

When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping

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INTRODUCTION

At a recent dinner with a group of Georgetown University law students, Laurence Silberman, Senior Judge on the District of Columbia Circuit Court of

* Georgetown Law, J.D. expected 2009; Cornell University, B.A. 2006. © 2008, Josh Dugan. I am grateful to all those who took time out of their days to listen to a discourse on what quartering meant in the late-eighteenth century, particularly my parents and sisters who bore the brunt of it. I also thank Melissa Jackson-Veneziano, Michael Stoll, Vernon Cassin, Lauren Schorr, David Shaw, John Stith, and John Toro for their helpful comments on various drafts of this Note. Finally, I am uniquely indebted to Professor Mike Seidman, for whose Constitutional Theory Seminar this paper was originally written, and whose motivation, advice, and wisdom made writing it possible.

Appeals, was asked about his experience writing *Parker v. District of Columbia*.¹ The Judge described his experience writing the opinion, the first circuit court opinion to hold that the Second Amendment protects an almost unlimited individual right to bear arms,² as a highlight of his legal career that provided him with the opportunity to tackle an area of constitutional law that had long been neglected by the federal courts.

Silberman's anecdote prompted another student at the dinner to remark that the judge need only write an opinion on the Third Amendment—which provides that “[n]o 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”³—for his judicial career to be complete. Silberman paused before replying, “I’m very sorry, but what is the Third Amendment again?”⁴

Whether or not Silberman was joking, the point is the same. When it comes to the proscription against quartering troops during peacetime, ignorance is bliss. In fact, a purely unscientific survey of law students, professors, and practitioners reveals that a significant portion of the legal community does not know what the Third Amendment is,⁵ despite easily being able to recite amendments one, two, and four.

But why should Silberman—or any other legal scholar in good standing—know about the Third Amendment? After all, it is not as though there is an impending threat of dirty, angry, and ungrateful soldiers knocking on people's doors and demanding to sleep in their spare bedrooms and eat their leftovers. Likewise, it is not apparent that there has been a real threat of such an invasion at any point in the last 150 years.⁶ Indeed, with the exception of one moment in 1982, no federal court has ever reached a binding decision solely on Third Amendment grounds.⁷ Additionally, probably the most famous reference to the Third Amendment, Justice William O. Douglas's claim in *Griswold v. Connecticut* that the existence of “penumbras” and “emanations” in the Bill of Rights, including the Third Amendment, supports a constitutional right to privacy broad enough to encompass the right of married couples to purchase birth control, is widely mocked.⁸

1. 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub. nom.* *Heller v. District of Columbia*, 128 S. Ct. 2783 (2008).

2. *Id.* at 395.

3. U.S. CONST. amend. III.

4. This story was related second-hand to the author and may or may not be apocryphal.

5. See also Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 209 (1991) (discussing his own unscientific survey of Harvard Law professors).

6. See Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 136–39 (1993) (discussing forced quartering of soldiers in civilian homes during the War of 1812 and the Civil War).

7. The exception is *Engblom v. Carey*, in which a Second Circuit panel held that the Third Amendment was applicable to the states through the Fourteenth Amendment, and that national guard occupation of prison guard dormitories during a strike could violate the Third Amendment's ban on quartering during peacetime. 677 F.2d 957, 961, 964 (2d Cir. 1982).

8. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *id.* at 500 (Harlan, J., concurring) (mocking Douglas's discussion of “penumbras” and “emanations” by referring to them as “radiations”).

In short, the Third Amendment is the ultimate Not-Constitutional Law⁹—a nominally constitutional provision that is considered too irrelevant, too literal, or too boring to receive substantial scholarly attention. As the Leviticus¹⁰ of the Bill of Rights, it is a constitutional chapter read only, if at all, to get from one more-interesting chapter to the next or to gain insight into a past generation's long-lost esoteric practice, but never to glean any knowledge that is applicable to our current lives.¹¹

This is not to say that there has been no scholarly attention paid to the Third Amendment. Arguments about the Third Amendment can be divided roughly into two categories: those that accept the basic assumption that quartering was conceived of as a very narrow, substantive protection but that seek to broaden its applications by examining the surrounding clauses in the Third Amendment,¹² and those that present the Amendment as having only symbolic value.¹³

The latter group of scholars, including some judges writing in court opinions, notice a connection between the Founders' general fear of standing armies and their concerns about quartering but have treated these concerns as, at most, symbolic and have not considered how this connection went from symbolic expression to practical protection or rule.¹⁴ Morton Horwitz, for example,

9. Cf. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 22 (1991) (“[A] proposition about the US constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world.”).

10. Leviticus is the third of the Five Books of Moses in the Old Testament. It is primarily concerned with issues of ritual purity, sacrifices, and other activities in the long-since-destroyed Tabernacle and Jewish Temple. See generally *Leviticus*.

11. See Horwitz, *supra* note 5, at 214 (describing the obsolescence of the Third Amendment as a function of its inability to be removed from its historical context).

12. See, e.g., Bell, *supra* note 6, at 118–28, 146–49 (providing detailed history of quartering in England and the United States and arguing that quartering can be conceptualized as a specific type of Fifth Amendment “taking”); Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 770–71 (2000) (arguing that under “Living Constitution” theory, the Third Amendment should be read to invalidate the Endangered Species Act); Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 601, 604 (2004) (arguing that “soldier” is broad enough to encompass CIA and FBI agents, but not questioning the underlying definition of quartering); Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 142–48 (2005) (arguing that the Third Amendment bars forced military recruiting on private college campuses because the “any house” clause in the Third Amendment is broad enough to encompass colleges, while conceding that quartering is a private property right to exclude soldiers with an underlying concern about separating military from civilian spheres).

13. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 61–63 (1998) (discussing the way in which the Third Amendment embodies broader concerns about federalism, separation of powers, and protecting civilians from the military); Horwitz, *supra* note 5, at 214 (noting that in light of the Fourth Amendment, the Third Amendment offers largely symbolic protection).

14. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 15–16 (1972) (noting that the Third Amendment's “philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644–45 (1952) (Jackson, J., concurring) (discussing the Third Amendment as it relates to separation of military from civilian power and the Legislative from Executive Branch); *Padilla v. Rumsfeld*, 352 F.3d 695, 714–15 (2d Cir. 2003) (“[T]he Third Amendment's prohibition on the quartering of troops during times of peace reflected the

argues that the Third Amendment *could* have been the grounds for finding a right to privacy or a protection against intrusions into those areas in which individuals have a reasonable expectation of privacy but did not develop that way because the Supreme Court has based this right in the Fourth Amendment.¹⁵ William Fields and David Hardy describe the development of the Third Amendment in the context of many of the Founders' fears of standing armies, but argue that the Amendment fails to practically limit the army in any way beyond a narrow, individual protection against abuse of people and property.¹⁶ And Akhil Amar and Geoffrey Wyatt argue that the Third Amendment represents broader principles of separation of powers and skepticism about military power found throughout the Constitution.¹⁷

In this Note, I challenge the prevailing assumption that has rendered the Third Amendment a symbolic constitutional footnote with no modern applications—that the practical intrusion embodied in the term “quartering” is unambiguously limited to soldiers occupying people’s homes.¹⁸ Instead, I argue that between the immediate pre-revolutionary period and the ratification of the Bill of Rights, the Founders used the word “quartering” to expansively refer to a practical and substantial intrusion that threatened the legitimacy of government and the rule of law; that when they used the term, they did so to express their fear of, and outrage over, soldiers being used to escort the “exciseman”¹⁹ or the “Sheriff or Constable”²⁰ into homes to enforce the law.

Likewise, the debates about quartering illustrate an agreement between the warring Federalists and Anti-Federalists that individuals should be free from such military intrusions. The term “any house”—ultimately codified in the Third Amendment—was not a narrow exception to the general rule that soldiers could intrude into civilian life; rather, it represented an expansive definition of the civilian’s right to be free from such intrusions. The founding debates and the text of the Amendment suggest that these intrusions could permissibly occur

Framers’ deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life.”).

15. See Horwitz, *supra* note 5, at 214.

16. See 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, 394–95, 431 (1991). Fields and Hardy, like Geoffrey Wyatt, provide a detailed historical account of quartering practices dating back to the Middle Ages. See generally *id.* at 395–420. They ultimately conclude, contrary to my position, that the Third Amendment provides only a limited individual right, rather than a more fundamental check on the standing army. See *id.* at 431.

17. See AMAR, *supra* note 13, at 61–62; Wyatt, *supra* note 12, at 148 (noting that the goal of the Third Amendment is “the protection of private property and the separation of the military and civilian spheres”).

18. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 8–9 (1996) (arguing that there is no room to argue that the Third Amendment’s protection encompasses any larger principle beyond troops living in quarters); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 99 (1980) (arguing that the Third Amendment is too obscure to become an issue in modern society).

19. See Patrick Henry’s Objections to a National Army and James Madison’s Reply (June 16, 1788), in 2 *THE DEBATE ON THE CONSTITUTION* 695, 697 (Bernard Bailyn ed., 1993) [hereinafter Patrick Henry’s Objections].

20. See *id.* at 700.

only when mass unrest spilled onto the public streets²¹ or when the nation was threatened by war or insurrection.²²

In short, the peacetime proscription against quartering troops is a categorical ban on soldiers enforcing law against civilians in all areas in which private citizens may exclude others. Conversely, the Third Amendment gives Congress blanket authority to allow the military to enforce laws in these areas during time of war. This reading, I argue, helps to make sense of the Amendment's place in the larger constitutional scheme, creating a strong division between civil and military power. In particular, it provides a foundation for the Third Amendment's protection against quartering in light of the other law enforcement provisions of the Bill of Rights. Most significantly, it complements the Fourth Amendment's ban on unreasonable searches and seizures—a protection that would render the Third Amendment's proscription redundant were it merely protecting individuals against having their homes seized by soldiers. Because the history of the Fourth Amendment indicates that it was meant to apply to only unreasonable searches and seizures conducted by civilian officials, the Third Amendment's originally intended protection against the military conducting these activities is both consistent with and complementary to the Amendment that immediately follows it.

When viewed in this light, I argue that the Third Amendment has significant implications for contemporary political and constitutional debate. In particular, the protection against quartering raises serious constitutional questions about the ability of the President to authorize the National Security Agency (NSA) to intercept communications of individuals living in the United States. Because an NSA official fits the definition of "soldier" in the Third Amendment, courts that have contemplated this problem, so far, are wrong to analyze it under the Fourth Amendment and instead should analyze warrantless wiretapping under the Third.

