, *supra* note 217, at 132.

515. The first ten amendments of the United States Constitution are commonly referred to as the Bill of Rights.

516. *See* Tribe, *supra* note 61, at 93.

517. The First Amendment protects free speech, freedom of the press, freedom of association, and freedom of religion. U.S. CONST. amend. I. The Second Amendment, at least to a degree, protects the right to bear arms. U.S. CONST. amend. II. The Fourth Amendment protects against unreasonable search and seizures. U.S. CONST. amend. IV. The Fifth Amendment requires an indictment or presentment for certain criminal charges, it protects against self-incrimination, prevents taking private property for public use without just compensation, prevents being twice subjected to the same offense, and guarantees due process of law. U.S. CONST. amend. V. The Sixth Amendment grants the right to counsel, the right to jury trials in criminal cases, the right to a speedy and public trial, and the right of the accused to confront witnesses. U.S. CONST. amend. VI. The Seventh Amendment allows for civil jury trials in disputes for more than twenty dollars. U.S. CONST. amend. VII. The Eighth Amendment protects against excessive bail, excessive fines, and cruel and unusual punishments. U.S. CONST. amend. VIII. The Ninth Amendment grants individuals rights not enumerated within the first eight amendments. *Id*. at amend. IX.

518. *See* Scalia, *supra* note 44, at 134.

519. *See* Tribe, *supra* note 61, at 89.

520. BORK, *supra* note 25, at 165.

umbrella destroys the umbrella's overall protection. Maintaining the Bill of Rights' entire protective umbrella, especially in the Third Amendment, is the only way to ensure we all remain dry in a storm of government rain.