

**THIRD AMENDMENT
QUARTERING SOLDIERS**

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THIRD AMENDMENT—QUARTERING SOLDIERS

Amdt3.1 Overview of Third Amendment, Quartering Soldiers

The Third Amendment limits the federal government’s ability to use private homes as lodging for soldiers. The Supreme Court has never decided a case directly implicating the Third Amendment and has cited it only in a handful of opinions.¹ As a result, some legal scholars consider the Amendment to be “an interesting study in constitutional obsolescence.”² When ratified, however, the Third Amendment enshrined “protections of great importance,”³ reflecting the Founders’ pre-Revolutionary experiences with British soldiers and centuries of English history.⁴

Despite the Amendment’s near-disuse as to its original protections,⁵ it took on a new dimension in the second half of the twentieth century, with courts and scholars citing it as one of the constitutional “guarantees creat[ing] zones of privacy”⁶ and for a “traditional and strong resistance of Americans to any military intrusion into civilian affairs.”⁷

Amdt3.2 Historical Background on Third Amendment

Third Amendment:

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

The practice of quartering soldiers dates back to at least the Roman Republic, when territorial governors used it as a tool of oppression and source of income.¹ In seventeenth-century Britain, the Petition of Right of 1628 levied multiple complaints against King Charles I, including maintaining a standing army and the involuntary quartering of soldiers;² it called on King Charles to end those practices.³ When quartering continued, the English Parliament in 1679 passed the Anti-Quartering Act, which prohibited the involuntarily quartering and billeting of soldiers.⁴ A decade later, the Declaration of Rights (later codified as the Bill of Rights of 1689) cited King James II’s continued practices of

¹ See *infra* Amdt3.3 Government Intrusion and Third Amendment.

² Morton J. Horowitz, *Is the Third Amendment Obsolete?*, 26 VAL. UNIV. L. REV. 209, 212 (1991); accord 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, 393 (1991).

³ Fields & Hardy, *supra* note 2, at 394.

⁴ See *infra* Amdt3.2 Historical Background on Third Amendment.

⁵ *Contra* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see also *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967).

⁷ *Laird v. Tatum*, 408 U.S. 1, 15 (1972); see Amdt3.3 Government Intrusion and Third Amendment.

¹ R. Morris Coates & Gary M. Pecquet, *The Calculus of Conquests: The Decline and Fall of the Returns to Roman Expansion*, 17 INDEP. REV. 517, 528 (2013).

² Petition of Right 1628, 3 Car. 1, c. 1, § VI (Eng.) (“[O]f late great Companies of Souldiers and Marriners have been dispersed into divers Counties of the Realme, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourne against the Lawes and Customes of this Realme and to the great grievance and vexacion of the people.”).

³ *Id.* § VIII (demanding that the King “remove the said Souldiers and Mariners and that your people may not be soe burthened in tyme to come”).

⁴ 31 Car. 2, c. 1 (1679) (Eng.) (“Noe officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers.”).

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Historical Background on Third Amendment

maintaining a standing army and quartering as two justifications for his ouster in the “Glorious Revolution.”⁵ The Mutiny Act of 1689 further codified protections against quartering.⁶

Concerns over the existence of standing armies and their quartering in private homes spread to the American colonies. The Mutiny Act’s prohibitions on quartering did not extend to the colonies, where involuntary quartering continued.⁷ Although colonial legislatures attempted to regulate quartering to varying degrees,⁸ the British Parliament did not extend the Mutiny Act’s protections to the colonies until 1765.⁹ The Quartering Act forbade quartering in private homes but required the colonies to bear the costs of barracks and supplies for British soldiers or, in the alternative, to house British soldiers in “inns, livery stables, ale-houses, victualling-houses,” and other such establishments.¹⁰

The Quartering Act of 1765 contributed to growing tensions between the colonists and British Forces. This friction ultimately led to outright conflict, one notable example being the Boston Massacre in 1770.¹¹ In response to these hostilities, the British Parliament passed the so-called “Intolerable” or “Coercive Acts,” including the Quartering Act of 1774.¹² The 1774 Act expanded British officers’ ability to refuse unsuitable housing and seize “uninhabited houses, out-houses, barns, or other buildings” for purposes of quartering soldiers.¹³ As opposition to the Intolerable Acts led to revolution, the colonists’ experiences with quartering influenced the Declaration of Independence, which counted among its grievances against King George III the “Quartering [of] large bodies of armed troops among us.”¹⁴

As the newly independent states adopted organic laws, four states—Delaware, Maryland, Massachusetts, and New Hampshire—included restrictions on quartering.¹⁵ These early state

⁵ Bill of Rights 1689, 1 W. & M. 2d sess., c. 2.