In Part I of the Note, I provide the history of the Third Amendment as it has been both written and assumed until now, and fill in the gaps in this history by analyzing what quartering meant to the Founders of the Republic and Framers of the Constitution. In Part II, I consider what unique protection the Third Amendment offers in light of the Fourth Amendment's bar against unreasonable searches and seizures by civilians. And in Part III, I discuss potential modern applications of the Third Amendment, focusing on NSA wiretapping.

One could call this quixotic endeavor revisionist history but for the fact that the orthodox history of the Third Amendment has yet to be comprehensively written; it has merely been assumed. Even those few who have studied the Third Amendment's meaning have largely based their conclusions on what quartering meant in the context of seventeenth-century British common law²³ and not on what it meant to the Framers of the Constitution. In providing my

21. *See id.* at 699–700.

22. THE FEDERALIST No. 29, at 155 (Alexander Hamilton) (E.H. Scott ed., 2002).

23. *See, e.g.,* Bell, *supra* note 6, at 118–24; Fields & Hardy, *supra* note 16, at 395–413; Wyatt, *supra* note 12, at 125–30.

analysis and conclusions, my main goal is to question the prevailing orthodoxy that holds it is safe to ignore or disregard one-tenth of what many people believe to be the most important political document ever written.

And though I recognize that it is difficult to challenge assumptions that have such a pervasive hold on legal discourse, I also realize that the fact that an assumption is widely held does not mean that it will always be so; that for nearly one hundred years after the Fourteenth Amendment was ratified, people safely assumed that it did not encompass the right to abort a non-viable fetus; that for years before Judge Silberman wrote *Parker*, many people assumed that the Second Amendment embodied a collective and not an individual right to bear arms;²⁴ that history is first told with the Sound and Fury of its idiots,²⁵ before ultimately being written by its victors.²⁶

I. THE HISTORY

A. TRADITIONAL ASSUMPTIONS

The typical quartering narrative goes something like this. The king stationing troops in private homes without the consent of the owner became an endemic problem in seventeenth-century Britain.²⁷ British subjects grew tired of soldiers sleeping in their spare rooms, eating their food, and mistreating their property, which ultimately found expression in the Petition of Right and the English Bill of Rights.²⁸ Though no longer able to tyrannize British subjects with impunity, soldiers backed by the force of British law and a new tyrannical king were able to perpetrate many of the same wrongs against American colonists.²⁹ These colonists, even less enamored with soldiers' company than their counterparts across the pond, responded angrily by declaring independence and listing quartering as a primary grievance in their separation decree.³⁰ Finally, with little fanfare, save the objection of Roger Sherman, who felt quartering was a

24. See, e.g., Horwitz, *supra* note 5, at 209.

25. See WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5. See generally WILLIAM FAULKNER, *THE SOUND AND THE FURY* (1929) (telling the story of Caddy Compson and the decline of the Compson family first through the eyes of the severely mentally retarded Benjy Compson, before telling it through the mentally competent, albeit disturbed, viewpoint of his brothers).

26. See *Brewer v. Quarterman*, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting) (explaining how the Court's opinion in this capital case applied the logic of a previous string of dissenting opinions by noting that "[i]t is a familiar adage that history is written by the victors").

27. See, e.g., Bell, *supra* note 6, at 123; Fields & Hardy, *supra* note 16, at 402–06; Wyatt, *supra* note 12, at 125–27.

28. See, e.g., Bell, *supra* note 6, at 124–25; Fields & Hardy, *supra* note 16, at 405; Schmidt, *supra* note 12, at 645–46; Wyatt, *supra* note 12, at 125–27.

29. See Bell, *supra* note 6, at 124–126; Fields & Hardy, *supra* note 16, at 413–17; Schmidt, *supra* note 12, at 646–47.

30. See Bell, *supra* note 6, at 127; Fields & Hardy, *supra* note 16, at 417–18; Schmidt, *supra* note 12, at 647. The Declaration of Independence chastises the King for "quartering large bodies of armed troops among us." See Fields & Hardy, *supra* note 16, at 418.

necessary inconvenience for supporting a standing army,³¹ the Founders codified the ban against quartering in the Third Amendment. In essence, the argument goes, there is no reason to doubt that the American quartering experienced in the late eighteenth century tracked the British concern about soldiers disrupting their right to quiet enjoyment in the mid-seventeenth century;³² namely, people being fed up with having to tolerate uncouth soldiers “ruining everybody’s lives and eating all [their] steak.”³³

B. THE FIRST WRINKLES

If this story sounds like a vast oversimplification, it’s because it is one. Even this narrative, recently retold by a half-dozen academics who seek to breathe some life into this little-amendment-that-couldn’t,³⁴ provides an untenable picture of what quartering soldiers historically meant.

A look at the British quartering experience illustrates that in Great Britain “quarter” was never used exclusively to refer to soldiers living and sleeping in civilian homes,³⁵ and the harm it denoted was not merely a narrow harm specific to individuals and their property. A court in eighteenth-century Britain, for example, noted that the purpose of the quartering bans in England was “to guard civil authority against the military.”³⁶ Seventeenth-century British cases discuss soldiers being “quartered at” cities and describe quartering violations in which the offending soldier never slept in the affected home.³⁷ Quartering was used to describe where soldiers were stationed and where they conducted an array of activities, not just where they lived.

These observations lead Geoffrey Wyatt to conclude that the right to resist quartering “is fundamentally a private property right” and “is a particular facet of the general right to exclude.”³⁸ Because the proscription against quartering tracks the right to exclude more generally, Wyatt argues that it should be applied to a broad range of scenarios in which private people or groups are required to have soldiers occupying their property, particularly military recruiters on private university campuses.³⁹

This argument is ultimately unsatisfactory for a few reasons. First, it fails to fully explain why, if the Amendment was concerned principally with protecting

31. See Bell, *supra* note 6, at 135 n.151; Fields & Hardy, *supra* note 16, at 425; Wyatt, *supra* note 12, at 143.

32. See Bell, *supra* note 6, at 124–28. See generally Fields & Hardy, *supra* note 16; Wyatt, *supra* note 12, at 148–50.

33. NAPOLEON DYNAMITE (Fox Searchlight Pictures et al. 2004).

34. See generally Bell, *supra* note 6; Fields & Hardy, *supra* note 16; Moriss & Stroup, *supra* note 12; Schmidt, *supra* note 12; Wyatt, *supra* note 12.

35. See Wyatt, *supra* note 12, at 147–50 (noting that there are several lines of British cases that suggest quartering meant stationing or occupancy short of actually living in a given house).

36. *Midhurst v. Waite*, (1761) 97 Eng. Rep. 821, 822 (K.B.).

37. See, e.g., *The King v. Hellingley*, (1808) 103 Eng. Rep. 691, 691 (K.B.).

38. Wyatt, *supra* note 12, at 131–32.

39. *Id.* at 123.

the property right to exclude, it was written to apply only to the right to exclude soldiers. Second, it fails to address why quartering was such a uniquely horrible property intrusion that it warranted an absolute ban during peacetime, as opposed to say, eminent domain, which could be done with impunity so long as just compensation was paid and the property went to public use.⁴⁰ Finally, if quartering is principally a reaffirmation of the right to exclude, why should this be the right that the Founders made contingent on peacetime?⁴¹ After all, it does not follow that of all the rights enumerated in the Bill of Rights, the right to exclude should be the one that is left most vulnerable during wartime.

More fundamentally, though, this argument—like most of the textual and historical assertions made about the Third Amendment⁴²—fails to notice the way in which the term quartering evolved between the 1620s and the American Revolution. The argument assumes that quartering meant the same thing to people in 1600 Great Britain as it did to those in 1792 Philadelphia.⁴³ The argument does not consider the effect on a word's meaning and constitution of 200 years and a journey across the Atlantic Ocean.

C. WHAT QUARTERING MEANT TO THE FOUNDERS

A comprehensive look at the documents and debates surrounding the Revolution, the Constitution, and the Bill of Rights illustrates that regardless of what quartering meant to British subjects living in England, the term had taken on a substantively different meaning to colonists subjected to British foreign rule. The experience of having foreign rule imposed on them, often by force of armed soldiers,⁴⁴ led colonists to a new conception of what it meant to have soldiers quartered among them.⁴⁵ Gone was a nagging concern about property damage or the annoyance of having to put up with drunk, dirty, impolitic, and even violent soldiers.⁴⁶ In its place was a large-scale concern about a centralized executive power imposing its will at gunpoint, regardless of the underlying

40. U.S. CONST. amend. V.

41. See U.S. CONST. amend. III.

42. See *supra* note 12 and accompanying text.

43. Geoffrey Wyatt, for example, focuses his analysis of the term quartering almost exclusively on seventeenth, eighteenth, and early nineteenth-century British cases. Others give only a haphazard analysis of how quartering was used at the time of the Founding, usually by referring, in passing, to one or two examples of quartering used by the Founders. See Bell, *supra* note 6, at 128 (discussing *The Federal Farmer's* objection that the Constitution did not bar quartering of troops); Fields & Hardy, *supra* note 16, at 423–25 (discussing an exchange between Patrick Henry and James Madison at the Constitutional Convention and Roger Sherman and Thomas Sumter's remarks during the Bill of Rights ratification debates); Horwitz, *supra* note 5, at 211 (discussing James Madison and Patrick Henry's remarks about quartering at the Constitutional Convention); Wyatt, *supra* note 12, at 123 (discussing Roger Sherman's remarks about quartering at the ratifying convention).

44. See Bell, *supra* note 6, at 125.

45. See THE DECLARATION OF INDEPENDENCE paras. 11–14 (U.S. 1776).

46. See Fields & Hardy, *supra* note 16, at 416–17 (describing the “licentious and outrageous” behavior of British soldiers towards American colonists); Wyatt, *supra* note 12, at 147–48 (describing the “traditional Colonial American quartering tale” as involving soldiers occupying homes, demanding provisions, and harming the homeowners).

legitimacy of the law, a concern that ultimately resulted in a proscription against soldiers enforcing the law, except in the most extreme circumstances.

