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Is the Third Amendment Obsolete

Morton J. Horwitz

IS THE THIRD AMENDMENT OBSOLETE?

MORTON J. HORWITZ*

When I was called and asked to speak about the history of the Third Amendment, a paranoid reaction occurred. "He is just testing me," I said to myself. "He just wants to see whether I even know what the Third Amendment is." But before I was forced to reveal whether I knew or not, Dean Gaffney generously informed me that it involved the provision in the Bill of Rights prohibiting the Quartering of Soldiers in citizens' houses. But that produced a second wave of apprehension. Why did he choose *me* to discuss the Third Amendment. "Whom has he asked to do the First Amendment?" I thought, enviously. Or the Fourth or Fifth or Ninth Amendments. Even the long ignored Tenth Amendment seemed of more interest, or even the Second Amendment. To a Constitutional historian, it is no less an anachronism than the Third, but, at least, it has had the good fortune to have its own special lobby, the National Rifle Association, prepared to spend a fortune to remind us that the very integrity of constitutional government is at stake in allowing us to own guns. But no one cares about the Third Amendment; no one even has any interest in perpetuating its memory. For the record, many of my colleagues, after learning that I was to speak on the Third Amendment, sheepishly asked me what the Third Amendment is. Their indifference is but an echo of Supreme Court Justice Samuel F. Miller's terse summary of the case law involving the Third Amendment in his 1893 book on *The Constitution*. He wrote:

> This amendment seems to have been thought necessary. It does not appear to have been the subject of judicial exposition; and it is so thoroughly in accord with all our ideas, that further comment is unnecessary.[1]

And further comment has continued to be "unnecessary" during the century that has passed since Justice Miller wrote. Indeed, so far as I have been able to determine, there has been only one decided case under the Third Amendment. That case, *Engblom v. Carey*[2] decided by the Second Circuit Court of Appeals in 1982, vindicated the Third Amendment claims of striking state prison corrections officers who were ousted from their living quarters in order to

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* B.A., C.C.N.Y. 1959; Ph.D., Harvard University 1964; LL.B., Harvard Law School 1967; Charles Warren Professor of the History of the American Law, Harvard Law School.

1. SAMUEL F. MILLER, THE CONSTITUTION (1893).
2. 677 F.2d 957 (2d Cir. 1982).

provide facilities for members of the National Guard during the strike. In truth, it is hard not to sympathize with the claim of the dissenting judge that this was a "far-fetched" application of the Third Amendment. Unlike some belated discoveries of previously hidden meanings in constitutional texts, I doubt that *Engblom v. Carey* will be remembered for its contribution to the belated blossoming of Third Amendment jurisprudence.

So what is there to say about the Third Amendment? Most of the scholarly literature on the Amendment confines it to a humble, but dignified place in that parade of Anglo-American monuments to constitutional liberty that has come derisively to be called Whig History. So we learn that the English Petition of Right (1628) "humbly pray(s)" that quartered troops be removed;[3] that the Bill of Rights (1689) defends the ouster of King James II for, among other things, "subvert(ing) . . . the laws and liberties of this kingdom . . . by raising and keeping a standing army within the kingdom in time of peace and quartering soldiers contrary to law . . ."[4] Indeed, we see in the English Bill of Rights an ambiguity that would later become important during the drafting of the American Bill of Rights: A linkage between opposition to standing armies and to quartering of troops, raising the question of whether opposition to quartering was an end in itself or was simply a means of preventing the formation of standing armies during peace-time.

Immediately after the Glorious Revolution of 1689, Parliament enacted the Mutiny Act, which forbade quartering troops in private homes without the owner's consent. While the act permitted local magistrates to place troops in inns and stables, it failed to provide state-financed barracks, regarded as a dangerous encouragement to retaining a standing peacetime army, thought to be a major symbol of potential tyranny.[5] After much argument about whether the Mutiny Act applied to the colonies, Parliament responded in 1765 by explicitly extending its provisions, known in the colonies as The Quartering Act. By this time, however, the parliamentary action only added fuel to an already politically volatile situation raising fears of parliamentary tyranny and generating constitutional questions about parliamentary versus local legislative authority. As the colonists, especially in Boston, increasingly thought of the British troops as an army of occupation, confrontations between soldiers and civilians increased, resulting in fistfights, riots, and ultimately, The Boston Massacre of 1770. Francis Bernard, the royal governor of Massachusetts, shrewdly

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3. English Petition of Right, 1628, *in* 1 THE ROOTS OF THE BILL OF RIGHTS 19, 21 (Bernard Schwartz ed., 1980).

