

## The Third Amendment: Forgotten but Not Gone

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# THE THIRD AMENDMENT: FORGOTTEN BUT NOT GONE

by Tom W. Bell\*

## I. INTRODUCTION

Pity the Third Amendment.<sup>1</sup> The other amendments of the United States Constitution's Bill of Rights inspire public adoration and volumes of legal research. Meanwhile, the Third Amendment languishes in comparative oblivion. The scant attention that it does receive usually fails to serve it well. Lawyers twist it to fit absurd claims, the popular press subjects it to ridicule, and academics relegate it to footnotes. Is this any way to treat a member of the Bill of Rights?

A few scholars have, to their credit, recognized the important and dramatic role that the Third Amendment and its predecessors played in British and American history.<sup>2</sup> But even these accounts overlook crucial aspects of the Third Amendment's story. The Third Amendment has especially suffered from a lack of serious and sustained legal analysis.<sup>3</sup> This paper aims to fill the most glaring of these gaps in Third Amendment scholarship, so as to round out our knowledge of the Bill of Rights and to give the Third Amendment some respect long past due.

Part II of this paper examines the origins of the Third Amendment. Although this is the one aspect of Third Amendment scholarship that has received a fair amount of attention, a good deal remains to be said. Section A of Part II delves into the Third Amendment's European roots, which arguably run deeper than those of any other protection

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<sup>1</sup> It reads: "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." U.S. CONST. amend. III.

<sup>2</sup> Two articles address the history of the Third Amendment: William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393 (1991); and B. Carmon Hardy, *A Free People's Intolerable Grievance*, in *THE BILL OF RIGHTS, A LIVELY HERITAGE* 67 (1987). With regard to the second of these two papers, a nearly identical version without footnotes was published earlier in 33 VIRGINIA CAVALCADE 126 (1984). Subsequent references to B. Hardy in this paper refer to the later, footnoted version.

Each of the two law review articles that devote themselves solely to the Third Amendment treats it almost entirely from an historical point of view. See William S. Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195 (1989); and Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723 (1951).

<sup>3</sup> The Third Amendment surfaces for a few paragraphs in Akhail R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1174-75 (1991). A useful analysis of the only case interpreting the Third Amendment appears in Ann Marie C. Petrey, Comment, *The Third Amendment's Protection Against Unwanted Military Intrusion: Engblom v. Carey*, 49 BROOKLYN L. REV. 857 (1983). Litigation concerning the Third Amendment gets a brief survey in Frank B. Lewis, *Whatever Happened to the 3rd Amendment?*, N.Y.L.J., Feb. 26, 1979, at 1.

in the Bill of Rights. The account here traces the Third Amendment's pedigree back to Anglo-Saxon customary law. The first written provisions against quartering, appearing in town and borough charters throughout Europe, draw especially close scrutiny. The relationship between purveyance and quartering also receives more careful treatment than it has hitherto enjoyed. Section B in Part II concentrates on the Third Amendment's American origins. It reveals that a mystery surrounds the Third Amendment's ratification: why did Congress turn down James Madison's comprehensively worded amendment for a version that fails to specify what limits apply to quartering at times when the country is neither at peace nor officially at war?

Part III offers an answer to this mystery by examining the Third Amendment in practice and theory. Section A uncovers evidence that U.S. troops were widely quartered during the War of 1812 and the Civil War. While quartering during the former apparently violated the Third Amendment, we can excuse quartering during the latter by reading the Third Amendment in light of the theory that Congress turned down Madison's suggested quartering amendment so as to give the Executive power to quarter troops during times of civil unrest, military emergency, and rebellion. Section B in Part III discusses the few cases where the Third Amendment has been used and, as is most often the case, abused. Only the court in *Engblom v. Carey*<sup>4</sup> took the amendment seriously. Section C examines that case's effect on provisions against quartering in state constitutions. Lastly, Section D analyzes quartering as a form of taking subject to the Fifth Amendment.

## II. ORIGINS OF THE THIRD AMENDMENT

### A. *European Roots*

Protections against forced billeting appear to be a uniquely British invention, well-rooted in Anglo-Saxon law. Their first recorded use appears in the charter granted to London by Henry I in 1131, and they subsequently spread to town and borough charters throughout Great Britain. Although a few continental charters provided similar restrictions on quartering, they did so only after the grant of London's charter and apparently due to its influence. Initially, charter provisions about billeting appear to have been directed mainly against the purveyance (forced leasing) of lodging for the royal household. In time, however, concerns about the billeting of soldiers moved to the fore.

#### 1. *Home and Sword in Early English Law*

English law has traditionally held the rights of homeowners in high regard. The early Anglo-Saxon legal system placed concern for the household before nearly all else. It took the point of view that "[a] 'breach of the peace' in itself means nothing, for there is no general peace of the community, but only the thousands of islands of peace which surround the roof-tree of every householder, noble and simple . . ."<sup>5</sup> The *frith*, or peace, over each home was protected by penalties for its breach. Trespassers paid for having invaded the household enclosure, and those who committed offenses against persons within a home's *mund* (protection) faced fines in excess of those otherwise levied.<sup>6</sup>

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<sup>4</sup> 677 F.2d 957 (2d Cir. 1982).

<sup>5</sup> JOHN E. A. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 8 (1961) (footnote omitted).

<sup>6</sup> *Id.* at 12. See also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION* 56 (1983).

Homeowners never faced a severe threat from the quartering of soldiers in Anglo-Saxon times because there was no standing army as such. Instead, defense was provided by the *fyrð*, a militia to which all able-bodied men owed service. Those who were called up served locally for short durations and provided their own provisions. Professional soldiers were limited to the small contingents maintained by kings and earls at great expense. Only after the Norman Conquest in 1066 did quartering become a noticeable problem. The newly introduced feudal system ensured that William would have a regular supply of knights.<sup>7</sup> Scutage, introduced in 1156 by Henry II, provided kings with revenue for hiring professional soldiers.<sup>8</sup> "It was in the centralization of Norman rule, the militarization of the country, the abuse of the Saxon inhabitants, and the involvement in continental wars that the grievance against the involuntary quartering of soldiers first took root."<sup>9</sup>

## 2. British Town and Borough Charters

Legal protections against the forced billeting first appeared in the charters of English towns and boroughs, beginning with the charter that Henry I granted to London in 1131.<sup>10</sup> The charter stated that "within the walls of the city no one is to be billeted; neither for one of my household nor for one of any other is lodging to be exacted by force."<sup>11</sup> Subsequent London charters reiterated this right.<sup>12</sup>

The right to be free of quartering subsequently spread from London to boroughs throughout England, Ireland, and Scotland. Oxford acquired the right by implication when it was granted the same liberties enjoyed in London.<sup>13</sup> The charters of Bedford and Lynn then won Oxford's liberties, so that protections against quartering came to them twice removed from their London origins.<sup>14</sup> Many other boroughs secured freedom from forced billeting independently of London's charter, though no doubt due to its influence.<sup>15</sup> As was the case with London, these charters sometimes served as models for other boroughs'

<sup>7</sup> Fields & Hardy, *supra* note 2, at 395-96; Fields, *supra* note 2, at 196 n.4.

<sup>8</sup> WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 454 (8th ed. 1900). See also Fields & Hardy, *supra* note 2, at 397.

<sup>9</sup> Fields, *supra* note 2, at 196 n.4. See also Fields & Hardy, *supra* note 2, at 397-99.

<sup>10</sup> "Et infra muros civitatis nullus hospitetur, neque de mea familia neque de alia, nisi alicui hospitium liberetur." STUBBS, *supra* note 8, at 108.

<sup>11</sup> This translation comes from 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 62 (Carl Stephenson & Frederick Q. Marcham rev. ed., 1972).

<sup>12</sup> Henry II made the protection explicit in the charter he granted to London in 1155, as did Richard I, John, and Henry III in their charters. Later kings merely reaffirmed all previously granted rights. WILLIAM STEPHENSON, THE LAWS AND CUSTOMS, RIGHTS, LIBERTIES, AND PRIVILEGES, OF THE CITY OF LONDON 10-30 (1765).

<sup>13</sup> *Charter of Henry II to Oxford (1155-1162)*, reprinted in ENGLISH HISTORICAL DOCUMENTS 972-73 (David C. Douglas & George W. Greenway eds., 1968).

<sup>14</sup> BRITISH BOROUGH CHARTERS, 1042-1216, at cviii (Adolphus Ballard ed., 1913). See also, *infra* note 17 (a nonexclusive reference to Oxford in Portsmouth's charters of 1194 and 1201).

<sup>15</sup> Ballard finds 13 references to billeting in the charters of 10 boroughs (including another of Lynn's three charters). BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 86-87. Though he recognizes a reference to billeting in Norwich's 1189 charter, Ballard reads Norwich's 1199 charter differently. This later charter read "Nemo hospitetur nec quid per vim capiat infra burgum de Norwico." *Id.* at 87. Ballard takes this to say that "None shall be entertained nor take anything by force in the city of Norwich." *Id.* He interprets Ipswich's 1200 charter similarly. *Id.* But Ballard's use of "entertained" for "hospitetur" suggests that royal officers forced citizens to amuse the king. Other scholars thus prefer to read "hospitetur" as "lodged" in this context. See the translations of Norwich's 1199 charter in Hardy, *supra* note 2, at 68; and of Ipswich's charter in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 11, at 96.

charters.<sup>16</sup> Still other boroughs won protection from billeting when the king promised them liberties as good as those enjoyed by some general class of boroughs.<sup>17</sup> Summing these up gives thirty-three occurrences of legal protections against forced billeting in twenty-two British cities and boroughs during the period from 1131 to 1208.<sup>18</sup>

These protections were confirmed in 1215, when the Magna Carta stipulated that “London shall have all its ancient liberties and free customs. Besides we will and grant that all the other cities, boroughs, and ports shall have all their liberties and free customs.”<sup>19</sup> This was no mere boilerplate. Those who enjoyed legal immunity from forced billeting enforced their rights with great vigor and were given surprising leeway to do so. If a homeowner killed an unwelcome guest while attempting to turn him out, London’s laws in the early 1300s allowed the unwilling host to “clear himself, by the oath of any six, that he slew him for such cause.”<sup>20</sup>

### 3. Charters Outside of Britain

Were guarantees against forced billeting unique to Britain? No, but they appeared elsewhere only rarely, and then due arguably only to Britain’s influence. An extensive comparison between British borough charters and their contemporary counterparts in France, Germany, Spain, and the Latin Kingdom of Jerusalem uncovers provisions against forced billeting in only four French charters.<sup>21</sup>

The earliest and most interesting of these French charters was granted by Henry II to Rouen in 1151 or 1152.<sup>22</sup> It contains several clauses similar to those appearing in preceding English charters. In particular, the Rouen charter exempts the city from all

<sup>16</sup> Ballard identifies four such copy-cat charters in BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 23-34. Among these, Ballard shows Duleek following Bristol in 1194-1241. *Id.* at 30. But, Mary Bateson argues that this assignment is due to a mistaken translation of *Britolium*, and that the credit actually belongs to Breteuil. Mary Bateson, *The Laws of Breteuil, Part II*, XV ENGLISH HIST. REV. 514 (1900). Her reconstruction of the laws of Breteuil contains no provisions against quartering. *Id.*, *Part III*, at 754-57.

In other cases, copy-cat charters were granted prior to protections against quartering appearing in later versions of the master charter. See BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 26, 27, 29, 33. Absent greater knowledge of the period’s urban law it is difficult to say what rights accrued in such situations.

<sup>17</sup> Glasgow, for example, was granted a charter in 1175-77 “[w]ith all the liberties and customs which any of my burghs in my whole kingdom has, in the best and fullest and quietest and most honorable manner.” BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 26. Similar provisions appear in three other charters (including one of Lynn’s three). *Id.* at 31. Portsmouth’s charters of 1194 and 1201 came “with all liberties and free customs as well and peaceably freely and quietly as our citizens of Winchester, or Oxford or others of our land best have and hold.” *Id.* at 29. Either of the “Oxford or others” references suffice for our purposes. Liverpool’s charter of 1207 presents a special case; it gives the liberties of “any free borough on the sea in our land.” *Id.* at 33. Under this provision, the protections against quartering appearing in the charters of the coastal boroughs of Bristol in 1188 and Ipswich in 1200 may have extended to Liverpool.

<sup>18</sup> In arriving at this figure I have totaled the references appearing in notes 10 through 17, *supra*, excluding the questionable grants mentioned in notes 15 and 16.

<sup>19</sup> 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 11, at 118.

<sup>20</sup> GEORGE NORTON, COMMENTARIES ON THE HISTORY, CONSTITUTION, AND CHARTERED FRANCHISES OF THE CITY OF LONDON 144 n.\* (1829).

<sup>21</sup> BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at cv-cxxxvi. Ballard examined 102 French, 44 German, and two Spanish charters (which, he explains, served as models for many other Spanish towns) as well as the laws administered by the Court of Burgesses of the Latin Kingdom of Jerusalem in roughly 37 towns.

<sup>22</sup> *Id.* at cxx-cxxi. Henry II was still Duke of Normandy at this time, assuming the throne of England in 1154. *Id.* Philip Augustus (originally known as Philip II) apparently granted the subsequent French charters containing restrictions on forced billeting. *Id.* at cv.

billeting—except that directed by the Rouen's own marshal. This is a weaker version of the exemption from billeting that Henry I granted to London in 1131 (which prohibited *all* forced billeting, be it directed by London's marshal or not). In light of the parallels between these and other clauses, Ballard concluded that “the London charter of 1131 must have influenced the Rouen charter of twenty years later.”<sup>23</sup>

Subsequent French charters also addressed forced billeting. Under charters granted near the end of the twelfth century “the burgesses of Bourges and Dun-le-Roi were exempted from . . . the *exactio culcitrarum*, which appears to have been a right on the part of the lord to obtain a loan of his tenant's bedding on his visit to the town.”<sup>24</sup> The 1128 charter of Laon cut the other way; it bound Laon's burgesses to provide the King with either three nights food and lodging or twenty livres. The burgesses escaped this burden under their 1189 charter, however, by purchasing the King's right for 200 livres.<sup>25</sup>

Were the protections against forced billeting in the charters of Bourges, Dun-le-Roi, and Laon inspired by Rouen's charter? We can only say that they appeared after Rouen's billeting provision and that Rouen's charter was widely copied.<sup>26</sup> Even if English precedents did not inspire, by way of Rouen, the restrictions on billeting that appeared in the charters of Bourges, Dun-le-Roi, and Laon, we can be sure that the chain of causation did not run the other way. By no means did the Third Amendment spring from French soil. It thus appears that protections against forced quartering were few and meager outside of Britain, and were either attributable to that country's ameliorative influence or condemned to bloom and wither in isolation.

#### 4. *The Purveyance of Royal Lodging*

While all of the British charters offering guarantees against forced billeting employed terms broad enough to encompass the quartering of troops, none mentioned troops explicitly.<sup>27</sup> Troops, however, were not the only concern.<sup>28</sup> As the London charter of 1131 suggests, the purveyance of lodging for the royal household also worried homeowners.<sup>29</sup> This concern became more evident in the London charter of 1155, which

<sup>23</sup> *Id.* at cxxi.

