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Unwelcome Guests: The President's Authority to Move Troops into Your Home in a Post-9/11 America

Tyler Wicks

UNWELCOME GUESTS: THE PRESIDENT'S AUTHORITY TO MOVE TROOPS INTO YOUR HOME IN A POST-9/11 AMERICA

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I. INTRODUCTION

Can the President of the United States move troops into your home without your consent? Most Americans would likely respond with a resounding *No!* Despite that, how many are certain of that response, or indeed its basis?[1] Uncertainty arises because the mechanism that arguably prevents such conduct is, at best, a constitutional obscurity.[2] Rather than the Declaration of Independence, the Constitution of the United States of America as originally ratified[3], or any law passed by Congress, the answer lies in the Bill of Rights – the first ten amendments to the Constitution.

The Bill of Rights was ratified by three-fourths of the Legislatures of the fourteen States then-existing on December 15, 1791 and became the first Ten Amendments to the Constitution on March 1, 1792.[4] The Third of these Ten Amendments – the one important here – instructs that, "No Soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[5]

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[1] "'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.' – Morton J. Horwitz in *Valparaiso University Law Review*." Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627, 627 (2015).

[2] Glenn Harlan Reynolds, *Foreword: The Third Amendment in the 21st Century*, 82 TENN. L. REV. 491, 491 (2015) ("The Third [Amendment] [] remains obscure in a way that these other provisions [of the Constitution] cannot hope to match."); Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 209 (1991) ("[N]o one cares about the Third Amendment; no one even has any interest in perpetuating its memory.").

[3] Hereinafter, the "Constitution."

[4] J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights*, 1789-1791, 25 U. RICH. L. REV. 433, 462 (1991).

[5] U.S. Const. amend. III.

Since the ratification of the Third Amendment in 1791, no court has addressed the quartering of soldiers in homes in a time of war. Additionally, only one federal district court and its immediate appellate court – the Federal District Court for the Southern District of New York and the Second Circuit Court of Appeals, respectively – have addressed a legitimate claim of quartering soldiers in homes during a time of peace.[6]

While it is unlikely that you will come home after a long day at work to find unknown soldiers living in your home, the possibility cannot be discounted. As Thomas Cooley made clear over one-hundred years ago, "it may always be assumed as possible."[7]

> "It is difficult to imagine a more terrible engine of oppression than the power in an executive to fill the house of an obnoxious person with a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, not less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of duty. However contrary to the spirit of the age such a proceeding may be, it may always be assumed as possible that it may be resorted to in times of great excitement….[8]

[6] *Engblom v. Carey*, 677 F.2d 957, 959 n.1. (2d Cir. 1982) ("Aside from the lower court's opinion in this case, 522 F. Supp. 57 (S.D.N.Y. 1981), there are no reported opinions involving the literal application of the Third Amendment."); see also, e.g., *Goethal v. U.S. Dep't of Com*., 854 F.3d 106, 112 n.9. (1st Cir. 2017) (finding the application of the Third Amendment to "private contractors engaged in on-board monitoring of the fishing industry is a dubious proposition to say the least"), *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir. 2001) (commenting that Petitioners' argument that military flights above their homes are violative of the Third Amendment borders on frivolous), *Mitchell v. City of Henderson*, No. 2:13cv-01154-APG-CWH, 2015 U.S. Dist. LEXIS 12645, at *46-48 (D. Nev. Feb. 2, 2015) (finding municipal police offers are not soldiers for purposes of the Third Amendment.), *Estate of Bennett v. Wainwright*, No. 06-28-P-S, 2007 U.S. Dist. LEXIS 39631, at *20, 2007 WL 1576744, at *7 (D. Me. May 30, 2007) (declaring plaintiffs' position that a single state trooper and several deputy sheriffs can be considered 'soldiers' as another "far-fetched, metaphorical application[]" of the Third Amendment.) *Welch v. USAF*, No. 5:00-CV-392-C, 2001 U.S. Dist. LEXIS 21081, at *22 (N.D. Tex. Dec. 19, 2001) (concurring with 10th Circuit's conclusion of frivolity for Third Amendment challenge to overhead flights by military aircraft).

[7] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATING POWER OF THE STATES OF THE AMERICAN UNION 330 (2d ed. 1871).

[8] *Id*.

Since we now live "in times of great excitement,"[9] this Note will examine whether "insidious forms of military occupation, featuring federal soldiers cowing civilians by psychological guerilla warfare, day by day and house by house"[10] is possible in modern America. More specifically, this Note will look to whether the President of the United States, using the Congressional War Powers Resolution of 1973[11] and the Authorization for Use of Military Force 2001 ("AUMF")[12], may quarter[13] soldiers in private American homes, as generally proscribed by the Third Amendment to the Constitution.[14] This Note will focus on the term "soldier" in the commonly known vernacular as a professional soldier or servicemember[15] in the Armed Forces.[16] This is an important constraint, as other commentators have given the term a much broader definition, wherein they debated whether the term "soldier" encompassed the intelligence services (NSA, CIA, etc.) or other state actors, such as local or state police.[17]

