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James P. Rogers

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THIRD AMENDMENT PROTECTIONS IN DOMESTIC DISASTERS

*James P. Rogers**

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INTRODUCTION

“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹

In 2005, the United States experienced one of the most devastating disasters in its history, and in reaction, both federal and state governments deployed large numbers of troops and military personnel within the United States.² Approximately fifty thousand National Guard per-

* B.A., Connecticut College, 2004; J.D., Cornell Law School, 2008. This Note is dedicated to the indefatigable Morgan Williams and all the members of the Student Hurricane Network past and present who have helped the Crescent City and Gulf Coast. Thanks goes to Dustin Smith, Holly McHugh, and the Cornell Journal of Law and Public Policy associates for their meticulous editing, and also to Melody Wells for uncovering the Third Amendment violation that sparked this Note. Lastly, and most importantly, I would like to thank my mother and father, my sisters, Katie, Margaret, and Izzy, and Augusta Wilson for their love, succor, and advice.

¹ U.S. CONST. amend. III.

² U.S. GOV’T ACCOUNTABILITY OFFICE, PUBL’N NO. 06-618, CATASTROPHIC DISASTERS: ENHANCED LEADERSHIP, CAPABILITIES, AND ACCOUNTABILITY CONTROLS WILL IMPROVE THE

sonnel and countless relief workers occupied southeastern Louisiana and the Mississippi Gulf Coast in response to the humanitarian crisis caused by Hurricane Katrina.³ This was “the largest domestic military deployment within the United States since the Civil War.”⁴ Troops, personnel, and equipment came from all fifty states, two U.S. territories, and the District of Columbia.⁵

The situation in southeastern Louisiana and Mississippi after Hurricane Katrina was chaotic, dangerous, and anarchic, and the National Guard had to overcome logistical obstacles and implement heavy-handed measures to maintain order in some areas. Because of the diverse military presence and extensive damage to communication infrastructure, command structures occasionally broke down among the military.⁶ Due to the lack of structurally sound military housing,⁷ the National Guard sought shelter wherever possible, sleeping in schools,⁸ convention centers,⁹ hospitals,¹⁰ hotels,¹¹ churches,¹² and tents along the side of the road.¹³ Occasionally, Guardspersons seeking quarter were met with re-

EFFECTIVENESS OF THE NATION’S PREPAREDNESS, RESPONSE, AND RECOVERY SYSTEM 1 (2006) (“Hurricane Katrina was the worst natural disaster in our nation’s history in geographic scope, the extent and severity of its destruction and damage, and the number of persons displaced from their homes . . . whose effects almost immediately overwhelm the response capacities of affected state and local first responders and require[d] outside action and support from the federal government and other entities.”).

³ TOM DAVIS ET AL., A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, at 202 (2006). In total, 61,450 civilian and National Guard personnel were sent to Louisiana and Mississippi by March 24, 2006. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 13.

⁴ H.R. REP. NO. 109-377, at 201 (citing *Hearing on Hurricane Katrina: Preparedness and Response by the Department of Defense, the Coast Guard, and the National Guard of Louisiana, Mississippi, and Alabama Before Select Comm.*, 109th Cong. (2005)).

⁵ H.R. REP. NO. 109-377, at 207.

⁶ *See id.* at 219–21 (“[L]ines of command, control, and communication lacked clear definition and coordination between federal military forces and National Guard forces . . .”).

⁷ *See* JED HORNE, BREACH OF FAITH: HURRICANE KATRINA AND THE NEAR DEATH OF A GREAT AMERICAN CITY 121 (2006) (noting that the Hurricane flooded the New Orleans, Louisiana, National Guard post); *see also* THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 7 (2006) (*hereinafter* LESSONS LEARNED), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> (estimating that 300,000 homes were destroyed or made uninhabitable).

⁸ Kim Cobb, *Katrina’s Aftermath: Schools: Mississippi’s New Take on the 3R’s: Repair Buildings, Replace Textbooks, Reopen in October*, HOUS. CHRON., Sept. 7, 2005, at A18.

⁹ Hamilton Nolan, *Corporate Profile—CVB Bringing People Back to the Bayou*, PR WEEK, Dec. 11, 2006, at 7.

¹⁰ *Hurricane Katrina—The Aftermath: Meadowcrest Employees Protest Parish Order*, TIMES-PICAYUNE (New Orleans), Oct. 14, 2005, available at 2005 WLNR 19614104 [*hereinafter* *The Aftermath*].

¹¹ Kathleen Pender, *Investors Bet on Katrina*, S.F. CHRON., Sept. 4, 2005, at E1.

¹² *Christmas Gala*, TIMES-PICAYUNE (New Orleans), Nov. 30, 2006, at 8.

¹³ Dahleen Glanton, *Tent Life Wears Thin on Evacuees: 3 Weeks After Storm, Mississippi Victims Waiting for Trailers*, CHI. TRIB., Sept. 20, 2005, at C1.

sistance.¹⁴ To counter resistance, the National Guard's approach to maintaining order was sometimes harsh, as they commandeered private property for military use¹⁵ and limited civilians' speech rights.¹⁶ Occasionally, the National Guard themselves even participated in the lawlessness that they were sent to stop.¹⁷ The lack of housing, high military presence, and gaps in communications among personnel in the area were ingredients for a potential Third Amendment violation: the quartering of troops in a home during peacetime without the owner's permission.

For over 200 years, the Third Amendment has "rest[ed] in obscurity."¹⁸ It has been called the "forgotten amendment,"¹⁹ "undoubtedly obsolete,"²⁰ at best an "innocent bystander,"²¹ and at worst "an insignificant legal fossil."²² According to the late Justice William Douglas, it has "no immediate relation to any modern problem."²³ While this may have been historically true, marginalizing the importance of the Third Amendment today exposes individuals to a potentially real loss of civil liberty. When the government deploys the military domestically to restore order, the only protection individuals have against military abuse of power, other than vigilantism, is the self-discipline of military personnel to

¹⁴ See *The Aftermath*, *supra* note 10 (describing hospital workers protesting the National Guard's continued use of the hospital).

¹⁵ Marty Whitford, *Steps to Recovery: New Orleans PMPs Stand Tall in Their Commitment to Come Back Stronger than Ever from Katrina*, RITA, PEST CONTROL, Nov. 1, 2006, at 20 (noting that the National Guard commandeered all seven of a company's pest control trucks, which the owner had to track down to restart his business).

¹⁶ See Doug MacCash, *Devoted to Art: '80s Music Man Mark Mothersbaugh of Devo Fame Brings His Oddly Appealing Photos to the 9th Ward*, TIMES-PICAYUNE (New Orleans), Nov. 10, 2006, at 13 (reporting that the National Guard arrested an artist for displaying his art on the street near his gallery).

¹⁷ See Jarvis DeBerry, *Police Supporters Fire Back at Columnist*, TIMES-PICAYUNE (New Orleans), Sept. 22, 2006, at 7; Gerard Shields, *Military Justice at Issue: 19 Court-Martialed; Some Say Officers Escaped, Issue*, ADVOCATE (Baton Rouge), Aug. 24, 2006, at A1; see also George E. Edwards, *International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis*, 31 T. MARSHALL. L. REV. 353 (2006) (speculating that the federal, state, and local government violated internationally recognized individual rights, including the right to private property and privacy).

¹⁸ Editorial, *A Protection Prompted by Colonists' Hardship*, ARIZ. DAILY STAR, July 2, 2006, at H1; see also 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 (1991) ("For almost two hundred years, now, [the Third Amendment] has gone virtually unnoticed.").

¹⁹ ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 107 (1991).

²⁰ John S. Baker, Jr., *The Effectiveness of Bills of Rights*, 15 HARV. J.L. & PUB. POL'Y 55, 59 (1992).

²¹ Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723, 733 (1951).

²² B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, 33 VA. CAVALCADE 126, 126 (1984).

²³ William O. Douglas, *The Bill of Rights Is Not Enough*, in *THE GREAT RIGHTS* 115, 121 (Edmond Cahn ed., 1963).

honor the rights bestowed by the Constitution. If Americans generally are unaware of these rights, or consider them obsolete or unimportant, the government will not require the military to protect these rights and individual civilians will not demand them. If Americans ignore the Third Amendment, or dismiss it as trivial, they implicitly condone military incursion into their homes during domestic disasters when the rule of law has failed. This not only opens the door for potential abuse, theft, and destruction of individuals' personal property, but it allows the military to have unbridled access to individuals' most private space. In an era where natural and human-generated disasters are more likely, Americans need to be more cognizant of their Third Amendment rights and prepared to defend them.

This Note explores the possibility that Third Amendment violations occurred in Louisiana or Mississippi in the aftermath of Hurricane Katrina,²⁴ the remedies available to Third Amendment litigants, and why Americans need to be more aware of their Third Amendment rights in the wake of disasters. Part I contains a brief history of the Third Amendment, including its original purpose as evidenced by its historical roots and statements by its framers. Part II explores when and why the Third Amendment has been utilized, why it has largely been neglected, and why it is an important safeguard of civil liberties during domestic disasters. Part III examines each clause of the Third Amendment and offers potential constructions in light of domestic military activity in Louisiana and Mississippi after Hurricane Katrina. In particular, Part III analyzes the legal definitions of "soldier," "quarter," "house," "time of war," and "time of peace" for the purposes of the Third Amendment. Part III also examines possible remedies and defenses to Third Amendment challenges and whether sovereign or qualified immunity shield the state or its officers from civil liability.

The United States has enjoyed a long history of relative domestic tranquility. During that time, there has been little need for constitutional or statutory protection from domestic military encroachment. Nonetheless, continued tension between the United States and religious fundamentalist groups, as well as increasingly violent weather patterns,²⁵ are grim reminders that a disaster on the scale of Hurricane Katrina may occur again. In the event that such a disaster occurs, federal, state, and local governments will call upon military personnel to preserve order and provide relief. In circumstances like these, it will be essential for citi-

²⁴ This Note does not focus on the applicability of the Third Amendment in the aftermath of the terrorist attacks of September 11, 2001.

²⁵ See JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 351 (2006); Donald G. McNeil, Jr., *The Nation: Saturation Point: Imagine 20 Years of This*, N.Y. TIMES, Sept. 25, 2005, § 4, at 1.

zens, the military, and the judiciary to better understand and appreciate how the Third Amendment can protect civilians in domestic disasters.

I. BACKGROUND TO THE PASSAGE OF THE THIRD AMENDMENT

Anglo-American anti-quartering provisions date back to Norman England. In 1131, the London city charter prohibited quartering soldiers within the city walls.²⁶ Other cities followed suit, and the prohibition of troop quartering in homes spread slowly to other English urban centers and eventually to the countryside.²⁷ Anti-quartering provisions in English city charters were a response to the advent of the permanent national army used to fight a series of continental wars during the middle ages.²⁸ When feudal knight service failed to adequately fill the ranks for battle, British Monarchs relied more heavily on pardoning criminals in exchange for military service.²⁹ These soldiers were less disciplined and frequently took advantage of the civilian population.³⁰ In 1627, Parliament issued the "Petition of Right," which decried receiving soldiers into private homes as a "great grievance and vexa[t]ion of the people."³¹ In response to the English Civil War of the mid-seventeenth century, Parliament passed two nationwide anti-quartering acts.³² Likewise, the English Bill of Right of 1689 forbid "quartering soldiers contrary to law."³³ Although these acts applied to the entirety of Britain, they did not extend to its fledgling colonies.³⁴

The first evidence of British troop quartering in colonial homes dates back to King Philip's War, which took place in New England in

²⁶ ENGLISH HISTORICAL DOCUMENTS: 1042–1189, at 945 (David C. Douglas & George W. Greenway eds., 1953) ("Let no one be billeted within the walls of the city, either [a soldier of the King's household] or by the force of anyone else.").