<sup>24</sup> *Id.* at cx-cxi. Bourges' charter was granted in 1181 and Dun-le-Roi's in 1175. *Id.* at cvi.

<sup>25</sup> *Id.* at cxi.

<sup>26</sup> *Id.* at cvii. Although some scholars argue that the charters of Rouen and Laon represent two of several general types of twelfth century French charters, this by no means rules out the possibility that the former influenced the latter.

<sup>27</sup> The few French charters that addressed billeting reveal a more single-minded concern with purveyance. Only Rouen's charter could have protected citizens against the quartering of troops—so long as the marshal willed it. *Id.* at cxxi. The charters of Bourges, Dun-le-Roi, and Laon protected citizens only against the demands of nobles, not of soldiers. *Id.* at cx-cxi.

<sup>28</sup> As this and the subsequent section demonstrate, the Third Amendment grew out of the need to protect homeowners' property and privacy rights. Understanding this historical background does much to undermine Amar's claim that the Third Amendment is “centrally focused” not on individual rights but on the structural division between civilian values and military power. Amar, *supra* note 3, at 1174.

<sup>29</sup> Officially, purveyors satisfied the crown's needs by paying market prices for what they seized. This prerogative was widely abused, however, by purveyors who paid too little, too late, or not at all; by purveyors who sold protection from purveyance; and by those who purveyed under false pretenses. NORTON, *supra* note 20, at 143-44.

In the years immediately following the Norman invasion it must have been difficult to distinguish between the purveyance of lodging for the king's household and the quartering of troops. Royal troops were probably so few in number and so close to the king that they were regarded as members of his household. With the advent of scutage, however, the king could afford larger forces, often augmenting them with foreign professional troops. As an apparent consequence, the army outgrew the king's household and could no longer avail itself of his right to purvey lodging. Parliament drew the line in 1331 when it enacted “[t]hat

added a specific injunction against billeting by the marshal—the royal officer responsible for purveying lodging for the king's household during its forays.<sup>30</sup> “Within the walls no one shall take hospitality by force or by the billet of the marshal.”<sup>31</sup> Strictly speaking, the broad wording of London's 1131 charter rendered this extra clause unnecessary.<sup>32</sup> Yet it proved popular; nearly every subsequent British charter that addressed quartering included a prohibition against billeting by the marshal.<sup>33</sup>

The abuse of purveyance roused great resentment and by the late thirteenth and fourteenth centuries had become one of the chief complaints of barons and Parliament.<sup>34</sup> Purveyance of food, wares, and other chattels continued in one form or another until Parliament purchased the right from Charles II,<sup>35</sup> but the practice of purveying *lodging* appears to have ended sometime earlier.<sup>36</sup> As we have seen, many town and borough charters had outlawed the practice by the end of the twelfth century.<sup>37</sup> By the mid-fourteenth century people living outside of urban areas had also won protections, albeit limited ones, against the king's purveyance of lodging.<sup>38</sup> Sir Matthew Hale cites a case from as late as 1402 to support his contention that “the king hath a prerogative of purveyance of lodging for his courts and ministers of justice.”<sup>39</sup> But a close reading of the case reveals how weak the king's power to purvey lodging had become: the king lost the case and his officers were expelled from the property they had occupied.<sup>40</sup> By the middle of the sixteenth century the purveyance of lodging seems to have disappeared entirely.<sup>41</sup>

no Purveyance be made, but for the King, Queen, and their children, and that by good warrant and ready payment.” 8 Edw. 3, rot. 11 (1331), *reprinted in* ABRIDGMENT OF THE RECORDS IN THE TOWER OF LONDON 10 (collected by Robert Cotton 1679).

<sup>30</sup> The marshal also presided over the Court of the Marshalsea, in which matters pertaining to the king's household were heard. The pleas rolls of this little-studied court primarily carried complaints rising out of purveyance. VII SELECT CASES IN THE COURT OF KING'S BENCH, at xli-iii (G. O. Sayles ed., Selden Soc'y Pub. No. 88, 1971).

<sup>31</sup> BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 87.

<sup>32</sup> Recall that the London charter of 1131 read, “And within the walls of the city no one is to be billeted; neither for one of my household nor for one of any other is lodging to be exacted by force.” I SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 11, at 62.

<sup>33</sup> See BRITISH BOROUGH CHARTERS, 1042-1216, *supra* note 14, at 87.

<sup>34</sup> BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 395 (1960).

<sup>35</sup> Tenures Abolition Act, 12 Car. 2, ch. 24, § 11 (1660), *reprinted in* THE STATUTES [OF GREAT BRITAIN], at 378-79 (London: His Majesty's Stationary Office, 3rd rev. ed. 1950) [hereinafter STATUTES] *see* Fields & Hardy, *supra* note 2, at 404 n.47.

<sup>36</sup> NORTON, *supra* note 20, at 145.

<sup>37</sup> See *supra* notes 10-20 and accompanying text.

<sup>38</sup> In a successful petition to Edward III, Parliament asked that throughout the country housing and food be purveyed for the men and horses of the king's household only by bill of the marshal, and that victuals taken be paid for prior to their departure. 21 Edw. 3, rot. 22 (1347-48) (Eng.), *reprinted in* ABRIDGMENT OF THE RECORDS IN THE TOWER OF LONDON, *supra* note 29, at 55.

<sup>39</sup> MATTHEW HALE, THE PREROGATIVES OF THE KING 206 (D.E.C. Yale ed., Selden Soc'y Pub. No. 92, 1976).

<sup>40</sup> Coram Rege Roll, no. 391 (Easter 1358), m. 1 (crown) at Wells in Somerset, *reprinted in* VI SELECT CASES IN THE COURT OF KING'S BENCH, at 120-22 (G. O. Sayles ed., Selden Soc'y Pub. No. 82, 1965). The dispute giving rise to this case arose when the king's justices used the palace of the Bishop of Bath and Wells for hearing claims and other royal business. It is thus unclear that the case speaks to the king's right to purvey *lodging*. Nor is it clear that this case establishes the king's right to purvey the use of others' property *at all*: the bishop prevailed by pointing out that the king had previously granted him the right to turn away royal officials.

<sup>41</sup> The seizure of lodging fails to receive mention in Allegra Woodworth's exhaustive survey of Elizabethan purveyance. ALLEGRA WOODWARD, PURVEYANCE FOR THE ROYAL HOUSEHOLD IN THE REIGN OF QUEEN ELIZABETH (Transactions of the Am. Phil. Soc'y, New Series XXXV, Part I, December, 1945). Nor does purveyance of lodging appear in the catalog of purveyor's abuses that Sir Francis Bacon presented to Parliament in 1604. Bacon, *Petition to the King Touching Purveyors*, in III THE LETTERS AND THE LIFE

### 5. *The Quartering of Troops in Britain*

In the meantime, the quartering of troops grew to present a greater threat to homeowners. Few central controls on the lodging and feeding of soldiers in the thirteenth through sixteenth centuries existed; for the most part soldiers simply lived off the land.<sup>42</sup> The army repeatedly violated town and borough charters that prohibited forced quartering.<sup>43</sup> Invited or not, once soldiers occupied a home they were required to pay for anything they took with tallies, chits, or billets that their hosts could redeem for money or apply against taxes.<sup>44</sup> In practice, however, these receipts often proved to be worthless, and "billeting" came to signify free room and board.<sup>45</sup>

Soldiers traveling to and from the Continental wars in the fourteenth century often demanded free lodging—and more—from English householders along the way.<sup>46</sup> Parliament repeatedly heard protests such as that described in *Piers Plowman*, where a man complained of having lost his wife, barn, livestock, home, and the maidenhood of his daughter to soldiers.<sup>47</sup> Such travesties were not surprising, given that the military often pressed tramps, beggars, and criminals into service.<sup>48</sup> Parliament did not respond by outlawing forced quartering, but at one point it did try to shift the practice from England to Scotland.<sup>49</sup>

Tudor attempts to subject quartering to more centralized control through the appointment of lords lieutenant and the appropriation of "coat and conduct money" in the sixteenth century met with little success.<sup>50</sup> The problem grew worse under the Stuarts in the seventeenth century, creating tensions that helped to propel England toward civil war.<sup>51</sup> Rivalries between the emerging nation-states encouraged the growth of large standing armies needing year-round facilities, but military logistics had not kept pace with these developments.<sup>52</sup> For political reasons, the House of Commons refused to provide Charles I with adequate revenue for housing his troops, and as a consequence they sought quarters in private homes.<sup>53</sup>

OF FRANCIS BACON 181-87 (J. Spedding ed., 1868).

<sup>42</sup> Hardy, *supra* note 2, at 69-70.

<sup>43</sup> *Id.* at 69; Fields & Hardy, *supra* note 2, at 400.

<sup>44</sup> Hardy, *supra* note 2, at 69; Fields & Hardy, *supra* note 2, at 400.

<sup>45</sup> Hardy, *supra* note 2, at 69; Fields & Hardy, *supra* note 2, at 400.

<sup>46</sup> Hardy, *supra* note 2, at 69-70. An interesting example of litigation concerning billeting appears in Coram Rege Roll, no. 564 (Easter 1402), m. 28d, at Westminster in Middlesex, *reprinted* in VII SELECT CASES IN THE COURT OF KING'S BENCH, *supra* note 30, at 121-23. The plaintiff in this case, a squire in the king's army, claimed that he had suffered the theft of his horses and other chattels while staying at the defendant's inn, and that by law, custom, and express agreement the defendant was liable for such losses. The defendant prevailed, however, by testifying that he was but a farmer who had been forced to billet the plaintiff without recompense and that the plaintiff had acted at his own risk.

<sup>47</sup> Hardy, *supra* note 2, at 68; Fields & Hardy, *supra* note 2, at 399. The latter paper reports that English soldiers committed still worse abuses once they landed in Normandy. Fields & Hardy, *supra* note 2, at 399 n.22.

<sup>48</sup> In one year alone, Edward I pardoned 450 murders and lesser criminals in exchange for their army service. Fields & Hardy, *supra* note 2, at 399; Fields, *supra* note 2, at 197 n.15.

<sup>49</sup> Near the end of 1339, Parliament proclaimed that "the Captains and others being together, shall lie and forage upon Scotland, and not upon the Marches of England." 13 Edw. 3, rot. 35 (1340), *reprinted* in ABRIDGMENT OF THE RECORDS IN THE TOWER OF LONDON, *supra* note 29, at 21.

<sup>50</sup> Hardy, *supra* note 2, at 69.

<sup>51</sup> *Id.* at 69-70; Fields & Hardy, *supra* note 2, at 402-03.

<sup>52</sup> Hardy, *supra* note 2, at 70; Fields & Hardy, *supra* note 2, at 403.

<sup>53</sup> LOIS G. SCHWOERER, NO STANDING ARMIES 19-21 (1974).

In 1628 these circumstances led Parliament to complain, in the Petition of Right, that “of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm . . . .”<sup>54</sup> The Petition of Right asked “that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come . . . .”<sup>55</sup>

Nonetheless, abuses of quartering continued to surface. Royalist and Roundhead armies alike frequently resorted to free quartering during the English Civil War, despite official disavowals of the practice, extensive use of tents, and attempts at organized means of repaying unfortunate civilian hosts.<sup>56</sup> Nor did the Restoration of 1660 improve matters. Conflicts over forced quartering broke out between soldiers and civilians during the Third Anglo-Dutch War of 1672-1674.<sup>57</sup> The winter of 1678 brought the “Highland host”: some ten thousand troops quartered in Scotland as a measure to repress the nonconformist Presbyterian Covenanters.<sup>58</sup>

Parliament tried to assuage civilians’ grievances by passing the Anti-Quartering Act of 1679, which provided that “noe officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers upon any subject or inhabitant of this realme . . . without his consent . . . .”<sup>59</sup> In theory, this act provided homeowners with powerful protections against forced quartering, as it applied without exception to town and country, in peace and war. In practice, however, James II ignored the act.<sup>60</sup>

James II paid for his insolence, as dissatisfaction over billeting helped to trigger the Glorious Revolution.<sup>61</sup> The 1689 Bill of Rights presented to his successor, William III, accused James II of attempting to subvert English liberties by “quartering soldiers contrary to law . . . .”<sup>62</sup> Shortly thereafter Parliament enacted the Mutiny Act, which forbade quartering soldiers in private homes without the consent of the owners.<sup>63</sup> The act failed to allocate funds for barracks, however, instead directing civilian authorities to billet soldiers in ale-houses, inns, stables, and the like.<sup>64</sup> Limited though they were, the protections offered by the Mutiny Act did not extend to the North American colonies.<sup>65</sup>

<sup>54</sup> Petition of Right, 1628, 3 Car. 1, cap. 1, § VI (Eng.), reprinted in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 68 (Samuel R. Gardiner ed., Oxford University Press 1968).

<sup>55</sup> Petition of Right, § VIII, reprinted in *id.* at 69.

<sup>56</sup> Hardy, *supra* note 2, at 71; Fields & Hardy, *supra* note 2, at 403-04.

<sup>57</sup> SCHWOERER, *supra* note 53, at 98-99.

<sup>58</sup> JOHN MACKINTOSH, III THE HISTORY OF CIVILIZATION IN SCOTLAND 148-50 (1895).

<sup>59</sup> Anti-Quartering Act of 1679, 31 Car. 2, ch. 1, reprinted in STATUTES, *supra* note 35, at 411-12.

<sup>60</sup> Hardy, *supra* note 2, at 71; Fields & Hardy, *supra* note 2, at 405.

<sup>61</sup> SCHWOERER, *supra* note 53, at 137-47.

<sup>62</sup> Bill of Rights, 1689, 1 W. & M. 2, cap. 2, reprinted in STATUTES, *supra* note 35, at 426-31. An accusation concerning the raising and keeping of a standing army in time of peace immediately preceded this complaint about quartering. *Id.* Curiously, the document offers a remedy only for the former; it declares the raising or keeping of a standing army without the consent of the Parliament illegal, but fails to explicitly address quartering. *Id.* Schwoerer attributes this to haste and possibly reluctance to blame James II for something that could probably also have been charged against William III. LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 71 (1981).

<sup>63</sup> Mutiny Act, 1689, 1 W. & M., sess. 2, cap. 4 (Eng.), relevant text reprinted in GREAT BRITAIN WAR OFFICE, MANUAL OF MILITARY LAW (Hon. Hugh Godley ed., 6th ed. 1914).

<sup>64</sup> *Id.*

<sup>65</sup> Hardy, *supra* note 2, at 73.