4. English Bill of Rights, 1689, *in* 1 THE ROOTS OF THE BILL OF RIGHTS 41, 42 (Bernard Schwartz ed., 1980).

5. R. Carmon Hardy, *A Free People's Intolerable Grievance*, *in* THE BILL OF RIGHTS 67, 72 (Jon Kukla ed., 1987).

articulated the colonists' legal strategy of resistance as follows:

> There are no Barracks in the Town, and therefore by Act of Parliament . . . they must be quartered in the public Houses: but no one will keep a public House on such Terms, and there will be no public Houses; then the Governor and Council must hire Barns, Outhouses, etc. for them, but no-body is obliged to let them, no-body will let them, no-body will dare to let them. The troops are forbid to quarter themselves in any other manner than according to the Act of Parliament under severe Penalties; but they can't quarter themselves according to the Act, and therefore they must leave town, or seize on Quarters contrary to the Act. When they do this, when they invade Property contrary to an Act of Parliament, we may resist them with the Law on our side.[6]

In short, the events leading up to the American Revolution persuaded the colonists that there was a close connection between restrictions on quartering troops and maintenance of constitutional liberty. And, unlike some of their constitutional assertions, they were able to identity their resistance to quartering of troops with a long-standing English libertarian demand that had apparently triumphed after the Glorious Revolution.

The adoption of the provision in the Bill of Rights against quartering troops seems to have been relatively uncontroversial. Of the eight states that made recommendations for a future Bill of Rights during the ratification process of the original constitution, five included an anti-Quartering provision. Such a provision was also included in every draft of the Bill of Rights considered by the First Congress in 1789. Yet there were glimmers of controversy.

Opposing ratification of the Constitution without a Bill of Rights in the Virginia Ratifying Convention, Patrick Henry linked opposition to quartering troops with what he regarded as the much more dangerous power of Congress to create a standing army.[7] Wishing to restrict the armed forces of the United States to the existing state militias, he invoked republican principle in favor of a people's army and against a professionalized military. In response, James Madison supported a national army. He also sought to separate the Quartering issue from the question of a standing army. "We complained . . . that a standing army was quartered upon us . . . " Madison declared, "because it was done without the local authority of this country -- without the consent of the

6. *Quoted in* HILLAR ZOBEL, THE BOSTON MASSACRE 332 n.1 (1970).

7. Virginia Ratifying Convention, *in* 3 DEBATES ON THE FEDERAL CONSTITUTION 410 (Elliot ed., 1937).

people of the America."[8] Perhaps the limitation of quartering served actually as an insignificant symbolic concession to republican sympathies in order to avoid the real threat that advocates of a Bill of Rights might insist on a complete bar to any national standing army.

There was also an unsuccessful attempt to change the scope of the Third Amendment in the debate during the First Congress. The Amendment as we have it today reads: "No soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law."[9] There was an effort to eliminate the distinction between war and peacetime, and thus to bar quartering, without consent, in both cases. In successfully opposing the change, Roger Sherman stated:

> it was absolutely necessary that marching troops should have quarters, whether in time of peace or war, and that it ought not to be put in the power of an individual to obstruct the public service; if quarters were not to be obtained in public barracks, they must be procured elsewhere.[10]

To another effort -- also unsuccessful -- to control wartime quartering by including supervision by a magistrate, a congressman stated:

> those things ought to be entrusted to the legislature; that 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 inclemency of the weather for many hours. . . .[11]

So we see that there were important struggles over the scope of the Third Amendment and, in particular, over whether or not it should be related to a prohibition on standing armies. The really interesting question, in my view, is why, given the practical significance of the bar against quartering, it should never have emerged as an issue again. The history of the Third Amendment is thus an interesting study in constitutional obsolescence. We do not usually address the question of why provisions of the Bill of Rights either become famous or are simply forgotten.

Despite the failure to bar a standing army in the Bill of Rights, this issue

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8. *Id.* at 413.

9. *Id.*

10. Speech before the First Federal Congress, August 17, 1789. *Gazette of the United States*, August 22, 1879, *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 179, 185 (Helen E. Veidt et. al., eds., 1991).