To answer this obscure, but important question, the historical background surrounding the Third Amendment must be explored, followed by an examination of its two distinct components: (1) quartering soldiers in a time of peace, with the consent of the owner; and (2) quartering soldiers in a time of war, in a manner prescribed by law. In analyzing the two components, focusing

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[9] With respect to the political landscape of America and the world at large in 2018 vis-à-vis terrorism, refugees, and a blight of other world issues that fill the 24-hour news cycle.
[10] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 59 (1998).
[11] Pub L. No. 93-148, § 2, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541 *et seq*.).
[12] Pub. L. No. 107-40, 115 Stat. 224 (2001).
[13] Black's Law Dictionary defines "quartering" as, "[t]he furnishing of living quarters to members of the military." *Quartering*, BLACK'S LAW DICTIONARY (10th ed. 2014). Black's Law Dictionary explains that "In the United States, a homeowner's consent is required before soldiers may be quartered in a private home during peacetime. During wartime, soldiers may be quartered in private homes only as prescribed by law. The Third Amendment generally protects U.S. citizens from being forced to use their homes to quarter soldiers." *Id*.
[14] U.S. Const. amend. III.
[15] "'[S]ervicemember' means a member of the uniformed services." 50 U.S.C. § 511(1).
[16] "'[U]niformed services' means [] the armed forces." 10 U.S.C. § 101(5)(A); "[A]rmed forces means the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(4).
[17] *See, e.g.,* Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered In Your House During A War On Terrorism, Iraq or North Korea*, 48 ST. LOUIS L.J. 587 (2004); Josh Dugan, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555 (2009); Note, *The Third Amendment Incorporated: "Soldiers" and Domestic Law Enforcement*, 67 CASE W. RES. 537 (2016).

primarily on the latter, it must be determined whether the United States is "in a time of peace" or "time of war" for purposes of the Amendment, what constitutes a "manner prescribed by law," and finally, whether the modern war powers granted to the President of the United States currently authorize soldiers to be quartered in American homes.

II. The Third Amendment: A Historical Background

To understand the importance of this rarely cited and obscure Amendment, the historical situation underlying its proposal and ratification must be explored. However, given that "[t]he problems attributed to the presence of soldiers amongst the civilian population are as old as antiquity,"[18] rather than regale the reader with an in-depth exposition of English history[19] and the issues of standing armies that followed the colonists to the New World, it is sufficient to say that "[t]he grievances relating to the involuntary quartering of soldiers and the maintenance of standing armies were the products of a common experience"[20] in colonial America. Thus, this historical background will focus upon the activity that led to the eventual Declaration of Independence, and subsequent adoption of the Constitution of the United States and the Bill of Rights, starting around the time of the now infamous 1773 Boston Tea Party.

A. The British Quartering Acts and American Backlash

The first of two "Quartering Acts," which eventually led to the adoption and ratification of the Third Amendment was the Quartering Act of 1765.[21] The first Quartering Act was passed by the British Parliament on May 15, 1765,[22] and made the colonists responsible for the housing of

[18] William S. Fields and David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 395 (1991).
[19] *See id.*; *see also*, William S. Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195 (1989) for a detailed history of the quartering of soldiers through English history.
[20] *See supra* note 18.
[21] 5 Geo. III, c. 33.
[22] GORDON S. WOOD, THE AMERICAN REVOLUTION xiiv (2002).

and supply to the British soldiers.[23] Specifically, the Quartering Act of 1765 authorized the quartering of British soldiers in "inns, livery stables, ale-houses, victualling-houses … and other publick alehouses,"[24] and if such space was insufficient, the Act permitted the quartering of soldiers in "uninhabited houses, outhouses, barns, or other buildings."[25] "Implementation of the Quartering Act immediately met with opposition,"[26] and the colonists generally refused to comply with the Quartering Act of 1765.[27] This opposition resulted in, among other retaliations, the British Parliament suspending the New York Assembly and prohibiting it from conducting business.[28] Thankfully, and without much more occurring to require a larger chapter in the history books, the Quartering Act of 1765 expired, by its own terms, on March 24, 1767.[29]

However, due to increasing tensions caused by the over-taxation and under-representation of the colonists, and the use of regular soldiers for law enforcement, "confrontations between soldiers and civilians sparked fistfights, riots, and similar incidents, of which the Boston Massacre of March 5, 1770, remains the most vivid example."[30] Following the December 16, 1773 Boston Tea Party,[31] "the British Parliament passed a series of laws"[32] "that were designed to punish Massachusetts and keep other colonies in check. These laws were called the 'Coercive Acts' in

[23] *Id*. at 31.
[24] *1765: 5 George 3 c.33: The Quartering Act*, THE STATUTES PROJECT, http://statutes.org.uk/site/the-statutes/eighteenth-century/1765-5-george-3-c-33-the-quartering-act/ (last visited Aug. 31, 2018).
[25] *Id*.
[26] *See supra* note 18, at 415.
[27] RUMA CHOPRA, UNNATURAL REBELLION: LOYALISTS IN NEW YORK CITY DURING THE REVOLUTION, 24 (2011).
[28] SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775 318 (William MacDonald, ed., 1906).
[29] *See supra* note 24.
[30] See *supra* note 18, at 416.
[31] BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA, 1 (2010). The Boston Tea Party was a protest over taxes imposed by the British, wherein 340 chests of tea containing more than 46 tons of tea were thrown into the Boston Harbor. *Id*. at 1-2.
[32] Office of the Historian, Bureau of Pub. Affairs, *Continental Congress, 1774-1781*, U.S. DEP'T. OF STATE, https://history.state.gov/milestones/1776-1783/continental-congress (last visited Aug. 31, 2018).

