

2015

## WARTIME QUARTERING WITH AND WITHOUT LEGISLATIVE AUTHORIZATION

William Gill

Follow this and additional works at: <https://ir.law.utk.edu/tennesseelawreview>



Part of the [Courts Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Gill, William (2015) "WARTIME QUARTERING WITH AND WITHOUT LEGISLATIVE AUTHORIZATION," *Tennessee Law Review*. Vol. 82: Iss. 3, Article 6.

Available at: <https://ir.law.utk.edu/tennesseelawreview/vol82/iss3/6>

This Article is brought to you for free and open access by Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. It has been accepted for inclusion in Tennessee Law Review by an authorized editor of Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. For more information, please contact [eliza.boles@utk.edu](mailto:eliza.boles@utk.edu).

# WARTIME QUARTERING WITH AND WITHOUT LEGISLATIVE AUTHORIZATION

WILLIAM GILL\*

The first thing most scholars note about the Third Amendment to the Federal Constitution, which limits the government's authority to require citizens to quarter soldiers in their homes, is its relative obscurity.<sup>1</sup> In contrast to the surrounding provisions of the Bill of Rights—superstars like the First, Second, Fourth, and Fifth Amendments—the Third Amendment has been directly applied in a serious fashion in only one judicial decision,<sup>2</sup> and its role in Supreme Court jurisprudence has been limited to illustrating the importance of concepts such as the right to privacy and the separation of military and civilian affairs.<sup>3</sup> Depending on whom you ask, the infrequent application of the Third Amendment may be attributed either to its unequalled effectiveness in achieving its purpose<sup>4</sup> or to its obsolescence in the face of changes in technology and military operations.<sup>5</sup>

---

\* Law clerk in the Tennessee Judiciary.

1. See, e.g., Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 140–42 (1993) (describing the “[o]bscurity and [r]idicule” that have characterized the history of the Third Amendment); Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 209 (1991) (“[N]o one cares about the Third Amendment; no one even has any interest in perpetuating its memory.”).

2. *Engblom v. Carey*, 677 F.2d 957, 961–64 (2d Cir. 1982) (reversing summary judgment against correctional officers with living quarters in a state prison who used the Third Amendment to challenge their displacement by members of the National Guard brought in by a governor to staff the prison).

3. See *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (citing the Third Amendment as exemplifying the “traditional and strong resistance of Americans to any military intrusion into civilian affairs”); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing “[t]he Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner” as a facet of the right to privacy guaranteed by various constitutional provisions); see also Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1028 (2011) (observing that scholars, like courts, “have generally found little use for the Third Amendment, other than as a synecdoche of privacy”).

4. See, e.g., Glenn Harlan Reynolds, *Uphold the Third Amendment*, USA TODAY (July 7, 2013), <http://www.usatoday.com/story/opinion/2013/07/07/third-amendment-henderson-nevada-police-column/2496689/> (“[T]he Third Amendment is the only part of the Bill of Rights that really works—because there are almost no cases of troop-quartering. If only the rest of the Bill of Rights were so effective.”).

5. See, e.g., William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 211 (1989) (“The rights embodied in the [T]hird [A]mendment have rarely been invoked,

Another frequently discussed aspect of the Third Amendment is that it was among the most important of the provisions of the Bill of Rights to the American people at the time of its enactment.<sup>6</sup> This is hardly surprising given their experience prior to the Revolutionary War, when they had been forced to house and provide sustenance for standing armies of British troops.<sup>7</sup> What is surprising is that despite the Third Amendment's allowance for wartime quartering to be carried out "in a manner to be prescribed by law," Congress has never passed legislation to provide a process for wartime quartering. This paper addresses the question of whether wartime quartering is ever permissible in the absence of authorizing legislation and, drawing on examples of wartime quartering that were never challenged, catalogs the types of protections that should be included in a generally applicable wartime quartering statute.

The Third Amendment 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."<sup>8</sup> The provision pertaining to quartering in times of peace is relatively straightforward: absent the consent of the owner, the proscription of quartering is absolute. Quartering "in time of war," on the other hand, is permitted, with the caveat that it must be carried out as "prescribed by law." During the brief debate on the Amendment in the House of Representatives, the only controversy pertained to wartime quartering. Representative Thomas Sumter argued that the consent of the owner should be required in times of both war and peace; to address this concern, Sumter moved to modify the Amendment such that it would ban all non-consensual quartering.<sup>9</sup> Representative Elbridge Gerry raised a different concern: the possibility that the decision-making authority regarding wartime quartering would be exercised by military officials.<sup>10</sup> To ensure civilian control over the quartering process, Representative Gerry moved to amend the text to require the approval of a "civil

---

in part, because of circumstances unforeseen by the Framers. Advancements in military organization, technology, and the science of logistics eventually rendered obsolete the practice of quartering soldiers in homes, inns, and ale houses.").