²⁷ See Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 119–22 (1993); Fields & Hardy, *supra* note 18, at 399.

²⁸ See Fields & Hardy, *supra* note 18, at 398–99.

²⁹ *Id.*

³⁰ *Id.*; see also WILLIAM LANGLAND, *WILL'S VISION OF PIERS PLOWMAN* 34–35 (Talbot E. Donaldson trans., W.W. Norton & Co. 1990) (n.d.) (fourteenth-century poem in which a farmer tells of the loss of his livestock and rape of his daughter at the hands soldiers).

³¹ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 217 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

³² Bell *supra* note 27, at 124 (The first law, called the Anti-Quartering Act of 1679 provided that "[no] officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers upon any subject or inhabitant of this realme . . . without his consent." This applied to both public and private structures. The second anti-quartering act, the Mutiny Act of 1689, forbade quartering soldiers in private homes only.).

³³ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 217.

³⁴ See J. Alan Rogers, *Colonial Opposition to the Quartering of Troops During the French and Indian War*, MIL. AFF., Feb. 1970, at 7.

1675.³⁵ In 1765, Parliament passed a quartering act requiring colonists to bear the costs of quartering and supplying British troops for the French and Indian War.³⁶ If barracks were unavailable, the act required that colonists quarter troops in alehouses, stables, and inns.³⁷ In 1774, in response to unrest in Boston, Parliament passed another act that permitted the quartering of troops in private homes.³⁸ During the Revolution itself, both the British and American armies demanded quarter from citizens.³⁹

The Third Amendment was a direct response to this history of involuntary quartering.⁴⁰ Prior to the Revolution, colonists repeatedly expressed displeasure over forced quartering.⁴¹ The Quartering Act of 1774 was known popularly among colonists as one of the "Intolerable Acts."⁴² Benjamin Franklin wrote, "Let [the British] first try the effects of quartering soldiers on butchers, bakers, or other private houses [in England], and then transport the measure to America."⁴³ As one historian notes, "[W]riters throughout the colonies attacked the practice of quartering as despotic, dangerous, and violative of American rights."⁴⁴

Sentiments against peacetime quartering were strong among early state legislators. Five state conventions established anti-quartering amendments in their constitutions.⁴⁵ In addition, three of these states and two others proposed that the federal government adopt some form of

³⁵ See Bell, *supra* note 27, at 125.

³⁶ Fields & Hardy, *supra* note 18, at 415.

³⁷ *Id.*

³⁸ The act permitted "soldiers . . . to be quartered and billeted in such manner as is now directed by law, where no barracks are provided by the colonies." ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 785 (Merrill Jensen ed., 1969). The act also provided that soldiers could commandeer uninhabited structures if they were refused quarter for over twenty-four hours. *Id.*

³⁹ Fields & Hardy, *supra* note 18, at 422.

⁴⁰ See *id.* at 423 (noting that according to Patrick Henry, quartering was one of the principle reasons for breaking with Britain); see also ALDERMAN & KENNEDY, *supra* note 19, at 107 (arguing that the Third Amendment was proof that the Constitution was "written to address real and immediate grievances suffered by its authors").

⁴¹ Colonial leaders voiced their aversion to the Quartering Act of 1774 during the First Continental Congress, ENGLISH HISTORICAL DOCUMENTS: 1042-1189, *supra* note 26, at 808, and in the Declaration of Independence, THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 218; see also Rogers, *supra* note 34, at 9 (arguing that the forced quartering of British troops was "the thin edge of the wedge that was being driven between the colonies and the home country").

⁴² ENGLISH HISTORICAL DOCUMENTS: 1042-1189, *supra* note 26, at 785.

⁴³ GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 65 (1995).

⁴⁴ RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 106 (1999).

⁴⁵ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 216-17 (Delaware, Maryland, Massachusetts, New Hampshire, and New York); cf. Bell, *supra* note 27, at 144-45 (noting that today most states have anti-quartering provisions in their constitutions).

anti-quartering law.⁴⁶ For some state convention delegates, incorporating an anti-quartering provision into the constitution of the new federal government was essential for its ratification.⁴⁷

Including an anti-quartering amendment in the Bill of Rights may have been a foregone conclusion given the long history of analogous protections in Britain and given the strong and vocal opposition to peacetime quartering.⁴⁸ James Madison proposed the first draft of what would become the Third Amendment in a resolution to Congress on June 6, 1789.⁴⁹ It read, “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.”⁵⁰ After little debate, this version would, with only minor changes, become law.⁵¹ The proposed amendment was consistent with the proposed amendments sent by all but one of the five states that sent proposals to Congress.⁵² The House debated and passed the Amendment in one day, as did the Senate.⁵³ During the congressional debates, only three individuals offered suggestions to the Amendment—all were rejected in favor of the Amendment’s original form.⁵⁴ Neither body of Congress made any substantive changes to the Amendment over the course of the Bill of Rights debates.⁵⁵

According to Elbridge Gerry, a member of the first Congress, the Third Amendment was enacted “to prevent the arbitrary exercise of power.”⁵⁶ In order to preserve civilian rights, “[t]he military ought to be subordinate to civil authority.”⁵⁷ This was especially true within the sanctity of the home. Two generations after the country ratified the Amendment, jurist Joseph Story wrote: “[The Third Amendment’s] plain object is to secure the perfect enjoyment of that great right of the com-

⁴⁶ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 215–16 (New Hampshire, New York, North Carolina, Rhode Island, and Virginia).

⁴⁷ *See id.* at 220.

⁴⁸ *See* Fields & Hardy, *supra* note 18, at 430 (“The practice of involuntary quartering was considered to be so onerous by so many people that the amendment’s inclusion in the pantheon of rights was virtually beyond question. Further, the specific and limited nature of the grievance made it possible to easily obtain a consensus as to an appropriate and all inclusive wording for the right.”).

⁴⁹ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 207.

⁵⁰ *Id.*

⁵¹ *See* U.S. CONST. amend. III.

⁵² THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 215 (noting that New Hampshire’s proposed amendment did not provide for legal wartime quartering).

⁵³ *Id.* at 209–10.

⁵⁴ *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 179–80 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

⁵⁵ *See id.* at 39–48.

⁵⁶ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 220.

⁵⁷ *Id.* at 221 (quoting FED. FARMER, Dec. 25, 1787).

mon law, that a man's house shall be his own castle, privileged against all civil and military intrusion."⁵⁸

In addition to protecting private property and privacy rights in the face of the necessary evil of a standing army,⁵⁹ the framers had more abstract reasons for ratifying the Third Amendment—they wanted to maintain a distinct divide between military and civilian life.⁶⁰ This divide served not only to protect their individual rights, but to protect their civilian government from permanent military usurpation.⁶¹

Given its centuries-old predecessors, its apparent practical necessity, and its strong philosophical foundations in Anglo-American law, the Third Amendment was ratified with uniquely little debate or controversy and a high margin of support.⁶² Since then, however, the Amendment slipped from being a universally recognized right worthy of inclusion in the nation's most sacred document, to being virtually unknown and unutilized for over two hundred years.

II. A HISTORY OF THE THIRD AMENDMENT'S USE AND NEGLECT, AND WHY IT SHOULD BE REVIVED

A. WHEN HAS THE THIRD AMENDMENT BEEN USED?

In light of the Third Amendment's strong foundation in Anglo-American law, it has primarily served as a building block for litigants to construct arguments for analogous rights, rather than a basis for asserting a primary right to protection from quartering without permission.⁶³ "Its existence underscored the need for, and helped legitimize, the movement for a codification of fundamental liberties."⁶⁴ Courts and litigants have used the Third Amendment to bolster claims for various property and privacy rights.⁶⁵ Occasionally, litigants have used the Third Amendment

⁵⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1893 (Leonard W. Levy ed., De Capo Press 1970) (1833).

⁵⁹ See Bell, *supra* note 27, at 121 n.28; Fields & Hardy, *supra* note 18, at 417–18.

⁶⁰ See Laird v. Tatum, 408 U.S. 1, 16 (1972) (maintaining that the Third Amendment "reflect[s] a traditional and strong resistance of Americans to any military intrusion into civilian affairs"); ANASTAPLO, *supra* note 43, at 66 (equating Third Amendment rights to the rights of conscientious objectors in wartime); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175 (1991).

⁶¹ See Rogers, *supra* note 34, at 10.

⁶² William S. Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 195 (1989).

⁶³ Fields & Hardy, *supra* note 18, at 430 ("The third amendment . . . served as a broadly accepted basic right upon which a structure of newer, more enigmatic and controversial rights could ultimately be built").

⁶⁴ *Id.*

⁶⁵ See Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting); Maxwell v. Dow, 176 U.S. 581, 607–08 (1900) (Harlan, J., dissenting); Gosney v. Sonora Indep. Sch. Dist., 430 F. Supp. 53, 60 (D. Tex. 1977), *rev'd on other grounds*, 603 F.2d 522

to highlight the constitutional checks placed on the military.⁶⁶ In some instances, litigants have argued frivolous and illogical Third Amendment claims, which courts quickly dismiss.⁶⁷

Only once has it been directly litigated. In *Engblom v. Carey*,⁶⁸ the Second Circuit confronted the issue of whether National Guard troops could be quartered in on-site residences of striking corrections officers. After corrections officers at a state penitentiary went on strike, the governor of New York called the National Guard to maintain order at the prison.⁶⁹ The Guardsmen stayed in state-owned dormitories for eleven days.⁷⁰ The Corrections Officers sued the governor claiming a Third Amendment right violation.⁷¹ The court held that the Guardsmen were soldiers for the purposes of the Third Amendment, and because the corrections officers had a property-based privacy interest in their residences, the officers had a legal right to exclude the soldiers.⁷² On remand, however, the district court held that qualified immunity protected the governor from liability because the striking corrections officers' rights under the Third Amendment were not "clearly established."⁷³ On the one occasion Americans relied on the Third Amendment for protection, it was useless simply because it had never been used.

(5th Cir. 1979) (rejecting a claim that a teacher had a privacy right to seek outside employment from the school); Amar, *supra* note 60, at 1175 ("To the extent modern lawyers think about the Third Amendment at all, they are likely to see it as an affirmation of the general right of individual privacy thought to pervade the penumbras and inhabit the interstices of the Bill of Rights."); see also BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PERSONS 172 (1968) (mentioning the Third Amendment only once—in the context of privacy rights).

⁶⁶ See *Bissonette v. Haig*, 776 F.2d 1384, 1388 (8th Cir. 1985) (quoting *Laird v. Tatum*, 408 U.S. 1, 15–16 (1972)); *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974); *Jones v. U.S. Sec'y of Def.*, 346 F. Supp. 97 (D. Minn. 1972); see also *Luther v. Borden* 48 U.S. 1, 67 (1848) (Woodbury, J., Dissenting) (finding that the forced entry by militiamen into Luther's home to arrest him constituted a Third Amendment violation).