Great Britain and the 'Intolerable Acts' in America."[33] The fourth of these laws,[34] passed on June 2, 1774,[35] was the Quartering Act of 1774,[36] which authorized the governor to take over private buildings for the quartering of troops.[37] The passage of these Acts "provoked open rebellion in America."[38] Following the passage of the Intolerable Acts, Peyton Randolph, a Virginian politician and the first president of the Continental Congress,[39] along with some of his associates, on May 31, 1774 called "for the first of five revolutionary conventions that would guide the colony from resistance to independence."[40]

At the conclusion of the First Continental Congress, which convened in Philadelphia in September 1774,[41] "the Congress endorsed the fiery Resolves of Suffolk County, Massachusetts, which recommended outright resistance to the Coercive Acts."[42] As relevant here, the First Continental Congress resolved "[t]hat the following acts of parliament are infringements and violations of the rights of the colonists . . . [including] the act passed . . . for the better providing of suitable quarters for officers and soldiers in his majesty's service, in North-America."[43] Aside

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[33] Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 Geo. Wash. L. Rev. 397, 401 (2017) (internal footnotes omitted).
[34] *See* WOOD, *supra* note 22, at 38.
[35] *Parliament completes the Coercive Acts with the Quartering Act*, HISTORY.COM (2009), https://www.history.com/this-day-in-history/parliament-completes-the-coercive-acts-with-the-quartering-act (last visited Sept. 10, 2018).
[36] 14 Geo. 3, ch. 54 (1774); *See* The Avalon Project, *Great Britain: Parliament – The Quartering Act; June 2, 1774*, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/quartering_act_1774.asp (last visited Sept. 10, 2018).
[37] *See* WOOD, *supra* note 22, at 38.
[38] *See* WOOD, *supra* note 22, at 47.
[39] National Constitution Center, *Peyton Randolph: The forgotten revolutionary president*, (Oct. 22, 2017) https://constitutioncenter.org/blog/peyton-randolph-the-forgotten-revolutionary-president. (last visited Aug. 31, 2018).
[40] JON KUKLA, PATRICK HENRY: CHAMPION OF LIBERTY, 141 (2017).
[41] *See* WOOD, *supra* note 22, at 48.
[42] *See* WOOD, *supra* note 22, at 48.
[43] The Avalon Project, *Declaration and Resolves of the First Continental Congress*, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/resolves.asp (last visited Sept. 11, 2018).

from a lone New York Act passed in 1691,[44] the resolution by the First Continental Congress declaring the quartering of soldiers in private homes "a violation of the rights of the colonists," was the first concerted effort in America to prohibit the quartering of soldiers in private homes.[45]

B. The Declaration of Independence

Just as the First Continental Congress had rebuked the British for quartering soldiers among the colonists,[46] the Second Continental Congress, in "perhaps the most masterfully written state paper of Western civilization,"[47] took this rebuke one step further when delegates from twelve of the thirteen colonies broke from Great Britain and adopted the Declaration of Independence on July 4, 1776.[48] Specifically, within that portion of the Declaration known as the "indictment,"[49] the Founders lambasted the King of England for sending "Swarms of Officers to harrass our People,"[50] and "[f]or quartering large Bodies of Armed Troops among us."[51] These grievances were considered sufficiently severe that the colonists relied upon them, and others, to justify complete and permanent separation from Great Britain.[52] This was the first "national" declaration that America would no longer tolerate the quartering of troops in private dwellings.[53]

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[44] "An act declaring what are the rights and privileges of their Majestyes subjects inhabitaing within their province of New Yorke." CHARLES H. SCRIBNER, 1 A TREATISE ON THE LAW OF DOWER, 31, n.1 (1867); *see also*, NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 319 (2d ed. 2015).
[45] *See* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 319 (2d ed. 2015).
[46] *See* COGAN, *supra* note 45 and accompanying text.
[47] Stephen E. Lucas, *The Stylistic Artistry of the Declaration of Independence*, (1989), THE UNITED STATES NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, https://www.archives.gov/founding-docs/stylistic-artistry-of-the-declaration (last visited Sept. 13, 2018).
[48] New York abstained from the vote for independence. *The Declaration of Independence: A History*, THE UNITED STATES NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, https://www.archives.gov/founding-docs/declaration-history (last visited Sept. 13, 2018).
[49] *See supra* note 47.
[50] THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).
[51] THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).
[52] *See* Scott D. Gerber, *An Unavoidably Brief Historiography of the Third Amendment*, 82 TENN. L. REV. 627, 633 (2015).
[53] *See* COGAN, *supra* note 45.