⁶ 1 W. & M., c. 6.

⁷ 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, 406, 414 (1991).

⁸ See *id.* One such law was the New York Assembly’s 1683 Charter of Libertyes and Priviledges, which provided: “Noe Freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province.” B. Carmon Hardy, *A Free People’s Intolerable Grievance: The Quartering of Troops and the Third Amendment*, in *THE BILL OF RIGHTS—A LIVELY HERITAGE* 74 (Jon Kukla ed., 1987).

⁹ 5 Geo. 3 c. 33 (1765).

¹⁰ *Id.*

¹¹ See Fields & Hardy, *supra* note 7, at 415–16; Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. UNIV. L. REV. 209, 210 (1991).

¹² 14 Geo. 3 c. 54 (1774). Other Intolerable Acts included the Boston Port Act, 14 Geo. 3 c. 19 (1774) (prohibiting the use of the Port of Boston in commerce); the Administration of Justice Act, 14 Geo. 3 c. 39 (1774) (authorizing British officials to be tried in Great Britain instead of Massachusetts “to prevent a failure of justice”), and the Massachusetts Government Act, 14 Geo. 3 c. 45 (1774) (placing the Massachusetts colony directly under the British government’s control).

¹³ 14 Geo. 3 c. 54, ¶ 2. The interpretation of the Quartering Act of 1774—including whether it permitted quartering in private homes—is the subject of some debate. Compare Fields & Hardy, *supra* note 7, at 416 (“The 1774 Act, one of the so called ‘Intolerable Acts,’ was even more onerous than the 1765 Act in that it authorized the quartering of soldiers in the private homes of the colonists.”), with DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 10 (1974) (“The act did not, as has often been asserted, provide for billeting soldiers in private homes.”).

¹⁴ THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

¹⁵ Each of these states prohibited peacetime quartering in any house without the owner’s consent. DEL. DECLARATION OF RIGHTS § 21 (1776); MD. CONST. art. XXVIII (1776); MASS CONST. art. XXVII (1780); N.H. CONST. art. I, § XXVII (1784). In wartime, Delaware and Maryland limited quartering to “such manner only as the Legislature shall direct,” DEL. DECLARATION OF RIGHTS § 21 (1776); MD. CONST. art. XXVIII (1776), while Massachusetts and New Hampshire permitted wartime quartering when authorized “by the civil magistrate” under the legislature’s direction, MASS CONST. art. XXVII (1780); N.H. CONST. art. I, § XXVII (1784).

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Government Intrusion and Third Amendment

protections initially had no national analogue: the Articles of Confederation contained no restrictions on quartering.¹⁶ Likewise, although the Framers of the Constitution considered including such a restriction,¹⁷ it was not part of the final draft submitted to the states for ratification. Some Framers objected to the omission, arguing that the Constitution's failure to prohibit quartering, while allowing standing armies, strengthened the central government's power.¹⁸

Reflecting this concern, five states' ratifying conventions recommended amending the Constitution to include a prohibition on quartering in the Bill of Rights.¹⁹ The proposed amendments took two forms. Maryland and New Hampshire proposed amendments that would have prohibited involuntary quartering during peacetime but were silent as to quartering during wartime.²⁰ In contrast, Virginia, New York, and North Carolina proposed amendments with the same peacetime restrictions that also subjected wartime quartering to limits imposed by law.²¹ This second version formed the basis for the amendment as introduced in the House of Representatives by James Madison²² and ultimately adopted as the Third Amendment.

Amdt3.3 Government Intrusion and Third Amendment

Third Amendment:

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

The Third Amendment has rarely been the subject of litigation.¹ The Supreme Court has never directly construed it, and only two lower federal courts—the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit—have examined the Third Amendment in depth.² This lack of judicial interpretation may be due to the Amendment's straightforward phrasing. As Justice Joseph Story stated in his *Commentaries on the Constitution of the United States*, the “provision speaks for itself” as

¹⁶ See ARTICLES OF CONFEDERATION of 1781.