11. Speech of Congressman Hartley before the First Federal Congress. *Id.* at 186.

continued to dominate discussions of military policy throughout the ante-bellum period. In January 1792, after a two week secret debate, Congress agreed to President Washington's proposal to create a 5,000 man regular army.[12] Created in reaction to disastrous military defeats inflicted on inexperienced militiamen by various Indian tribes, this first standing army was not perceived as a threat to the white population. And because these troops were housed in various forts built along the frontier, the quartering issue never arose. Indeed, the real historical lesson of the colonial period was that the quartering issue would be likely to arise only when an army of occupation sought to suppress a local urban population.

Fear of such suppression grew in 1797, "when deteriorating relations with France became the catalyst for Federalist demands for a sudden increase in the military establishment."[13] Republicans reacted with fear that, together with the newly enacted Alien and Sedition Acts, this new army would become the mainstay of an authoritarian regime. In fact, the Federalists succeeded in increasing the regular army to 12,000 men.[14] By 1799, after increasing evidence of misuse of the army against political opponents, Thomas Jefferson included "the disbanding of the army" on his list of major issues that needed to be addressed by the newly elected Sixth Congress.[15] As the split within the Federalist ranks grew, President Adams sought to check Hamilton's power within the new army by restoring the original 5,000 man army.

After Jefferson was elected president in 1800, the Republican Congress authorized a reduction in the size of the army to 3,300 men, and Jefferson began to replace the solid Federalist officer core.[16] But in the process, the legitimacy of a standing army came to be accepted. Thus, the standing army issue would no longer be able to draw off the symbolic energy of those who might otherwise have turned to the Third Amendment to support their fears of the military or to insist that only a people's militia comported with Republican principles. Instead, the Third Amendment came to be read literally as confined to its precise terms, not as connected to some more general principles involving standing armies.

Next, we need to inquire why, even in its narrowest terms, the Third Amendment generated no applications. Why does the quartering issue never seem to have arisen? As I have already indicated, the quartering question would only arise around an army of occupation. Except for the quick suppression of the Whiskey Rebellion in western Pennsylvania in 1794, that problem did not

12. THEODORE J. CRACKEL, MR. JEFFERSON'S ARMY 9 (1987).
13. *Id.* at 17.
14. *Id.* at 18.
15. *Id.* at 28.
16. *Id.* at 40.

face the white population until the Civil War. Moreover, the regular army spent most of its time housed in forts built along the frontier to fight the Indians, not in urban centers. And while I am surprised that the issue did not arise during the Civil War, especially as Sherman's troops marched to the sea, the accounts that I have read suggest that new and improved army tents and the construction of barracks may have made quartering unnecessary, if *Gone With the Wind* is not consulted. Nor have I found any congressional authorization of war-time quartering, which would have been permitted under the Third Amendment.

There may be still another, more general explanation for the obsolescence of the Third Amendment. There appears to be a Gresham's Law of constitutional development whereby general principles drive out specific provisions. Unless a very specific provision can be generalized, it tends to eventually be subordinated to other existing general principles. Before the Civil War, the Contracts Clause was generalized to include cases far beyond the post-revolutionary debtor relief laws that originally occasioned for its enactment. After the Civil War, the Contracts Clause, itself, was absorbed into the more general principles of the Due Process Clause. The specific prohibition on bills of attainder only came to life after it was generalized beyond its narrow historical origins.[17] The Fifth Amendment protection against self-incrimination has been extended well beyond the Star Chamber imagery of coerced confessions that originally brought the provision to life. The dis-Establishment Clause of the First Amendment did not become obsolete with the end of the last state religious establishment in 1819. It was thereafter generalized to include principles of separation between church and state that certainly went beyond the original reason for its enactment. Even the Fourth Amendment ban on unreasonable searches and seizures has tended increasingly to be interpreted in light of emerging conceptions of privacy.

If the Fourth Amendment had never been enacted, the Third Amendment might have provided the raw material for generating something like an anti-search and seizure principle. This is similar to the seemingly innocuous language of the Ninth Amendment which has produced a constitutional guarantee of privacy in our own time.[18] Or if the opposition to standing armies had remained firm through Jefferson's administration, the anti-quartering position might have produced a constitutional bar to standing armies in peacetime. But none of this occurred, and, as a result, the Third Amendment was consigned to the graveyard of history, to be remembered only on occasions like this one,[19] when we seek to recapture the world of the founding fathers for its own sake.

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17. U.S. v. Lovett, 328 U.S. 303 (1946).

18. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 959 (1973).

19. The author is referring to the Bicentennial of the Bill of Rights, to which this Symposium is dedicated. [Ed. note].