C. The Constitution and Bill of Rights

Considering that the King's quartering of troops was listed among the serious grievances giving rise to America's independence, the issue is noticeably absent from the Constitution of the United States of America.[54] While many of the individual States included distinct provisions relating to the involuntary quartering of soldiers in their State Constitutions or declarations,[55] these provisions had no effect on the newly formed Federal government, to whom the States had granted supremacy[56], and the right "[t]o raise and support Armies"[57] and "provide and maintain a Navy."[58]

Many of the delegates at the Constitutional Convention were opposed to both the prospect of a standing army and there being no restriction on the quartering of that army. Patrick Henry argued that:

> "One of our first complaints, under the former government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain. Here we may have troops in time of peace. They may be billeted in any manner—to tyrannize, oppress, and crush us."[59]

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[54] *See supra* note 18, at 421-424. The Constitution of the United States does not once mention the word "quartering" throughout its text. However, that is not to say there was no discussion of soldiers at the First Constitutional Convention; to the contrary, but the discussion mostly centered on whether Congress should be authorized to maintain a standing army at all.

[55] *See* COGAN, *supra* note 45 at 318-319. (Delaware: Declaration of Rights, 1776, Sect. 21. "That no soldier ought to be quartered in any house in time of peace without the consent of the owner; and in time of war in such manner only as the Legislature shall direct. Delaware Laws, vol. 1, App., p. 81. Maryland: Declaration of Rights, 1776. "28. That no soldier ought to be quartered in any house in time of peace without the consent of the owner, and in time of war in such manner only as the legislature shall direct." Maryland Laws, November 3, 1776. Massachusetts: Constitution, 1780. "Part I, Article XXVII. In time of peace no soldier ought to be quartered in any house without the consent of the owner; and in time of war such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature." Massachusetts Perpetual Laws, p. 7. New Hampshire: Bill of Rights, 1783. "Part I, Article XXVII. No soldier in time of peace, shall be quarters in any house without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature." New Hampshire Laws, pp. 26-27.).

[56] U.S. Const., art. IV, cl. 2.

[57] U.S. Const., art. I, § 8, cl. 12.

[58] U.S. Const., art. I, § 9, cl. 13.

[59] *See supra* note 18, at 423.

Patrick Henry was so opposed to the Constitution as originally drafted that he "believed that the unamended constitution posed such threats … to American liberties in general"[60] that changes were utterly necessary. Similarly disturbed by the need for change to the Constitution, Virginia Governor Edmund Randolph "advocated a second constitutional convention to remedy the flaws of the plan adopted at Philadelphia and clarify 'all ambiguities of expression.'[61] It is worth noting however, the lack of prohibition on the quartering of soldiers was not a mere oversight by the convention delegates. "On August 20, 1787, Charles Pinckney of South Carolina 'submitted sundry provisions' to the [constitutional] convention that were sent to the Committee on Detail. [However,] the committee ignored his proposals . . . for a protection against quartering troops in private homes."[62]

After reviewing the Constitution, Thomas Jefferson, then serving as American minister to France, noted one omission that he thought must be added: "[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[63] Jefferson went so far as to suggest that after nine states had ratified the Constitution, the other four should "refuse to accede to it, till a declaration of rights be annexed."[64] The debate between Federalists and Antifederalists over whether a bill of rights or any amendments were necessary went on for some time.[65] Following the Federalists concession on the question of amendments to the Constitution, every State that

[60] *See* KUKLA, *supra* note 40, at 309.
[61] *See* KUKLA, *supra* note 40, at 309.
[62] Paul Finkelman, *Bill of Rights: Adoption of*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 139 (Paul Finkelman, ed. 2006).
[63] MICHAEL J. KLARMAN, THE FRAMERS' COUP 546 (2016).
[64] *Id*. at 468.
[65] *Id*. at 548-554 (A bill of rights was suggested by George Mason five days before the Philadelphia convention ended, which was unanimously defeated after a brief debate. The Federalists did not concede to the possibility of amendments to the Constitution until they were almost defeated at the Massachusetts ratifying convention (the sixth ratifying State) in February 1788.)

subsequently ratified, except Maryland, recommended amendments to the Constitution.[66] By December 1788, both Federalists and Antifederalists "generally agreed that [the Constitution] should be revised."[67]

During the federal Congress's inaugural session,[68] Madison (then a member of the House of Representatives) introduced the first proposed amendments to the Constitution on June 8, 1789.[69] The Third Amendment, as we know it today, was originally the seventh proposed amendment, in a list containing nearly twenty amendments,[70] wherein Madison proposed that "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" be inserted into Article I, Section 9 of the Constitution.[71] Originally, Madison proposed that the "amendments be interdelineated with the text of the original Constitution, rather than appearing collectively at the end."[72] Congress ultimately decided that the amendments would be appended to the end of the Constitution.[73] After significant debate and alterations to the text that would eventually become the Third Amendment[74], Congress settled on the following language: "Article the fifth . . . 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."[75]