## B. American Origins of the Third Amendment

### 1. Prelude to Revolution

The Third Amendment was directly inspired by the abuses colonialists suffered at the hands of British soldiers immediately prior to and during the Revolutionary War. The colonies, however, had seen quartering even before the 1700s. Indeed, each time the British government launched a significant military operation in North America, it brought along quartering problems. Civilians in Massachusetts and Connecticut complained about the quartering of soldiers in private homes as early as King Philip's War (1675-1676).<sup>66</sup> Similar allegations surfaced in New York at the time of the Dominion of New England in 1688.<sup>67</sup> The quartering of troops also led to trouble in the West Indies, Virginia, South Carolina, and Nova Scotia during the course of the seventeenth century.<sup>68</sup>

Colonial legislatures responded to these grievances by enacting legal protections against quartering. The first of these appeared in the New York Assembly's 1683 Charter of Liberties and Privileges: "Noe Freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourn, against their willes provided Always it be not in time of Actuall Warr within this province."<sup>69</sup>

This marks the first instance of a dual standard for quartering, whereby the normally stringent consent requirement was relaxed during times of "Actuall Warr." All prior protections against forced billeting had stated categorically that no troops would be quartered in a home without the owner's consent—whether it be in time of war or peace.<sup>70</sup> Perhaps this American innovation arose out of a conflict between respect for English legal traditions and the need for protection from New World dangers. Whatever the inspiration for the dual standard, it won the approval of American lawmakers. They almost always incorporated the dual standard in subsequent protections from quartering—including the Third Amendment.<sup>71</sup>

The quartering of soldiers became a major problem for the colonists during the French and Indian War (1754-1763), which brought thousands of British regulars to North America.<sup>72</sup> American colonists repeatedly denied General Edward Braddock's requests for quarters and provisions.<sup>73</sup> His successor, John Campell, Earl of Londoun, complained in 1756 that Americans cited "Rights and Privileges" while opposing his efforts at nearly every turn.<sup>74</sup> But even the most spirited protests sometimes failed to stop the British from forcing troops on homeowners.<sup>75</sup>

<sup>66</sup> Hardy, *supra* note 2, at 73; Fields & Hardy, *supra* note 2, at 414.

<sup>67</sup> Hardy, *supra* note 2, at 73; Fields & Hardy, *supra* note 2, at 414.

<sup>68</sup> Hardy, *supra* note 2, at 73; Fields & Hardy, *supra* note 2, at 414.

<sup>69</sup> Reprinted in I THE ROOTS OF THE BILL OF RIGHTS 166 (B. Schwartz ed. 1980). Other colonial legislatures enacted similar measures with exceptions for "innholders or other houses of entertainment." Hardy, *supra* note 2, at 74. In this regard such measures resembled the Mutiny Act. See *supra* notes 63-65 and accompanying text.

<sup>70</sup> The one exception to this rule comes not from Britain, but from France: the 1151-52 charter of Rouen, which allowed billeting at the behest of the town's marshal. See *supra* notes 22-26 and accompanying text.

<sup>71</sup> The one exception occurs in Louisiana's state constitution, which forbids all unconsented quartering. LA. CONST. art. 1, § 6. See *infra* note 225 and accompanying text.

<sup>72</sup> Fields & Hardy, *supra* note 2, at 414; Fields, *supra* note 2, at 200.

<sup>73</sup> Hardy, *supra* note 2, at 74.

<sup>74</sup> *Id.*

<sup>75</sup> For a detailed account of quartering in Pennsylvania during the French and Indian War see Jeffrey L. Scheib, *Barracks for the Borough: A Constitutional Question in Colonial Lancaster*, 87 J. LANCASTER COUNTY HIST. SOC'Y 53 (1983). Scheib also makes reference to quartering in New York and Massachusetts. *Id.* at 55.

After Pontiac's War concluded in 1763 the British government began to seek ways to shift the financial burden of defending the western frontier onto the colonies.<sup>76</sup> In 1765, Parliament passed the Quartering Act, requiring the colonists to bear the costs of providing barracks and supplies for British soldiers stationed in the Colonies.<sup>77</sup> Should these barracks prove insufficient, the Act stipulated that troops be quartered in inns, livery stables, and ale-houses.<sup>78</sup> If these too fell short, the troops could be quartered in other private buildings.<sup>79</sup> This last alternative opened the door to virtually limitless abuse and roused great resentment in the colonies.<sup>80</sup> To make matters worse, Parliament enacted the hated Stamp Act of 1765 in order to squeeze from the colonists the revenue required to satisfy the Quartering Act's demands.<sup>81</sup> "As a result, the problems related to the quartering of soldiers became entwined with the volatile political issue of 'taxation without representation.'"<sup>82</sup>

Resistance to the burdens of quartering British troops grew and spread throughout North America.<sup>83</sup> When New York refused to fully carry out the terms of the Quartering Act, Parliament suspended its Assembly until that body voted to support the royal troops stationed in New York.<sup>84</sup> October 1768 saw the governor of Massachusetts quarter troops in the state-house after the selectmen of Boston refused to provide them with quarters.<sup>85</sup> In response to the Boston Tea Party of December 16, 1773, Parliament passed five acts.<sup>86</sup> Among them was a new Quartering Act, approved in June 1774.<sup>87</sup> Because it authorized the quartering of troops in private *homes* (as opposed to private *buildings*), the colonists regarded this Quartering Act as even more offensive than its 1765 predecessor and they labeled it as one of the "Intolerable Acts."<sup>88</sup>

Parliament's response to the Boston Tea Party triggered a series of political statements that addressed the quartering issue, culminating in the Declaration of Independence in 1776. The First Continental Congress complained of this latest Quartering Act in its

<sup>76</sup> Fields, *supra* note 2, at 200.

<sup>77</sup> Quartering Act of 1765, 5 Geo. 3, ch. 33, IX ENGLISH HISTORICAL DOCUMENTS 656 (Merrill Jensen & David G. Douglas eds., 1953).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Consider Samuel Adams' complaint in the Boston Gazette, Oct. 17, 1768:

Where Law ends, (says Mr. Locke) TYRANNY begins, if the Law be *transgress'd* to *another's harm*: No one I believe will deny the truth of the observation, and therefore I again appeal to *common sense*, whether the act which provides for the quartering and billeting the King's troops, was not TRANSGRESS'D, when the barracks at the Castle WHICH ARE SUFFICIENT TO CONTAIN MORE than the whole number of soldiers now in this town, were ABSOLUTELY REFUS'D: This I presume cannot be contested.

*Reprinted in* V THE FOUNDERS' CONSTITUTION 215 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis in original).

Adams also cited the abuses of quartering in his 1772 "List of Infringements and Violations of Rights." *Reprinted in* Hardy, *supra* note 2, at 79.

<sup>81</sup> Fields & Hardy, *supra* note 2, at 415; Fields, *supra* note 2, at 200.

<sup>82</sup> Fields, *supra* note 2, at 200.

<sup>83</sup> Hardy reports resistance to quartering having appeared in Quebec, Montreal, Massachusetts, Connecticut, New York, Maryland, East Florida, and Georgia during this time. Hardy, *supra* note 2, at 76-77.

<sup>84</sup> *Id.* at 76.

<sup>85</sup> Wurfel, *supra* note 2, at 726.

<sup>86</sup> *Id.*

<sup>87</sup> Quartering Act of 1774, 14 Geo. 3, ch. 54.

<sup>88</sup> Fields & Hardy, *supra* note 2, at 416; Fields, *supra* note 2, at 201.

Declaration and Resolves of 1774 and called for a repeal of the Act.<sup>89</sup> In 1775, the Declaration of the Causes and Necessity of Taking Up Arms also cited the 1774 statute passed “for quartering soldiers upon the colonists in time of profound peace.”<sup>90</sup> Finally, the Declaration of Independence justified breaking the “political bands” that had bound the colonists to England by explaining that George III had “combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation: For quartering large bodies of armed troops among us. . . .”<sup>91</sup>

Those opposing revolution also raised the specter of quartering. Pennsylvanian Joseph Galloway tried to dissuade his countrymen from rebellion by warning that the American army would prove too undisciplined, “travelling over your estates, entering your houses—your castles . . . seizing your property . . . ravishing your wives and daughters, and afterwards plunging the dagger into their tender bosoms.”<sup>92</sup> Galloway was correct in part; the American forces did quarter troops on civilians during the Revolutionary War (as did the British).<sup>93</sup> He seems, however, to have exaggerated the threat.

Thanks in large part to Whig rhetoric, American military leaders held an aversion to quartering. They tried to avoid quartering by building barracks, using public buildings, and avoiding towns.<sup>94</sup> What little American quartering there was occurred early in the war, before the states’ legislatures had made other provisions for housing troops.<sup>95</sup>

By the war’s end, the legislatures of Delaware, Maryland, and Massachusetts had issued declarations of rights protecting their civilians from unchecked billeting. Delaware’s quartering provision set the pattern for the other two states: “That no soldier ought to be quartered in any house in time of peace without the consent of the owner; and in time of war in such manner only as the Legislature shall direct.”<sup>96</sup> All of these states thus

<sup>89</sup> Resolved, N. C. D. That the following acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary in order to restore harmony between Great Britain and the American colonies, viz. . . . the act passed in the same session for the better providing suitable quarters for officers and soldiers in his Majesty’s service in North-America. *Reprinted in I THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 218 (B. Schwartz ed., 1971).

<sup>90</sup> *SOURCES OF OUR LIBERTIES* 296 (R. Perry ed., 1952).

<sup>91</sup> *DECLARATION OF INDEPENDENCE* para. 15 (U.S. 1776).

<sup>92</sup> Hardy, *supra* note 2, at 79.

<sup>93</sup> *Id.* at 79-80. For a particularly vivid description of the quartering of American troops, see *Major Thompson’s Deposition: Being a Spirited Protest to the General Court by a Brookline Patriot of 1775, Against the Forcible Quartering of Soldiers in his Domicile*, *PUBLICATIONS OF THE BROOKLINE HISTORICAL PUBLICATION SOCIETY* 17 (1900). Major Thompson’s plight must have been well known to his contemporaries; Joseph Hawley called it “downright and intolerably wrong” in a letter he wrote to Elbridge Gerry in February 18, 1776, asking him to help reform the American Army. *V THE FOUNDERS’ CONSTITUTION, supra* note 80, at 216. Gerry apparently took Hawley’s admonitions seriously; he later argued that the Third Amendment should put civil magistrates in control of quartering. *I ANNALS OF CONG.* 752 (Gales & Seaton eds., 1789). See also *infra* note 213.

<sup>94</sup> G. Bradsher, *Preserving the Revolution: Civil-Military Relations During the American War for Independence, 1775-1783*, at 498 (1984) (unpublished Ph.D. Dissertation, University of Massachusetts).

<sup>95</sup> *Id.* See also Fields & Hardy, *supra* note 2, at 417 n.111.

<sup>96</sup> Although Delaware’s Declaration of Rights borrowed heavily from the declarations of Pennsylvania and Virginia in other respects, its quartering provision was a unique addition. *DEL. DECLARATION OF RIGHTS*, § 21 (1776), *reprinted in SOURCES OF OUR LIBERTIES, supra* note 90, at 339.

Unlike Delaware’s free-standing declaration of rights, the declarations subsequently issued by Maryland, Massachusetts, and New Hampshire were attached to their constitutions. Maryland essentially copied Delaware’s quartering provision: “That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war in such manner only, as the Legislature shall direct.” *MD. CONST. art. XXVIII* (1776), *reprinted in SOURCES OF OUR LIBERTIES, supra* note 90, at 348.

Massachusetts’ restriction on quartering differed only in its reference to the intermediary role of the civil magistrate: “In time of peace, no soldier ought to be quartered in any house without the consent of the

applied the uniquely American dual standard that first appeared in the New York Assembly's 1683 Charter of Liberties and Privileges.<sup>97</sup>

## 2. *The Path to Ratification*

Defeated, Britain withdrew its troops from the colonies. Since this assuaged their fears of forced billeting and they were growing weary of debate, the delegates to the Philadelphia Convention of 1787 turned down Charles Pinckney's proposal for a constitutional prohibition on the quartering of soldiers.<sup>98</sup> Opponents of the Constitution seized upon the absence of a bill of rights to buttress their arguments against a strong central government. The analysis in "The Federal Farmer" of the Constitution's failure to address quartering provides an excellent survey of the Anti-Federalists' arguments against a powerful central government:

[I]s there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? you will answer, there is not. This may sometimes be deemed a necessary measure in support of armies; on what principle can the people claim the right to be exempt from this burden? they will urge, perhaps, the practice of the country, and the provisions made in some of the state constitutions—they will be answered, that their claim thus to be exempt is not founded in nature, but only in custom and opinion, or at best, in stipulations in some of the state constitutions, which are local, and inferior in their operation, and can have no controul over the general government—that they had adopted a federal constitution—had noticed several rights, but had been totally silent about this exemption—that they had given general powers relative to the subject, which, in their operation, regularly destroyed the claim. Though it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government.<sup>99</sup>

The Anti-Federalists took a dim view of quartering. Samuel Chase objected that "Congress will have a right to quarter soldiers in our *private* houses, not only in time of war, but also in time of *peace*."<sup>100</sup> "The Federal Farmer" categorically demanded that

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owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature." MASS. CONST. art. XXVII (1780), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 90, at 377.

New Hampshire also regulated quartering, but did so only after the 1783 Treaty of Peace had brought the conflict to a close. In essence, it copied Massachusetts' quartering article: "No soldier in time of peace, shall be quartered in any house without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature." N.H. CONST. art. I, § XXVII (1784), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 90, at 385.

<sup>97</sup> See *supra* notes 69-71 and accompanying text.

<sup>98</sup> EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 5-6 (1957). Pinckney's proposal, submitted Monday, August 20, read: "No soldier shall be quartered in any house, in time of peace, without consent of the owner." JAMES MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 427 (G. Hunt & J. Scott eds., 1920) (1840). It thus took the same form as the quartering amendments that Maryland and New Hampshire later proposed for the Bill of Rights. See *infra* notes 107, 108.

<sup>99</sup> *Letters from the Federal Farmer*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 329 (H. Storing ed., 1981).

<sup>100</sup> *Notes of Speeches Delivered to the Maryland Ratifying Convention*, in 5 *THE COMPLETE ANTI-FEDERALIST* 86 (H. Storing ed., 1981) (emphasis in the original).

“no soldier be quartered on the citizens without their consent,” and made no exception for quartering controlled by law in times of war.<sup>101</sup>

Although the Anti-Federalists did not ultimately prevail, they gave voice to a widespread concern. Eight of the state ratifying conventions sent proposals for a bill of rights to Congress. Five of these proposals contained protections against quartering. Of the ninety distinct types of provisions forwarded to Congress among all of the states' proposals, only seven appeared more often than provisions that addressed quartering.<sup>102</sup> This article will turn now to examining the relations between these quartering amendments proposed by the states, the quartering amendment that Madison submitted to Congress, and the Third Amendment in its final form.