1. Pre-Revolutionary War Anger

As early as 1768, the colonists were using collective anger and frustration about quartering to foment revolutionary sentiment among the people.⁴⁷ The Quartering Act of 1765 allowed British troops to be housed in certain public and private buildings within American cities but did not allow for quartering in occupied *homes*.⁴⁸ Samuel Adams summed up much of the colonists' anger at this practice in a letter to a local newspaper:

No man can pretend to say that the *peace* and *good order* of the community is so secure with soldiers quartered in *the body of a city* as without them. Besides, where *military power* is introduced, *military maxims* are propagated and adopted, which are inconsistent with and must soon eradicate every idea of *civil government*. . . . Soldiers are not govern'd properly by the laws of their country, but by a law made *for them only*: This may in time make them look upon themselves as a body of men *different* from the rest of the people; and as they and they only have *the sword* in their hands, they may sooner or later begin to look upon themselves as the LORDS and not the SERVANTS of the people: Instead of enforcing the execution of law, which by the way is far from being the original intent of soldiers, they may *refuse to obey* it themselves: Nay, they may even *make laws for themselves*, and enforce them by the *power of the sword!*⁴⁹

Adams's arguments are striking for several reasons. First, they illustrate how, at a minimum, the concern about quartering went well beyond a concern about soldiers invading individual homes. The conduct about which Adams and other colonists were concerned at this point was not soldiers being quartered in homes; it was about soldiers being quartered "in the body of a city."⁵⁰ This language mirrors some of the language in nineteenth-century British cases about soldiers being quartered in or at cities and not just in homes.⁵¹ It goes further in showing that the evil of quartering extended far beyond intruding on the right to quiet enjoyment or the right to exclude from one's castle.

Adams hints at no concern about the sanctity of the home or even property rights, more generally. Instead, his anger and frustration come from a fear that soldiers may use their power to enforce arbitrary law; that "*military maxims* . . .

47. See Samuel Adams, Letter to the Editor, BOSTON GAZETTE, Oct. 17, 1768, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 215, 215–16 (Philip B. Kurland & Ralph Lerner eds., 1987).

48. See An act for punishing mutiny and desertion, and for better payment of the army and their quarters, 1765, 5 Geo. 3, c. 33 [hereinafter Quartering Act of 1765], *available at* http://www.yale.edu/lawweb/avalon/amerrev/parliament/quartering_act_165.htm.

49. Adams, *supra* note 47, at 215–16.

50. *Id.* at 215 (emphasis omitted).

51. See *King v. Hellingley*, (1808) 103 Eng. Rep. 691, 691 (K.B.); Wyatt, *supra* note 12, at 149.

must soon eradicate every idea of *civil government*"; that if soldiers could penetrate the walls of the city "they may even *make laws for themselves*, and enforce them by the *power of the sword*."⁵²

Whatever quartering meant to British subjects a century earlier, to Adams it meant the ability of the military to enforce the law upon civilians with force instead of legitimacy. The government of King George relied heavily on the use of force and presence of soldiers to enforce its rule on the unrepresented colonists living thousands of miles away.⁵³ To revolutionaries like Adams, this method of governing was dangerous because it threatened civilian government, self-rule, and a just legal system.⁵⁴ They believed that once soldiers became the means of enforcing the law, the law was no longer legitimate and there was no longer a guarantee that only those laws that were duly enacted by the people or their representatives would be enforced; it violated the fundamental tenet of social contract theory that the people should be ruled by consent instead of by the sword.⁵⁵

Although it is hardly new or controversial to claim that the colonists were concerned about military enforcement of the law and soldiers overtaking civilian authority, Adams's statement makes clear that this concern found expression in his fear of and outrage over quartering. To Adams, the evil of quartering was soldiers enforcing the law on a civilian population.

But Adams was hardly alone in equating quartering with the military enforcing the law. In the debates surrounding the ratification of the Constitution, the Anti-Federalists were extremely wary of the national government's proposed power to maintain a standing army and call forth that army to execute the laws.⁵⁶ Brutus,⁵⁷ Centinel,⁵⁸ the Federal Farmer,⁵⁹ and Samuel

52. Adams, *supra* note 47, at 215–16.

53. See, e.g., *id.* (lamenting how soldiers threatened to overwhelm civil society in the colonies); THE DECLARATION OF INDEPENDENCE para. 25 (U.S. 1776) ("[The King] is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.").

54. See Adams, *supra* note 47, at 215–16.

55. See Speeches of Patrick Henry in the Virginia State Ratifying Convention (June 1788) [hereinafter Patrick Henry Virginia Speeches], reprinted in 5 THE COMPLETE ANTI-FEDERALIST 207, 235 (Herbert J. Storing ed., 1981) ("An English army was sent to compel us to pay money contrary to our consent. To force us by arbitrary and tyrannical coercion to satisfy their unbounded demands. We wished to pay with our own consent.").

56. See *infra* notes 121–24 and accompanying text.

57. Anti-Federalist writer whose identity is generally considered to be Robert Yates. See Herbert J. Storing, *Introduction to ESSAYS OF BRUTUS*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 358, 358.

58. A "prolific" Anti-Federalist writer, whose work is now generally believed to be a collaboration between George Bryan, a Pennsylvania judge and legislator, and his son Samuel. See Herbert J. Storing, *Introduction to LETTERS OF CENTINEL*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 130, 130.

59. Identity is unknown, although some believe him to be Richard Henry Lee. See Herbert J. Storing, *Introduction to OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT. IN A*

Chase,⁶⁰ for example, listed quartering as a primary and fundamental problem with keeping standing armies.⁶¹ None of them couched their fears in property rights or personal inconvenience terms; instead, all of them articulated their fears that troops could arbitrarily impose the law on the people, or even replace civilian law with an entirely military brand of rule, and emphasized the need to check this power.⁶²

Conversely, the Federalists responded to these concerns by insisting that the power to raise and keep armies did not give the government carte blanche for military intrusions into civil society.⁶³ Implicit in the Constitution, they argued, was the notion that the military lacked authority to impose either its law or the laws of Congress arbitrarily on the people. Although this check did not need to be made concrete, they argued, the Federalists agreed that the military's power to enforce the law against civilians during peacetime was tyrannical and that it could not be sanctioned by the founding document.⁶⁴

Perhaps even more striking than the notion found in all of these writings that the evil of quartering was that soldiers could enforce the law at gunpoint, regardless of the law's underlying legitimacy, is the absence of an expressed concern about soldiers inconveniencing private homeowners or interfering with

NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN [hereinafter LETTERS FROM A FEDERAL FARMER], in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 214, 214–15.

60. Eventual Supreme Court justice and Maryland political official. See Herbert J. Storing, *Introduction to SAMUEL CHASE, NOTES OF SPEECHES DELIVERED TO THE MARYLAND RATIFYING CONVENTION*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 79, 79.

61. See BRUTUS IX (Jan. 17, 1788), *reprinted in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 19, at 40, 42 (analogizing the general danger of standing armies to quartering); LETTERS OF CENTINEL IX (Jan. 5, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 179, 182 (expressing his “jealousy” at troops “instituted” in the cities and towns without the “sanction of the law”); LETTERS FROM A FEDERAL FARMER XVI (Jan. 20, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 323, 329 (“General powers carry with them incidental ones, and the means necessary to the end. In the exercise of these powers, is there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? you will answer, there is not.”); SAMUEL CHASE, NOTES OF SPEECHES DELIVERED TO THE MARYLAND RATIFYING CONVENTION, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 79, 82 (listing quartering as the sole problem under his discussion of “standing armies”); see also LETTERS OF CENTINEL I (Oct. 5, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 136, 136 (demonstrating concern over whether the people’s houses will continue to be their “castles”—a phrase that was used synonymously with quartering); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (Fred B. Rothman ed., 1991).

62. See BRUTUS X (Jan. 24, 1788), *reprinted in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 19, at 86, 88 (noting that the twin dangers of keeping standing armies in peacetime was the government using the army to enforce its arbitrary rule and the threat of the army overthrowing the government); CENTINEL IX (Jan. 5, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 179, 182 (describing his fear that the select army will suppress freedom and enslave the nation); LETTERS FROM A FEDERAL FARMER II (Oct. 9, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 230, 233 (describing how the federal government will inevitably call forth the military to implement its general laws and thereby “destroy all elective governments in the country, produce anarchy, or establish despotism”).

63. See, e.g., THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 22, at 154, 155; Patrick Henry’s Objections, *supra* note 19, at 695, 700.

64. See, e.g., THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 22, at 154, 155; Patrick Henry’s Objections, *supra* note 19, at 695, 700.

private property rights. The supposedly unambiguous and unquestionable problem of soldiers disrupting the tranquility of private homes, which the Third Amendment was allegedly written to alleviate, is simply not discussed in the founding debates.

Though the colonists certainly experienced and resented many of the horrible intrusions that historically accompanied the forced keeping of soldiers in private homes—property damage, theft, rape, and even murder—this does not appear to have been a fundamental concern of the Founders. In fact, these intrusions are only mentioned as ancillary to the primary problem of soldiers enforcing the law. In the Essay by a Farmer and Planter, for example, the author explains his fear that Congress will be able to call upon the military to enforce the law:

[A]nd if you should at any time, think you are imposed upon by Congress and your great Lords and Masters, and refuse or delay to pay your taxes, or do any thing that they shall think proper to order you to do, they can . . . send the militia of Pennsylvania, Boston, or any other state or place, to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters, and live in free quarters, until you get into a good humour, and pay all that they may think proper to ask of you⁶⁵

The author is certainly concerned with many of the traditional intrusions that quartering connoted in seventeenth-century Britain, including rape, murder, and property damage, but these concerns are subordinated to his primary concern that Congress will be able to call forth the military for the purpose of enforcing the law—specifically, forcing the citizens to pay taxes. Although the substantive wrongs associated with “liv[ing] in free quarters” were egregious and important to the colonists, they arose solely in the context of the greater harm of using the military to compel the citizenry to submit to unjust laws.

2. Ratification Debates About Quartering

The discussion between the Federalists and Anti-Federalists about quartering came to a head at the Constitutional Convention, and the debate between Patrick Henry and James Madison at the Virginia ratifying convention illustrates their shared notion that quartering referred to the military enforcement of the law. When Henry rose to speak at the convention against Congress’s power, vested in Article I, Section 8, to “raise and support armies,”⁶⁶ his argument against the provision was firmly rooted in his fear that the provision gave Congress the power to quarter troops during peacetime:

65. ESSAY BY A FARMER AND PLANTER, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 74, 76.

66. U.S. CONST. art. I, § 8.

One of our first complaints under the former Government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain. Here we may have troops in time of peace. They may be billeted in any manner—to tyrannize, oppress, and crush us.