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[66] *Id.* at 554-555.
[67] *Id*. at 563.
[68] *Id*. at 571.
[69] *See* KLARMAN, *supra* note 63, at 572.
[70] MARK GROSSMAN, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS 14-15 (2017).
[71] Gordon Lloyd, *Bill of Rights: Madison's Proposals Integrated into the Constitution*, TEACHINGAMERICANHISTORY.org, http://teachingamericanhistory.org/bor/madison-integrated/ (last visited Sept. 14, 2018); *see also*, Edward Hartnett, *A "Uniform and Entire" Constitution; or, what if Madison had won?*, 15 CONST. COMMENT. 251, 252, 289 (1998).
[72] *See* KLARMAN, *supra* note 63, at 581.
[73] *See* KLARMAN, *supra* note 63, at 581.
[74] *See* COGAN, *supra* note 45, at 309-317.
[75] *See* COGAN, *supra* note 45, at 317. (There were twelve amendments submitted to the States for ratification. *See supra* note 63, at 587. The proposed third through twelfth amendments were ratified and became the Bill of Rights as we know it today, while the proposed second amendment was not ratified until 1992, becoming the Twenty-

III. Quartering in a Time of Peace

Aside from the matter of *Engblom v. Carey*,[76] and its subsequent appeal,[77] "there are no reported opinions involving the literal application of the Third Amendment."[78] "The Second Circuit's decision in 1982 was the first involving the literal application of the Third Amendment."[79] This is important because the Second Circuit's interpretation of the Third Amendment and its application to modern day life, while not binding on other Circuit Courts or the Supreme Court of the United States,[80] will nonetheless be instructive and influential on those Courts in considering future Third Amendment questions.[81]

Engblom was a lawsuit brought by two correctional officers against the Governor of New York State and other State officials for evicting those correctional officers from their facility-residences and subsequently housing members of the National Guard therein.[82] The correctional officers claimed that such action violated their Third Amendment rights.[83] Neither the Circuit Court nor the District Court addressed whether the "time of war" or "time of peace" component of the Third Amendment was in play. However, given the limited use of the Armed Forces in the

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Seventh Amendment. *See Why Didn't the Original 12 Amendments Make it into the Bill of Rights?*, NATIONAL Constitution Center, (Dec. 15, 2015) https://constitutioncenter.org/blog/when-congress-passed-the-original-12-amendments-in-the-bill-of-rights/.)

[76] 522 F. Supp. 57 (S.D.N.Y. 1981).

[77] 677 F.2d 957 (2d Cir. 1982).

[78] *Id*. at 959, n.1.

[79] *Engblom v. Carey*, 572 F.Supp. 44, 47 (S.D.N.Y. 1983).

[80] Assuming any other legitimate claims of quartering ever arise.

[81] *See Gutierrez v. Sessions*, 887 F.3d 770, 779 (6th Cir. 2018) ("While 'decisions from our sister circuits are not binding, we have repeatedly recognized their persuasive authority.' We 'routinely look to our sister circuits for guidance when we encounter a legal question that we have not previously passed upon,' and we have before adopted the reasoning of the overwhelming majority of our sister circuits on questions of first impression.") (internal citations and alterations omitted); *see also*, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 521 (1940) (considering and relying upon the decisions of Circuit Courts in construing that the Sherman Act does apply to certain types of conspiracies.)

[82] 677 F.2d at 958-959 (2d Cir. 1982).

[83] *Id.*

years surrounding *Engblom*,[84] it is likely safe to conclude the Courts simply assumed, without question, that the "time of peace" component applied.

In ruling on the claims presented in *Engblom*, the Second Circuit affirmed that National Guardsmen are "soldiers" for purposes of the Third Amendment,[85] that the Third Amendment is applicable to the states through the Fourteenth Amendment,[86] that the term "house" means "a structure intended for human habitation-[a] term readily encompass[ing] the various modern forms of dwelling,"[87] and that the term "owner" is "not limited solely to those [holding] fee simple ownership but extend[s] to those [holding] lawful occupation or possession with a legal right to exclude others."[88]

Given these findings, it seems that the term "soldier" in the Third Amendment applies to both service members of the United States Armed Forces[89] *and* National Guardsmen. More importantly however, it now appears that the Third Amendment protections apply to every home in the United States, irrespective of whether the occupant owns or leases the home, and regardless of whether it is a state government or the federal government trying to quarter "soldiers" therein.[90]