⁶⁷ *Sec. Investor Prot. Corp. v. Executive Sec. Corp.*, 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977) (dismissing a claim that a subpoena violated the claimant's Third Amendment right); *United States v. Valenzuela*, 95 F. Supp. 366 (S.D.Cal. 1951) (rejecting a claim that the 1947 House and Rent Act is "the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people").

⁶⁸ 677 F.2d 957 (2d Cir. 1982).

⁶⁹ See Ann Marie C. Petrey, *The Third Amendment's Protection Against Unwanted Military Intrusion: Engblom v. Carey*, 49 BROOK. L. REV. 857 (1982).

⁷⁰ *Engblom v. Carey*, 522 F. Supp. 57, 63 (1981), *rev'd*, 677 F.2d 957 (2d Cir. 1982).

⁷¹ *Id.*

⁷² *Engblom*, 677 F.2d at 962.

⁷³ *Engblom v. Carey*, 572 F. Supp. 44, 49 (S.D.N.Y. 1983), *aff'd*, 724 F.2d 28 (2d Cir. 1983).

B. WHY IS THE THIRD AMENDMENT UNKNOWN?

There are five reasons why the Third Amendment has been “relegated to . . . obscurity.”⁷⁴ First, situations that could lead to possible Third Amendment violations are probably uncommon. The military has rarely required private property, let alone private dwellings, for its operations.⁷⁵ Soldiers are customarily quartered in barracks or camps separated from civilian residential areas.⁷⁶ In cases where soldiers have used civilian property without the consent of the property owner, owners have only brought claims against soldiers for destruction of property or trespass, and not against the soldiers or government for impermissible quartering.⁷⁷ Soldiers may have committed Third Amendment violations during the United States’ few domestic wars but no violations have been litigated or documented. After the War of 1812, Congress authorized payment to homeowners whose property had been damaged as a result of military occupation.⁷⁸ 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. During the Civil War, Congress passed a series of laws permitting military confiscation and use of Confederate citizens’ property, but passed no analogous law regulating the use of property owned by Union citizens.⁷⁹ At the end of the war, the Committee on War-Claims estimated that the war cost private citizens \$500,000 in the Union and \$2,500,000 in the Confederacy for rent and damages.⁸⁰ It is unclear whether any of these rents or damages were recompense for military quartering, and no one in the wake of either conflict brought a Third Amendment claim.⁸¹

⁷⁴ Fields & Hardy, *supra* note 18, at 393.

⁷⁵ *See Id.* at 429.

⁷⁶ *Id.*

⁷⁷ *See* *Ashby v. New York*, 103 Misc. 206 (N.Y. Ct. Cl. 1918) (finding National Guardspersons who used farmers’ fences and trees for firewood and pastured horses on farmers’ property liable for trespass); *White v. M’Neily*, 1 S.C.L (1 Bay) 11 (1784) (holding British loyalists liable for trespassing on a plantation, commandeering horses, stealing furniture, and burning the plantation house); *see also* *Smith v. Illinois*, 2 Ill. Ct. Cl. 149 (Ct. Cl. 1912) (awarding damages to land owner for the National Guard’s destruction of foliage and plumbing while the National Guard was conducting a “sham battle”).

⁷⁸ Bell, *supra* note 27, at 137 n.162.

⁷⁹ *See* GARRARD GLENN & A. ARTHUR SCHILLER, *THE ARMY AND THE LAW* 137 (1943). Whether these statutes fulfilled the “manner prescribed by law” requirement was never determined.

⁸⁰ Bell, *supra* note 27, at 138 (noting that this is a woeful underestimation of the cost of damages to civilians).

⁸¹ The constitution of the Confederacy contained an anti-quartering provision identical to the Third Amendment, CONFED. CONST. art. I, § 9, cl. 14 (1861), but there is no evidence that any Confederate citizen brought a claim under this Article during the country’s existence; *cf.* *United States v. Lee*, 106 U.S. 196 (1882) (In an effort to recover his father’s estate, which was used as a military camp and then a cemetery during and after the Civil War, the son of

Second, Third Amendment claims may be unpopular. During crises and war, civilians have concerns that eclipse their desire to protect their homes from invasion. “Modern experience has shown that civilians readily consent to quartering when threatened by a common enemy.”⁸² Acquiescence to military incursion into the home is a function of the belief that the military acts as a protector not an oppressor.⁸³ Citizens tend to accept that, during emergencies, “[c]onstitutional rights should be relaxed, so that the executive can move forcefully against the threat.”⁸⁴ Also, in times of crisis, popular support for government intervention overrides concerns for individual civil liberties.⁸⁵ As a result, the government is able to take broader license with little opposition. Additionally, during crises and war, people’s primary concern is to minimize loss of life, not maximize property rights.⁸⁶

Third, the lack of Third Amendment jurisprudence and legal scholarship prevents Third Amendment claims from being viable. First, potential litigants may be unaware when colorable Third Amendment claims arise because they are not present when soldiers occupy their homes or because they are not aware they have a constitutional protection at all.⁸⁷ Second, the lack of interpretive guidance or record of successful litigation suggests to litigants that no remedy may be available under the Third Amendment.⁸⁸ This deters lawyers who limit their advocacy to claims they see as realistic. Here, the Third Amendment’s miniscule jurisprudence is telling. In *Engblom*, the district court found that the

Confederate General Robert E. Lee sued the U.S. government for ejectment but did not bring a Third Amendment claim.)

⁸² Bell, *supra* note 27, at 133; *see also* Wurfel, *supra* note 21, at 733 (discussing how during World War II civilians quartered soldiers who were on leave in their homes through the United Service Organization, or who were given independent assignments in remote locations such as antiaircraft defense).

⁸³ *See* Fields & Hardy, *supra* note 18, at 429; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1500 (1987) (“The sturdy contemporary ethos of civilian supremacy that makes an attempted military takeover unlikely today draws much of its strength from an unblemished history of due subordination of the national military.”).

⁸⁴ Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 55, 56 (Mark Tushnet ed., 2005) [hereinafter *THE CONSTITUTION IN WARTIME*]; *see also* Hugo L. Black, *The Bill of Rights and the Federal Government*, in *THE GREAT RIGHTS*, *supra* note 23, at 41, 53 (“[N]o one has ever thought [the Third Amendment] could be violated on the basis of an overwhelming public interest.”).

⁸⁵ *See* ALAN BARTH, *THE RIGHTS OF FREE MEN: AN ESSENTIAL GUIDE TO CIVIL LIBERTIES* 134 (James E. Clayton ed., 1984) (“[W]hen passions run high and the nation’s security seems threatened from outside, a critic is even less likely than a prophet to find honor in his own country.”).

⁸⁶ *See* Brenna Nava, Comment, *Hurricane Katrina: Duties and Responsibilities*, 37 *ST. MARY’S L.J.* 1153, 1155 (2006).

⁸⁷ *See* Bell, *supra* note 27, at 140 (speculating that quartering during the Civil War occurred due to a general ignorance of the Third Amendment).

⁸⁸ *Cf. infra* Part III.E (analyzing whether remedies exist under the Third Amendment).

doctrine of Qualified Immunity protected the New York governor's decision to quarter the National Guard in the corrections officers' dormitories.⁸⁹ Under this doctrine, government officials are not liable for the damage resulting from their actions if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁹⁰ This effectively insulated both the individual government actors and the state. Because no litigant had ever brought a legitimate Third Amendment claim to court before, and because the *Engblom* court deemed the quartering as a proper "prompt-counter measure" to quell vandalism in the prison,⁹¹ it dismissed the corrections officers' claim. Hence, the litigants lost their case entirely because "it was the first time in the two-hundred-year history of the Republic that someone had brought an arguably bona fide claim under the amendment."⁹²

Fourth, the circumstances surrounding post-disaster litigation create an undesirable context in which to bring a Third Amendment claim. Overcoming the hurdle of unbroken jurisprudential ground is problematic where litigants are seeking damages following disasters. In these situations, lawyers, whose resources may have been compromised by the disaster, must bring the claims of clients who have limited funds due to losses from the disaster, before courts that are reeling from the disaster themselves.⁹³ The litigants are most concerned with recouping losses quickly through insurance or tort claims in order to begin rebuilding their lives.⁹⁴ Lawyers, litigants, and courts do not have the time or resources to lay the foundations necessary to flesh out the merits of a previously unlitigated Third Amendment claim.

Fifth and finally, strong sentiments of patriotism in the wake of a disaster may deter litigants from suing the government that "saved" them, and sentiments of gratitude towards rescuers may deter litigants from suing the men and women that aided them during the disaster.⁹⁵ Consequently, the situation in which the Third Amendment can offer the most protection is a situation in which circumstances deter litigants from seeking remuneration from the transgressions of soldiers.

⁸⁹ *Engblom v. Carey*, 572 F. Supp. 44, 49 (S.D.N.Y. 1983), *aff'd* 724 F.2d 28 (2d Cir. 1983).

⁹⁰ *Id.* at 46 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

⁹¹ *Id.* at 49.

⁹² ALDERMAN & KENNEDY, *supra* note 19, at 111.

⁹³ Nava, *supra* note 86, at 1157-58, 1162-63.

⁹⁴ See Jeff Duncan & Coleman Warner, *Waiting is Tough on Road Home*, TIMES-PICAYUNE (New Orleans), July 15, 2006, at 1.

⁹⁵ Cf. LESSONS LEARNED, *supra* note 7, at 133 (discussing how Federal agents in the Gulf Coast opened up their houses to coworkers).

C. WHY INVOKE THE THIRD AMENDMENT?

The drafters intended the Bill of Rights to protect individual liberties in the face of a powerful government. As the Supreme Court has noted, civil liberties “imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.”⁹⁶ The negative rights enumerated in the Constitution, “function as an integral part of a larger system of moral-legal norms whose purpose is to organize things so that the free life is fully established and preserved.”⁹⁷ They “limit governmental power so it will most likely be used within its range of effectiveness and consistency with freedom to foster the realization and perpetuation of the life of freedom.”⁹⁸ As the most specific negative right, and the only amendment “directly concerned with the rights of the individual vis-à-vis the military in both war and peace,”⁹⁹ the Third Amendment protects individual liberty when the government’s authority manifests itself in its most unadulterated form—domestic military occupation.

William Douglas, who believed the Third Amendment lacked modern utility,¹⁰⁰ noted that when the country is the “throes of another national seizure of paranoia,” the government takes more license with invading the home and privacy.¹⁰¹ This is particularly dangerous in the case of domestic disasters and the military for two reasons: (1) people are more willing to sacrifice personal liberties for a feeling of security,¹⁰² and (2) during disasters, when the rule of law fails, there are no institutional safeguards, other than the military itself, against civil liberties violations. Powerfully enforced negative rights deter the military from depriving citizens of constitutional rights because of a fear that citizens will successfully litigate these deprivations in court against the individuals responsible, and also because the military, made up of U.S. citizens, or those seeking citizenship, will respect these rights on a normative level.

The devastation caused by Hurricane Katrina demonstrates that circumstances exist today where the Third Amendment may be relevant, albeit in contexts not expressly contemplated by the framers or the legis-

⁹⁶ *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

⁹⁷ Gary C. Bryner & A.D. Sorensen, *The Future of Rights, in The BILL OF RIGHTS: A BICENTENNIAL ASSESSMENT* 235, 246 (Gary C. Bryner & A.D. Sorensen eds., 1993).