We are told, we are afraid to trust ourselves.—That our own Representatives—Congress, will not exercise their powers oppressively.—That we will not enslave ourselves.—That the militia cannot enslave themselves, [etc.] . . . I am still persuaded that the power of calling forth the militia to execute the laws of the Union, [etc.] is dangerous. . . . Under the order of Congress, they shall be called to execute the laws.⁶⁷

Words matter. And Henry, like many of his contemporaries, did not use the terms “billet” and “quarter” interchangeably; rather, he used “quarter” to reflect a general fear that came with having troops in time of peace, and used “billet” to refer to the specific act of placing soldiers in private homes—one means by which the military tyrannized, oppressed, and crushed the colonists.⁶⁸

What else, besides billeting, made quartering a principal reason to fight a bloody, risky, and expensive war against a world superpower? “We are told we are afraid to trust ourselves,” Henry continues, presenting and rejecting a common argument advanced by the Federalists against a Bill of Rights to limit some of the enumerated powers in the Constitution, “[but] I am still persuaded that the power of calling forth the militia to execute the laws of the Union, &c. is dangerous.”⁶⁹ Billeting troops was not a principal reason for the Revolutionary War, nor was it a principal reason for concern about the Constitution; quartering was. And quartering was of principal concern because it meant the military enforcing the decrees of a centralized government by force and with power and guns as the only justification.

Henry continued his speech by providing a prototypical example of quartering that he feared would be allowed to continue under the unamended Constitution:

Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed it, will they give you redress? They will tell you that he is executing the laws under the authority of the continent at large, which must be obeyed. . . . Will Gentlemen voluntarily give up their liberty? With respect to calling the militia to execute every execution indiscriminately, it is unprecedented.⁷⁰

67. Patrick Henry’s Objections, *supra* note 19, at 695–96.

68. See Quartering Act of 1765, 5 Geo. 3, c. 33, and Quartering Act of 1774, 14 Geo. 3, c. 54, for examples of “billeting” as used to define giving soldiers tickets or “billets” to use for obtaining living quarters.

69. Patrick Henry’s Objections, *supra* note 19, at 695–96.

70. *Id.* at 697.

Notice first that Henry is not worried about the exciseman—the tax collector and the paradigmatic civil authority—entering people’s homes. That is a problem entirely separate from quartering—the subject of a different speech and a different amendment.⁷¹ Likewise, he is not concerned simply with the Congress calling forth the militia to execute the laws—a power codified in Article I.⁷² Rather, he is concerned with the militia executing the laws “*indiscriminately*.”⁷³ Henry’s concern about quartering is that Congress will unjustly use military force at inappropriate times and in inappropriate places, like using soldiers to escort the tax collector into people’s homes to enforce the tax laws during peacetime.

Patrick Henry was hardly the only representative at the convention to distinguish the limited intrusion of billeting from the larger intrusion of quartering. James Madison, one of Henry’s most frequent targets and perhaps the most outspoken Federalist, described quartering in the same terms when he rose to defend the Constitution against Henry’s charge:

He says, that one ground of complaint at the beginning of the revolution, was, that a standing army was quartered upon us. This was not the whole complaint. We complained because it was done without the local authority of this country,—without the consent of the people of America.⁷⁴

Fundamentally, Madison agrees with Henry that quartering consisted of the military oppressing the people by enforcing law. Madison echoes the complaint that quartering violates the social contract by imposing law by force instead of “consent.” And he, too, refers to an army “quartered upon us,” indicating that he recognizes quartering to be a general form of military oppression, and not an intrusion limited to a specific area. This intrusion, he agrees, was severe enough to cause a war, but he seeks to allay Henry’s fears that it will happen under this government by emphasizing that a local authority would have the consent of the people and would not have any need to enforce the law with the military.

Madison continues to allay Henry’s concerns about quartering by saying that “[t]he Honorable Gentleman says, it is a Government of force. If he means *military* force, the clause under consideration proves the contrary.”⁷⁵ In other words, Henry’s fear of quartering—of soldiers being called to escort, or give quarter, to the tax collector in citizens’ homes—is unfounded; the people will, of course, be protected against such an intrusion.

Like so many of the other debates concerning the ultimate provisions in the

71. See *infra* section II.A (discussing the legislative history of the Fourth Amendment and the Framers’ intent to protect against unreasonable searches and seizures conducted by civilian authorities).

72. See U.S. CONST. art. I, § 8, cl. 15 (“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

73. Patrick Henry’s Objections, *supra* note 19, at 697 (emphasis added).

74. See *id.*

75. *Id.* at 699.

Bill of Rights, the debate between the Anti-Federalists and Federalists was primarily not about what was to be protected but whether such additional protections were necessary in light of the Constitution-proper.⁷⁶ Madison does agree that quartering is an evil to be guarded against. He does agree that quartering refers to a government's use of military force to impose and enforce its law. But he disagrees that such explicit protections are necessary given that the military will be under the control of Congress and given that Congress is subordinate to the people.

Although the existence of the Third Amendment is itself proof that Madison and the other Federalists ultimately lost the battle⁷⁷ over whether to make the proscription against quartering explicit in the Bill of Rights, Madison's response to Henry's quartering concern at the convention shows that he did win another battle that helped shape the Third Amendment's text. In his speech, Henry stated that "a standing army was quartered upon us,"⁷⁸ a term whose meaning Madison sought to limit:

It never was a complaint in Great Britain that the militia could be called forth. If riots should happen, the militia are proper to quell it, to prevent a resort to another mode. . . . This is the same power which the Constitution is to have. There is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the Sheriff or Constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause.⁷⁹

Madison rejects Henry's argument that the Constitution will permit the type of quartering that Henry fears; namely, soldiers serving as tax collectors. As he did earlier in his response, Madison agrees that quartering should not be used to enforce the civil law against individuals; that role, he insists, is for "the Sheriff or Constable," not the militia. He disagrees, however, that the military should be barred from enforcing *any* laws or serving *any* law enforcement function during peacetime; a categorical bar on soldiers being quartered "upon us" is too broad, he appears to say. He alludes back to Henry's complaint that quartering allowed soldiers to escort civilian government officials into homes and reiterates that it is not a proper use of the military. Instead, Madison argues that the military should be used to quell riots or other large-scale disturbances.

76. See AMAR, *supra* note 13, at 12 (noting that the Federalists were "not oblivious to the[] concerns" of the Anti-Federalists); Fields & Hardy, *supra* note 16, at 424; Patrick Henry's Objections, *supra* note 19, at 697–700 (transcribing a disagreement between Madison and Henry about whether limits on Congress's ability to call forth the militia may be implied from the Constitution).

77. Madison is commonly referred to as the "Father of the Bill of Rights," and he ultimately championed its adoption. However, for a long time, Madison opposed the Anti-Federalist efforts to include a Bill of Rights in the Constitution. See Fields & Hardy, *supra* note 16, at 424 (discussing Madison's concerns about a Bill of Rights as expressed in a letter to Thomas Jefferson).

78. Patrick Henry's Objections, *supra* note 19, at 697.

79. *Id.* at 699–700.

From this perspective, the evolution of the Third Amendment comes into greater focus. It embodies Henry's fear, shared by Madison, that military law enforcement is dangerous and should be categorically banned during peacetime, while also embodying Madison's recognition that the new government should have the flexibility to use this power during war. Unlike the Anti-Federalists and the Declaration of Independence, the Amendment does not condemn quartering "on" or "upon us" during peacetime; rather, it bars quartering in any home without the owner's consent. This evolution appears to be precisely the sort of protection Madison had in mind. The military could not escort the constable, sheriff, or taxman into one's home, but could quell riots and insurrections on the streets.

Likewise, the Third Amendment provision that allows for unlimited quartering of troops during time of war when so provided by Congress also emerges from Madison's arguments. Wartime is the ultimate "riot" and "combination . . . formed to prevent the execution of the laws."⁸⁰ And just as Madison was able to limit Henry's proposed ban to "any home," he was also able to limit the proscription to peacetime.

This proposal, as it emerged from the discussion between Madison and Henry, the Federalists and Anti-Federalists, was ultimately ratified in the Bill of Rights. Notably, many scholars who largely overlook the debates about quartering at, and leading up to, the Constitutional Convention, have pointed to the debates at the ratification of the Bill of Rights as evidence that the quartering proscription was essentially a narrow, substantive protection of property and well-being against soldiers.⁸¹

Although the debate over the Third Amendment was relatively short, several comments suggest that at least a few of those debating the first amendments to the Constitution felt quartering was just such a limited and narrow right. Thomas Sumter, for one, sought to alter the proposed amendment to bar quartering completely, even in time of war, in a way that suggests he was concerned primarily with protecting homeowners and their property from being disturbed by soldiers:

Mr. Sumter hoped soldiers would never be quartered on the inhabitants, either in time of peace or war, without the consent of the owner. It was a burthen, and very oppressive, even in cases where the owner gave his consent; but where this was wanting, it would be a hardship indeed! Their property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family.⁸²

80. *See id.*

81. *See Bell, supra* note 6, at 135 n.151 (pointing to Sherman's statements as evidence of what quartering meant to those at the debates); *Fields & Hardy, supra* note 16, at 425; *Wyatt, supra* note 12, at 143 (relying on statements of Roger Sherman for his definition of quartering).

82. HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION (Aug. 17, 1789), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 217.

Rather than being concerned with protecting the people from military enforcement of the law—the overwhelming concern of the Founders debating the Constitution-proper—Sumter was quite clearly concerned with protecting families and property from being disturbed by irritated soldiers.

Likewise, Roger Sherman sought to do away with the Amendment altogether because he conceived of quartering as simply being an inconvenience necessary to support the troops:

Mr. Sherman observed 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 In England, where they paid considerable attention to private rights, they billeted the troops upon the keepers of public houses, and upon private houses also, with the consent of the magistracy.⁸³

Sherman, like Sumter, adhered to the traditional British notion of quartering as an inconvenience imposed on individuals for the good of the military. He did not suggest that quartering had acquired any new meaning in America under British rule.