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[84] *See* Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1789-2009*, CONGRESSIONAL RESEARCH SERVICES 13 (Jan. 27, 2010) http://www.au.af.mil/au/awc/awcgate/crs/rl32170.pdf.
[85] 677 F.2d at 961 (2d Cir. 1982).
[86] *Id*.
[87] *Id*. at 962 n.11.
[88] *Id*. at 962.
[89] *See supra* notes 15 & 16.
[90] *See, e.g.*, *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982) (incorporating, as a matter of first impression, the Third Amendment to the states through the Fourteenth Amendment), *Nika Corp. v. Kan. City*, 582 F. Supp. 343, 360 n.2 (W.D. Mo. 1983) (finding it "reasonably clear" that the Third Amendment protections are included in the category of "'substantive' constitutional rights" incorporated in the Fourteenth Amendment and made applicable to the states), *United States v. Nichols*, 841 F.2d 1485, 1510 n.1 (10th Cir. 1988) (suggesting the Third Amendment is incorporated in the Fourteenth Amendment and made applicable to the states), *Estate of Bennett v. Wainwright*, No. 06-28-P-S, 2007 U.S. Dist. LEXIS 39631, at *20 (D. Me. May 30, 2007) (assuming without deciding that the Third Amendment applies to the states and finding that a single state trooper and several deputy sheriffs are not soldiers within the meaning of the Third Amendment), *Mitchell v. City of Henderson*, No. 2:13-cv-01154-APG-CWH, 2015 U.S. Dist. LEXIS 12645, at *48 (D. Nev. Feb 2, 2015) (assuming without deciding that the Third Amendment applies to the states and holding that a municipal police officer is not a soldier for purposes of the Third Amendment), *SFF-TIR, LLC v. Stephenson*, 262 F.Supp.3d 1165, 1224, n.78 (N.D. Okla. 2017) ("The United States

Therefore, the President may not quarter troops in *any* home in a time of peace without the occupant's consent.

IV. Quartering in a Time of War

A. Defining War

At first blush, the term "war" seems not to need a definition; it is one of those concepts like obscenity – you know it when you see it.[91] However, just as the Second Circuit in *Engblom* defined the terms "soldier," "house," and "owner," here too, the term "war" should be defined for clarity and analysis. As previously noted, no Court has addressed the Third Amendment in a time of war,[92] so there has been no occasion to define "war" for such purposes.

The generic dictionary definition is "a state of usually open and declared armed hostile conflict between states or nations."[93] The legal dictionary definition is a "hostile conflict by means of armed forces, carried on between countries, states, or rulers, or sometimes between parties within the same county or state; a period of such conflict."[94] Given these definitions, it appears that for a war to constitute a "war," it must be both declared *and* carried on between countries or states.[95] With this definition in mind, the next question that arises is who can declare war? The answer to this question is a simple one – only the United States Congress may declare war. This is a legislative power enumerated and exclusively given to Congress in the Constitution.[96] Therefore, given the foregoing, since only Congress may declare war and war must be declared to constitute

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Court of Appeals has held that the Third Amendment is incorporated, and the Tenth Circuit has suggested that it is.")

[91] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (arguing that "obscenity" is an indefinable term, "but I know it when I see it.")

[92] *See supra* note 78.

[93] *War*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/war (last visited Sept. 22, 2018).

[94] *War*, Black's Law Dictionary (10th ed. 2014).

[95] Although, see Section B, *infra*.

[96] U.S. Const. art. I, § 8, cl. 11.

a war, the answer to the introductory question posed[97] should be simple enough to answer. Since the last time Congress declared war was on June 4, 1942, during World War II,[98] "No, a President may not currently quarter troops in our homes, *because we're not at war*."

B. What About Those Other "Wars"?

If, as discussed above, war must be declared to constitute a war and Congress has not done so since World War II, what then was the Korean War, the Vietnam War, the Iraq War, the War on Terror, and every other happening called a war by the media and government?[99]

The Korean War, while not a formally declared war by Congress, involved over 1.8 million American soldiers,[100] and when U.S. President Eisenhower announced the end of hostilities, he stated, "[S]o long at last the carnage of war is to cease."[101] Similarly, the Vietnam War enjoyed no Congressional declaration of war, and yet 2,594,000 American soldiers served in South Vietnam[102] during the conflict. More recently, the Iraq War and more generally, the War on Terror enjoyed no Congressional declaration of war but have both consistently been referred to as wars. In speaking to the media on September 16, 2001, and referring to the upcoming response to the September 11, 2001 attacks in New York and elsewhere, President Bush[103] stated that "[t]his crusade, this war on terrorism is going to take a while."[104] He further stated that "[i]t is time for us

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[97] *See supra* Part I.
[98] *Official Declarations of War by Congress*, UNITED STATES SENATE, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Sept. 22, 2018).
[99] For example, President Nixon's "War on Drugs." *War on Drugs*, ENCYCLOPEADIA BRITANNICA, https://www.britannica.com/topic/war-on-drugs (last visited Sept. 23, 2018); or President Trump's supposed war on almost everything – Google "President Trump Declares War."
[100] *Armistice Agreement for the Restoration of the South Korean State (1953)*, OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=true&doc=85 (last visited Sept. 22, 2018).
[101] *Id.*
[102] *Vietnam War Fast Facts*, CNN, https://www.cnn.com/2013/07/01/world/vietnam-war-fast-facts/index.html (last visited Sept. 22, 2018).
[103] The 43rd President, not his father, the 41st President.
[104] *Remarks by the President Upon Arrival*, THE WHITE HOUSE (Sept. 16, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html.

to win the first war of the 21st century decisively."[105] Then Secretary of Defense, Donald Rumsfeld said on September 16, 2001, "It is a very different kind of war."[106] President Obama on May 23, 2013, while speaking at the National Defense University remarked that "[w]e have been at war for well over a decade"[107] and that "[u]nder domestic law, and international law, the United States is at war with Al Qaeda, the Taliban, and their associated forces."[108] With respect to the invasion of Iraq, on June 19, 2014, President Obama referred to the "deep scars left by America's war in Iraq."[109]