### 3. *Proposed Quartering Amendments*

James Madison took the lead in presenting a bill of rights to the first Congress. He distilled his proposal for the Bill of Rights from the best and most popular amendments suggested by the state conventions.<sup>103</sup> He realized that wandering from their guidelines would risk failure: “Two or three contentious additions would even now prostrate the whole project.”<sup>104</sup> Yet his quartering amendment strayed from the states' proposals. Even supposing that Madison looked to outside sources for inspiration, he gave quartering a unique treatment. Nothing quite like it had appeared in state constitutions, political commentaries, or English laws.<sup>105</sup> The quartering amendment that Madison offered in his address to the House read: “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.”<sup>106</sup> To see what marks this as special we must look to the alternatives offered by the states' proposed amendments.

The states offered two other versions of a quartering amendment. The first version forbade quartering without consent in times of peace, but was silent in regard to quartering at other times. This version appeared in the proposals of Maryland<sup>107</sup> and

<sup>101</sup> *Id.* at 262.

<sup>102</sup> These seven provisions concerned the number of Representatives, religious freedom, the right to a jury trial, powers reserved to the states, regulation of elections, curbs on federal power to tax, and standing armies. DUMBAULD, *supra* note 98, at 161-65.

<sup>103</sup> *Id.* at 36.

<sup>104</sup> Letter from James Madison to Edmund Randolph (August 21, 1789), in 12 THE PAPERS OF JAMES MADISON 349 (C. Hobson and R. Rutland eds., 1985).

<sup>105</sup> But for the recent discovery of a working draft of the Bill of Rights that Roger Sherman prepared while sitting in the House committee responsible for reviewing Madison's proposal, the unusual wording of Madison's quartering amendment might lead us to suspect that it arose out of an error in transcription. Prior to finding Sherman's draft, the only known version of Madison's proposed bill of rights came to us from shorthand notes prepared for the Congressional Register by one Thomas Lloyd, a stenographer known for drinking on the job and spicing up his notes with sketches of nudes. Madison himself had condemned the Register as exhibiting “the strongest evidences of mutilation and perversion.” Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, § A, at 1. See also PEOPLE, Aug. 17, 1987, at 71.

Article Six of Sherman's draft of the Bill of Rights shows the obvious influence of Madison's proposed quartering amendment: “No soldier shall be quartered in any private house in time of Peace, nor at any time, but by authority of law.” *Text of Proposal for a Separate Bill of Rights*, N.Y. TIMES, July 29, 1987, § C, at 21. Compare this with Madison's version, *infra* note 106 and accompanying text.

<sup>106</sup> 1 ANNALS OF CONG. 434 (Gales & Seaton eds., 1789). Thereafter Madison's proposed amendments went to a select committee composed of one member from each of the eleven states then represented in Congress. *Id.* at 664-65.

<sup>107</sup> “That soldiers be not quartered, in time of peace, upon private houses, without the consent of the owners.” *Amendments Proposed by Maryland Convention Committee*, art. 10, in DUMBAULD, *supra* note 98, at 178.

New Hampshire.<sup>108</sup> The second version likewise prohibited forced quartering in times of peace, but in addition subjected wartime quartering to legal controls. This version appeared in the proposals offered by Virginia,<sup>109</sup> New York,<sup>110</sup> and North Carolina.<sup>111</sup> This second version eventually found its way into the Third Amendment.<sup>112</sup> How should we go about interpreting these three different sorts of quartering amendments? The key is in what they do *not* say. Each categorically prohibited quartering without consent in times of peace—that much is clear. They differ, however, in what they required in the absence of peace.

#### a. *The First Proposed Version*

The first version of the states' proposed amendments says nothing about how to deal with quartering when the nation no longer finds itself at peace. One would have to look elsewhere at such times to determine the constitutional limits on quartering, most probably to the other amendments in the Bill of Rights and to Articles I and II of the Constitution. Subsection B will discuss similar problems of constitutional interpretation with regard to the second version of the states' proposed quartering amendments. For now it suffices to wonder why Maryland and New Hampshire, the states forwarding the first version, neglected to say anything about quartering outside times of peace. This is particularly puzzling given that their own constitutions put wartime quartering in the control of the legislature (the same approach taken by the states proposing the second version).<sup>113</sup>

The answer to this riddle may lie in the changing political climate of the times. Maryland and New Hampshire ratified their constitutions in 1776 and 1784, respectively.<sup>114</sup> Their proposed amendments issued forth several years later in 1788.<sup>115</sup> In the interim, the Anti-Federalists had come onto the political scene.<sup>116</sup> Perhaps disagreement broke out between those who preferred the quartering provisions in the state constitutions and Anti-Federalists who wanted stiffer prohibitions against quartering.<sup>117</sup> Such political

<sup>108</sup> New Hampshire's variation came in the same article of the proposal with a restriction on standing armies, following up with "nor shall Soldiers in Time of Peace be quartered upon private Houses without the consent of the Owners." *Amendments Proposed by New Hampshire Convention*, art. 10, in DUMBAULD, *supra* note 98, at 182.

<sup>109</sup> "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." *Amendments Proposed by Virginia Convention*, art. 18, in DUMBAULD, *supra* note 98, at 185.

<sup>110</sup> "That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct." *Amendments Proposed by New York Convention*, in DUMBAULD, *supra* note 90, at 190.

<sup>111</sup> "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." *Amendments Proposed by North Carolina Convention*, art. 18, in DUMBAULD, *supra* note 90, at 201.

<sup>112</sup> It also tracks the wording of most of the quartering provisions found in the states' constitutions. See *infra* notes 212-27, and accompanying text.

<sup>113</sup> See *supra* note 96.

<sup>114</sup> *Id.*

<sup>115</sup> DUMBAULD, *supra* note 97, at 177, 181.

<sup>116</sup> The Anti-Federalists' critiques of centralized national power began in earnest following the publication of the Constitution in 1787. I THE ESSENTIAL ANTIFEDERALIST, at x-xi (W. Allen & G. Lloyd eds., 1985). No major Anti-Federalist documents were published in New Hampshire prior to 1787 nor in Maryland prior to 1788. See I THE COMPLETE ANTI-FEDERALIST, *supra* note 99, at x-xi.

<sup>117</sup> With regard to the Anti-Federalist view, see *supra* notes 99-102 and accompanying text.

divisions may have kept the Maryland and New Hampshire conventions from agreeing to a quartering amendment with more specific terms.<sup>118</sup>

b. *The Second Proposed Version*

Like the first version of the states' proposed quartering amendments, the second version prohibited forced quartering of troops in times of peace. Unlike the first version, the second version went on to specify that during times of war soldiers be quartered "only as the laws direct."<sup>119</sup> This additional clause lightens the burden of constitutional interpretation. There appears to be little doubt it was meant to put control of wartime quartering in the hands of Congress.<sup>120</sup> Nevertheless, the second version of the states' proposed quartering amendments still leaves us with an interpretative puzzle. While it effectively deals with the problems of quartering during times of peace and war, it fails to address explicitly the gray area between these two extremes. Therein lies the broad category of *unrest*, which includes insurrection, low-level conflict, and the period between the advent of a threat to national security and a formal declaration of war.

One can avoid the challenges of interpreting within this lacuna only by squeezing "unrest" into either "peace" or "war." But could the founders have failed to recognize a distinct condition of unrest? One would not expect lawyers and philosophers to use words so casually, but the founders were primarily statesmen. They may sometimes have put style before clarity in drafting the Bill of Rights. In any case, restricting oneself to "peace" and "war" does not entirely violate common usage. Supposing the founders did limit themselves to "peace" or "war," into which camp would they have put unrest? It seems most likely that the founders would have officially classified unrest as an instance of peace. The Constitution tends to treat war in a narrow and technical manner, thereby making it less susceptible to broad interpretations.<sup>121</sup> By default, "peace" would thus describe any time when no official declaration of war is in effect. This approach may well have appealed to the founders. It maximizes protection from quartering by extending homeowners' peacetime rights to periods of unrest. It also encourages Congress to deliberate seriously before declaring war because it adds quartering to the list of evils that such action may invite.

But might not the founders have thought of unrest as something distinct from peace and war? There are sound reasons to believe that they did indeed. The drafters of the states' proposed quartering amendments referred to war, rebellion, insurrection, and invasion elsewhere in the documents they forwarded to Congress, and used these words in specific contexts.<sup>122</sup> This implies that they regarded these words as legal terms having

<sup>118</sup> Why did the Anti-Federalists in Virginia, New York, and North Carolina not have a similar effect on the second version of the states' proposed quartering amendments? None of these three states had constitutional protections from quartering. Perhaps this weakened Anti-Federalist arguments for the long leap to a strict prohibition on quartering.

<sup>119</sup> *Amendments Proposed by Virginia Convention*, art. 18, DUMBAULD, *supra* note 98, at 185. The amendments proposed by New York and North Carolina employ similar wording. See *supra* notes 110, 111.

<sup>120</sup> See U.S. CONST. art. I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States. . . ." Prior examples of quartering provisions in the state constitutions of Delaware, Maryland, Massachusetts, and New Hampshire made the legislature's control over wartime quartering explicit. See *supra* note 95. The second version's deviation from these precedents may probably be attributed to stylistic preferences.

<sup>121</sup> See, e.g., U.S. CONST. art. I, § 8, cl. 11; see also *infra* notes 122-24 and accompanying text.

<sup>122</sup> See *Amendments Proposed by Maryland Convention Committee*, art. 13, DUMBAULD, *supra* note 98, at 178; *Amendments Proposed by New Hampshire Convention*, art. 12, DUMBAULD, *supra* note 98, at 182; *Amendments Proposed by Virginia Committee*, amend. XI, DUMBAULD, *supra* note 98, at 187; *Amendments Proposed by New York Convention*, art. 16, DUMBAULD, *supra* note 98, at 190; *Amendments Proposed by*

independent meanings, and that they were not wont to interchange them casually. The Constitution likewise uses these words carefully, giving Congress a power for declaring war at one point<sup>123</sup> and a power “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” at another.<sup>124</sup>

The use of these special terms denoting conditions of unrest intermediary to peace and war appears to be consistent with the manner of thought that military historians ascribe to the founders. “The Revolutionary generation did not identify sharp dividing lines between war and peace,” explains Reginald C. Stuart.<sup>125</sup> Instead, they distinguished between perfect wars, which were conducted in a formal manner towards limited ends, and imperfect wars, such as the intermittent, ill-defined skirmishes with Indians on the northern and western borders.<sup>126</sup> The founders derived these views on war from the writings of great legal theorists such as Hugo Grotius and Baron Samuel von Pufendorf.<sup>127</sup>

These distinctions also fit military policies of the time. The founders were quite familiar with civil unrest short of war. They had not only employed it themselves in order to irritate Britain; they had also seen it threaten their own nation’s unity. Hence Alexander Hamilton’s complaint of “the revolt of a part of the State of North Carolina, the late menacing disturbances in Pennsylvania, and the actual insurrections and rebellions in Massachusetts . . . .”<sup>128</sup> Backcountry unrest remained a persistent problem for the new country, as evidenced in the Whiskey Rebellion in 1791-1794, in subsequent separatist movements,<sup>129</sup> and in low-level Indian conflicts that repeatedly plagued the borders. In each of these instances government authorities quelled the unrest not by formally declaring war, but by direct applications of military force.

If those who drafted the second proposed quartering amendment did recognize a condition of unrest distinct from peace and war, why did they not address it directly? They may simply have drafted the amendment sloppily. Or perhaps political conflict forced them to keep their wording vague, just as political conflict may have shaped the first version. Alternatively, the drafters may have wished to leave open the possibility that the executive would control quartering during times of unrest, as discussed below with regard to the rejection of Madison’s proposed amendment.<sup>130</sup>

Assuming the recognition of a distinct condition of unrest, what rights would homeowners have had at such times under the second version of the states’ proposed quartering amendments? Homeowners would want to argue that the government’s power to quarter troops during wartime should not be taken to disparage their retained right to turn away troops during times of unrest. The states proposing the second version of the

*North Carolina Convention*, amend. XI, XII, DUMBAULD, *supra* note 98, at 178.

<sup>123</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>125</sup> REGINALD C. STUART, *WAR AND AMERICAN THOUGHT: FROM THE REVOLUTION TO THE MONROE DOCTRINE* 62 (1982).

<sup>126</sup> *Id.* at 9.

<sup>127</sup> Grotius had explained that “no war is considered to be lawful, regular, and formal, except that which is begun and carried out by the sovereign power of each country.” H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* 314-15 (A. Campbell trans., 1901). Pufendorf drew a similar line between “Solemn” and “Less Solemn” wars. S. PUFENDORF, *VIII OF THE LAW OF NATURE AND NATIONS* 93-94 (B. Kennet trans., 1717). Stuart nonetheless cautions us about over-generalizing about the founders’ views on war. STUART, *supra* note 125, at 9.

<sup>128</sup> THE FEDERALIST No. 6, at 33 (A. Hamilton) (E. Earle ed., 1941). The “rebellions in Massachusetts” refers to Shays’ rebellion of 1786-1787, an event that did much to increase sympathies for scrapping the Articles of Confederation and instituting a constitution that provided stronger central powers.

<sup>129</sup> D. FISCHER, *ALBION’S SEED* 840-41 (1989).

<sup>130</sup> See *infra* note 152 and accompanying text.

states' quartering amendments seemed to invite such claims; each one asked Congress to protect retained rights of the sort eventually safeguarded in the Ninth Amendment.<sup>131</sup> This argument faces a telling objection: that which has never existed cannot be retained.<sup>132</sup> Most state constitutions of the period had not yet even prohibited forced quartering during *peacetime*, and none had explicitly extended the right to times of unrest. Nor had homeowners enjoyed a *de facto* right to be free of quartering during times of unrest—hence their demands for the protection of a quartering amendment.<sup>133</sup>

The founders would have had several good reasons to oppose homeowners' attempts to retain their peacetime rights in periods of unrest. Quartering would probably have been most sorely needed during such times. Unrest tends to rise up unexpectedly, far from centers of power—conditions under which barracks are often unavailable.<sup>134</sup> Once Congress has declared war, the need for forced billeting largely disappears because there is more time to prepare military housing and there is increased public support for the war effort. Modern experience has shown that civilians readily consent to quartering when threatened by a common enemy.<sup>135</sup> Residents in a rebellious area, however, are much less likely to open their homes to troops, thus requiring the State to force quartering on them.<sup>136</sup> Doing so has the added benefit of monitoring and suppressing further insurrection. These strong policy arguments seem destined to overcome any claims that homeowners might make for extending their peacetime rights to times of unrest. If so, which branch of government should control quartering during unrest—the Executive or the Legislature?

Proponents of executive control could argue that during times of unrest the Executive must be free to act quickly and decisively, without waiting for Congressional approval.<sup>137</sup> Early American responses to unrest support this claim.<sup>138</sup> They could further argue that the second version of the states' proposed quartering amendments gives power over *wartime* quartering to lawmakers because that is the *only* time at which the

<sup>131</sup> They were the only states to do so. DUMBAULD, *supra* note 98, at 162. The Ninth Amendment provides: "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.