6. *See id.* at 195 ("Of the rights embodied in the United States Constitution, perhaps none was of greater importance to the revolutionary generation than the [T]hird [A]mendment's prohibition against the involuntary quartering of soldiers in private homes.").

7. *See id.* at 199–202 (describing the British quartering practices in the years leading up to the Revolutionary War).

8. U.S. CONST. amend. III.

9. 1 ANNALS OF CONG. 752 (1789) (Joseph Gales ed., 1834).

10. *Id.*

magistrate” before wartime quartering could take place.<sup>11</sup> Representatives Roger Sherman and Thomas Hartley opposed these suggested modifications, arguing that non-consensual quartering was a necessity in times of war when the housing of marching troops became a priority, and that wartime quartering should therefore be entrusted to the legislature.<sup>12</sup> The view of Representatives Sherman and Hartley prevailed, and the Amendment was enacted without either of the suggested modifications pertaining to wartime quartering.

The Third Amendment’s wartime provision operates on the assumption that Congress will enact legislation to prescribe the manner in which such quartering may be carried out. But Congress has not enacted any such legislation, either in the form of a general wartime quartering statute or a law enacted in response to a particular conflict.

The closest thing we have seen to national quartering legislation came in the form of a series of laws enacted during the Civil War that authorized Union troops to confiscate and use the property of citizens in Confederate states.<sup>13</sup> Although no court has ever considered whether these statutes satisfied the “manner prescribed by law” requirement of the Third Amendment,<sup>14</sup> there are several reasons to conclude that they did not. First, strange as it may seem, it is not clear that the Civil War was a “time of war” for purposes of Third Amendment. As noted by Professor Tom W. Bell, “Congress never officially declared war against the Confederate States. It regarded the conflict as a response to insurrection rather than the conquest of a foreign nation. We might therefore conclude that the Civil War was a time of peace so far as it concerns the Third Amendment.”<sup>15</sup> Under this interpretation, the quartering of troops in Confederate territory during the Civil War would qualify as unlawful peacetime quartering, and any law would be in contravention of the Third Amendment to the extent that it purported to authorize such quartering. Assuming that courts would find that the “insurrection” of the Confederate states would be sufficient to create a *de facto* state of war, one must also take into account that the laws authorizing the confiscation of Confederate

---

11. *Id.*

12. *Id.*

13. For a more thorough description of these laws, see James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL’Y 747, 756 & n.79 (2008) (citing GARRARD GLENN & ARTHUR SCHILLER, *THE ARMY AND THE LAW* 137 (1943)).

14. *Id.*

15. Bell, *supra* note 1, at 139.

citizens' property were enacted during a period when the Supreme Court had held that "during this condition of civil war," all rights of the states of the Confederacy and their citizens "were suspended."<sup>16</sup> In light of this holding—which Professor Bell generously describes as "controversial"<sup>17</sup>—the laws providing for the confiscation of Confederate property would likely be viewed not as an approval of wartime quartering in the homes of citizens, but as one of "the consequences of rebellion" for persons who had "assumed the character of enemies."<sup>18</sup> Furthermore, the confiscation laws lacked any explanation as to the procedure to be followed during the occupation of citizens' homes. It is difficult to characterize such a blanket authorization as prescribing the "manner" in which wartime quartering was to occur.<sup>19</sup>

Despite the longstanding absence of authorizing legislation, there are several examples of wartime quartering during the course of our nation's history, as discussed by Professor Bell in his two articles on the subject. Putting aside the complications associated with the confiscation of Confederate property during the Civil War, Union forces also commandeered homes in Union states for barracks and other military uses.<sup>20</sup> Quartering also took place during the War of 1812, as evidenced by post-war legislation providing compensation to citizens whose homes had been damaged while occupied for military purposes.<sup>21</sup> In a more recent article, Professor Bell explores an appalling instance of wartime quartering that occurred in the Aleutian Islands during World War II, when U.S. Army troops occupied the homes of native Aleuts in at least one village as part of

---

16. *Texas v. White*, 74 U.S. 700, 727 (1868).