If war must be declared by Congress and no declaration has been made since World War II,[110] how have so many American soldiers been involved in conflicts that the Commander in Chief of the United States Armed Services[111] has called war? The answer lies in historical practice, judicial interpretation, and due to the passage of the War Powers Resolution of 1973.[112] A joint resolution passed by Congress and made into law over President Nixon's veto[113], the law's purpose to ensure that the President, as Commander in Chief, would have only limited powers to introduce the United States Armed Forces into hostilities.[114] Specifically, the Resolution limits[115] the

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[105] *Id.*
[106] Kenneth R. Bazinet, *A Fight vs. Evil, Bush and Cabinet Tell U.S.*, DAILY NEWS (Sept. 17, 2001, 2:23 A.M.), https://web.archive.org/web/20100505200651/http:/www.nydailynews.com/archives/news/2001/09/17/2001-09-17_a_fight_vs__evil__bush_and_c.html.
[107] *Remarks by the President at the National Defense University*, THE WHITE HOUSE (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.
[108] *Id*.
[109] *Remarks by the President on the Situation in Iraq*, THE WHITE HOUSE (June 19, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/19/remarks-president-situation-iraq.
[110] *See supra* note 98.
[111] U.S. Const., art. II, § 2.
[112] *See supra* note 11.
[113] 87 Stat. 559-560 (1973).
[114] *See supra* note 11 at § 2.
[115] The Resolution frames the limitation as a mere definition of existing Presidential war powers under the Constitution, but given that the Resolution was passed in response to the Vietnam War and President Nixon's unauthorized secret bombing of Cambodia during the Vietnam War, the Resolution was truly intended as a check and limitation on Presidential authority to drag the United States into a state of war. *See Nixon and the War Powers Resolution*, BILL OF RIGHTS INSTITUTE, https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/presidents-constitution/war-powers-resolution/ (last visited Sept. 23, 2018).

President's authority to only introduce United States Armed Forces into hostilities when presented with: (1) a declaration of war; (2) specific statutory authorization, or; (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[116] If the President lacks a Congressional declaration of war, but commits soldiers to a hostility, the President must provide Congress with a written report outlining certain reporting requirements within 48-hours seeking authorization to continue the commitment of soldiers.[117] Congress will then determine whether to authorize or decline the commitment of soldiers in such hostility.[118]

Since the passage of the War Powers Resolution, Congress has authorized the continued use of soldiers in Lebanon in 1983,[119] denied the use of soldiers in El Salvador in 1984,[120] authorized the use of soldiers in Iraq in 1991,[121] Somalia in 1993,[122] condemned (but permitted) the use of soldiers in Haiti in 1994[123] and finally withdrew funding in 1999,[124] and subsequently authorized the use of military force against those responsible for the September 11, 2001 attacks,[125] and then authorized the invasion of Iraq in 2002.[126] While none of these authorizations explicitly constitute a declaration of war, Congress nonetheless refers to the "war on terrorism" – apparently commenced post-September 11, 2001 – twice in the 2002 authorization for the invasion of Iraq.[127] Given that Congress did not declare war against any nation or state, but is referring to the use of

[116] *See supra* note 11, at § 2(c).
[117] *See supra* note 11 at § 4.
[118] *See, e.g.*, Pub. L. No. 98-119, 97 Stat. 805 (1983) (authorizing the use of soldiers in Lebanon) and Pub. L. No. 106-65, 113 Stat. 788 (1999) (withdrawing funding for the use of soldiers in Haiti).
[119] Pub. L. No. 98-119, 97 Stat. 805 (1983).
[120] Pub. L. No. 98-473, 98 Stat. 1942 (1984); Pub. L. No. 98-525, 98 Stat. 2516 (1984).
[121] Pub. L. No. 102-1, 105 Stat. 3 (1991).
[122] Pub. L. No. 103-139, 107 Stat. 1475 (1993); Pub. L. No. 103-160, 107 Stat. 1840 (1993).
[123] Pub. L. No. 103-423, 108 Stat. 4358 (1994).
[124] Pub. L. No. 106-65, 113 Stat. 788 (1999).
[125] *See supra* note 12.
[126] Pub. L. No. 107-243, 116 Stat. 1498 (2002).
[127] *Id.* ("Whereas the United States is determined to prosecute the war on terrorism . . . ." and "Whereas Congress has taken steps to pursue vigorously the war on terrorism . . . .")

soldiers in a "war on terrorism," can it then be said that Congress conceded that a state of war may exist without formal declaration and without a nation state as the opponent? In other words, it appears that Congress conceded that America exists in a de facto state of war against an ideal or set of persons[128], as opposed to a mere conflict that lacked the indicia of war (i.e., a declaration).