<sup>132</sup> This objection would appear to preclude further appeals of the Ninth Amendment: "It is far from obvious that [the Ninth Amendment] empowers judges to announce additional constitutional rights. Its history suggests it was meant merely to preclude any inference from the Bill of Rights that would lead to an unnaturally broad interpretation of the granted federal powers." D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 48 (1985). *But see* Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 3 (1988) ("[T]he judicial protection of unenumerated rights is consistent with the structural features of the Constitution, and . . . philosophical skepticism about the idea of 'retained rights' should not operate as a bar to their recognition.').

<sup>133</sup> Perhaps today homeowners could appeal to the privacy rights they enjoy by the grace of substantive due process. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

<sup>134</sup> As proof of this, consider that contemporary instances of a government imposing the quartering of troops on its own civilians have arisen during times of civil unrest, not war. *See Premier of India Meets Sikh Leader*, N.Y. TIMES, December 29, 1990, § 1, at 3; and *Reports from Yerevan and Stepanakert on 29th September*, BBC Summary of World Broadcasts, October 3, 1988, part 1. In the latter, a Soviet colonel of troops sent to quell Armenian unrest makes an ominous claim: "There have been many examples of kindness on the part of the inhabitants in the billeting of troops, they have been helpful." The story reveals that the soldiers had in fact been attacked by locals.

<sup>135</sup> During World War II, civilians often opened their houses to military personnel on pass or leave. Troops on isolated assignments were also sometimes invited into local homes. Having been consented to, such quartering did not offend the Third Amendment. Wurfel, *supra* note 2, at 734.

<sup>136</sup> Americans' behavior in the years leading up to the Revolutionary War should give proof enough of that. *See supra* notes 66-91 and accompanying text.

<sup>137</sup> This was a far greater problem in the 1700s than it is today, given improvements in transportation and communication.

<sup>138</sup> *See supra* notes 129-30 and accompanying text.

legislature can hope to direct quartering effectively. At all other times, the power to quarter troops must be wielded by the Commander in Chief if it is to be wielded well.<sup>139</sup> Despite these policy arguments, those who advocated executive control over quartering during times of unrest would have found it difficult to defend their position in Constitutional terms. On the one hand, they could depend on the clause vesting executive powers in the president.<sup>140</sup> Hamilton, for example, maintained that this power was “subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.”<sup>141</sup> Less controversially, they could depend on the executive’s designation as commander in chief.<sup>142</sup> Neither argument, however, convinced the *Youngstown* court that the Executive has broad “inherent” powers.<sup>143</sup>

Constitutional arguments for giving the legislature control over quartering during unrest carry more weight. The Constitution recognizes Congressional authority to act during times of unrest by giving it the power to call forth the militia “to execute the Laws of the Union, suppress Insurrections, and repel Invasions.”<sup>144</sup> Congress also has the power “To raise and support Armies,”<sup>145</sup> and “To make rules for the Government and Regulation of the land and naval Forces.”<sup>146</sup> These powers operate in full force during times of unrest and appear wide enough to include the quartering of troops.<sup>147</sup> More generally, the Constitution’s grant of congressional authority in these areas indicates a deep-seated mistrust of the Executive’s military power. This makes it all the more doubtful that the drafters of the second version of the proposed quartering amendments intended to let the Executive set the terms of quartering during times of unrest.

### c. Madison’s Proposed Version

Madison suggested a uniquely worded quartering amendment. Like both versions of the quartering amendments offered by the states, his proposed amendment prohibited forced billeting during times of peace. Madison, however, went on to forbid quartering “at any time, but in a manner warranted by law.”<sup>148</sup> This departed from the states’ proposed quartering amendments by explicitly giving Congress the power to direct

<sup>139</sup> For judicial recognition of the need for executive action in such cases, see the concurring opinions in *Youngstown Street & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *infra* note 143.

<sup>140</sup> U.S. CONST. art. II, §1, cl. 1.

<sup>141</sup> Hamilton, *Pacificus No. 1*, in XV THE PAPERS OF ALEXANDER HAMILTON 33 (H. Syrett ed., 1969) (emphasis in the original).

<sup>142</sup> U.S. CONST. art. II, §2, cl. 1.

<sup>143</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Note, though, that the concurring opinions may yet leave room for the president to seize control of quartering during times of unrest. “We must therefore put to one side consideration of what powers the President would have had if . . . the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.” *Id.* at 597 (Frankfurter, J., concurring); “[I]n the absence of [specific procedures laid down] by Congress, the President’s independent power to act depends on the gravity of the situation confronting the nation.” *Id.* at 662 (Jackson, J., concurring).

<sup>144</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>145</sup> *Id.* at cl. 12.

<sup>146</sup> *Id.* at cl. 14.

<sup>147</sup> If so, their express enumeration would exempt them from the Executive’s reach even under Hamilton’s argument. If not, Congress could still claim that it holds an implied power to quarter troops as a necessary and proper means of fulfilling its Constitutional duties to support armies. See *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819).

<sup>148</sup> DUMBAULD, *supra* note 98, at 207.

quartering whenever the nation was other than at peace.<sup>149</sup> Madison's revision of the states' proposals may have stemmed from his recognition that they held potentially dangerous ambiguities, raising interpretative problems by their having failed to address the gap between peace and war. Madison neatly avoided these problems by extending legislative control to "any time" outside of peace. This still leaves the exact boundary between peace and non-peace undefined, but it vastly narrows the range within which the line must be drawn. More importantly, it leaves no room for the Executive to step in and assert the power to quarter troops; jurisdiction over the home lies either with its owner (during peace) or with Congress (at all other times).

In spite of the apparent superiority of Madison's quartering amendment, the select committee to which it and Madison's other proposed amendments were referred rejected it for a quartering amendment that read essentially the same as the second version of the states' proposals and the final version of Third Amendment.<sup>150</sup> It would be rash to conclude, however, that the committee thereby thwarted Madison's plans. Perhaps he foresaw counterproposals for quartering amendments giving the Executive unqualified control over quartering in times of unrest, or for denying citizens the right to turn away troops at all.<sup>151</sup> Faced with the possibility of very weak amendments such as these, Madison may have advanced his amendment with an eye to the middle position that would survive the committee's compromises. Regardless of Madison's reaction, the committee's decision should pique interest. Why did the committee reject Madison's carefully worded amendment for an alternative that seems to ignore the issue of quartering during times of unrest? Unfortunately, we have no record of the committee's proceedings. A discussion of the intentions giving rise to the second version of the states' proposed quartering amendments, however, provides three possible reasons for the rejection of Madison's proposal: the failure to recognize an intermediary to war and peace; negligence; or purposeful silence.

The prior discussion of the founders' views on war, peace, and unrest casts doubt on the first of these possibilities. It also seems unlikely that the committee negligently failed to notice the unique aspects of Madison's quartering amendment, especially because

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<sup>149</sup> There were other, more subtle differences. Fields & Hardy point out that the nearly all of the state constitutions before Madison employed "ought" in restricting quartering. The exception lay in New Hampshire's constitution, which employed "shall." Fields & Hardy, *supra* note 2, at 420. As these authors see it, "Madison substituted the mandatory imperative 'shall' for the 'oughts' that had characterized those earlier documents; thus making the provision a true 'right.'" *Id.* at 425 (footnotes omitted). The proposed quartering amendments showed a similar bias, with all but Maryland and New Hampshire employing "ought." Maryland's proposal used no auxiliary verb. See *supra* note 104. New Hampshire's proposal used "shall." See *supra* note 105.

Note, too, that the second version of the states' proposed quartering amendments required that wartime quartering be done only "as the laws direct." *Amendments Proposed by Virginia Convention*, art. 18, in DUMBAULD, *supra* note 98, at 185. The amendments proposed by New York and North Carolina employed similar wording. See *supra* notes 109, 110. Madison changed this to "a manner warranted by law." DUMBAULD, *supra* note 98, at 207. While he may have been acting for entirely stylistic reasons, perhaps Madison was implying that, above and beyond statutory and constitutional restraints, quartering ought to conform with *natural law*. This would have given normative weight to the amendment's restrictions and alluded to limits beyond which the State could not justifiably intrude—constitution or no.

<sup>150</sup> The committee recommended a quartering amendment that read, "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." 1 ANNALS OF CONG. 752 (Gales & Seaton eds., 1789).

<sup>151</sup> At least one member of the committee, Roger Sherman of Connecticut, appears to have favored an amendment stripping homeowners of the right to turn away troops in times of peace. In later House debate over what would become the Third Amendment, Sherman claimed "that it was absolutely necessary that marching troops should have quarters, whether in time of peace or war, and that it ought not to be put in the power of an individual to obstruct the public service." *Id.* at 751-52.

Madison himself was on the committee to explain and defend his proposal. Did the committee reject Madison's proposed quartering amendment because it preferred to remain silent on the issue of who should control quartering during times of unrest? There are several reasons why it may have done so. The committee may have been unable or unwilling to resolve the issue, or perhaps it preferred the status quo for fear that the states would reject a revised quartering amendment.<sup>152</sup> The most intriguing conjecture, however, is that the committee wanted to give the Executive power over quartering in times of unrest, or at least to not foreclose that option. This explanation finds support in policy, politics, and actual practice.

For reasons of policy discussed above, the committee may have felt that the Executive was best able to direct quartering during border conflicts, invasions, and rebellions, but expressly giving the Executive such authority would have stirred up a political tempest. The states had demanded a Bill of Rights—not a Bill of Powers. Had the committee wanted to quietly leave room for the Executive to assume control over quartering during times of unrest, however, it could hardly have done better than the Third Amendment as written. If such was the committee's intent, it probably would have been pleased with the actual practice of quartering during the Civil War, as the next section will reveal.

### III. THE THIRD AMENDMENT IN PRACTICE AND THEORY

#### A. *Quartering Under the Third Amendment*

It should not be surprising to discover that United States troops have been quartered contrary to the Third Amendment; the Bill of Rights suffers violations all too frequently. It would be remarkable, however, if the Third Amendment had been violated openly and repeatedly over a period of several years without creating an uproar. Yet this seems to have been the case with regard to the quartering of troops during the War of 1812 and the Civil War.<sup>153</sup>

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<sup>152</sup> The committee rewrote other proposed amendments without apparent regard for such concerns, however. In drafting what would eventually become the Second Amendment, for example, the committee arguably associated the right to bear arms with the support of the militia: "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed. . . ." DUMBAULD, *supra* note 98, at 210-11. Yet even the most similar of the states' proposed amendments clearly insulates the right to bear arms from their use in militias: "That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defence of a free State." *Amendments Proposed by Virginia Convention*, art. 17. DUMBAULD, *supra* note 98, at 185. See also *Amendments Proposed by North Carolina Convention*, art. 17. DUMBAULD, *supra* note 98, at 201. Other states took a more radical stance. See, for example, New Hampshire's proposal: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Amendments Proposed by New Hampshire Convention*, art. 12. DUMBAULD, *supra* note 98, at 182. See also *Amendments Proposed by Pennsylvania Convention Minority*, art. 7. DUMBAULD, *supra* note 98, at 174.

<sup>153</sup> These two conflicts arguably mark the only times that U.S. troops have engaged in major military conflicts on their native soil. Most of the action in the other contender for this category, the Mexican-American War, took place on foreign ground. What little fighting there was in the U.S. occurred in sparsely populated areas. I have thus found no records of potential violations of the Third Amendment during the Mexican-American War.

During World War I, Congress came quite close to authorizing the quartering of troops without explicitly mentioning the Third Amendment. It authorized the Secretary of War "to requisition or otherwise take over for the United States any lands, including the buildings thereon and their equipment, or any temporary use thereof, required for hospital facilities." Act of Nov. 4, 1918, ch. 201, 40 Stat. 1020, 1029. Congress also authorized the seizure of buildings and furnishings for housing shipyard employees, Act of Mar. 1, 1918, ch. 19, 40 Stat. 438, 438, and workers in industries essential to the national defense, Act of

To emphasize how the Third Amendment was ignored and abused in these conflicts, this article will first consider the respect with which the states treated their quartering laws during the War for Independence. As noted earlier, Delaware and Maryland had issued declarations of rights stipulating that troops could be quartered only via legislatively enacted processes.<sup>154</sup> When faced with the need to quarter troops, the legislatures of each of these states admitted that they were obligated to uphold their prior declarations and passed acts to regulate quartering.<sup>155</sup> New Jersey,<sup>156</sup> Connecticut,<sup>157</sup> New York,<sup>158</sup> and Pennsylvania<sup>159</sup> enacted similar legislation even though these states were not bound by previous declarations of rights. Although the latter three states did little more than give permission for troops to be quartered, the legislatures of Delaware, Maryland, and New Jersey issued highly detailed quartering regulations. Generally speaking, their statutes required that Justices of the Peace direct the quartering of troops; that they try first to find rooms in hired housing, then in taverns and inns, then in empty or abandoned houses,<sup>160</sup> and only then in private homes;<sup>161</sup> that troops be distributed evenly and fairly; that fines be paid by officials who quartered in violation of the statute and by civilians who resisted lawful requests for shelter; and that those on whom troops were quartered receive rent and recompense for property damage. The legislatures of Delaware, Maryland, and New Jersey apparently took their duties to oversee quartering quite seriously.

Congress has shown much less sensitivity to the requirements of the Third Amendment. Consider its behavior during the War of 1812. Although it had officially declared war against England, it did not lay down laws regulating the quartering of troops.<sup>162</sup> Yet, troops *were* quartered in U.S. homes.<sup>163</sup>

May 16, 1918, ch. 74, § 1, 40 Stat. 550, 550 (amended 1922). Each of these acts limited the grant of power to the duration of the war and provided for just compensation.

<sup>154</sup> See *supra* note 96 and accompanying text.

<sup>155</sup> An ACT for the Quartering of Soldiers Passed at Session Beginning January, 1779, Acts of the General Assembly of the Delaware State 7 (Adams); An ACT for quartering Soldiers Passed at Session Beginning Feb. 5, 1777, Chap. XIV, I Laws of Maryland (Maxcy 1811), *reprinted in* EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917, DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE, at 290 (J. Reuban Clark ed., 1918) [hereinafter EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917].

<sup>156</sup> New Jersey's legislators explained they were fulfilling their state's constitutional requirement to follow common law. An ACT for the better regulating the Quartering of Soldiers, etc., passed at Session Beginning Oct. 28, 1777, Chap. XV, Acts of the General Assembly of the State of New Jersey 35, 35 (Collins).

<sup>157</sup> An Act enabling the Civil Authority and Select-men in the several Towns within this State, to appoint Barrack-Masters within said Towns, 1778 Conn. Pub. Acts 482.

<sup>158</sup> AN ACT for regulating impresses of forage and carriages and for billeting troops within this State, Ch. 29, I Laws of the State of New York 55 (Weed, Parsons & Co.).

<sup>159</sup> AN ACT to MAKE MORE EFFECTUAL PROVISION FOR THE DEFENSE OF THIS STATE, Ch. CML, § V, 10 Pa. Stat. 361 (Mitchell & Flanders).

<sup>160</sup> The Delaware statute placed empty or abandoned houses before taverns and inns. An ACT for the Quartering of Soldiers Passed at Session Beginning January, 1779, Acts of the General Assembly of the Delaware State at 8 (Adams).