These statements certainly suggest, at a minimum, that not everyone at the time of the Founding thought quartering meant the same thing or thought that the Third Amendment was protecting the same right. Because these statements were made when the text of the Third Amendment was actually being ratified by Congress,⁸⁴ one could even argue that scholars and historians are justified in giving these statements unique weight in seeking to determine what the term quartering meant at the founding. At a minimum, one could be justified in throwing up one's hands and giving up on the notion that there was one predominant way to define quartering as it appears in the text of the Third Amendment.

There is only one problem with giving special, or even significant, weight to these statements: these statements were rejected by the House of Representatives.⁸⁵ So while Sherman and Sumter may have thought the term quartering protected against the same substantive disturbance that concerned seventeenth-century British subjects, the overwhelming majority of those who ratified the Third Amendment apparently did not. Sherman's and Sumter's views should instead be given comparatively little weight in determining what the Third Amendment ban on quartering meant to those who used and heard the term at

83. *Id.* at 218.

84. *Id.* at 217.

85. *See id.* at 218 (“Mr. Sumter’s motion being put, was lost by a majority of sixteen.”). The final form of the Third Amendment is decisive proof that Sherman’s amendment failed as well.

the time of the Founding and how it should be applied today.⁸⁶

Instead, the Third Amendment was left as it appeared after the Federalist/Anti-Federalist compromise: a categorical bar against soldiers invading “any home” to enforce the law during peacetime and no bar against soldiers doing so during time of war when authorized to do so by Congress.⁸⁷

3. Contemporary Treatises

Justice Joseph Story, a near-contemporary of the Bill of Rights ratifying convention, confirms the view of the Amendment as proscribing military law enforcement in his treatise on the Constitution:

[The Third Amendment’s] plain object is to secure the perfect enjoyment of that great right of the common law, that a man’s house shall be his own castle, privileged against all civil and military intrusion. The billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril.⁸⁸

Story reiterates the shared notion expressed in the writings of Adams, Henry, Madison, and others that the proscription against quartering is primarily directed against “arbitrary” rule; that using the military to enforce the prince’s law both undermines that law’s legitimacy and creates the danger of military law replacing civilian rule.

Perhaps the most interesting part of Story’s analysis of the Third Amendment is his statement that it protects owners “against all civil and military intrusion.”⁸⁹ The Third Amendment’s language says nothing about civil intrusion; it protects only against soldiers. At first glance, Story’s account seems to be conjuring images of penumbras that protect a general privacy interest that is attenuated from the Amendment’s text.

Though Story does mention the “inconvenience”⁹⁰ associated with billeting, which might suggest that he shares Roger Sherman’s belief that quartering is a minor substantive threat,⁹¹ rather than a large-scale procedural one, Story, like the Farmer and Planter,⁹² mentions it only after expressing his broader concern about arbitrary rule. Story thereby reiterates the Founders’ conception of quarter-

86. Cf. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 248 (1988) (explaining why the intentions of dissenters should be ignored for purposes of determining original meaning).

87. The Third Amendment says only that quartering is allowed during wartime “as prescribed by law.” U.S. CONST. amend. III. Congress, however, is granted the exclusive authority under the Constitution to make laws. See U.S. CONST. art. I, § 1.

88. STORY, *supra* note 61, at 747.

89. *Id.*

90. See *id.*

91. See HOUSE OF REPRESENTATIVES, AMENDMENTS TO THE CONSTITUTION (Aug. 17, 1789), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 47, at 217, 218.

92. See ESSAY BY A FARMER AND PLANTER, *supra* note 65, at 76.

ing as involving a civil authority using soldiers to enforce arbitrary law, as well as the military enforcing its own rules at the expense of the elected government's. As Patrick Henry did at the convention, Story distinguishes quartering from billeting.⁹³ He uses quartering to expansively refer to intrusions by the military into civilian law enforcement and uses billeting as one specific example of such an intrusion. The concerns about protecting against property damage or personal annoyance, Story recognizes, are secondary and subordinate to protecting citizens against arbitrary enforcement of law by soldiers.

This is not to say that every near-contemporary of the Bill of Rights agreed that the proscription against quartering was a direct ban on the military's enforcing the law in peacetime. Contemporary dictionaries do not suggest that quartering was used to refer to anything more than citizens providing soldiers with living quarters and provisions.⁹⁴ William Rawle, who wrote his treatise on the Constitution at around the same time as Story, argued that quartering was only "an *indirect* and odious means of compelling submission to improper measures."⁹⁵ And St. George Tucker insisted that prohibiting the "billeting of soldiers upon the citizens of a state . . . certainly adds nothing to the national security."⁹⁶

These divergent views about quartering do not reflect the substance of the debate over the Third Amendment leading up to the ratification of the Constitution. But even Rawle notices the connection between a state using the military to compel the people's submission to arbitrary rule and quartering in the small-scale sense of the word. And Tucker ignores the distinction drawn by Henry and Story between billeting and quartering.⁹⁷ Billeting may have been a relatively insignificant intrusion, but it was not the intrusion banned in the Constitution. And billeting was only a small part of the larger concern about military law enforcement that the Founders feared and that they focused on when ratifying the Constitution.

Perhaps the best way to explain how the expansive and narrow definition of quartering could be confused and conflated is through an analogy. Suppose that during the first half of the twentieth century, the government sought to ban certain classes of people from "sleeping together." The debates featured some representatives railing against the moral decay of society, the need to protect

93. See Patrick Henry's Objections, *supra* note 19, at 695–96.

94. See, e.g., *DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN JURISPRUDENCE, ANCIENT AND MODERN* 977 (Henry Campbell Black ed., 1891) (defining quartering as "[t]he act of a government in billeting or assigning soldiers to private houses, without the consent of the owners of such houses, and requiring such owners to supply them with board or lodging or both").

95. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 126–27 (2d ed. 1829), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 47, at 218 (emphasis added).

96. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES* 300–01 (1803), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 47, at 218.

97. See STORY, *supra* note 61, at 747; Patrick Henry's Objections, *supra* note 19, at 695–96.

children, and the general “Slouching Towards Gomorrah,”⁹⁸ and others insisting that there was no need for the government to directly get involved in the issue.

One hundred years from now, anthropologists and legal historians trying to determine what this term meant to those who used it would first look to the plain meaning of “sleep” and “together” and conclude that it probably referred to individuals engaging in rapid-eye-movement in the same physical bed. Most would probably decide that this was not a terribly interesting or relevant issue and move on with their lives. If, for whatever reason, they looked to the etymology of the term “sleep together” a century before the debates, they would probably find a number of social etiquette books that discussed the social impropriety of husbands and wives sleeping in the same bed together. These scholars might well conclude from both the assumed plain meaning and the distant history of the term that the debate was about a fairly narrow, esoteric, and irrelevant practice that reflected a general desire to protect social stratification and etiquette.

But if they looked at the debates and larger political context in which they occurred, they would find that the term was used to express a concern about the erosion of morals and the intent to regulate sexual activity. This does not mean that the term “sleep together” did not also mean individuals literally sleeping in the same bed or even that there were not people at the time who were concerned about individuals physically being unconscious together in a confined space for different reasons—safety, health, or social mores. But in the context of legislative debates that used the term to refer to sex, the absence of legislative concern about these other issues, and a culture that was predominately fixated on regulating sexual activity, these historians and scholars would be correct in concluding that the legislation meant to use the term to ban sex, regardless of whether it occurred lying down in a bed or whether the participants opted to sleep in separate structures after completing the act.

The same analysis can be applied to quartering. The original “Greatest Generation”⁹⁹ was not concerned with small-scale inconveniences or even tragedies; their concern with quartering, like their concern with most other elements of British rule, was that it was a fundamentally unjust and illegitimate way for a government to exercise power and enforce its law. Patrick Henry, the man who famously declared “give me liberty or give me death,” was not concerned about property damage or having tremendously unruly houseguests in his spare bedroom; he was concerned about illegitimate and arbitrary rule. The proscription against quartering was not an exception to large-scale concerns about reforming oppressive government institutions—it was part and parcel of it.

98. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE* (1996).

99. TOM BROKAW, *THE GREATEST GENERATION* (1998) (discussing the generation that lived through and fought in World War II). To be clear, it is not my intent to equate the greatness of the Revolutionary Generation with a hypothetical generation that sought to regulate sexual activity between consenting adults.

II. QUARTERING IN LIGHT OF UNREASONABLE SEARCHES AND SEIZURES

The previous section of this Note begins to provide a workable solution to a problem that arises when one reads the Third Amendment in light of the Fourth: why, if the Third Amendment protects only against a small-scale property intrusion by soldiers, is it necessary in light of the more general protections against unreasonable searches and seizures in the Fourth Amendment? If the traditional assumption about quartering is correct, then the Third Amendment's protections simply copy or are part of the protections in the Fourth Amendment.¹⁰⁰ But by reading both amendments in the context of the other, a clearer picture of each one's meaning emerges.

In this Part, I argue first that the history of the Fourth Amendment, when compared with that of the Third, illustrates that the Fourth Amendment was originally meant to protect against only civilian intrusions. Next, I compare the Third Amendment's categorical peacetime ban and wartime congressional authorization provisions with the Fourth Amendment's reasonableness standard, to show the substantively different ways in which the Founders meant to treat the use of civilian and military power. And finally, I conclude that the Third Amendment's broad protection of "any house," read in light of the Fourth's protection of "persons, houses, papers, and effects," illustrates that each amendment was meant to protect substantively different areas against government intrusion.

A. THE FOURTH AMENDMENT PROTECTION AGAINST CIVILIAN INTRUSION

The Fourth Amendment provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." ¹⁰¹ Although the Framers of the Amendment do not define "unreasonable," courts now define it to mean searches conducted without a warrant, unless the search falls within a narrow and clearly established judicially created exception¹⁰²—a rule that the Framers certainly never meant to create.¹⁰³ If the Framers intended quartering to only protect against soldiers taking over their homes and rifling through their personal property, then the Third Amendment seems superfluous to the protection against

100. Geoffrey Wyatt notes, from a doctrinal perspective, that interpreting the Third Amendment to protect areas in which an individual has a reasonable expectation of privacy would likewise be duplicative of Fourth Amendment protections, as interpreted by the Supreme Court. *See* Wyatt, *supra* note 12, at 133.

101. U.S. CONST. amend. IV.

102. *See, e.g.,* Terry v. Ohio, 392 U.S. 1, 20–21 (1968).

103. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–70 (1994) (describing the Framers' aversion to general warrants and the implausibility of the notion that they would have presumed warrants were necessary for searches and seizures based on the common law history of warrants). The argument, then, that the Third Amendment and Fourth Amendment offer substantively different standards therefore assumes that although the warrant requirement may be one indicator of reasonableness, blanket congressional authorization for officers to search and seize, absent any other individualized criteria, would not be.

unreasonable invasions of person and property embodied in the Fourth.¹⁰⁴ In this section I present and reject two typical answers to this problem before arguing that the Third Amendment complements the Fourth because the latter was meant to protect against only civilian intrusions.

The first potential solution to this problem is that the Third Amendment protects places,¹⁰⁵ while the Fourth protects people.¹⁰⁶ The Third Amendment's mention of "any house," this theory suggests, means that it protects the right to exclude from property and not a general right of "the people to be secure."¹⁰⁷ This argument, however, ignores two important things. First, the Third Amendment, though explicitly protecting "any house," also explicitly protects a person—the "owner"—who is authorized to consent to the intrusion onto his property. Similarly, even if the Third Amendment is not principally concerned with protecting people, it is still superfluous with the Fourth Amendment's protection of "persons, houses, papers, and effects."¹⁰⁸ If the Third Amendment's text suggests a primary concern with things, instead of people, then the Fourth Amendment's language implies the same concern. Indeed, "people" are only one of four things explicitly protected by the Amendment, while the rest of the list consists of places and things.

Another possibility, articulated by Morton Horwitz, is that although the Third Amendment's specific protections are swallowed by those in the Fourth, it has unique symbolic value.¹⁰⁹ In essence, Horwitz argues, the Third Amendment was a sop thrown to the Anti-Federalists by the Federalists to mollify their anger that Article I provided for Congress to maintain a standing army.¹¹⁰ So while the Federalists got their wish for a standing army, the Anti-Federalists received contentless *ipse dixit* and a symbolic expression of moral outrage.¹¹¹

Horwitz reaches this conclusion by looking at Patrick Henry's statement at the Constitutional Convention.¹¹² He acknowledges that the statement suggests that the Anti-Federalists linked quartering to their general hatred of standing armies, but argues that this did not lead the Framers to include any practical protections in the Third Amendment.¹¹³ This conclusion results largely from Horwitz not looking to Madison's response to this statement¹¹⁴ or the vast majority of other constitutional debates that addressed quartering. If he had, he

104. See Horwitz, *supra* note 5, at 214.

105. See Wyatt, *supra* note 12, at 132–33.

106. See *Terry*, 392 U.S. at 9 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

107. See Wyatt, *supra* note 12, at 132–33.

108. U.S. CONST. amend. IV (emphasis added).

109. See Horwitz, *supra* note 5, at 212.

110. See *id.* at 211–12.

111. See *id.*

112. See *supra* notes 67–70 and accompanying text.

113. See Horwitz, *supra* note 5, at 211–12; see also Fields & Hardy, *supra* note 16, at 402–06, 426 (arguing that although the concern about quartering and the concern about standing armies were related, the proscription against quartering in the Third Amendment protected a limited individual right that was distinct from the political dispute about standing armies).

114. See *supra* notes 74–79 and accompanying text.

would have noticed that quartering dealt with a specific fear of standing armies—soldiers enforcing law against individual civilians—and would have seen that Madison and the other Federalists shared this fear.¹¹⁵ If the Third Amendment does serve merely symbolic value, this interpretation is not supported by the historical record upon which Horwitz bases this conclusion.

A reading of the Third Amendment that suggests it protects a practical and distinct right from that in the Fourth Amendment is further illustrated when the history of the Third Amendment is compared to that of the Fourth. As both the text and history of the Third Amendment illustrate, this Amendment is concerned exclusively with military intrusions.¹¹⁶ The plain meaning of the Fourth suggests, at least on its face, that it applies to both civilian and military intrusions.

The history suggests otherwise, however. The officials whose power the Fourth Amendment sought to limit were civil officials in the Executive and Judicial Branches, including constables, customs officials, judicial magistrates, and executive magistrates.¹¹⁷ Patrick Henry, who spoke passionately of the need for a Bill of Rights to protect the people against quartering, also invoked the necessity of a Bill of Rights to protect against searches and seizures by civilian officials:

The officers of Congress may come upon you, fortified with all of paramount federal authority.—Excisemen may come in multitudes:—For the limitation of their numbers no man knows.—They may, unless the general government be restrained by a Bill of Rights, or some similar restriction, go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink and wear. They ought to be restrained within proper bounds.¹¹⁸

Henry's concern about quartering was that soldiers could be called to escort the excisemen into individual homes.¹¹⁹ His concern here, ultimately codified in the Fourth Amendment, is that civilian "officers of Congress," including the excisemen, may come into people's homes to "search" and "ransack."¹²⁰

Similarly, in an even more spirited moment, Henry rails against the federal sheriff, whose powers he argues must also be limited by a Bill of Rights:

The Federal Sheriff may commit what oppression, make what distresses he pleases, and ruin you with impunity. For how are you to tie his hands? Have you any sufficient decided means of preventing him from sucking your blood by speculations, commissions, and fees? . . . When these harpies are aided by

115. *See id.*

116. *See* U.S. CONST. amend. III; *see also* Wyatt, *supra* note 12, at 132 (noting that the Third Amendment is part of a larger constitutional tradition of separating military from civilian spheres).

117. *See* Amar, *supra* note 103, at 770–80.

118. Patrick Henry Virginia Speeches (June 16, 1788), *supra* note 55, at 246, 249.

119. *See* Patrick Henry's Objections, *supra* note 19, at 697.

120. *See* Patrick Henry Virginia Speeches (June 16, 1788), *supra* note 55, at 246, 249.

excise men, who may search at any time your houses and most secret recesses, will the people bear it?¹²¹

The federal sheriff, like the exciseman and the other civil officers, had to be restrained under the new system of government. Henry and the other Framers were deeply worried about the power of civilian officials to search and seize with impunity; however, this concern is separate and distinct from their concern about the military entering people's homes to enforce the law. The Founders saw two spheres of power that had to be controlled—the military and the civilian.¹²² The distinction drawn by the Founders between these two spheres—and the ways in which each could intrude on the people—suggests that the proscription against unreasonable searches and seizures distinctly limited the civilian sphere while the proscription against quartering troops distinctly limited the military one.

Alexander Hamilton, writing as Publius, makes this distinction explicit when he addresses the concerns raised by many of the Anti-Federalists about both, in *The Federalist* No. 29: “If the Federal Government can command the aid of the militia in those emergencies, which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force.”¹²³ Writing what would subsequently be echoed by Madison at the Convention,¹²⁴ Hamilton insists that the federal government's ability to use the military to enforce the law will be limited to “emergencies,” as reflected in the wartime provision of the Third Amendment.¹²⁵ In other times, though, the government must rely on “the employment of a different kind of force,” which he subsequently identifies as the *posse comitatus*.¹²⁶

One popular view about the purpose of the Bill of Rights posits that it was originally intended to implement the structural commands of the Constitution-proper.¹²⁷ When the Bill of Rights is viewed in this light, the distinction between the Third Amendment's protections and the Fourth Amendment's protections becomes clearer. The Third Amendment implements Congress's authority in Article I, Section 8 to call forth the militia to execute the laws,¹²⁸ by explicitly prohibiting this authority from extending to individuals and individual homes. In Patrick Henry's words, it limits Congress's power “to call[] the

121. Patrick Henry Virginia Speeches (June 5, 1788), *supra* note 55, at 211, 223–24.

122. *See* Wyatt, *supra* note 12, at 132.

123. *THE FEDERALIST* NO. 29 (Alexander Hamilton), *supra* note 22, at 155.

124. *See supra* note 76 and accompanying text (describing Madison's belief that no explicit bar on the quartering of troops was necessary because the power to call forth the militia was implicitly limited to quelling emergencies in public areas).

125. *See* U.S. CONST. amend. III (“No soldier shall in time of peace be quartered in any house, *nor in time of war*, except as provided by law.” (emphasis added)).

126. *See THE FEDERALIST* NO. 29 (Alexander Hamilton), *supra* note 22, at 155.

127. *See* AMAR, *supra* note 13, at xii (“The genius of the Bill was not to downplay organizational structure, but to deploy it, not to impede popular majorities, but to empower them.”).

128. *See* U.S. CONST. art. I, § 8, cl. 15.

militia to execute every execution *indiscriminately*”¹²⁹ The Fourth Amendment, in contrast, implements Congress’s authority in the Necessary and Proper Clause,¹³⁰ made explicit by Hamilton,¹³¹ to call forth the *posse comitatus* and other civilian officers to implement the laws.

If the Fourth Amendment were meant to protect only against civil intrusions, why, then, is the word “civilian” not in the text? The proscription against unreasonable searches and seizures appears to impose a categorical ban on the practice, regardless of who is executing it. It is undisputed, however, that the supposedly categorical ban on unreasonable searches and seizures was not meant to apply to the state governments, but only to the federal government, even though the words “federal government” do not appear in the Amendment. Because the divide between civil and military authority was as deeply entrenched in the Founders’ notions about government as the state-federal divide, it follows that they would presume that restrictions on military power would come only from provisions that specifically listed the military. It did so with the Third Amendment and not the Fourth.

B. FOURTH AMENDMENT REASONABLENESS V. THIRD AMENDMENT ABSOLUTES

Not only does the Third Amendment serve a distinct purpose from the Fourth Amendment, but it also has a fundamentally different standard. The hallmark of the Fourth Amendment is “reasonableness.”¹³² The Third Amendment, on the other hand, speaks in absolutes—“No soldier shall in time of peace be quartered in any house”—which reflects the Founders’ intense fear of the military encroaching on civilian life.¹³³ Likewise, while the Fourth Amendment, on its face, applies with equal force to both time of war and time of peace, the Third Amendment’s categorical proscription against quartering is contingent on peacetime.¹³⁴ Once the country enters a war, the proscription is taken out of the traditional realm of “rights”—conceived of as protecting against the changing attitudes of the majority—and placed squarely in the hands of the majority to maintain or do away with as it pleases.¹³⁵ This conditionality reflects the Madisonian and Hamiltonian notion that in time of war, Congress must be free to use the military to enforce laws in homes and against individuals in the face of the gravest threat to national security.