⁹⁸ *Id.*

⁹⁹ Fields, *supra* note 62, at 195.

¹⁰⁰ See Douglas, *supra* note 23 and accompanying text.

¹⁰¹ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 329–30 (1972) (Douglas, J., concurring).

¹⁰² See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 174 (2006) (noting that in times of crisis people have three reactions: they (1) overreact, (2) acquiesce to infringement of previously bedrock principles like a right to privacy, and (3) selectively sacrifice liberties of minorities to obtain security for the majority).

latures that enacted similar colonial and British laws. The chances of a disaster, manmade or natural, which incapacitates a civilian government, may increase in coming years.¹⁰³ As a result, civilians may be less opposed to the government's use of military force to maintain order than they were in the 20th century when the government acted to secure their protection.¹⁰⁴ In this political context, the Third Amendment will have two functions: (1) to protect individual rights; and (2) to curb expanding executive and military power.

During states of emergency, elected executives at the state and federal level have increased authority to commandeer private property and punish disobedience.¹⁰⁵ The executive exercises this power with the use of National Guard or federal troops to restore order.¹⁰⁶ There are two dangers to enhanced executive power and use of the military as a police force. First, there is the danger that a temporary increase in executive power for the sake of security can lead to a permanent diminution in individual rights.¹⁰⁷ This is not necessarily an overt erosion. Executives have the power to suspend laws during emergencies,¹⁰⁸ and while that suspension is intended to be temporary, the effects can endure. Using his emergency power to suspend city zoning ordinances, C. Ray Nagin, Mayor of New Orleans, authorized dumping of debris on vacant land that was not zoned to be a landfill.¹⁰⁹ Although Mayor Nagin shut down the

¹⁰³ See Robert J. Rhee, *Catastrophic Risk and Governance After Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy*, 38 ARIZ. ST. L.J. 581, 582 (2006) ("We live in an era of mega-catastrophes."); LESSONS LEARNED, *supra* note 7, at 5 ("Terrorists still plot their evil deeds, and nature's unyielding power will continue. We know with certainty that there will be tragedies in our future.").

¹⁰⁴ See Charles J. Dunlap, *Putting Troops on the Beat*, WASH. POST, Sept. 30, 2006, at A17.

¹⁰⁵ See e.g., CAL. GOV'T CODE §§ 8572, 8621 (West 2006) (an example of state law conferring on the governor the power to commandeer private property during emergencies); *Hatfield v. Graham*, 81 S.E. 533, 536 (W. Va. 1914) (holding the governor had power to order troops to surround a socialist newspaper during civil disorder); see also LESSONS LEARNED, *supra* note 7, at 11–19 (providing a "primer" in federal disaster management including the President's power to declare state's of emergency).

¹⁰⁶ See 10 U.S.C. 333(a)(i)(A) (2006) (conferring upon the President the discretion to use the National Guard to maintain order when state authorities are incapacitated due to an emergency).

¹⁰⁷ See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in THE CONSTITUTION IN WARTIME, *supra* note 84, at 161, 161 ("Times of heightened risk to the physical safety of their citizens inevitably cause democracies to recalibrate their institutions and processes, and to reinterpret existing legal norms, with greater emphasis on security, and less on individual liberty, than in 'normal' times.").

¹⁰⁸ See, e.g., N.Y. EXEC. LAW § 29-a (McKinney 2006).

¹⁰⁹ See Michelle Krupa, *Nagin Will Order Landfill to Close*, TIMES-PICAYUNE (New Orleans), Aug. 13, 2006, at 1.)

landfill by not renewing the ordinance suspension, the existing debris on the site remained.¹¹⁰

Also, executives are prone to making poor decisions regarding military and law enforcement deployment during disasters¹¹¹—disregarding laws with which they are unfamiliar. Executives or military personnel might quarter soldiers in private homes without the owners' consent due to simple ignorance of the law.

Constitutional drafters anticipate some emergencies, but they failed to anticipate all the ones that future decisionmakers will be forced to deal with. Facing a Constitution seeming not to authorize or, worse, to prohibit actions that policymakers deem necessary for responding to the perceived emergency, decisionmakers, including courts, will feel pressure to 'interpret' the Constitution so as to allow the actions.¹¹² This is even more likely considering the failure of the Department of Homeland Security's National Response Framework to address military commandeering of private citizens' property.¹¹³

Second, the use of the military to maintain civil order can endanger civil liberties. A recent newspaper columnist pointed out, "few models exist around the world in which the recurring use of militaries in law enforcement furthers democratic values."¹¹⁴ Soldiers are trained to fight, not to be peace officers, and their actions reflect this training.¹¹⁵ They take a heavy-handed approach to maintaining order, and at times, that approach can border on an abuse of power. This is especially true where the soldiers in question are civilians who serve part-time with the National Guard.¹¹⁶ After Hurricane Katrina, several National Guardspersons and civilian peacekeepers in New Orleans committed larceny, burglary, and unlawful entry of businesses.¹¹⁷ There were reports of unpunished looting of stores by the National Guard, who stole jewelry, nar-

¹¹⁰ *Id.*

¹¹¹ See David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 644 (1997).

¹¹² Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in THE CONSTITUTION IN WARTIME, *supra* note 84, at 39, 43.

¹¹³ See DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 18–20 (2008), available at <http://www.fema.gov/emergency/nrf/>, (detailing the role of private-sector entities in disaster relief but not clarifying the extent to which private-sector entities or individuals are required to relinquish property to government entities).

¹¹⁴ Dunlap, *supra* note 104.

¹¹⁵ Kopel & Blackman, *supra* note 111, at 659.

¹¹⁶ See, e.g., Chris Rose, *Shootin' From the Hip*, TIMES-PICAYUNE (New Orleans), Nov. 26, 2006, Living, at 1.

¹¹⁷ *National Guardsmen Court-Martialed and Their Punishments*, ADVOCATE, Aug. 24, 2006, at A4; see also HORNE, *supra* note 7, at 123 (noting that New Orleans Police officers commandeered over two hundred vehicles and that "stolen Cadillac Escalades would become emblems of a big-city police department's breakdown in command").

cotics and firearms.¹¹⁸ “Everybody stole stuff,” reported one Guardsperson, “but the only ones getting kicked out [were] the people who saw the leadership [stealing].”¹¹⁹ The National Guard had little federal supervision and often acted without consulting other military personnel.¹²⁰ One federal army soldier reported to Congress, “[T]he National Guard seems to move in and out of sectors doing what they want then just leaving without telling anyone”¹²¹

The National Guard moved into the area affected by Hurricane Katrina rapidly, commandeering facilities without warning.¹²² Often, they quartered in areas to quell looting and violence.¹²³ Occasionally, civilians returned to the storm-ravaged area to find small outfits of the National Guard living in unauthorized places. For instance, the superintendent of the New Orleans’ public golf courses returned to a course three weeks after the storm to find “[N]ational [G]uard troops sleeping in the clubhouse and wearing golf club apparel.”¹²⁴ On another occasion, doctors returned to their hospital to find “that the infirmary’s data center had been turned into a command post for the Louisiana National Guard.”¹²⁵ In addition, private security forces, acting with government approval or under government contract, invaded New Orleans homes. Employees of Blackwater USA, a private security firm, ransacked an apartment in the French Quarter, throwing “mattresses, clothes, shoes, and other household items from the balcony to the street” while federal troops watched.¹²⁶ These abuses went unnoticed and unpunished because of the lack of clear command and communication structures between forces operating in New Orleans and the surrounding area.¹²⁷ Leadership structures and chains of command were constantly

¹¹⁸ Shields, *supra* note 17.

¹¹⁹ *Id.*

¹²⁰ H.R. REP. NO. 109-377, at 219 (2006).

¹²¹ *See Id.*

¹²² Tim Doherty, *Family Endures Katrina*, CLARION-LEDGER (Jackson, Miss.), Dec. 25, 2006, Local, at 1B.

¹²³ *See* Zeke MacCormack, *Area Counties Sizing Up Response to S.A. Disaster*, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 2005 (explaining that National Guardspersons were “sleeping on the ground in neighborhoods to try to control looting”); CNN American Morning, Sept. 4, 2005 (explaining that National Guardspersons were sleeping at a shopping mall to prevent looting).

¹²⁴ Alan Blondin, *Devastation Still Being Felt: Katrina’s Effect on Gulf Coast Courses an Eye-Opener for Grand Stand Layouts*, SUN NEWS (Myrtle Beach, S.C.) Nov. 16, 2006, at 2.

¹²⁵ *See* Zack Martin, *Disaster Recovery*, HEALTH DATA MGMT., Jan. 2007, at 30.

¹²⁶ *See* JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY 322 (2007).

¹²⁷ *See* H.R. REP. NO. 109-377 (2006), at 219; LESSONS LEARNED, *supra* note 7, at 43 (“A fragmented deployment system and lack of an integrated command structure for both active duty and National Guard forces exacerbated communications and coordination issues during the initial response.”); Greg Gecowets, *Coordination, Command, Control, and Communications*, JOINT CTR. FOR OPERATIONAL ANALYSIS Q. BULL., June 2006, at 17 (“The rapid destruc-

changing, and command centers had trouble keeping track of their troop movements.¹²⁸ Intra-military communication was so poor that troops were forced to rely on news media for information and damages assessments.¹²⁹ This was partly because the National Guard was short on supplies and equipment, which would have facilitated transportation and communication between units, while \$1.2 billion worth of equipment was left overseas in places such as Iraq and Afghanistan.¹³⁰ In this chaotic and unregulated environment, where supplies are low and soldiers are able to roam abandoned areas unsupervised, the likelihood of abuses to private property by the military, and potential Third Amendment violations, is high.¹³¹ Therefore to avoid these violations, the Third Amendment must be considered in disaster planning and preparation. To best do this, law and policymakers must understand how to recognize a potential Third Amendment violation and understand what remedies are available.

III. ANALYSIS: HOW TO INTERPRET THE THIRD AMENDMENT

In the wake of a domestic disaster, the state¹³² or federal government deploys the National Guard or the U.S. military to restore order.¹³³ In a disaster situation, the National Guard must make do with limited infrastructure and resources within the affected area. To best restore order and serve victims of the disaster, states allow the Guard to utilize

tion of infrastructure, the loss of first response capability, and the lack of situational awareness on the scope of the disaster across all levels of government, posed severe challenges to incident management.”).

¹²⁸ See Gecowets, *supra* note 127, at 21.

¹²⁹ H.R. REP. NO. 109-377, at 22.

¹³⁰ Mackenzie M. Eaglen, *Go Guard . . . With What?*, WASH. TIMES, Dec. 11, 2006, at A19.

¹³¹ See *Corbin v. Marsh*, 2 Ky. (1 Duv.) 193 (1865) (“As the Constitution was made to secure liberty and property against arbitrary and ambitious power, its guarantees are most needful when there is most danger of the assumption of any such power; and where, therefore, the safety of the people needs their only protection most.”).

¹³² At least one scholar points out that the Third Amendment may not apply to states. See Rex Martin, *Civil Rights and the U.S. Constitution*, in THE BILL OF RIGHTS: A BICENTENNIAL ASSESSMENT, *supra* note 97, at 27, 48. The Second Circuit in *Engblom v. Carey*, however, had no trouble finding that the Amendment applied to the state through the Fourteenth Amendment. 677 F.2d 957, 961 (2d Cir. 1982).