<sup>161</sup> The Maryland statute stipulated that troops be quartered in the houses of those "who shall hereafter be adjudged Enemies or disaffected Persons by any legal Authority of this State" before they be quartered in any other house. ACT for quartering Soldiers Passed at Session Beginning Feb. 5, 1777, Chap. XIV, § II, I Laws of Maryland (Maxcy) *reprinted in* EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917, *supra* note 155, at 290-301.

<sup>162</sup> From a search of the United States Statutes at Large, vol. 1-3.

After the fact, however, Congress offered to compensate any person who had "sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military deposite [sic], under the authority of an officer or agent of the United States. Act of April 9, 1816, ch. 40, § 9, 3 Stat.

The Civil War ushered in another plague of forced quartering.<sup>164</sup> An account given of the Union's invasion of Virginia's Eastern Shore indicates its prevalence.<sup>165</sup> The Union's occupying force "was better received and more friendly to most of their captors" than any other during the war.<sup>166</sup> Yet even here the Army quartered troops on local civilians.<sup>167</sup> One might follow *Texas v. White* in arguing that the citizens of Virginia and the other rebel states did not deserve the Third Amendment's protections.<sup>168</sup> The Supreme Court held that "during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended."<sup>169</sup> This is a controversial claim.<sup>170</sup> Even if we accept it, however, it does nothing to excuse the quartering of troops on the citizens of *loyal* states. Apparently, however, such quartering did take place. Not only are there specific reports of troops having been quartered in Union territory,<sup>171</sup> but the Secretary of War alluded to having seized the homes of loyal citizens to use as barracks.<sup>172</sup> The practice grew so common that the military developed a sophisticated system for reviewing claims "for rent for houses . . . seized and occupied by the military authorities in loyal States during the rebellion."<sup>173</sup>

How much quartering did Union citizens endure? The Committee on War-Claims estimated that \$500,000 in claims for rent and damage to real estate came from loyal states following the Civil War (\$2,500,000 in like claims came from rebel states).<sup>174</sup> This is but a portion of the actual damages, for many of these claims were test-cases designed to determine Congress' willingness to pay for such claims. The Committee

261, 263, *amended* by Act of March 3, 1817, ch. 110, § 1, 3 Stat. 397, 397 (explaining that the prior act applied only to those places that had been used "as a place of deposit for military or naval stores, or as barracks . . .").

<sup>163</sup> Evidence of such quartering exists in the many private acts passed to provide compensation as required by the Act of April 9, 1816, 3 Stat. 261. For an extensive listing of such acts, see REFERENCES TO ACTS AUTHORIZING THE PAYMENT FOR PROPERTY LOST, CAPTURED, OR DESTROYED BY THE ENEMY WHILE IN THE MILITARY SERVICE, ETC. (1914). One example is an Act of April 17, 1822 "to pay John Anderson, of Michigan, \$1,300 for his house destroyed by fire in 1813 while occupied by United States troops without his consent." *Id.* at 5.

<sup>164</sup> This fact appears to have been overlooked by prior researchers on the Third Amendment. Fields & Hardy, for example, merely find it "interesting to note that the Civil War produced no cases interpreting the Third Amendment, even though it involved the domestic presence of large numbers of soldiers." Fields & Hardy, *supra* note 2, at 394 n.4. See also Fields, *supra* note 2, at 204-05 n.83.

<sup>165</sup> Crowson, *The Expedition of Henry Lockwood to Accomac*, 36 WEST VIRGINIA HISTORY 202-12 (1984).

<sup>166</sup> *Id.* at 209.

<sup>167</sup> *Id.* at 208, 210.

<sup>168</sup> *Texas v. White*, 74 U.S. (7 Wall.) 700 (1896).

<sup>169</sup> *Id.* at 727. It is not clear that this applies to the counties of Virginia's Eastern Shore, however, as Lincoln declared them to be loyal in November of 1862. Crowson, *supra* note 165, at 211.

<sup>170</sup> Consider that the Court also held that "the State did not cease to be a State, nor her citizens to be citizens of the Union." *White*, 74 U.S. (7 Wall.) at 726.

<sup>171</sup> See, e.g., reference to an instance of quartering in Kentucky, described as "one of the numerous cases of hardships occurring all over the border States during the war." CONG. GLOBE, 40th Cong., 2d Sess. 3074 (1868)(statement of Rep. Willey). See also COMMITTEE ON CLAIMS, S. REP. NO. 138, 40th Cong., 2d Sess. 1 (1868) (petitioner Jerome J. Getty of Stearns County, MN complaining that Union troops occupied his house and burnt it to the ground). See also the account of quartering in Maryland that Hon. John Ritchie gave to the House of Representatives in CONG. GLOBE, 42d Cong., 2d Sess. 2406 (1872) (statement of Rep. Ritchie). Troops were even quartered in the homes of citizens of Washington, D.C. See CONG. GLOBE, 39th Cong., 1st Sess. 3950 (1866) (statement of Rep. Anthony).

<sup>172</sup> Letter from William W. Belknap, Secretary of War, to Hon. William Lawrence, Chairman of Committee on War-Claims (February 24, 1874) [hereinafter Letter from Belknap], in COMMITTEE ON WAR-CLAIMS, WAR-CLAIMS AND CLAIMS OF ALIENS, H.R. REP. NO. 262, 43d Cong., 1st Sess., at 73-74 (1874).

<sup>173</sup> *Id.* at 74.

<sup>174</sup> *Id.* at 64 n.130.

estimated that "very many millions" of further such claims would surface if Congress offered compensation for rent and damage to real estate.<sup>175</sup> It declined to do so.<sup>176</sup>

One way or another, quartering Union troops in loyal states probably offended the Third Amendment. The question, however, is how it did so. As long as it remains unclear whether there existed a state of war sufficient to trigger the Third Amendment's second clause, one cannot be sure which part of the Third Amendment such quartering violated. Congress never officially declared war against the Confederate States. It regarded the conflict as a response to insurrection rather than the conquest of a sovereign nation. We might therefore conclude that the Civil War was a time of peace so far as it concerns the Third Amendment. If so, then quartering Union troops in loyal states violated the first clause of the Third Amendment: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner."<sup>177</sup> On the other hand, one might agree with the Committee on War-Claims that the insurrection had created a *de facto* state of war giving the U.S. government "the same rights and powers which they might exercise in the case of a national or foreign war."<sup>178</sup> If so, then the second clause of the Third Amendment would come into play, allowing wartime quartering "in a manner to be prescribed by law."<sup>179</sup> But quartering Union troops in loyal states violated this part of the Third Amendment, too; Congress, the sole federal body with constitutional authority to write laws,<sup>180</sup> had neither authorized nor regulated such measures.<sup>181</sup>

<sup>175</sup> *Id.* at 65 n.130. The committee estimated that merely one class of these hidden claims would call for compensation of \$300,000. *Id.*

<sup>176</sup> Congress initially denied remedy in the Court of Claims for all claims against the United States for the destruction or appropriation of property during the suppression of the rebellion. Act of July 4, 1864, ch. 240, § 1, 13 Stat. 381. Congress relented many years later, allowing citizens who had remained loyal to the Union to bring claims for "stores or supplies" seized by Union troops. Act of March 3, 1871, ch. 116, § 2, 16 Stat. 521, 524 (repealed 1879). Even this concession failed to aid those on whom troops had been quartered, however, for the Commissioners of Claims held that claims for rent or damage to property were not included within the scope of the statute. U.S. COMMISSIONERS OF CLAIMS, 5TH GENERAL REPORT, 44th Cong., 1st Sess. 42 (1876).

Many of these claims for rent and damage to real estate undoubtedly arose from causes other than troops being lodged in private houses. Some may also have come from homeowners seeking rent promised them in consensual agreements. It seems safe to conclude, however, that a significant proportion of these claims arose from the forced quartering of troops.

<sup>177</sup> U.S. CONST. amend. III, cl. 1.

<sup>178</sup> COMMITTEE ON WAR-CLAIMS, WAR-CLAIMS AND CLAIMS OF ALIENS, *supra* note 172, at 4, quoting the *headnotes* of the Prize Cases, 67 U.S. (2 Black) 636, 636 (1862). The actual holding of the Prize Cases appears to be somewhat more narrow. It extended the laws of war only to relations with neutral vessels caught in a naval blockade—not to relations with loyal citizens holding constitutionally protected rights. 67 U.S. (2 Black) at 666.

<sup>179</sup> U.S. CONST. amend. III, cl. 2.

<sup>180</sup> U.S. CONST. art. I, § 1.

<sup>181</sup> A search through the U.S. Statutes at Large from 1860 to 1865 reveals that Congressional concern about the quartering of troops extended only as far as providing funds for the "hire or commutation of quarters for officers on military duty, [and the] hire of quarters for troops. . . ." Act of June 21, 1860, ch. 163, § 1, 12 Stat. 64, 65 (repealed 1933). Nearly identical wording appears in Army appropriation acts throughout the Civil War period. *See* Act of March 2, 1861, ch. 72, § 1, 12 Stat. 200, 201; Act of July 5, 1862, ch. 133, § 1, 12 Stat. 505, 507; Act of February 9, 1863, ch. 25, § 1, 12 Stat. 642, 644; Act of June 15, 1864, ch. 72, § 1, 13 Stat. 126, 128; Act of March 3, 1865, ch. 25, § 1, 13 Stat. 495, 496. Congress apparently provided such funds only for leasing quarters in the conventional fashion, not for compensating those on whom troops had been forced. *See supra* note 176.

Congressional authorization for the quartering of troops also fails to appear among the statutes compiled in EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917, *supra* note 155.

The Secretary of Defense apparently viewed quartering as a form of taking allowed by the Fifth Amendment. He justified the military's policy of paying rent for houses seized and occupied in loyal states as just compensation. Letter from Belknap, *supra* note 172, at 74. He admitted that there was "no specific

There appears to be only one way to avoid the conclusion that Union forces repeatedly and openly violated the Third Amendment in the course of the Civil War: by reading the Third Amendment to leave a gap between peace and war wide enough for the Executive to order the quartering of troops during times of unrest. This article has already considered the possibility that the select committee favored this interpretation of the Third Amendment.<sup>182</sup> Quartering practices during the Civil War support this hypothesis by vindicating the committee's expectations and legitimizing the Union's policies. Otherwise the most charitable excuse for quartering practices under the Third Amendment would blame them on mere ignorance of the law.<sup>183</sup> This explanation finds support in the absence of any record that victims of quartering sued to protect their Third Amendment rights and in the fact that none of the federal documents referred to in this section make even passing reference to the Third Amendment. Charitable though the ignorance alibi may be, it still paints an unattractive picture of U.S. citizens, attorneys, and public servants disregarding an entire portion of the Bill of Rights.

### B. *The Third Amendment in Litigation*

The Third Amendment is the least litigated provision of the Bill of Rights. The Supreme Court has never given it more than a passing reference, and no case has ever grappled head-on with its apparent concern: the quartering of troops in civilian homes. For the most part, the Third Amendment has played the role of a non-speaking extra on the judicial stage. It has enjoyed but one brief moment in the spotlight: *Engblom v. Carey*.<sup>184</sup> Consequently, this case serves as the major, if not only, judicial interpretation of the Third Amendment.

#### 1. *Obscurity and Ridicule*

That the Third Amendment has received scant recognition may be to its benefit, considering the sort of attention that it has sometimes received. The first judicial references to it were harmless, if uninspiring. They came only in Supreme Court dissents, and in each case, the Third Amendment received no more than a passing reference as one of several constitutionally protected rights.<sup>185</sup> More recently, the dissent in *Poe v.*

statutory authority" for this policy, *id.*, but defended it on three grounds. First, he pointed to an act authorizing him to "fix and make reasonable allowance for the store rent, [and] storage . . ." necessary for the safe keeping of all military stores and supplies. Act of March 3, 1812, ch. 513, § 5, 2 Stat. 816, 817. (Note that it does not refer to housing troops.) Second, he found support in art. 42 of the Revised Regulations of the Army, August 11, 1861, approved by the President (not Congress). Letter from Belknap, *supra* note 172, at 74. Finally, the Secretary of Defense explained that "it is believed that the practice of the War Department in this regard is well known to Congress, and thus far it has met with no mark of disapproval." *Id.* None of these justifications does much to establish that the Secretary quartered troops in a manner "prescribed by law."

<sup>182</sup> See *supra* notes 150-52 and accompanying text.

<sup>183</sup> Apparently suspecting that the Civil War may indeed have seen troops quartered in violation of the Third Amendment, Fields explains the absence of litigation to "the exigencies of war, the enhanced authority of the military, and the sensibilities of the era. . . ." Fields, *supra* note 2, at 205 n.83. But the number of pleas for recompense brought before the Committee on War-Claims demonstrates that many citizens did not surrender to military demands without a struggle.

<sup>184</sup> 677 F.2d 957 (2d Cir. 1982).

<sup>185</sup> See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 615 (Harlan, J., dissenting) ("[S]uppose a State should prohibit the free exercise of religion . . . or authorize soldiers in time of peace to be quartered in any house without the consent of the owner . . . or inflict cruel and unusual punishment.'). See also, *Luther v. Borden*, 48 U.S. 1 (1848) (Woodbury, J., dissenting); *Block v. Hirsh*, 256 U.S. 135 (1920) (McKenna, J., White, Ch. J., et al., dissenting).

*Ullman* employed the Third Amendment in this same manner.<sup>186</sup> *Poe* laid the groundwork for the Third Amendment's most well-known Supreme Court appearance in *Griswold v. Connecticut*.<sup>187</sup> In that case the Third Amendment appeared as one of many amendments demonstrating a constitutional right to privacy, a role the Third Amendment has since played often.<sup>188</sup> Lower federal courts have likewise ensconced the Third Amendment in string cites with other amendments.<sup>189</sup>

Less frequently, courts have pointed to the Third Amendment as proof that the Constitution carefully distinguishes between times of war and peace. The Supreme Court cited the Third Amendment in this context in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>190</sup> Courts have similarly referred to the Third Amendment in order to emphasize that the Constitution limits the role of the military in civilian affairs.<sup>191</sup> The Third Amendment has also served as a prop in judicial expositions on constitutional interpretation, in one case demonstrating how certain freedoms have "faded into relative inconsequentiality."<sup>192</sup>

The Third Amendment has also acted like a magnet for somewhat less sensible uses. Perhaps its relative anonymity invites mistreatment; that would explain why the court in *Marquette Cement Mining Co. v. Oglesby Coal Co.* cited it as supporting the right to a civil jury trial, presumably intending to refer to the Seventh Amendment.<sup>193</sup> At other times plaintiffs have used the Third Amendment in support of far-fetched, metaphorical applications. *Securities Investor Protection Corp. v. Executive Securities Corp.* grew out of a claim that the use of a subpoena violated the Third Amendment.<sup>194</sup> Army reservists

<sup>186</sup> 367 U.S. 497, 522 (1961) (Douglas, J., dissenting) ("Can there be any doubt that a Bill of Rights that in time of peace bars soldiers from being quartered in a home 'without the consent of the Owner' should bar the police from investigating the intimacies of the marriage relation?") See also *Lombard v. State of Louisiana*, 373 U.S. 267, 274 (Douglas, J., concurring).