17. Bell, *supra* note 1, at 138.

18. *White*, 74 U.S. at 727.

19. However, if the matter of wartime quartering is left entirely to Congress, as indicated by the remarks of Representatives Roger Sherman and Thomas Hartley during the House debates, *see* 1 ANNALS OF CONG. 752 (1789) (Joseph Gales ed. 1834), then a blanket authorization should arguably be interpreted as a license for the military to quarter in a time of war without any procedural limitations aside from those imposed by other provisions of the Constitution.

20. Bell, *supra* note 1, at 139; *see also* Rogers, *supra* note 13, at 756.

21. Bell, *supra* note 1, at 137-38 & n.163 (citing REFERENCES TO ACTS AUTHORIZING THE PAYMENT FOR PROPERTY LOST, CAPTURED, OR DESTROYED BY THE ENEMY WHILE IN THE MILITARY SERVICE, ETC. (1914)); *see also* Rogers, *supra* note 13, at 756 ("After the War of 1812, Congress authorized payment to homeowners whose property had been damaged as a result of military occupation. Although not stated as such, Congress may have intended these reparations to make up for its failure to comply with the Third Amendment and prescribe a legal method for quartering during the war.").

an effort to counteract the Japanese invasion of nearby territory.<sup>22</sup> The military forces not only lodged in the dwellings of the natives, who had been forcibly evacuated and interned in camps, but also “pillaged and ransacked” the villagers’ homes and destroyed their personal property.<sup>23</sup>

In each of these instances of wartime quartering, the military acted without legislative authorization. This raises a fundamental question: does the Third Amendment ever permit wartime quartering in the absence of any legislation? The simplest, and perhaps the best, answer to this question is that it does not. This is the view expressed by Professor Bell in furtherance of his well-reasoned conclusion that each instance of quartering discussed above gave rise to a violation of the Third Amendment.<sup>24</sup>

Nevertheless, there are countervailing considerations. One response is that the Third Amendment generally permits wartime quartering but allows Congress to place limits on such quartering in the form of regulations to be followed in carrying out the occupation of citizens’ homes, thereby assuring that quartering does not take place in a manner that contravenes the law. The government could argue that when Congress fails to enact legislation specifically addressing quartering, then the military can engage in wartime quartering so long as it complies with any other laws that may apply. This view also finds tangential support in the legislative history in the comments of Roger Sherman, who warned that individuals should not be given an absolute entitlement to prevent quartering when it is necessary for public safety.<sup>25</sup> In essence, the contention would be that the Third Amendment authorizes Congress to place limits on wartime quartering but does not allow it to prevent the practice altogether by failing to act.

The most fundamental problem with this interpretation is that the text of the Third Amendment contemplates a process for

---

22. Tom W. Bell, *“Property” in the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1271–72 (2012).

23. *Id.* at 1271–72 & n.237 (quoting REPORT OF THE COMM’N ON WARTIME AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 318 (1982)).

24. Bell, *supra* note 22, at 1272 (“[L]awmakers evidently passed no statute regulating the quartering of soldiers on the natives of the Aleutian Islands. The Amendment’s closing mandate—“in a manner to be prescribed by law”—therefore went unmet, giving rise to a violation of the Third Amendment.” (footnote omitted) (quoting U.S. CONST. amend. III)); Bell, *supra* note 1, at 131, 139 (concluding that the quartering during the War of 1812 and the Civil War violated the Third Amendment because in both instances Congress had “neither authorized nor regulated” the quartering).

25. 1 ANNALS OF CONG. 752 (1789); *see also* Fields, *supra* note 5, at 203.

quartering “prescribed by law.”<sup>26</sup> Thus, it appears that the Amendment envisions that wartime quartering will be carried out in accordance with an established legal process, or not at all. The government could counter this point, however, by arguing that even without legislation allowing quartering in a particular time of war, there are still “laws” that apply, establishing a base level of process that must be provided. To the extent that military quartering involves the government acting with the “intent to harness private property to accomplish a public purpose,”<sup>27</sup> it should be subject to the Takings Clause of the Fifth Amendment, which provides that “property [shall not] be taken for public use, without just compensation.”<sup>28</sup> Even where military forces only occupy a portion of a home for a short period of time, the homeowner should still be entitled to invoke the protections of the Takings Clause so long as he or she can demonstrate that the quartering resulted in the taking of private property for public use.<sup>29</sup>