¹³³ See Army National Guard Home Page, <http://www.army.mil/AboutUs.aspx> (last visited Nov. 18, 2007). Typically, the relevant state governor is responsible for deploying and overseeing the Guard in domestic disasters. Army National Guard Organizational Structure Page, http://www.army.mil/org_command.aspx (last visited Nov. 18, 2007). See also 10 U.S.C. 333(a)(1) (2006) (“The President may employ the armed forces, including the National Guard in Federal service, to (A) restore public order and enforce the laws of the United States” when, as a result of a disaster, the President determines that state authorities “are incapable of maintaining public order.”).

private property in rescuing civilians and maintaining order.¹³⁴ Some of these uses may violate the Third Amendment. To understand the modern applicability of the Third Amendment, it is important to examine each clause in light of the framers' intent.

A. SOLDIER

The Constitution provides little guidance for interpreting who qualifies as a soldier under the Amendment.¹³⁵ First, the term could be limited to include only Army troops at the exclusion of other military branches. Article I, Section 8 of the Constitution distinguishes between land and naval forces,¹³⁶ whereas the Third Amendment makes no separate prohibition against quartering sailors. As a source for comparison, New York's 1691 anti-quartering act protected citizens from "be[ing] compelled to receive any Souldiers or Marriners . . . and there suffer them to sojourn again their Wills."¹³⁷ Congress could have short-sightedly omitted the term sailor, feeling that soldiers presented more of a threat than sailors, who usually occupy ships that contain a sufficient number of berths. This is easy to explain if the Amendment is understood to be a direct response to the Quartering Act of 1774, which permitted the quartering of army soldiers.¹³⁸ However, since the "amendment[was] designed to prevent the arbitrary exercise of power,"¹³⁹ which can come at the hands of any branch of the military, it is reasonable to conclude that any branch of the federal military could violate the Third Amendment.

Given that the Third Amendment covers quartering of the federal military, the next issue is whether the same exclusion applies to state militias. Read in context with its neighboring Amendments, the Third Amendment may not be intended to apply to state armies. The Second Amendment explicitly references the necessity of a militia,¹⁴⁰ and Article I, Section 8 distinguishes a pre-existing state militia¹⁴¹ from a congres-

¹³⁴ See, e.g., CAL. GOV'T CODE § 8572 (West 2006) (allowing the governor the right to commandeer private property, which he can delegate to the National Guard).

¹³⁵ See LANGUAGE OF THE CONSTITUTION 1020 (Thurston Greene ed., 1991) (demonstrating that the term "soldier" appears nowhere else in the Constitution).

¹³⁶ U.S. CONST. art. I, § 8.

¹³⁷ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 217.

¹³⁸ See ALDERMAN & KENNEDY, *supra* note 19, at 107 (noting that the Third Amendment was "written to address real and immediate grievances suffered by its authors").

¹³⁹ CREATING THE BILL OF RIGHTS, *supra* note 54, at 180.

¹⁴⁰ U.S. CONST. amend. II (noting that "[a] well regulated militia . . . [is] necessary to the security of a free State").

¹⁴¹ The state militias are the predecessors to the modern National Guard. See George W. Reilly, *Veterans Journal: National Guard Marks 370 Years*, PROVIDENCE J., Dec. 18, 2006, at C2.

sionally-raised army.¹⁴² This reading is plausible given that the Supreme Court has never explicitly incorporated the Third Amendment into the Due Process Clause of the Fourteenth Amendment, and thereby applied it to the states.¹⁴³ But the realities of military use and deployment strain this interpretation. First, the modern National Guard is a far cry from the state militias the founding fathers knew. It is a semi-professional corps of well-trained troops capable of substituting the federal army in military engagements.¹⁴⁴ Second, National Guard troops are just as capable of seeking forced quarter in private homes as federal troops. In fact, a Third Amendment violation is even more likely to occur at the hands of the National Guard. Guard troops, not federal ones, typically respond first to national disasters.¹⁴⁵

If the term soldier encompasses the National Guard, the next question is how much farther the term extends. When considering the Third Amendment's wording, the first Congress chose not to adopt New York's more broadly worded anti-quartering provision of 1787, which prohibited forced quartering of a soldier by any "[o]fficer, military or civil, nor any other Person whatsoever."¹⁴⁶ Under this act, nonmilitary persons such as civilian law enforcement, and even those unaffiliated with any government, could be liable for illegal quartering. By rejecting this version, Congress may have intended to limit the scope of Third Amendment liability to military personnel and their elected commanders—leaving forced quartering at the hands of others to be an issue of trespass.

Drafters of the Third Amendment omitted sheriffs and constables, the precursors to modern day police,¹⁴⁷ from the literal scope of the Amendment's protection. However, the drafters may not have necessarily anticipated the existence of the armed and uniformed peace-keeping

¹⁴² U.S. CONST. art. I, § 8.

¹⁴³ See LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE* 83–86 (6th ed. 2007). *But see* Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (incorporating the Third Amendment into the Fourteenth Amendment).

¹⁴⁴ See Reilly, *supra* note 141; see also John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (codified at 10 U.S.C. §§ 2002–2904) (giving the President the power to commandeer National Guard troops in the event of a domestic emergency).

¹⁴⁵ See H.R. REP. NO. 109-377, at 201 (2006); *Id.* at 202 (noting that the National Guard made up seventy percent of the military force used after Hurricane Katrina); see also Engblom, 677 F.2d at 961.

¹⁴⁶ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 217. New York adopted a broad-sweeping anti-quartering provision because it was occupied by the British for most of the war and suffered more forced quartering than other colonies. See PRIMUS, *supra* note 44, at 106–07.

¹⁴⁷ See Eric H. Monkkonen, *History of Urban Police*, CRIME AND JUST. 547, 549 (1992).

corps that make up the law enforcement agencies of today.¹⁴⁸ Also, while historically the Posse Comitatus Act, which forbids the use of the military as a police force, has rigidly maintained the line between military personnel and civilian law enforcement,¹⁴⁹ the introduction of military consultants and SWAT-type corps to civilian police forces and federal investigative agencies has blurred the lines.¹⁵⁰ The National Guard itself comprises civilians that serve at the request of the government,¹⁵¹ many of whom may have careers in law enforcement.¹⁵² Because the Third Amendment attempts to diffuse the potential for governmental oppression in the home, then by logical extension, Third Amendment prohibitions could apply to any armed government official wielding authority in a disaster area. The term soldier could be interpreted to include those officials for purposes of Third Amendment protection. This interpretation could even include private security forces working under government contract.¹⁵³ This is especially true given that disaster areas are inundated with armed officials from every level of government as well as private security details.¹⁵⁴

In the week following Hurricane Katrina, thousands of officials from federal agencies, state national guards, police departments from other cities, and private security forces patrolled the streets of New Orleans. Even medical technicians in New Orleans were armed with M-16 rifles.¹⁵⁵ Every military and law enforcement agency was theoretically coordinated by a Joint Field Office (“JFO”) run by the Department of Homeland Security.¹⁵⁶ The JFO coordinated patrols, meals and accommodations,¹⁵⁷ although supervisors from each enforcement agency were meant to “maintain accountability for their assigned personnel with regard to exact location(s).”¹⁵⁸ Military and civilian law enforcement personnel patrolled together—held equally accountable for transgressions

¹⁴⁸ See *id.* at 553 (noting that most uniformed urban police forces were created between 1850 and 1880).

¹⁴⁹ 18 U.S.C. § 1385 (2006) (forbidding the use of military for domestic law enforcement).

¹⁵⁰ See *id.* at 649–50; *c.f.* 18 U.S.C. § 2332e (2006) (permitting the Attorney General to request military assistance in situations involving weapons of mass destruction).

¹⁵¹ See Rose, *supra* note 116.

¹⁵² See *id.*

¹⁵³ See SCAHILL, *supra* note 126, at 324 (noting that Blackwater USA security forces claimed to be patrolling New Orleans under contracts with the Department of Homeland Security and the state of Louisiana).

¹⁵⁴ See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 9–18 (2003) (detailing the global scope of the privatization of the military and the need for “radical reassessments” of how to handle them).

¹⁵⁵ See ANDERSON COOPER, DISPATCHES FROM THE EDGE 168 (2006).

¹⁵⁶ See U.S. DEP’T OF HOMELAND SEC., JOINT FIELD OFFICE FIELD OPERATIONS GUIDE 1-1 (2006).

¹⁵⁷ *Id.* at 2-3.

¹⁵⁸ *Id.* at 2-4.

committed on joint patrols.¹⁵⁹ Given that (1) all these armed personnel were theoretically under federal supervision, (2) they had joint liability for the damage they caused on joint patrols, and (3) there is a lack of a historical distinction between soldiers and other armed government personnel, the Third Amendment could cover anyone who acted in an official capacity in the Gulf Coast region after Hurricane Katrina.

B. QUARTER

The next relevant issue is to define what conduct constitutes quartering. The two issues of uncertainty inherent in the anti-quartering clause are (1) the scope of the term “quarter,” and (2) the distinction between quartering and trespass. According to Samuel Johnson’s 1755 *Dictionary of the English Language*, “to quarter” meant “to station or lodge soldiers.”¹⁶⁰ “To lodge” was defined as “[t]o place in a temporary habitation,” “[t]o afford a temporary dwelling,” or “[t]o harbour or cover.”¹⁶¹ “To station” was defined as “[t]o place in a certain post, rank, or place.”¹⁶² Given this definition of quartering, which likely still applied at the time the framers drafted the Bill of Rights, a Third Amendment violation could occur where a soldier was “placed,” presumably by order, in a house, or sought harbor or cover in the house. Therefore, a soldier would not have to sleep, eat, or necessarily use personal property in the house to fall within the Third Amendment. This interpretation is consistent with the assumption that the framers were concerned that undisciplined soldiers quartered in civilian homes could harm civilians or damage or steal property. Given this concern, the scope of the term quarter could include uses of property such as taking food or clothes from a home.

It is thus possible that the National Guard or other military personnel committed some act of quartering in New Orleans in the aftermath of Hurricane Katrina. The National Guard was responsible for patrolling flooded areas and checking abandoned houses for victims after the hurricane.¹⁶³ The vast majority of the population had evacuated, leaving thousands of empty homes and desolated neighborhoods possibly available for military use. And although not widespread, there were isolated

¹⁵⁹ See *Former Kenner Official Sues Police Chiefs in Arrest; Floyd Was Booked in Misappropriation*, TIMES-PICAYUNE (New Orleans), Oct. 10, 2006, Metro, at 1 (noting that the former official sued the National Guard and the police together).

¹⁶⁰ 2 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (1st ed. 1755) (defining “to quarter”). In modern usage, to quarter means “to lodge or dwell,” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1018 (11th ed. 2003), which may lead to a narrow interpretation of the Third Amendment, strictly applying to occasions where soldiers lived in a structure.

¹⁶¹ *Id.* (defining “to lodge”).

¹⁶² *Id.* (defining “to station”).