<sup>187</sup> 381 U.S. 479, 484 (1965).

<sup>188</sup> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy.

*Id.* at 484

<sup>189</sup> See, e.g., *United States v. Sprague*, 44 F.2d 967 (D.N.J. 1930), *rev'd on other ground*; *Wallace v. Ford*, 21 F. Supp. 624 (N.D. Tex. 1937).

<sup>190</sup> 343 U.S. 579, 644 (1952). The Third Amendment has played a similar role in other federal courts. See, e.g., *United States v. Rappeport*, 36 F. Supp. 915 (S.D.N.Y. 1941), *aff'd sub nom United States v. Herling*, 120 F.2d 236 (2d Cir. 1941); *United States v. Yasui*, 48 F. Supp. 40 (1942), *aff'd*, 320 U.S. 115 (1943).

<sup>191</sup> See, e.g., *Laird v. Tatum*, 408 U.S. 1, 22 (1972) (Douglas, J., dissenting). *Laird* is the Third Amendment's only Supreme Court appearance since *Youngstown* in which it has not been used in support of a right to privacy. The Third Amendment also demonstrates the military's limited role in civilian affairs in *United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974), *cert denied*, 416 U.S. 983 (1974), and *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985).

<sup>192</sup> *Mitman v. Glascott*, 557 F. Supp. 429, 431 (E.D. Pa. 1983). In *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987), Judge Easterbrook used the Third Amendment to distinguish between a "rule" (like the Third Amendment) and a "standard" (like the First Amendment).

<sup>193</sup> *Marquette Cement Mining Co. v. Oglesby Coal Co.*, 253 Fed. 107 (N.D. Ill. 1918). The Seventh Amendment provides: "In suits at common law, where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend VII.

<sup>194</sup> *Securities Investor Protection Corp. v. Executive Securities Corp.*, 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977).

ordered to march in a parade appealed to a supposed Third Amendment right to sit it out in *Jones v. United States Secretary of Defense*.<sup>195</sup> The defendant in *United States v. Valenzuela* alleged that “[t]he 1947 House and Rent Act...is and always was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III....”<sup>196</sup> The courts summarily rejected the Third Amendment claims in each of these cases.

Though the legal community has sometimes given the Third Amendment short shrift, the popular press has subjected it to outright ridicule. Prof. M. E. Shugee, for example, has presented a unique interpretation of the Third Amendment’s prohibitions on quartering troops: “‘The amendment actually means that no soldier shall be cut into four parts in a person’s house unless the owner agrees.’”<sup>197</sup> Dave Barry, on the other hand, has questioned the need for the Third Amendment’s protection on other grounds:

[T]here are times when I wouldn’t mind having soldiers lodged in my home, such as the other day when my wife told me the lawn-sprinkler valve was leaking, and I went outside to check it out, in my role as a Guy Fixing a Mechanical Problem, and suddenly—this is the truth—a totally unanticipated snake stuck its head out of the valve, and I was forced to switch over to my role of a Guy With No Pulse Backing Away From a Valve. If there had been soldiers lodging in my home, they could have dealt with this situation calmly and professionally by shooting the snake into 30,000 pieces...<sup>198</sup>

Disrespectful though it may be, such humor actually bears witness to the success of the Third Amendment’s silent vigil. Few people would giggle about the Third Amendment if they had to tiptoe around slumbering G.I.s on the way to breakfast each morning.

## 2. *Engblom v. Carey*

*Engblom v. Carey* was the first case to subject the Third Amendment’s restrictions on quartering to judicial interpretation.<sup>199</sup> It presented the question of whether New York State violated the Third Amendment by quartering National Guard troops in the on-site residences of striking correctional officers.<sup>200</sup> The Second Circuit Court of Appeals held that there were sufficient questions of fact regarding the officers’ possessory interests in their residences to raise the issue of whether or not their Third Amendment rights had been infringed.<sup>201</sup> The court’s findings had a powerful impact on the scope of liability under the Third Amendment, but because the defendants ultimately prevailed, the court did not decide how to remedy violations of the Third Amendment.<sup>202</sup>

<sup>195</sup> 346 F. Supp. 97 (D. Minn. 1972).

<sup>196</sup> *United States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D. Cal. 1951).

<sup>197</sup> M.E. Shugee, *Constitutional Right to Bear Arms: Bombs Away*, LEGAL TIMES, Dec. 17, 1984, at 14.

<sup>198</sup> Dave Barry, *Snakes and the Constitution*, THE WASHINGTON POST, June 7, 1987, at F1.

<sup>199</sup> *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982). For an analysis of *Engblom* see Comment, *supra* note 3, at 857-70. Only one other case, *Ramirez de Arellano v. Weinberger*, 568 F. Supp. 1236 (D.D.C. 1983), presented as promising a set of facts for Third Amendment litigation. The plaintiff in *Ramirez de Arellano* complained that U.S. troops had set up a regional military training center on his Honduras ranch. *Id.* at 1238. The case never gave the Third Amendment more than passing mention, however, instead winding through the U.S. court system in pursuit of other issues.

<sup>200</sup> *Engblom*, 677 F.2d at 961.

<sup>201</sup> *Id.* at 964.

<sup>202</sup> See *infra* notes 228-32 and accompanying text.

The correctional officers' dorm-style residences were owned by the State of New York and located on the grounds of the Mid-Orange Correctional Facility for its employees to use at their option. Documents governing the use of the residences explicitly specified that the state and the occupant officers held a normal landlord-tenant relation. On April 18, 1979, correctional officers at Mid-Orange joined in a state-wide strike called by the AFL-CIO. In response, Governor Hugh L. Carey activated the National Guard. The Mid-Orange superintendent locked the plaintiff officers out of the facility grounds and, as a consequence, out of their on-site residences. The state housed National Guard troops in the officers' rooms during the strike. The plaintiff officers alleged that upon their return they found their rooms ransacked and their personal property destroyed or missing.<sup>203</sup>

Based on these facts, the plaintiffs asserted that the State of New York had violated their Third Amendment rights by quartering troops in their homes during peacetime.<sup>204</sup> The district court granted the state summary judgment on the claim, finding that the plaintiffs lacked a sufficient possessory interest in their residences to qualify for the Third Amendment's protections.<sup>205</sup> The court of appeals reversed and remanded on this count.<sup>206</sup> In the process, the *Engblom* court came to three findings that have important, if unexamined, consequences for future litigation of the Third Amendment.

Two of these three findings have particular importance to the states' approach to quartering. In the first place, the court of appeals agreed with the trial court that National Guard troops are "soldiers" within the meaning of the Third Amendment.<sup>207</sup> In the second place, the *Engblom* court explicitly extended the Third Amendment to the states by incorporating it into the Fourteenth amendment.<sup>208</sup> The *Engblom* court's third finding with respect to the Third Amendment has more general import. Referring to the Supreme Court's use of the Third Amendment in *Griswold*, the court in *Engblom* maintained that "The Third Amendment was designed to assure a fundamental right to privacy."<sup>209</sup> The Supreme Court has rejected rigid definitions of "ownership" when applying the Fourth Amendment's protections against unreasonable search and seizure.<sup>210</sup> *Engblom* applied a similar analysis to the Third Amendment, holding that "property-based privacy interests protected by the Third Amendment . . . extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."<sup>211</sup> After *Engblom*, then, the Third Amendment applies to owners of leaseholds as well as to owners in fee simple.

<sup>203</sup> *Id.* at 960.

<sup>204</sup> *Id.* at 961.

<sup>205</sup> *Engblom v. Carey*, 522 F. Supp. 57, 64 (S.D.N.Y. 1981).

<sup>206</sup> *Engblom*, 677 F.2d at 963.

<sup>207</sup> *Id.* at 961. Although the court went no further than this in defining the term, the Supreme Court has found that "soldier" embraces non-commissioned officers, musicians, artificers, privates, and "other enlisted men." *Hartigan v. United States*, 196 U.S. 169, 173 (1905). "Soldier" has also been held to include officers generally, *Lamb v. Kroeger*, 8 N.W.2d 405, 406 (Iowa 1943), and persons enlisted in the Navy, *Macon v. Samples*, 145 S.E. 57, 61 (Ga. 1928), while excluding field clerks, *Stephens v. Civil Service Comm'n of New Jersey*, 127 A. 808, 809 (N.J. 1925). Ironically, though, one might say that officially there are *no* soldiers in the U.S. armed forces, as the term does not appear among the applicable statutory definitions. See 10 U.S.C. §101 (1988).

<sup>208</sup> *Engblom*, 677 F.2d at 961. By citing it in support of a right to privacy, several Supreme Court cases have apparently assumed the incorporation of the Third Amendment: see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting); *id.* at 549 (Harlan, J., dissenting).

<sup>209</sup> *Engblom*, 677 F. 2d at 962.

<sup>210</sup> *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

<sup>211</sup> *Engblom*, 677 F. 2d at 962.

### C. State Constitutions and Quartering

By extending the reach of the federal constitution's Third Amendment, *Engblom* significantly reduced the practical importance of states' constitutional protections from the quartering of troops. To fully understand *Engblom's* impact, this article will first examine the wide variety of quartering amendments that states have placed in their constitutions.

A majority of the states' constitutions—thirty-three in all—include a quartering amendment nearly identical to the U.S. Constitution's Third Amendment.<sup>212</sup> Other quartering amendments vary only slightly from the Third Amendment. Delaware's quartering amendment, for example, stipulates that civil magistrates must carry out the legislature's requirements for wartime quartering.<sup>213</sup> The constitutions of Massachusetts and New Hampshire likewise call for the involvement of civil authorities, in addition specifying that quartering shall be done in a manner ordained "by the legislature," rather than "by law."<sup>214</sup>

Seven state constitutions fail to even mention quartering, and one may well wonder why the other forty-three concern themselves with the topic.<sup>215</sup> After all, states can scarcely purport to command the billeting of federal troops. But states can claim authority over their National Guards. The courts have traditionally considered National Guard troops to be state employees unless they are called into federal service.<sup>216</sup> *Engblom v. Carey* reaffirmed this view.<sup>217</sup> The states' quartering amendments thus protect their residents from the forced billeting of National Guard troops. *Engblom* explicitly extended the Third Amendment to the states by incorporating it into the Fourteenth Amendment and held that National Guard troops are "soldiers" within the meaning of the Third Amendment.<sup>218</sup> As a consequence, no state can take a more permissive approach to quartering than the

<sup>212</sup> Most state quartering amendments differ from the Third Amendment only in matters of punctuation or capitalization, if at all. Connecticut's constitution, for example, stipulates that "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." CONN. CONST. art. I, § 17. California captures the substance of the Third Amendment in a somewhat more different form: "Soldiers may not be quartered in any house in wartime except as prescribed by law, or in peacetime without the owner's consent." CAL. CONST. art. I, § 5. The Confederate Constitution copied the Third Amendment verbatim. C.S. CONST. art. I, § 9, cl. 14.

<sup>213</sup> "No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war but by a civil magistrate, in manner to be prescribed by law." DEL. CONST. art. I, § 18.

This is the sort of quartering amendment suggested by Elbridge Gerry of Massachusetts in House debate over the Bill of Rights. 1 ANNALS OF CONG. 752 (Gales & Seaton eds., 1789).

<sup>214</sup> MASS. CONST. pt. 1, art. 27 ("In time of peace, no soldier ought to be quartered in any house without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.") N.H. CONST. pt. 1, art. 27 ("No soldier in time of peace, shall be quartered in any house, without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil authorities in a manner ordained by the legislature.").

<sup>215</sup> These seven constitutions belong to Florida, Georgia, Minnesota, Mississippi, Vermont, Virginia, and Wisconsin. Each of these constitutions have other clauses, however, from which one could patch together protections similar to those put forward in the Third Amendment. Virginia's constitution, for example, emphasizes that "in all cases the military should be under strict subordination to, and governed by, civil power." VA. CONST. art. I, § 13.

<sup>216</sup> See *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46-47 (1965) (each state's governor commands its guard except when it is called into federal service), *vacated on other grounds*, 382 U.S. 159 (1965); *Gnagy v. United States*, 634 F.2d 574, 580 (Ct. Cl. 1980) ("a National Guard unit not in active federal service is a state organization, rather than a federal organization"); *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974).

<sup>217</sup> *Engblom*, 677 F.2d at 961.

<sup>218</sup> *Id.* See *supra* note 208.

Third Amendment permits, even with regard to National Guard troops.<sup>219</sup> State quartering amendments still serve a purpose, however, insofar as they offer their residents greater protections from the billeting of National Guard troops than the Third Amendment requires.

With two exceptions, that seems to be the aim of the eight remaining state constitutions. The first exception appears in the constitution of Texas, which protects only citizens from the abuses of quartering.<sup>220</sup> If Texas officials treated this as an invitation to quarter their National Guard on non-citizen homeowners during times of war, they would do so in violation of the Third Amendment.<sup>221</sup> The second exception appears in the constitution of Kansas, which shelters only occupants from billeting.<sup>222</sup> If Kansas officials tried to quarter National Guard troops in an unoccupied house, its owner could justly appeal to the Third Amendment's guarantees.

The final six state constitutions present some interesting variations on the quartering amendment theme, all apparently attempting to offer stronger protections than does the Third Amendment. The constitutions of five of them—Alaska, Hawaii, Louisiana, Maine, and Michigan—extend their protections to occupants as well as owners.<sup>223</sup> Unless these states intend to protect even *illegal* occupants from peacetime quartering, however, their generosity has little effect. *Engblom* has effectively preempted such measures by extending Third Amendment rights to anyone who holds the legal right to exclude others from a home.<sup>224</sup> Only the quartering amendments in the constitutions of Arkansas and Louisiana can claim to have a broader reach than the Third Amendment. Arkansas's quartering amendment shelters not only the home, but *all* of an owner's real property.<sup>225</sup> Given that it emphasizes privacy rights rather than property rights, *Engblom* would probably not give the Third Amendment this broad a reach. Louisiana goes still further beyond the limits of *Engblom*'s Third Amendment. Its constitution provides that: "No person shall be quartered in any house without the consent of the owner or lawful occupant."<sup>226</sup> This is the strongest guarantee against quartering in any U.S. federal or state constitution. Louisiana's quartering amendment forbids quartering anyone (soldiers or otherwise) on anybody (owners or occupants) at anytime (war or peace).

<sup>219</sup> At present, only the Constitutions of Texas and Kansas threaten to do so. See *infra* notes 220-22 and accompanying text.

<sup>220</sup> "No soldier shall in time of peace be quartered in the house of any citizen without the consent of the owner, nor in time of war but in a manner prescribed by law." TEX. CONST. art. I, § 25 (emphasis added).