Perhaps a different way of looking at the two standards would be to read

129. Patrick Henry’s Objections, *supra* note 19, at 697 (emphasis added).

130. See U.S. CONST. art. I, § 8, cl. 18.

131. See THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 22, at 155 (discussing Congress’s implied authority to use civilian authority to implement the laws).

132. Amar, *supra* note 103, at 759, 760 n.4.

133. See Adams, *supra* note 47, at 215–16 (describing the danger of soldiers both violating civilian law or imposing arbitrary law through force); Wyatt, *supra* note 12, at 132 (“The Third Amendment is, after all, one tool to establish the separation of the military and civilian spheres as designed by the Constitution and the Bill of Rights.”).

134. See U.S. CONST. amend. III.

135. See *id.*

them as intersecting with one another, instead of creating parallel rules. Under this reading, during time of war, congressional authorization of quartering would be a necessary, but not sufficient, justification for the military to conduct law enforcement activities. Any congressional authorization would have to comply with the other commands in the Bill of Rights, including the requirement that searches and seizures be reasonable. This layered interpretation makes particular sense in light of the Founders' profound fears of the dangers of an unimpeded military.¹³⁶

Generally, though, specific Bill of Rights' provisions control over more general ones. A Fourth Amendment search or seizure that comports with the reasonableness requirement is not, for example, second-guessed under the broader due process standard in the Fifth and Fourteenth Amendments.¹³⁷ Likewise, the Takings Clause of the Fifth Amendment enumerates a specific standard for a particular type of "seizure." Rather than require that eminent domain be "reasonable," the Fifth Amendment requires only that the property be taken for "public use" and that the state pay just compensation.¹³⁸ A Fifth Amendment taking, then, is *per se* reasonable when the government pays just compensation.¹³⁹

This rule of construction is particularly appropriate in the context of the Third Amendment's distinction between peace and war. The Fourth Amendment's reasonableness requirement is precisely the type of time-consuming, individualized inquiry¹⁴⁰ that Madison, Hamilton, and others wanted to avoid during time of war and emergency in the quartering context.¹⁴¹ The Constitution, more generally, is littered with clauses that reinforce this reading and eliminate the need for individualized tests and proceedings in the context of the military and war. The Grand Jury Clause of the Fifth Amendment, for example, explicitly waives the grand jury right for those accused of a crime in the militia during time of war.¹⁴² And Congress is expressly authorized to suspend habeas corpus during time of "Rebellion or Invasion."¹⁴³ Reading the Third Amendment as requiring only congressional authorization for quartering, and nothing more, therefore makes the most sense in light of the prevailing belief by the Framers that individualized proceedings and inquiries are inappropriate in a wartime

136. See, e.g., Adams, *supra* note 47, at 215–16; Patrick Henry's Objections, *supra* note 19, at 697.

137. See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

138. See U.S. CONST. amend. V; *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (explaining that states may impose heightened standards for eminent domain, but that the Constitution requires only just compensation, assuming that the property is taken for nominally public use).

139. See U.S. CONST. amend. V; *Kelo*, 545 U.S. at 489–90.

140. See Amar, *supra* note 103, at 776 (describing how the reasonableness inquiry was typically done by a jury on a case-by-case basis).

141. See THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 22, at 155; Patrick Henry's Objections, *supra* note 19, at 700.

142. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .").

143. U.S. CONST. art. I, § 9, cl. 2.

context. The Third Amendment's absolute standard, read in light of the Fourth Amendment's reasonableness standard, illustrates that the Founders wanted to leave the government flexibility to use during wartime a uniquely dangerous source of power that they did not want used at all during time of peace.

C. "PERSONS, HOUSES, PAPERS, AND EFFECTS" V. "ANY HOUSE"

But what about the term "any house"?¹⁴⁴ What does it suggest about the area the Founders intended to protect from military encroachment, particularly in the context of the Fourth Amendment's protections? Although the historical record concerning what "any house" meant at the time the Third Amendment was ratified is less developed than the historical record concerning the meaning of quartering, the American experience with quartering and the Amendment as a whole, especially when read in light of the Fourth Amendment, suggest that the term was meant to cover all areas in which an individual has a right to exclude.¹⁴⁵

The notes from the Constitutional Convention and ratification debates contain very little information about how "any house" became the demarcation line or what those who included the term in the Amendment understood it to represent. Notably, though, the Third Amendment Framers did not use the term "private house" as some suggested,¹⁴⁶ nor did they simply use "houses" as they did in the Fourth Amendment, which gives added significance to the word "any" and suggests the term was used to refer to a much a broader area than just traditional, private homes.¹⁴⁷ This reading is supported by the colonists' experience under the British Quartering Acts of 1765 and 1774, in which quartering was explicitly sanctioned in "public houses"¹⁴⁸ as well as "uninhabited houses, outhouses, barns, [and] other buildings."¹⁴⁹

Likewise, the debate about quartering between Patrick Henry and James Madison, which mirrored that between the Federalists and Anti-Federalists more generally, suggests a broad reading of the "any house" clause. Madison responds to Henry's concern about the Constitution's implicit sanction of quartering by agreeing with Henry's general concern about quartering but by narrowing the scope of the violation.¹⁵⁰ While Henry speaks about quartering without any time or place restrictions,¹⁵¹ Madison counters that the militia

144. U.S. CONST. amend. III.

145. Geoffrey Wyatt recognizes that this broad reading of the term is possible but rejects it in favor of a more narrow one. See Wyatt, *supra* note 12, at 144.

146. See, e.g., *Address of a Minority of the Maryland Ratifying Convention*, (BALTIMORE) MARYLAND GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 55, at 96 ("That soldiers be not quartered in time of peace upon *private* houses, without the consent of the owners.").

147. See Wyatt, *supra* note 12, at 142.

148. Quartering Act of 1765, 5 Geo. 3, c. 33, § 2.

149. Quartering Act of 1774, 14 Geo. 3, c. 54, § 2; see Wyatt, *supra* note 12, at 143.

150. See Patrick Henry's Objections, *supra* note 19, at 695, 700.

151. See *id.* at 695.

should be able to quell riots in the streets¹⁵² and be called to enforce the law “when a combination is formed to prevent the execution of the laws.”¹⁵³ Madison does not distinguish particular types of houses from a general right for the government to quarter; instead, he draws a line between the individual and private, which should be protected, and the group and public, which should not.¹⁵⁴

The notion of categorically prohibiting soldiers from being “quartered upon us”¹⁵⁵ was too broad for Madison and the other Federalists, yet they did not believe the proscription against quartering should be so narrow as to apply only to private homes. Instead, they appear to agree that quartering should be broadly banned, except for use against group uprisings in public.¹⁵⁶ In this sense, “any house” is not carving out a small, narrow area for protection—it is describing a much broader area to be protected. Read in conjunction with the “Owner” clause of the Amendment, it protects “any” private area in which an individual “Owner” can claim a right to exclude. Unlike the Fourth Amendment, which protects only “persons, houses, papers, and effects,”¹⁵⁷ the history and text of the Third Amendment suggest it was intended to protect a broader private, individual sphere.¹⁵⁸

III. IMPLICATIONS

If the Third Amendment proscription against quartering troops in any home during peacetime offers protection against a substantive intrusion that is significantly different from that being protected against in the Fourth Amendment, how would this protection look in practice? Before analyzing a Third Amendment test in the context of national security wiretapping, I first want to use an easier case to demonstrate how the Amendment could be practically applied.¹⁵⁹

152. *Id.* at 699.

153. *Id.* at 700.

154. *See id.*

155. *Id.* at 697.

156. Compare Patrick Henry’s Objections, *supra* note 19, at 697 (Henry decrying the dangers of indiscriminate quartering), with *id.* at 699–700 (Madison recognizing Henry’s concern but arguing that the militia always had and should continue to have the ability to enforce the law during mass uprisings or street riots).

157. U.S. CONST. amend. IV.

158. Interestingly, the Second Circuit panel that decided *Engblom v. Carey* also found that the Third Amendment protected a very broad private area, but rather than compare and contrast the original standards as intended by the Founders, the court made this determination by analogy to the Supreme Court’s interpretation of the Fourth Amendment. *See Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

159. Until recently, much of the Third Amendment protection I articulated in the preceding sections was statutorily protected by a number of provisions, including the Posse Comitatus Act, 18 U.S.C. § 1385 (2000). These provisions, while statutorily prohibiting a number of violations that are unconstitutional under my reading of the Third Amendment, include a number of exceptions that allow the military to enforce law in ways that contravene the original understanding of the Third Amendment. They also allow Congress to pass express provisions for military enforcement of civilian law, notwith-

A. THE EAS[IER] CASE: A HYPOTHETICAL

Suppose, in the simplest case, that Congress authorized the military broadly to use enlisted soldiers to conduct almost unlimited surveillance of suspected terrorists. This authority included the ability to set up video and audio recorders in the suspects' homes without their consent. If at any point the military had sufficient grounds to believe that the suspect was engaged in terrorist activities, that individual could be seized and interrogated.

Traditionally, such a scenario would be evaluated under the Fourth Amendment on the assumption that it implicates the Amendment's protection against unreasonable searches and seizures.¹⁶⁰ The analysis in the previous sections suggests, however, that the analysis should begin and end not with the Fourth Amendment but with the Third Amendment; that instead of implicating a Fourth Amendment search or seizure, the above scenario implicates a Third Amendment quarter because the military is involved.

Under a Third Amendment analysis, a reviewing court would first consider whether it was peacetime or time of war.¹⁶¹ If peacetime, then the analysis would consider (1) whether the action complained of was conducted by "soldiers"; (2) whether the action was indeed a traditional law enforcement activity; and (3) whether it was done in an area in which the complaining individual had a right to exclude and the individual did not waive that right by consent.

Because the hypothetical conduct was engaged in by enlisted members of the military, the first prong is satisfied. Likewise, the action implicates a quarter because surveillance of civilians is a traditional law enforcement activity. Finally, because the surveillance was done inside an individual's home, it would satisfy even the most rigid and formalistic definition of the "any house" prong of the Third Amendment. Once these three factors are determined, the government action is categorically barred by the Third Amendment, even if Congress had also included a number of procedural protections, including a warrant requirement. No amount of "reasonableness" can cure a Third Amendment violation in time of peace.