¹⁶³ Gordon Russell et al., *News from New Orleans Parishes*, HOUS. CHRON., Sept. 12, 2005, Special, at 4.

incidents of National Guardspersons and police looting in the Gulf Coast region after Hurricane Katrina.¹⁶⁴ In one case, as noted above, National Guard troops in New Orleans after Hurricane Katrina were living in a golf course clubhouse wearing clothes stolen from the pro shop.¹⁶⁵ While residing in the pro shop constitutes quartering, it is unclear whether wearing the clothes from the shop also constitutes quartering. On another occasion, hospital workers returned to find that the National Guard had transformed their “infirmaries’ data center into a command post.”¹⁶⁶ While the soldiers may not have slept in the data center, they were making use of it at the expense to the hospital. The National Guard commandeered facilities wherever they could in order to restore order to the region;¹⁶⁷ some of this commandeering could fit within a definition of quarter.

The second issue is whether illegal entry into property by soldiers constitutes quarter, or merely trespass. Historically, when soldiers have occupied private property, private citizens have sued for trespass and not under the Third Amendment.¹⁶⁸ Part of the distinction may lie in who ordered the soldiers to occupy the property. Soldiers acting on their own accord, without direction from a superior officer, may not be compelling quarter on private property, but instead may be committing trespass as private citizens.¹⁶⁹ On the other hand, while the Third Amendment may have been an immediate response to the British Quartering Acts, earlier legislatures passed anti-quartering provisions in English towns and American colonies to help prevent individual soldiers from abusing civilians and personal property. History is rife with stories of troops stealing food, destroying homes, and assaulting civilians. In the fourteenth-century poem *Piers Plowman*, a farmer laments that soldiers killed his wife, raped his daughter, and destroyed his barn.¹⁷⁰ Early anti-quartering laws recognized that forced quartering occurs at gunpoint, and not by formal edict.

¹⁶⁴ See HORNE, *supra* note 7, at 85, 123.

¹⁶⁵ Blondin, *supra* note 124.

¹⁶⁶ See Martin, *supra* note 125.

¹⁶⁷ See, e.g., Paul Purpura, *Hospital Lawsuits Probably Moot; Meadowcrest Can't Be Expropriated*, TIMES-PICAYUNE (New Orleans), Nov. 23, 2005, Metro, at 1 (noting that the National Guard had commandeered the hospital for use as sleeping quarters in the aftermath of Hurricane Katrina).

¹⁶⁸ *Ashby v. New York*, 103 Misc. 206, 207 (N.Y. Ct. Cl. 1918); *Smith v. Illinois*, 2 Ill. Ct. Cl. 149 (Ct. Cl. 1912); *White v. M'Neily*, 1 S.C.L. (1 Bay) 11 (1784).

¹⁶⁹ *Ashby*, 103 Misc. at 208 (describing how a National Guard unit occupied a farm, destroyed the farmers property, and pastured horses in the farmer's field, and holding that the unit's actions were not an exercise of state police power or eminent domain powers because no superior officer had ordered the trespass, making the acts “mere wrongs and trespasses of individuals, who mistakenly assumed to act in [the state's] name”).

¹⁷⁰ See LANGLAND, *supra* note 30, at 34.

If the framers' intended the Third Amendment to curb unruly military personnel, then invoking Third Amendment rights may have been necessary in the aftermath of Hurricane Katrina. Anderson Cooper, a CNN reporter, noted how disorderly the military and law enforcement personnel became when they were not on duty. Describing the scene in the first strip club to reopen in New Orleans, he wrote, "The place is filled with the storm's flotsam and jetsam: cops and soldiers, National Guard, Border Patrol, Customs—you name it, they're all here, their badges and guns badly concealed. They're . . . horny as hell and twice as bored."¹⁷¹ Cooper was in the club to meet a New Orleans police officer—the officer arrived late, explaining that he had been in a bar, and a National Guardsperson took his seat while he was in the bathroom. "So I grabbed him and took him outside," the officer told Cooper.¹⁷² This story is consistent with others, reporting law enforcement abuses of power and violence.¹⁷³ The fact that some members of the law enforcement and peace-keeping forces acted this way, and that command control centers had trouble keeping track of their forces,¹⁷⁴ illustrates that the concerns of early anti-quartering law drafters regarding soldiers is still relevant, and therefore the Third Amendment is still necessary to restrain them. Given this interpretation, the Third Amendment may extend to all quartering of soldiers, regardless of whether it is promulgated from a higher authority.

C. HOUSE

Historically, both private and public dwelling spaces were included in anti-quartering provisions.¹⁷⁵ In passing the Third Amendment, Congress rejected a proposal to create a provision allowing billeting of soldiers in public houses or inns without consent.¹⁷⁶ This may indicate that Congress intended the Amendment to cover quartering in public facilities such as hotels or hospitals.¹⁷⁷

A related issue is whether non-owner occupants of "houses" have standing to claim Third Amendment protections. According to the language of the Amendment, the owner of the "house" must consent to quartering in peacetime.¹⁷⁸ However, this does not answer the question

¹⁷¹ COOPER, *supra* note 155, at 189.

¹⁷² *Id.* at 190.

¹⁷³ See HORNE, *supra* note 7, at 123; see also *CBS News: New Orleans Cops Indicted* (CBS television broadcast Mar. 30, 2006) (reporting that two New Orleans Police Department officers were indicted by a federal grand jury for beating a man in October 2005), available at www.cbsnews.com (search for video by title); see also *supra* note 126 and accompanying text.

¹⁷⁴ See Gecowets, *supra* note 127, at 21.

¹⁷⁵ See *supra* Part I.

¹⁷⁶ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 218–19.

¹⁷⁷ See Wurfel, *supra* note 21, at 733.

¹⁷⁸ U.S. CONST. amend. III.

of whether non-owners have the authority to refuse quartering.¹⁷⁹ In *Engblom v. Carey*, the Southern District of New York used a test from the Supreme Court's Fourth Amendment jurisprudence: "whether the person claiming protection has a legitimate expectation of privacy usually arising from a property or possessory interest in the premises."¹⁸⁰ The court held that the prison guards claiming Third Amendment protection did not have a claim because their tenancy in the dormitories commandeered by the National Guard were "incident to their employment."¹⁸¹ In an analogous situation, in October 2005, the President of St. Bernard Parish, Louisiana, commandeered a hospital in order to house the National Guard. Hospital workers protested outside, concerned that closing the hospital would jeopardize their jobs.¹⁸² The hospital workers did not live in the hospital, so their only claim of ownership to the facility would have been incident to their employment, and therefore, under the *Engblom* standard they probably would not have had standing to bring a Third Amendment claim. However, patients of a hospital might have a Third Amendment claim in that situation. In Algiers, a district of New Orleans, the National Guard occupied the rooms of evacuated residents of the Our Lady of Wisdom Healthcare Center.¹⁸³ Similarly, law enforcement officers, firepersons, and Emergency Medical Technicians slept in an emptied nursing home nearby.¹⁸⁴ If the residents of these facilities left possessions behind before the storm,¹⁸⁵ and intended to return to the hospital after the storm, they may have had the expectation of privacy necessary for Third Amendment standing under *Engblom*.¹⁸⁶

Ultimately, however, consent to quarter derives from the owner of the house, which raises the question of whether an owner's consent to quarter could trump that of a resident. If the corporate owner of the

¹⁷⁹ Presumably, if a non-owner occupier consented to quartering but the owner refused, the owner's refusal would trump the non-owner occupier's consent. In this way, the owner's right to refuse is vested in his property rights, while the non-owner's right to refuse, if such a right exists, is vested in a right to privacy as well as property rights.

¹⁸⁰ *Engblom v. Carey*, 522 F. Supp. 57, 66 (S.D.N.Y. 1981), *rev'd*, 677 F.2d 957 (2d Cir. 1982) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)).

¹⁸¹ *Id.* at 67; *see also* ALDERMAN & KENNEDY, *supra* note 19, at 109 (noting that the dormitories furnishings and accessories were supplied by state).

¹⁸² Hurricane Katrina—The Aftermath, Weblog for Day 49, <http://times-picayune.com> (Oct. 14, 2005).

¹⁸³ Lisa Hollis, *Health Care Center's Director Wins Honor*, TIMES-PICAYUNE (New Orleans), Jan. 4, 2007, at 6.

¹⁸⁴ *See* HORNE, *supra* note 7, at 125.

¹⁸⁵ *See Engblom*, 522 F. Supp. at 63 ("[T]he striking resident correction officers were ordered to clear out their rooms specifically to provide quarters for the Guard.")

¹⁸⁶ *See also* Neil Hayes, *New Orleans Payton's Super Home*, CHI. SUN TIMES, Dec. 15, 2006, at 122 (the National Guard also requisitioned the New Orleans Saints training facility where members of the team may have kept personal effects).

healthcare center or nursing home, as the owner of the “house,” gave consent to quarter, this might override the objections of the patients.¹⁸⁷ In *Engblom*, the correctional officers’ refusal to quarter was essentially trumped by the consent of the state, which owned the prison.¹⁸⁸ However, this result runs counter to the jurisprudence of the Third Amendment’s closest constitutional relative, the Fourth Amendment’s Search and Seizure Clause. The Supreme Court has held that landlords do not have permission to give consent to the searching of their tenant’s rented space.¹⁸⁹ Similarly, the Second Circuit, in which *Engblom* was decided, held that hotel guests have standing under the Fourth Amendment to challenge law enforcement entry into their room.¹⁹⁰ Both Third and Fourth Amendment consent situations revolve around the expectation of, and right to, privacy. In fact, the Third Amendment litigant’s claim to privacy may be even stronger than a Fourth Amendment litigant because quartering is an indefinite duration occupation of the litigant’s living space, while a police search, although intrusive, is brief. Therefore, the consent of an owner to quarter troops in a house would probably not trump a non-owner-occupier’s refusal.

D. TIMES OF PEACE AND WAR

The most interesting clauses for analyzing modern Third Amendment application are the peace and wartime distinctions. In time of peace, soldiers must obtain consent to quarter from homeowners, while in times of war, soldiers may be quartered in homes in a manner prescribed by law.¹⁹¹ In addition to the literal language, legislative history indicates that the peace-wartime distinction was important to the framers. In the Third Amendment debates, Congress rejected a motion by Representative Thomas Sumter to strike out the peace-wartime distinction.¹⁹² The distinction essentially permits forced quartering during times of war, presumably acknowledging that necessity may compel the government to limit civil liberties and property rights for the sake of preserving local

¹⁸⁷ It is unclear whether the owner or occupier of the house would have to be a natural person. See Stephen G. Wood, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 549 (Supp. 2002) (noting that “[n]o cases have been decided concerning whether corporations are protected from the prohibition on the quartering of soldiers”). If corporations have standing, then a claimant might not need to reside in the house to have standing.

¹⁸⁸ See *Engblom*, 522 F. Supp. at 67.

¹⁸⁹ *Chapman v. United States*, 365 U.S. 610 (1961).

¹⁹⁰ *United States v. Agapito*, 620 F.2d 324 (2d Cir. 1980).

¹⁹¹ See *Cobb*, *supra* note 8.

¹⁹² CREATING THE BILL OF RIGHTS, *supra* note 54, at 179.

peace or the nation itself.¹⁹³ Given that the government has the power to override Third Amendment protections in wartime, it is necessary to first determine what qualifies as wartime.