<sup>221</sup> It is not clear whether the Texas quartering provision refers to Texas citizens or U.S. citizens. If the former, it probably violates the Privileges and Immunities Clause. U.S. CONST. art. IV, § 2. If the latter, it probably violates the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.

<sup>222</sup> "No soldier shall, in time of peace, be quartered in any house without the consent of the occupant, nor in time of war, except as prescribed by law." KAN. CONST. Bill of Rights, § 14 (emphasis added).

<sup>223</sup> See, for example, Maine's quartering amendment: "No soldier shall in time of peace be quartered in any house without the consent of the owner or occupant, nor in time of war, but in a manner to be prescribed by law." ME. CONST. art. I, § 18 (emphasis added).

Hawaii and Alaska forbid more than just soldiers from quartering. Hawaii's quartering amendment applies to any "soldier or member of the militia." HAW. CONST. art. I, § 18. Alaska's applies to any "member of the armed forces." ALA. CONST. art. I, § 20. These modifications are probably not enough to give residents of Hawaii and Alaska greater protections than they would enjoy under *Engblom*, however, for courts would probably prevent the quartering of National Guard cooks just as readily as they would National Guard troops.

<sup>224</sup> *Engblom*, 677 F.2d at 962.

<sup>225</sup> "[N]o soldier shall be quartered in any house, or on any premises, without the consent of the owner in time of peace; nor in time of war, except in a manner prescribed by law." ARK. CONST. art. 2, § 27 (emphasis added).

<sup>226</sup> LA. CONST. art. I, § 6.

Unfortunately, we can only speculate about the impact that the variations among the states' quartering amendments would actually have in practice. To date, no state restriction on quartering has undergone the acid test of litigation.<sup>227</sup>

#### D. Quartering as Taking

Regardless of *Engblom's* powerful effects on Third Amendment theory, it failed to specify the remedies available to victims of quartering. Equitable remedies were inappropriate under the facts of the case, and the court neglected to set forth guidelines for monetary damages.<sup>228</sup> Nor was the matter settled on remand, where the defending state officials prevailed.<sup>229</sup> In any event, *Engblom* presents the easy case—it seems certain that those who prevail on claims of illegal peacetime quartering will receive something for their troubles.

Courts, however, must not treat peacetime quartering as merely another form of taking. Unless they levy punitive damages or other penalties against those responsible for this illegal and unconstitutional behavior, the Third Amendment's consent requirement will offer no more protection from quartering than the Fifth Amendment's takings clause.<sup>230</sup> For this reason, courts must also guard against the military circumventing the Third Amendment by formally condemning homes in peacetime for use as barracks.<sup>231</sup> The military could make a plausible claim to possess such power under current statutes.<sup>232</sup>

More difficult questions arise with regard to the remedies available to victims of quartering imposed legally during wartime. These victims would certainly seem to deserve recompense for having temporarily sacrificed their homes. They will probably have also suffered damage to their real and personal property. How will they find relief? The Fifth Amendment's takings clause seems to offer a means for the victims of wartime quartering to seek relief.<sup>233</sup> But before they can lay claim to the just compensation that it would provide, they must satisfy two questions. Does quartering constitute an instance of taking

<sup>227</sup> From a WESTLAW and hardcopy search of annotated state constitutions, July 20, 1991.

<sup>228</sup> *Engblom*, 677 F. 2d 957. An equitable remedy would have come too late to stop the quartering, which had already begun and ended. Nor would an equitable remedy have helped the plaintiffs to recover their residences, because they had already been offered housing at the facility following the strike's conclusion. *Id.* at 961. Because facts similar to these are present in most cases of quartering, victims of quartering will generally find equitable relief of little use—unless they can obtain it quickly enough to oust troops from their homes.

<sup>229</sup> They won on an affirmative defense of "good faith" immunity. *Engblom v. Carey*, 572 F. Supp. 44 (S.D.N.Y. 1983). In effect, the Third Amendment's obscurity came to their rescue, for the absence of judicial interpretation on the topic meant that "plaintiffs' Third Amendment rights were not 'clearly established' at the time of the events in question." *Id.* at 49.

<sup>230</sup> "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>231</sup> Although quartering puts troops and homeowners in the same building, this does not necessarily make it any worse than condemnation. To the contrary, victims of quartering enjoy an advantage: they can live elsewhere while troops occupy their homes and return later to resume possession.

With regard to quartering during times of war, courts should have the opposite concern: that the military will favor quartering over compensation in an attempt to escape the duty to pay compensation.

<sup>232</sup> A Secretary of a military department may "acquire by condemnation any interest in land, including temporary use, needed for—(1) the site, construction, or operation of fortifications, coast defenses, or military training camps . . ." 10 U.S.C. § 2663(a) (1988).

<sup>233</sup> The seizure of private property for military purposes must meet the same standards of just compensation that apply to other takings for public use. *See United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

private property for public use? If so, do any intervening doctrines prevent the Fifth Amendment from applying to the quartering of troops?

Homeowners can take advantage of the Fifth Amendment's protections only if quartering qualifies as a form of taking. There can be little doubt that it involves private property—lest we miss the point, the Third Amendment capitalizes “Owner.” Nor does there seem to be much doubt that wartime quartering serves a public end. The only real point of contention is whether or not quartering would qualify as a form of taking. If quartering is a form of taking, it must be a particularly limited kind. Sometimes only a portion of a home may be needed to provide a soldier or soldiers with lodging. Also, billeted troops do not become permanent guests; unless the war never ends, quartering will be only a temporary taking at the most.

Taken separately, these limits on the space and time of quartering's intrusions do not appear to exempt it from the Fifth Amendment. In *Loretto v. Teleprompter Manhattan CATV Corp.* the Supreme Court held that even an intrusion as small as that inflicted by an unwelcome video cable could constitute a taking of private property.<sup>234</sup> On the other hand, the wartime taking cases firmly establish that a temporary invasion of property constitutes a taking no less than a permanent one.<sup>235</sup> But does the Fifth Amendment apply even when these space and time limitations occur in the same taking? *Penn Central Transportation Company v. City of New York* set forth the various criteria that courts should weigh in determining if the government has a duty to compensate takings of a very limited nature.<sup>236</sup> Courts should ask whether the putative taking “can be characterized as a physical invasion,”<sup>237</sup> whether it conflicts with interests that are “sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes,”<sup>238</sup> and whether it interferes “with distinct investment-backed expectations.”<sup>239</sup> Quartering qualifies as a form of taking on all three counts.

Absent intervening doctrines, then, the Fifth Amendment should guarantee that those who suffer quartering receive just compensation for their losses. In practice, that is how Union military officials regarded quartering during the Civil War. They paid “rent for houses . . . seized and occupied by the military authorities in loyal States” because they reasoned that they were bound to do so “by virtue of an implied contract, under the [F]ifth [A]mendment of the Constitution.”<sup>240</sup> Two theoretical arguments, however, threaten this practical understanding of the relationship between the Third Amendment and the Fifth Amendment. The first treats quartering as a special class of taking; the second avoids compensation by appealing to “military necessity.”

The Third Amendment makes no explicit provision for compensating homeowners who have suffered quartering. It states only that quartering must be done, if at all, “in a manner to be prescribed by law.”<sup>241</sup> Does the “law” in this case include the Fifth Amendment? It would certainly seem odd to hold that it does not, given that the Constitution sets forth the highest law of the land. Suppose, however, that the Founders meant to treat quartering as a special class of takings. In this case, the Third Amendment would demand more and less than the Fifth Amendment. Unlike the Fifth Amendment,

<sup>234</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>235</sup> See *Petty Motor Co.*, 327 U.S. at 372; *General Motors Corp.*, 323 U.S. at 373; *Kimball Laundry Co.*, 338 U.S. at 1.

<sup>236</sup> *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>237</sup> *Id.* at 124.

<sup>238</sup> *Id.* at 125.

<sup>239</sup> *Id.* at 124.

<sup>240</sup> Letter from Belknap, *supra* note 172, at 74.

<sup>241</sup> U.S. CONST. amend. III.

the Third Amendment would require that homeowners consent to quartering-type takings in times of peace. On the other hand, the Third Amendment would undercut the Fifth Amendment in times of war by allowing Congress to deny compensation to those on whom troops had been quartered.<sup>242</sup> The Founders may have felt that quartering at the expense of homeowners would save funds better spent on uniforms and gunpowder, or that the exigencies of war would leave little time for the niceties of just compensation.

Can we thus read the Third Amendment's silence with regard to compensation as an implicit license to deny it? Here, at last, may be an unquestionably proper role for the Ninth Amendment, which asserts that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>243</sup> The Fifth Amendment gives the people the right to just compensation if their private property is seized for public use. Applying the Ninth Amendment and the Fifth Amendment to the case at hand leads quite directly to one conclusion: the Third Amendment's enumeration of a constitutional right to legal constraints on wartime quartering shall not be taken to deny or disparage a homeowner's right to receive just compensation for a public taking.

Victims of quartering must cross yet another hurdle before they can appeal to the Fifth Amendment, however: the argument of military necessity. In the face of hundreds of thousands of dollars of potential claims arising out of the Civil War, the Committee on War-Claims contended that

In battle or immediately after, and when it may be impossible to procure property in any regular mode by contract or impressment, self-preservation and humanity may require the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, and for necessary military operations which admit of neither choice nor delay....<sup>244</sup>

The Committee concluded that under these conditions instances of quartering constitute acts which "arise from and are governed by the law of overruling military necessity—mere accidents of war inevitably and unavoidably incidental to its operations—and which by international law impose no obligations to make recompense."<sup>245</sup> President Grant expressed a similar view in vetoing a bill for compensating one who had lost his home to military necessity: "It is a general principle of both international and municipal law that all property is held subject . . . to be temporarily occupied, or even actually destroyed, in times of great public danger and when the public safety demands it . . ."<sup>246</sup> In these cases, the President continued, "governments do not admit a legal obligation on their part to compensate the owner."<sup>247</sup>

The Committee of Claims (not to be confused with the Committee on War-Claims) disagreed with the President: "The committee has not found any such general principle affirmed either in international or municipal law, but has found the very reverse of that to be affirmed by all law, international and municipal."<sup>248</sup> Whether or not this

<sup>242</sup> This argument parallels the Supreme Court's holding in *Hollingsworth v. Virginia* that the veto clause does not apply to an area about which it is silent, constitutional amendments. 3 U.S. (3 Dall.) 378 (1798). But note this crucial difference: the President's veto powers are not protected by the Ninth Amendment; citizens' rights to just compensation are protected. See *infra* note 243 and accompanying text.

<sup>243</sup> U.S. CONST. amend. IX.

<sup>244</sup> COMMITTEE ON WAR-CLAIMS, WAR-CLAIMS AND CLAIMS OF ALIENS, *supra* note 171, at 40.

<sup>245</sup> *Id.* But see Letter from Belknap, *supra* note 172, at 74 (recognizing a Fifth Amendment right to just compensation for quartering).

<sup>246</sup> S. EXEC. DOC. NO. 85, 42d Cong., 2d Sess. 1 (1872) (veto of bill for relief of J. Milton Best).

<sup>247</sup> *Id.*

<sup>248</sup> COMMITTEE ON CLAIMS, S. REP. NO. 412, 42d Cong., 3d Sess. 2 (1873).

overstated the case in 1873, today one must consider the *Caltex* decision, in which the Supreme Court held that the Fifth Amendment did not apply when U.S. forces seize and destroy private property to prevent it from falling into the hands of a wartime enemy.<sup>249</sup> *Caltex*, however, does not go so far as to excuse quartering without compensation. More fundamentally, we should question whether international and municipal law apply to this issue. The Committee on War-Claims justified appealing to them by citing Congress's power "To define and punish... Offences against the Law of Nations."<sup>250</sup> From this the Committee argued that, being part of the law of nations, "The laws of war, equally with the amendments to the Constitution, determine certain rights of person and property... But where war is actually flagrant, or a state of war and the exercise of military authority exist, the laws of war prevail."<sup>251</sup> This argument proves too much, however. It gives the President power to suspend the Fifth Amendment, and the rest of the Bill of Rights,<sup>252</sup> wherever war-like conditions obtain—even if Congress has not officially declared war and even if the President has initiated and encouraged the emergency situation. The conflict need only be "actually flagrant."<sup>253</sup> But "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, and under all circumstances."<sup>254</sup>

Several flaws thus weaken the arguments that would bar victims of wartime quartering from appealing to the Fifth Amendment. Assume then that victims of quartering could sue for just compensation. What would they get for their efforts? Generally speaking, victims of quartering would deserve recompense for any lost value that they could have exchanged on the market were it not for the government having seized their property, including the rental value of their homes and the value of any property stolen or destroyed.<sup>255</sup> Courts will not, however, award damages for "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it...."<sup>256</sup> It therefore does not appear that the victims of quartering could recover for what may be their most grievous injuries: being forced onto the street, seeing strangers occupy and ransack their houses, and homesickness.

#### IV. CONCLUSION

The threat of quartering that seemed so immediate to the Founders seems remote to us now. But one should not therefore dismiss the Third Amendment as a charming relic from more dangerous times. It can speak volumes—if one takes the time to listen. Tracing

<sup>249</sup> *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149 (1952).

<sup>250</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>251</sup> COMMITTEE ON WAR-CLAIMS, WAR-CLAIMS AND CLAIMS OF ALIENS, *supra* note 172, at 10-11 (emphasis in the original).

<sup>252</sup> Thus the Third Amendment would also fall before the Committee's argument. But the Third Amendment lays down provisions that apply specifically during times of war. The Founders apparently assumed that the Bill of Rights would continue to define the law at such times.

<sup>253</sup> Note that the Committee's argument does not even require that the President, much less Congress, declare an area to be in rebellion for military necessity to obtain. It argued that no recompense was due to citizens in portions of Missouri, Kentucky, Maryland, Ohio, Indiana, and Pennsylvania. COMMITTEE ON WAR-CLAIMS, WAR-CLAIMS AND CLAIMS OF ALIENS, *supra* note 172, at 11. President Lincoln never proclaimed insurrections to exist in these states. *Id.* at 77-78.

<sup>254</sup> *Ex Parte Milligan*, 71 U.S. 2, 120-21 (1866). *But see id.* at 138 (Chase, C.J., concurring) (joined by Wayne, Swayne, & Miller, J.J.) ("[T]he power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.").

<sup>255</sup> *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 7-8.

<sup>256</sup> *Id.* at 5.

the Third Amendment's deep roots in English law reveals the origins of our legal heritage. Its bloodline winds through early American history, outlining the causes of the Revolution and culminating in the struggle to determine the final content of the Constitution's Bill of Rights. Although the Third Amendment has seldom been litigated, it still raises interesting theoretical questions about states' powers under federalism, rights to property and privacy, and the interplay of overlapping constitutional protections.

Fortunately, the Third Amendment is not yet gone. Now perhaps it will not remain forgotten. If the Third Amendment is forgotten, one can only hope will ever again need its protection. In that case, complacency would merely demonstrate that the Third Amendment works exactly as planned. But if memory fails and history repeats, one can only hope that the troops will not stay long.