Upon making such a showing, a homeowner would be entitled to just compensation in the amount of the rental value of the home during its occupation and the value of lost or destroyed property.<sup>30</sup> Although the Takings Clause may be the only constitutional protection that applies in every instance of wartime quartering, other provisions would be potentially applicable depending upon the specific circumstances presented. Quartering in a discriminatory fashion, for example, would implicate the Equal Protection Clause, just as targeting political dissidents for quartering based on their speech would implicate the protections of the First Amendment. Therefore, to the extent that the government could show that it had satisfied the Takings Clause by providing just compensation and had otherwise complied with any other statutory or constitutional law implicated by the particular circumstances, it could seek to avoid liability under the Third Amendment by arguing that it had executed the process of wartime quartering as “prescribed by law.”<sup>31</sup>

Another possible argument for the government, depending on the circumstances, would be that Third Amendment rights must at some point give way to the executive’s authority to protect national

---

26. U.S. CONST. amend. III.

27. Eduardo M. Peñalver and Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 318 (2012).

28. U.S. CONST. amend V.

29. See Bell, *supra* note 1, at 147.

30. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 4–6 (1949) (discussing just compensation in the context of a military taking).

31. U.S. CONST. amend. III.

security interests in a time of war. Consider the following hypothetical offered by Judge Posner:

[W]hen a power collides with a right, it is not necessarily the power that must give way. . . . Suppose the survival of the nation in wartime depended on an immediate quartering of troops in people's homes but no law authorizing that quartering had been enacted; it would be arguable that the president had implicit authority, as commander in chief of the armed forces in a desperate war, to override the Third Amendment.<sup>32</sup>

Whatever the merits of the two sides of the wartime quartering issue, Congress could avoid this controversy altogether by enacting a general quartering statute, which, in the absence of more specific legislation, would apply whenever quartering becomes necessary in a time of war. Notably, while Congress has not seen fit to enact any such law in the past, quartering laws passed by several states during the Revolutionary War provide useful guidance as to the types of provisions that should be included. During the years following the Declaration of Independence, as it became apparent that quartering would be necessary, the legislatures of Delaware, Maryland, and New Jersey enacted statutes that delineated specific wartime quartering procedures.<sup>33</sup> Either by constitution or statute, each of these states required that a civil officer, such as a justice of the peace, direct the quartering. The statutes ensured that quartering in private dwellings was a last resort, to be undertaken only after less intrusive options, such as hired housing, inns, and taverns, had been exhausted. Consistent with the concept of just compensation later incorporated into the Takings Clause, the state quartering laws required compensation for damages to property during the course of military occupation. Moreover, the states imposed fines on both military officials who failed to comply with the quartering regulations and citizens who resisted or refused lawful requests for quartering.

---

32. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 69 (2006).

33. Act of Feb. 1, 1779, 1779 Del. Laws 247, *reprinted in* EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917, DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE 247–52 (J. Reuban Clark ed., 1918) [hereinafter EMERGENCY LEGISLATION]; An ACT for quartering Soldiers, Feb. 1777, ch. XIV, 1777 Md. Laws 290, *reprinted in* EMERGENCY LEGISLATION 290–93; Act of Mar. 24, 1778, ch. XV, 1778 N.J. Laws 517, *reprinted in* EMERGENCY LEGISLATION 517–24.



Although these statutes were enacted over 200 years ago, the concerns they address remain pertinent today. Taken together, these statutes demonstrate the key components of an effective quartering regulation: (1) the designation of a civilian authority to oversee the quartering process, which provides a check on the military's quartering power; (2) a priority system for the types of structures to be used for quartering, requiring public and commercial buildings to be used before any occupation of private residences; (3) a requirement that citizens be compensated for any harm to their property, which should obviate the need for citizens to resort to a constitutional claim under the Takings Clause for just compensation; and (4) a means of enforcing quartering regulations by levying fines or otherwise punishing any citizens and military personnel who fail to comply.

Avoiding the controversy over the legality of wartime quartering in the absence of legislation is not the only reason that Congress might consider enacting general quartering regulations. The historical examples discussed above illustrate that whenever war touches or threatens to touch American soil, there is a risk that quartering will occur irrespective of whether Congress has enacted laws that authorize or regulate quartering. By providing a general set of procedures to apply in any instance of wartime quartering, Congress could better equip military personnel with guidance and citizens with legal recourse, thereby forestalling the negative consequences associated with unregulated wartime quartering.