¹⁷ See, e.g., JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., 1920) (“Mr. Pinkney submitted to the House . . . the following propositions . . . ‘No soldier shall be quartered in any House in time of peace without consent of the owner.’”).

¹⁸ See, e.g., Letter from the Federal Farmer, no. 16 (1788), reprinted in 5 THE FOUNDER'S CONSTITUTION 217 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[I]s there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? . . . Though it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals . . .”).

¹⁹ Tom W. Bell, Note, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL OF RTS. J. 117, 129 (1993); Fields & Hardy, *supra* note 7, at 81.

²⁰ BELL, *supra* note 19, at 129–30.

²¹ BELL, *supra* note 19, at 129–30.

²² 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) (“No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.”).

¹ Although the United States quartered troops during both the War of 1812 and the Civil War, see Tom W. Bell, Note, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL OF RTS. J. 117, 136–39 (1993), there do not appear to have been any cases alleging Third Amendment violations based on this quartering. Congress did, however, authorize compensation for damage caused by quartering during the War of 1812. See, e.g., Act of Apr. 17, 1822, ch. 22, 6 Stat. 264 (authorizing payment “for the loss of a house by fire . . . while, without the consent of the owner, it was occupied by the troops of the United States”).

² *Engblom v. Carey*, 522 F. Supp. 57 (S.D.N.Y. 1981), *aff'd in part and rev'd in part*, 677 F.2d 957 (2d Cir. 1982).

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Amdt3.3

Government Intrusion and Third Amendment

“secur[ing] 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.”³

The few Supreme Court cases that mention the Third Amendment support this view. In *Griswold v. Connecticut*, a case involving the constitutional right to contraception, the Court included the Third Amendment as one of several constitutional guarantees with “penumbras” that “create zones of privacy.”⁴ Likewise, in *Katz v. Connecticut*, concerning the meaning of a “search” or “seizure” under the Fourth Amendment, the Court noted the Third Amendment as “another aspect of privacy from governmental intrusion.”⁵ Finally, in *Laird v. Tatum*, involving a challenge to an army surveillance program directed at civilians, the Supreme Court cited the Third Amendment as an example of “a traditional and strong resistance of Americans to any military intrusion into civilian affairs.”⁶

Engblom v. Carey, the only federal appeals court case to examine the Third Amendment in depth, concerned whether the State of New York violated correction officers’ Third Amendment rights when it used their state-owned residences without their consent to house members of the New York National Guard.⁷ The Second Circuit recognized the Third Amendment as “designed to assure a fundamental right of privacy.”⁸ The court further held that the Fourteenth Amendment incorporated the Third Amendment and made it enforceable against the states.⁹ However, the Second Circuit did not reach the issue of whether the State of New York violated the plaintiffs’ Third Amendment rights because it decided the case on procedural grounds.

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1893 (1833); accord Warren E. Burger, *Introduction*, in BURNHAM HOLMES, THE AMERICAN HERITAGE HISTORY OF THE BILL OF RIGHTS: THE THIRD AMENDMENT 6 (1991) (“[T]he Third Amendment still embodies the same basic principles: that the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason.”); see also SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1891) (reflecting Justice Miller’s view that the Third Amendment “seems to have been thought necessary” and “is so thoroughly in accord with all our ideas, that further comment is unnecessary”).

⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵ *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967). For more information about *Katz*, see Amdt4.3.3 *Katz* and Reasonable Expectation of Privacy Test.

⁶ *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

⁷ *Engblom v. Carey*, 677 F.2d 957, 958–59 (2d Cir. 1982).

⁸ *Id.* at 962 (citing *Griswold*, 381 U.S. at 484).

⁹ *Id.* at 961 (“[W]e agree with the district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.”); see *Engblom v. Carey*, 552 F. Supp. 57, 65 (S.D.N.Y. 1981) (“Here, it should not be necessary to wander too far into the thicket of incorporation jurisprudence. Under any of the theories extant . . . the right not to have troops quartered in one’s home must be considered so incorporated.” (internal citations omitted)). For more information on the Fourteenth Amendment’s incorporation of the Bill of Rights, see Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.