Conversely, if a court determined both that the country was at war *and* that Congress had passed a law specifically allowing the military to conduct such activities, then the military's actions would be justified, regardless of whether there were any procedural protections. Quarters authorized by Congress during time of war are *per se* reasonable, so to speak. All the Third Amendment requires for the military to engage in civilian-style, domestic law enforcement is for there to be war and for Congress to authorize the intrusion.

standing the statutes' general prohibitions on the practice, suggesting that the only protection against military enforcement of civilian law would be the Third Amendment.

160. See, e.g., *United States v. Walden*, 490 F.2d 372, 376-77 (4th Cir. 1974) (considering the Fourth Amendment implications of defendant's conviction for illegally selling a handgun to investigating Marines).

161. In this Note, I have purposely avoided this issue. Whether the War on Terror or War in Iraq constitutes "wartime" for constitutional purposes is a difficult and complex issue that is beyond the scope of this Note.

B. THE HARD[ER] CASE: NSA WIRETAPPING

Given this framework, it is now easier to apply the test to NSA wiretapping. Traditionally, wiretapping is evaluated under the Fourth Amendment,¹⁶² but if the NSA can be defined as a military institution, the proper framework is actually the Third Amendment. Although it is certainly not a clear-cut issue, there is strong reason to argue that the NSA would be a “soldier” for Third Amendment purposes. The NSA is a cryptologic agency that “provide[s] timely information to U.S. decisionmakers and military leaders”¹⁶³ It is based at Fort Meade and led by Lieutenant General Keith B. Alexander.¹⁶⁴ It employs both civilians and active-duty military personnel.¹⁶⁵

In December 2005, *The New York Times* revealed that President George W. Bush had authorized the NSA to eavesdrop on American citizens without warrants or court approval to search for evidence of future terrorist activity.¹⁶⁶ This revelation ultimately led to Congress’s passing the Protect America Act of 2007¹⁶⁷ and the FISA Amendment Act of 2008,¹⁶⁸ with the purpose of updating national security procedures while complying with the Fourth Amendment¹⁶⁹ and ensuring judicial oversight.¹⁷⁰ These legislative developments illustrate the fundamental assumption that the warrantless wiretapping authorized by the President implicated a Fourth Amendment issue that could be cured by individualized, judicial inquiry.

The analysis of the differences between the Third and Fourth Amendments in the preceding sections suggests that this assumption may be misguided. Because the NSA uses the information it gathers for military purposes and because it reports to military officials, it should be considered a “soldier” for Third Amendment purposes.¹⁷¹ The history of the Third Amendment suggests that the two paradigms used by the Founders were the federal sheriff (*posse comitatus*) and soldiers. To the extent that the Amendment reflects a fear of the coercive authority of the military during peacetime, the term “soldier” should be read to

162. See *Katz v. United States*, 389 U.S. 347, 352–53 (1967).

163. See National Security Agency, Introduction to History, <http://www.nsa.gov/history/index.cfm> (last visited Aug. 27, 2008).

164. See National Security Agency, 16th Director: LTG Keith B. Alexander, USA—Biography, <http://www.nsa.gov/about/about00022.cfm> (last visited Aug. 27, 2008).

165. See National Security Agency, Introduction to NSA/CSS, <http://www.nsa.gov/about/index.cfm> (last visited Aug. 27, 2008).

166. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

167. Pub. L. No. 110-55, 121 Stat. 552 (2007).

168. Pub. L. No. 110-261, 122 Stat. 2436 (2008).

169. See *id.* sec. 101, § 702(b)(5), 122 Stat. 2436, 2438 (requiring that electronic surveillance procedures comport with the Fourth Amendment).

170. See *id.* sec. 101, § 702(i), 122 Stat. 2436, 2443–46 (discussing requirements for judicial oversight).

171. Cf. Schmidt, *supra* note 12, at 595, 601, 604 (discussing why FBI and CIA agents should be considered “soldiers” under the Third Amendment, though the author eschews any reliance on founding documents or original intent).

include a wide variety of individuals and organizations.¹⁷² The history of the Amendment likewise suggests that the Framers intended the term “soldier” to be construed broadly to include members of the standing army and members of the local militias.¹⁷³ The main difference between the soldiers contemplated by the Third Amendment and the *posse comitatus*, or federal sheriff, appears to be the primary purpose the given actor served and to whom that actor reported. The federal sheriff’s primary purpose was civilian law enforcement, and he generally reported to the federal or executive magistrate or other civilian bureaucrat.¹⁷⁴ The soldier’s primary purpose, however, was to engage in conflict, and he reported to generals and other commanders who were authorized to use greater coercive force.

The term “soldier,” then—like “Army” and “Navy” in Article I and “press” in the First Amendment—is written in the “exhaustive” terms of the category it describes.¹⁷⁵ There were no special agents or secret servicemen at the Founding; there were only “soldiers.” Although the NSA did not exist at the time the Third Amendment was ratified, there is reason to believe that it should be included in this otherwise exhaustive definition supplied by the Amendment.¹⁷⁶

The NSA is primarily concerned with national security, not civilian law enforcement.¹⁷⁷ Although it employs both civilians and soldiers, it is led by an army general.¹⁷⁸ The information it collects is used by the military engaged in armed conflict around the world.¹⁷⁹ Its intelligence-gathering role, especially in light of recent legislation, makes it a separate entity from judges and other traditional law enforcement mechanisms. Its ability to identify individuals as suspected terrorists allows it to subject individuals to uniquely coercive power substantially greater than that inhering in traditional law enforcement and the criminal justice system. Conversely, it performs a key intelligence-gathering function, which in time of war or insurrection would be crucial to the type of necessary military response the Framers envisioned when they gave Congress the authority to allow quartering during wartime.¹⁸⁰ It therefore is most analogous to the type of authority envisioned by the Framers when using the term “soldier” and leads to a “legitimate inference[]”¹⁸¹ that the NSA should be covered by the Third Amendment.

172. See Wyatt, *supra* note 12, at 136–37.

173. See RAWLE, *supra* note 95, at 218.

174. See Amar, *supra* note 103, at 771–73 (discussing the traditional, common law officials who issued and executed warrants).

175. See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1377 (1997).

176. *Cf. id.* (suggesting that there is no reason to suspect that the U.S. Air Force would not be included under the army or navy provisions in Article I).

177. See National Security Agency, *supra* note 163.

178. National Security Agency, *supra* note 164.

179. National Security Agency, *supra* note 163.

180. See *THE FEDERALIST NO. 29* (Alexander Hamilton), *supra* note 22, at 154–55; Patrick Henry’s Objections, *supra* note 19, at 700.

181. See Kay, *supra* note 86, at 255–56.

Likewise, the communications that the President authorized the NSA to intercept likely fall within the area designated by the Third Amendment as “any house.” As described in Part III, the history illustrates that the term “any house,” when read in conjunction with “Owner,” is “exhaustive”¹⁸² of the areas in which an individual had a right to exclude others from unauthorized encroachment. Furthermore, the communications do not fall under the exception to this broad area—the public street—articulated by Madison and Hamilton.¹⁸³ The communications intercepted by the NSA are generally emails and phone calls, which state laws recognize and protect against unauthorized third-party monitoring. They are “areas,” then, in which those engaging in them have a right to exclude under the term “any house” as conceived by the Framers.

Even applying, for argument’s sake, a narrower reading of the textual proscription against quartering in “any house,” many of the communications monitored by the NSA would still likely be covered. Many textualists, including Justice Antonin Scalia, believe that the text of the Fourth Amendment draws a bright-line distinction between surveillance that penetrates the walls of the home and that which does not.¹⁸⁴ If the NSA is intercepting communications that are being sent and received by Americans in their homes, then this surveillance would implicate even this more narrow reading of “any house.”

Once it is determined that the NSA and the communications it is authorized to intercept are covered by the Third Amendment, it is appropriate to apply the Amendment’s categorical test, rather than the Fourth Amendment’s reasonableness analysis. In his *Katz* concurrence, Justice Byron White outlined his belief that wiretapping done during emergencies for national security purposes would be reasonable under the Fourth Amendment and would not be subject to the warrant requirement that the Court articulated for general law enforcement wiretapping.¹⁸⁵

Instead of imposing a general reasonableness requirement on national security wiretapping when done by the military, though, the Third Amendment imposes a categorical one. If a reviewing court determined that the nation was not at war, then no number of warrants and no amount of general reasonableness would justify the NSA policy. If, however, that court determined that the nation was at war and that the policy was “prescribed by law,”¹⁸⁶ then no further analysis would be necessary to uphold the policy. Military power was seen by the Founders as both uniquely coercive and uniquely necessary, depend-

182. Lessig, *supra* note 175, at 1377.

183. See Patrick Henry’s Objections, *supra* note 19, at 700.

184. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (Scalia, J., majority opinion) (holding that use of a thermal imaging device that detects the physical attributes of a home’s interior constitutes a “search” under the Fourth Amendment).

185. See *Katz v. United States*, 389 U.S. 347, 364 (1967) (White, J., concurring) (concurring on the condition that the majority decision requiring a warrant to conduct wiretapping does not apply to wiretapping authorized by the President for national security purposes).

186. U.S. CONST. amend. III.

ing on the time and place. Considering NSA surveillance under this analysis best vindicates this conception.

CONCLUSION

The Third Amendment is not merely an esoteric prohibition on an obscure and outdated inconvenience. Instead, the Amendment prescribes practical rules for limiting the enforcement power of the most coercive and dangerous organ of government power: the military. The Amendment's proscription against military enforcement of civilian law is evident in the founding debates and documents and is the best explanation for the Amendment in the larger constitutional scheme. This explanation also frees the Third Amendment from offering a redundant protection already contained in the Fourth Amendment.

Far from being irrelevant to contemporary constitutional law, the Third Amendment could have an enormous role to play in today's constitutional schema. As the military establishment grows and its role confronting terrorism expands within the United States, the Third Amendment provides the proper backdrop against which to analyze those military actions which intrude on an individual's life and constitute traditional law enforcement functions, such as wiretapping. This test would categorically bar the military from enforcing the law against civilians during peacetime but would allow the military to do so without any further conditions, so long as the activities were approved by Congress, during time of war.

The Third Amendment may have fallen into obsolescence, but its history suggests it should not remain there. Despite what many are content to believe, the American experience with quartering may not be over. It might have just begun.