Traditionally, wartime exists when Congress declares war on another nation.¹⁹⁴ One military historian noted, “[whether] war in the legal sense exists will depend upon whether the parent state recognizes the insurgents as belligerents.”¹⁹⁵ Wartime may also exist when part of the nation is in a state of martial law.¹⁹⁶ Most broadly, an area is under martial law “when military authorities carry on government or exercise various degrees of control over civilians or civilian authorities in domestic territory.”¹⁹⁷ Although states are constitutionally forbidden from declaring war unless actually invaded,¹⁹⁸ today some states have delineated between peace and wartime emergencies, wartime emergencies occurring when the nation is attacked, or in probable or imminent danger of attack.¹⁹⁹ Comparatively, states of emergency occur when there are “conditions of disaster or of extreme peril to the safety of persons and property,” which civilian services are unable to handle adequately.²⁰⁰

While the distinction between war and peacetime appears clear at the center, it is less clear at the margins. Martial law is a malleable term that “has been employed in various ways by different people and at different times,”²⁰¹ and executives have wielded the term to quell rebellions,²⁰² break strikes,²⁰³ and even compel oil production.²⁰⁴ For much of the 20th century, the Cold War brought the constant threat of war to civilian population.²⁰⁵ After September 11, 2001, the United States engaged in a global “War on Terror” with no clear enemy and no clear

¹⁹³ See *Sterling v. Constantin*, 287 U.S. 378, 401 (1931) (“[I]n the theater of actual war, there are occasions in which private property may be . . . impressed into public service, and the officer may show the necessity in defending an action for trespass.”).

¹⁹⁴ See U.S. CONST. art. I, § 8, cl. 11.

¹⁹⁵ CHARLES FAIRMAN, *THE LAW OF MARTIAL LAW* 117 (2d ed. 1943).

¹⁹⁶ See *Luther v. Borden*, 48 U.S. 1, 45 (1849) (declaring that an insurrection in Rhode Island was a “state of war”).

¹⁹⁷ *Ochikubo v. Bonesteel*, 60 F. Supp. 916, 928 (S.D. Cal. 1945).

¹⁹⁸ U.S. CONST. art. I, § 10, cl. 3.

¹⁹⁹ CAL. GOV’T CODE § 8558(a) (West 2006).

²⁰⁰ See § 8558(b).

²⁰¹ See *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946). See generally *Duncan*, 327 U.S. at 320–22 (giving a brief history of martial law in England and America).

²⁰² See *Luther v. Borden*, 48 U.S. 1, 7 (1848).

²⁰³ See generally HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT*, at 206–89 (1995) (detailing numerous accounts of gubernatorial use of martial law powers and the National Guard to break up strikes).

²⁰⁴ See *Sterling v. Constantin*, 287 U.S. 378, 387–90 (1932).

²⁰⁵ See generally *People v. City of Chicago*, 108 N.E.2d 16, 21 (Ill. 1952) (“War is no more a creature of the restricted battlefield, a deadly enterprise conducted according to rules and limitations. Today its destruction may spread throughout the nations, by-passing the soldier and spreading havoc among the all civilian population.”).

end.²⁰⁶ Today, the government responds to war and peacetime disasters in similar ways. In both scenarios, it employs military force to keep order. For instance, the military deployment in the aftermath of Hurricane Katrina was the largest since the Civil War.²⁰⁷

The drafters distinguished peacetime and wartime in the Third Amendment in order to give the government the ability to diffuse lawlessness and defeat enemies quickly during wartime,²⁰⁸ while ensuring protection of civilian homes in peacetime. While the country is engaged in a War on Terror, the country may be in a continual state of wartime for purposes of the Amendment. Any diminution in the nation's ability to govern itself, whether it is through a man-made or natural disaster, could constitute a threat to national security that cannot be tolerated during wartime. The issue remains whether wartime and peacetime are broad, national states of affairs that pre-exist and outlast a discreet disaster and military response, or whether they can be localized in time and space to the specific disaster that requires military quartering. The arguments on both sides are strong. On the one hand, when civil disorder caused by domestic disaster must be quelled by military force, the government should be able to respond rapidly and flexibly without being constrained by individual hold-outs. On the other hand, citizens most need the Third Amendment to safeguard their right to privacy and property during disaster situations in which the civilian rule of law fails.²⁰⁹

The next step in determining the viability of a Third Amendment claim is to determine what the parameters are for legal wartime and peacetime quartering. If a domestic disaster occurs during wartime, quartering would be permissible "in a manner prescribed by law."²¹⁰ Presumably, "by law" refers to an act of Congress.²¹¹ Legislative history supports this interpretation. Congress rejected a motion by Elbridge Gerry to insert "by a civil magistrate" into the Amendment.²¹² As

²⁰⁶ See Gregory R. Copley, *World War III by Any Other Name*, DEF. & FOREIGN AFF. STRATEGIC POL'Y 3, 3-4 (Sept. 2001); see also LESSONS LEARNED, *supra* note 7, at 5 ("Terrorists still plot their evil deeds . . .").

²⁰⁷ H.R. REP. NO. 109-377, at 201 (2006).

²⁰⁸ See THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 219 (noting one Congressman's concern that unless Congress had the power to order wartime quartering, "cases might arise where the public safety would be endangered by putting it in the power of one person to keep a division of troops standing in the inclemency of the weather for many hours").

²⁰⁹ See *Corbin v. Marsh*, 63 Ky. (2 Duv.) 193, 194 (1865) ("[T]he Constitution was made even more for the turbulence of war than the calm of peace.").

²¹⁰ U.S. CONST. amend. III.

²¹¹ See U.S. CONST. art. I, § 8 ("The Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

²¹² THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 208.

Thomas Hartley, another member of Congress, said, the prescription of quartering “ought to be entrusted to the legislature.”²¹³

Given that quartering in wartime can only occur through legislation, the next issue is whether Congress can confer the power to quarter to the executive or to military personnel for the sake of expediency or necessity. The Supreme Court has noted that the military can take civilian property when there is an immediate danger or “necessity urgent for the public service.”²¹⁴ By extension, if a soldier felt he was in danger and demanded quarter in a civilian’s home, there would not likely be a Third Amendment violation.²¹⁵

If a domestic disaster, when the country is not in a declared war, is more like peacetime, quartering would only be permissible at the consent of the owner.²¹⁶ Although this might hinder rescue efforts, it preserves civilian’s rights in the face of authoritarian military occupation. This reading conforms to the Gerry’s rationale for passing the Third Amendment: “to prevent the arbitrary exercise of power.”²¹⁷

E. REMEDIES

Critical to the analysis of the Third Amendment is whether citizens have any remedies for their Third Amendment claims. Since no case has reached the remedies stage on a Third Amendment issue, and since no legislature has created statutory guidance, litigants must look to history and analogous amendments.

Despite the lack of a remedies provision in the Third Amendment, courts likely have jurisdiction to prescribe some remedy and will in fact find that a Third Amendment violation is actionable prospectively for injunctive relief or retroactively for damages against both the state or federal government and individual military personnel committing the violations. Whether the suit is brought against the state or federal government would likely depend on which sovereign was exercising authority over the military. Under 5 U.S.C. § 702, the federal government has waived its sovereign immunity to suits seeking to enjoin an unconstitutional act by an arm of the government.²¹⁸ A suit to enjoin the state would likely lie in the Amendment itself imposed on the states through

²¹³ *Id.* at 219.

²¹⁴ *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (quoting *Mitchell v. Harmony*, 13 U.S. 115, 134 (1851)).

²¹⁵ See *State v. Pinsince*, 192 A.2d 605, 607 (N.H. 1963) (compelling civilians to seek shelter in an emergency was not a violation of their constitutional rights). *But cf.* *Smith v. State*, 2 Ill. Ct. Cl. 149, 149 (Ct. Cl. 1912) (holding soldiers liable for trespass and destruction of property for conducting a “sham battle.”).

²¹⁶ U.S. CONST. amend. III.

²¹⁷ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 220.

²¹⁸ 5 U.S.C. § 702 (2008).

the Fourteenth Amendment.²¹⁹ Because the Fourteenth Amendment was ratified after the Eleventh Amendment, the Court has held it overrides states' sovereignty.²²⁰ Also, individual officers may be enjoined in federal court.²²¹ Thus, theoretically, a litigant could seek to enjoin the military and its officers from quartering troops in the litigant's home. Seeking an injunction prior to a domestic disaster is unlikely, however, given that litigants will not have advance notice of the use of military in the area.

It is more likely that a litigant would seek damages from the government or an individual officer after the Third Amendment violation. As the Supreme Court stated in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."²²² More recently, the Court noted that "[h]istorically, damages have been regarded as the ordinary remedy for invasion of personal interests in liberty."²²³ The state government would be subject to suit under the Amendment itself.²²⁴ The federal government would be subject to suit under the Federal Tort Claims Act.²²⁵ Under the statute the federal government waives sovereign immunity for negligent acts committed by its agents, including the intentional tort of trespass. Individual soldiers would most likely be liable for damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.²²⁶ There Court found that a plaintiff had a cause of action for damages where the plaintiff alleged that government enforcement officers entered his home in violation his Fourth Amendment right to protection from unreasonable search and seizure.²²⁷

²¹⁹ See *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

²²⁰ See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding state governments may be sued under Title VII of the Civil Rights Act of 1964 because the Fourteenth Amendment was intended to override state sovereignty). Note that state legislatures or judiciaries impose bars on suits against them for damages incurred during disasters. See CAL. GOV'T CODE § 8655 (West 2006) ("The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or employee of the state or its political subdivisions in carrying out the provisions of this chapter."); *Dudley v. Orange County*, 137 So. 2d 859 (Fla. 1962) (holding that the state was immune from liability for flood damage incurred by private citizens as a result of damming during a natural disaster). The Third Amendment, imposed through the Fourteenth Amendment, would likely override these state laws. Note also that this Note does not address to what extent litigants could prevail on claims under anti-quartering provisions in state constitutions. See *Bell*, *supra* note 27, at 144–45 (explaining that most states today have anti-quartering provisions in their constitutions).

²²¹ See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

²²² 5 U.S. 137, 163 (1803).

²²³ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

²²⁴ See *supra* notes 219–20 and accompanying text.

²²⁵ 28 U.S.C. § 1346 (2008).

²²⁶ 403 U.S. 388 (1971).

²²⁷ See *Id.* at 389.

Since *Bivens*, the Court has found causes of action for damages under the First,²²⁸ Fifth,²²⁹ and Eighth²³⁰ Amendments. These Amendments, like the Third Amendment, protect individuals from potential deprivation of rights or property at the hands of government officials. Also, given that violations of the Third and Fourth Amendments involve invasion of places in which individual have an expectation of privacy, courts would likely find that individual military soldiers and possibly government contractors²³¹ would be liable under *Bivens* for Third Amendment violations.

Under one method of remedy, citizens could receive compensation for quartering soldiers similar to the “just compensation” received for Fifth Amendment violations.²³² As the Supreme Court noted in *Luther v. Borden*, “if the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them to do so, unless a justification is made out fully on correct principles.”²³³ Some states expressly include a compensation provision within their emergency powers statutes.²³⁴ The fact that quartering may be done out of necessity caused by the disaster should be irrelevant. As one court pointed out, the Takings Clause “has the same validity in time of war as in time of peace.”²³⁵

However, the most challenging obstacle for Third Amendment litigants seeking damages is overcoming the shield of Qualified Immunity that protected individuals in *Engblom v. Carey*.²³⁶ In *Engblom*, the district court held the National Guard was “shielded from liability” on two grounds: (1) the Guardspersons’ “conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person

²²⁸ See *Bush v. Lucas*, 462 U.S. 367 (1980) (accepting the *Bivens* actions for First Amendment violations are permissible).

²²⁹ *Davis v. Passman*, 442 U.S. 228 (1979).

²³⁰ *Carlson v. Green*, 446 U.S. 14 (1980).

²³¹ Although the Court has held that a *Bivens* suit was not permitted against privately operated prison, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), the Court has not yet reached the issue of whether private citizens acting under government contract would be liable under *Bivens*. *But cf.* *Holy v. Sott*, 434 F.3d 287 (4th Cir. 2006) (barring *Bivens* action against employees of a privately operated prison working under federal government contract).

²³² U.S. CONST. amend. V.

²³³ 48 U.S. 1, 87 (1949).

²³⁴ See CAL. GOV'T CODE § 8570(i) (West 2006) (declaring that the Governor has the power to “[p]lan for the use of any private facilities, services, and property, and, when necessary and when in fact used, provide for payment for that use”).

²³⁵ *Atwater v. United States*, 106 Ct. Cl. 196, 208 (U.S. Ct. Cl. 1946) (quoting *Causby v. United States*, 104 Ct. Cl. 342, 349 (U.S. Ct. Cl. 1945)) (holding that a taking existed where the military sought to condemn the property to use as an aerial gunnery during World War II).

²³⁶ 724 F.2d 28 (2d Cir. 1983).

would have known,”²³⁷ and (2) their “actions were taken during an emergency as ‘prompt-counter measures’” necessary to quell alleged vandalism by the strikers.²³⁸

Given the lack of Third Amendment case law and scholarship coming out of situations in which Third Amendment violations likely occurred,²³⁹ individual Guardspersons would not necessarily know that they were violating a constitutional right. Courts like in *Engblom* may be sympathetic to their lack of knowledge based on this widespread ignorance of the existence of, or lack of appreciation for, the right.

Historically, courts have ruled favorably for soldiers who use their discretion to preserve order, even when the soldiers restrict civil liberties or confiscate private property.²⁴⁰ During the Civil War, states enacted indemnity statutes to protect soldiers from suit for damages caused by following orders.²⁴¹ Similarly, the Model Penal Code makes “executing an order” of a superior officer an affirmative defense.²⁴² Soldiers may also defend their actions on the grounds of necessity, similar to the *Engblom* defendants. A century and a half ago, the Supreme Court set a fairly low threshold for what constitutes necessity, requiring that the soldier demonstrate that he had “reasonable grounds to believe” that the “nature and character of the emergency” at issue compelled him to take civilian property.²⁴³ Thus, during an actual disaster, a soldier could likely seek shelter in a home for necessity without fear of incurring Third Amendment liability. Under these circumstances, the best claim a litigant may have is trespass.²⁴⁴

Recently, however, there has been judicial resistance to the Doctrine of Qualified Immunity that might override a defense of necessity or following orders. The Supreme Court recently held that officers may not avail themselves of a qualified immunity defense if “the facts alleged show the officer’s conduct violated a constitutional right.”²⁴⁵ Also, tra-

²³⁷ *Engblom v. Carey*, 572 F. Supp. 44, 46 (S.D.N.Y. 1983), *aff’d*, 724 F.2d 28 (2d Cir. 1983) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

²³⁸ *Id.* at 49.

²³⁹ See *supra* Part II.B.

²⁴⁰ See *Drehman v. Stifel*, 41 Mo. 184, 206 (1867), *aff’d*, 75 U.S. 595 (1869) (“A sagacious military commander is apt to see necessities that are not apparent to everybody.”); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the military’s exclusion of persons of Japanese ancestry from sections of the west coast during World War II).

²⁴¹ See FAIRMAN, *supra* note 195, at 283–96.

²⁴² MODEL PENAL CODE § 2.10 (1985).

²⁴³ *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1851).

²⁴⁴ Cf. *Amar*, *supra* note 83, at 1508 (noting that “state remedies such as trespass may continue to help plug the remedial gap” in Fourth Amendment violations by federal agents).

²⁴⁵ *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). But see *id.* at 202 (Stevens, J., dissenting) (“Law enforcement officers should never be subject to damages liability for failing to anticipate novel developments in constitutional law.”).

ditionally qualified immunity has only applied to money damages and not injunctive relief.²⁴⁶ Furthermore, if law and policymakers begin to incorporate the Third Amendment in their decision making in the wake of large domestic disasters, executives and soldiers may not have the shield of qualified immunity to protect them.

In addition, the military may claim immunity, arguing courts lack jurisdiction to hear claims involving incidents that occurred pursuant to executing martial law.²⁴⁷ The Supreme Court has held, however, that civil courts would have jurisdiction in post-martial law litigation and that martial law “was not intended to authorize the supplanting of courts by military tribunals.”²⁴⁸

In a disaster such as Hurricane Katrina, where infrastructure is so damaged that the governmental personnel must rely heavily on private facilities for shelter and logistics,²⁴⁹ use of private property, even private homes, may be necessary.²⁵⁰ On the other hand, in a situation where lines of communication are tenuous and chains of command uncertain, there is a greater need to hold the government accountable for the actions of military personnel.²⁵¹

CONCLUSION

This Note attempts to examine the potential application of the Third Amendment to twenty-first century domestic disasters. Increased awareness of the Amendment and the rights it attempts to protect may serve citizens in the aftermath of large-scale disasters. If the Third Amendment has a well understood meaning and application, it will become part

²⁴⁶ See *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997).

²⁴⁷ See Robert S. RANKIN, *WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES* 110–11 (AMS Press, Inc. 1965) (1939) (arguing that martial law exists when civil courts are unable to properly render justice).

²⁴⁸ *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946); see also *Hamdi v. Rumsfeld*, 543 U.S. 507, 535 (holding that protection of citizens’ “core rights” outweighed a need for limiting civilian court jurisdiction in the due process claims of enemy-combatant detentions).

²⁴⁹ See e.g., H.R. REP. NO. 109-377, at 22 (2006) (noting that the National Guard relied on the national media for information and damage assessments); Hayes, *supra* note 186 (reporting that the National Guard commandeered an NFL training facility); Whitford, *supra* note 15 (reporting that the National Guard commandeered all of the trucks in a pest control business).

²⁵⁰ L.K. Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 CAL. L. REV. 159, 178 (1924) (arguing that in order to preserve order, the military “may have to go farther than peace officers may do, and refuse, for the time being, to obey the order of a court to vacate . . . property”).

²⁵¹ See George E. Edwards, *International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis*, 31 T. MARSHALL L. REV. 353, 418 (2006) (“[A]ll States, and the international community as a whole, must condemn, seek to halt, and facilitate remedies for international human rights law violations that occur in the United States, including Katrina-related international human rights law violations.”).

of the fabric of laws and rules that the government applies; if it has no perceived application, the rights it was intended to protect will be lost. If emergency workers are cognizant of the Third Amendment's application to their work, they may be more respectful of people's homes and property. On the other hand, it may be unreasonable, and potentially dangerous, to check relief operations with blanket restrictions. Enforcing the Third Amendment stifles the human compassion essential to mitigating disasters by making rescue workers more concerned about liability than about saving lives.²⁵²

In disasters, in war, it isn't governments that help people, at least not early on. It's individuals: policemen, doctors, strangers, people who stand up when others sit down. There were so many heroes in [Hurricane Katrina], men and women who grabbed a bandage, an axe, a gun, and did what needed to be done.²⁵³

Writing on the need for an anti-quartering amendment to the Constitution, the newspaper *Federal Farmer* noted, "[T]he English, always in possession of their freedom, are frequently unmindful of the value of it: we, at this period, do not seem to be so well off, having, in some instances abused ours; many of us are quite disposed to barter it away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty"²⁵⁴ Today some scholars accuse Americans of making the same mistake: relinquishing liberties for the sake of security.²⁵⁵ During disasters Americans are willing to sacrifice civil liberties to the state's claim of "emergency powers."²⁵⁶ To best preserve individual rights while still ensuring rapid disaster recovery, Americans must be aware of two things. First,

[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government

²⁵² See Rhee, *supra* note 103, at 602–03 ("Government action then in times of crisis can be a poisoned tonic, the perceived remedy that can in fact be a harmful agent.").

²⁵³ COOPER, *supra* note 155, at 182.

²⁵⁴ THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 221.

²⁵⁵ See NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE* 17 (2003) ("[A]s this war on terrorism continues, young Americans will have become accustomed to—indeed conditioned to—the diminishment of the Bill of Rights."); Mark E. Brandon, *War and the American Constitutional Order*, in *THE CONSTITUTION IN WARTIME*, *supra* note 84, at 20 ("[C]oncern for national security has contributed to the diminution of rights . . . for everyone.").

²⁵⁶ See Posner & Vermeule, *supra* note 84, at 56 ("[T]he costs of a temporary dictatorship . . . and suppression of civil liberties are less than the costs of national destruction.").

and its limitations of the power of the States were determined in light of emergency and they are not altered by emergency.²⁵⁷

Second, constitutional protections such as the Third Amendment do not function in a vacuum but require a well-maintained and respected constitutional system.²⁵⁸ If the government uses its self-proclaimed “emergency powers” to erode that system, eventually it will no longer protect the rights Americans take most for granted.

On the whole, the National Guard’s rescue and recovery efforts after Hurricane Katrina were herculean. The Department of Defense estimates that the National Guard rescued 17,000 stranded civilians and evacuated 70,000 from the region.²⁵⁹ They transformed private facilities into temporary hospitals and shelters for victims of the storm.²⁶⁰ Their presence was a welcome sight to many. One woman wrote a year later, “When I came back to assess my property, I was glad to see these ‘M16-toting’ [G]uardsmen all over. It gave me a some [sic] sense of security.”²⁶¹ Given this attitude, if there was any quartering of National Guard troops in homes, it may have been consensual²⁶²—or civilians who discovered the quartering after they returned to their homes may have accepted it as necessary for rescue operations. But the National Guard are soldiers, and soldiers are capable of abusing their power. Civilians acquiescing to martial protection after disasters must be aware of this danger and cognizant of their rights—especially their most forgotten ones.

²⁵⁷ *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934).

²⁵⁸ See Baker, *supra* note 20, at 55 (“[A] bill of rights depends for its effectiveness on other political and constitutional conditions [T]he protection of liberty in the United States derives in large part from other components of the constitutional system.”).

²⁵⁹ DEP’T OF DEF., U.S. ARMY RELEASE, HURRICANE KATRINA: NATIONAL GUARD’S FINEST HOUR (Aug. 29, 2006).

²⁶⁰ See Mick Walsh, *Orthopedic Tech Has Seen Two War Zones*, COLUMBUS LEDGER-ENQUIRER (Columbus, Ga.), Sept. 6, 2006, at 1.

²⁶¹ Cindy Bulligan, Letter to Editor, *Security Measures Needed*, TIMES-PICAYUNE (New Orleans), Aug. 24, 2006, Metro, at 6.

²⁶² See LESSONS LEARNED, *supra* note 7, at 133; *30 Mobile Homes Given to Guardsmen*, TIMES-PICAYUNE (New Orleans), Nov. 5, 2006, at 22 (reporting that Dow Chemicals donated mobile homes to house Guardsmen while storm-wrecked barracks were being renovated).