In support of this conclusion, the Supreme Court of the United States has found that war can be waged between a nation and an opponent that is not necessarily an independent nation or sovereign State.[129] Additionally, and contrary to the dictionary definitions provided above,[130] the Supreme Court has determined that "war may exist without a declaration on either side"[131] and Justice Jackson declared, "Of course, a state of war may in fact exist without a formal declaration."[132] Indeed, the President may take steps, which with Congresses silence, may constitute an assent to war, even without a formal declaration of war.[133] This conclusion is supported by judicial precedent[134] and by a review of historical eighteenth century practice concerning the commencement of hostilities as distinguished from a formal declaration of war.[135]

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[128] I.e., terrorism or terrorists.
[129] *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1863).
[130] *See supra* Part IV.A.
[131] *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) at 668 (1863).
[132] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).
[133] *See generally*, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (discussing that the Executive may take action in foreign hostilities, but that such action need not necessarily require a declaration of war); *see also*, *Com. of Mass. v. Laird*, 451 F.2d 26, 31-34 (1st Cir. 1971) (finding that Congress may expressly or impliedly ratify foreign military actions taken by the Executive without a formal declaration of war), *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971) (noting that neither the Executive escalation of the Vietnam police action into a large scale military operation, nor the de-escalation of the same, without a formal declaration of war, is in violation of the Constitution.)
[134] *See Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) ("The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war."); *Com. Of Mass. v. Laird*, 451 F.2d at 33 (1st Cir. 1971) ("This was an authorized but undeclared state of warfare."); *Id*. at 34. ("[I]n a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached.")
[135] *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1564-1565 (2002) (Discussing British and American practices in the Eighteenth century and identifying that a declaration of war could take place either before or after the commencement of hostilities.).

As John Locke noted, war may be declared "by word or action."[136] Given the foregoing, it becomes clear that the United States exists in a state of war – concededly a state of undeclared war, but war nonetheless.[137]

V. Quartering in a Manner Prescribed by Law

As previously noted, the Third Amendment permits the quartering of soldiers in American homes during time of war, without the owner's consent, but such quartering must be "in a manner prescribed by law."[138] Whether such manner must be an explicit prescription for quartering, such as the Quartering Acts,[139] or whether a broader, more implicit authorization would suffice has not been decided or addressed by any branch of government.[140]

A. In A Manner [Implicitly] Prescribed By Law

To examine whether a broad prescription is sufficient to permit quartering, analysis of an existing statute may suffice. The AUMF,[141] which became law on September 18, 2001 in response to the September 11, 2001 attacks,[142] provides,

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[143]

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[136] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 112, § 16 (Rod Hay, ed., McMaster Univ. Archive of the Hist. of Econ. Thought 1999) (1689).
[137] *See, e.g.,* Leo Shane III, *Despite 17 years of war, next US commander in Afghanistan sees progress*, MILITARYTIMES (June 19, 2018) https://www.militarytimes.com/news/pentagon-congress/2018/06/19/despite-17-years-of-war-next-us-commander-in-afghanistan-sees-progress/.
[138] *See supra* note 5.
[139] *See supra* notes 20 & 35.
[140] That is to say, this author could not locate any guidance or decisions by the Judiciary, Executive, or Legislative branches on the subject. Additionally, the discussions and debates surrounding the Third Amendment throughout history do not elucidate the matter any further. *See* Part II, *supra*.
[141] *See supra* note 12.
[142] *See supra* note 12
[143] *See supra* note 12, at § 2(a).

This sweeping resolution, which is still in force as of 2018, provided the President a "blank check"[144] to wage war and "opened an era of indefinite war."[145] Presidents George W. Bush, Barack Obama, and Donald Trump have used the AUMF to undertake military action at least 41 times in 18 different countries, including Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, and Niger.[146] However, given that more than seventeen years have passed since the attacks against America on September 11, 2001, questions have been raised about the ongoing vitality of the AUMF as a viable tool in the President's war chest.[147] In spite of these questions, the 2001 AUMF survives without any genuine prospect of being repealed or replaced.[148]

Since the President has been authorized to "use all . . . force against those . . . persons he determines . . . aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . persons,"[149] and such authorization has been "stretched . . . beyond all recognition,"[150] it is not inconceivable that the President could claim the AUMF provides authority to quarter troops

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[144] CATO INSTITUTE, CATO HANDBOOK FOR POLICY MAKERS 281 (8th ed. 2017), https://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-27_0.pdf.

[145] Samuel Moyn, *Debating the Legality of the Post-9/11 'Forever War'*, COUNCIL ON FOREIGN RELATIONS (Sept. 1, 2016), https://www.cfr.org/expert-roundup/debating-legality-post-911-forever-war.

[146] Rep. Barbara Lee, *No More Blank Checks for War*, THE NATION, (June 20, 2018), https://www.thenation.com/article/no-more-blank-checks-for-war/.

[147] *See, e.g.*, Tyler Arnold, *Senate Backs Excess War Power for the President, Snubbing the Constitution*, NATIONAL REVIEW (Sept. 18, 2017, 8:00 A.M.), https://www.nationalreview.com/2017/09/united-states-senate-authorization-use-military-force-republicans-rand-paul-constitution-executive-power-congress-limited-government/; *see also* Pete Kasperowicz, *Rand Paul: Senators who oppose my AUMF amendment 'oppose the Constitution'*, WASHINGTON EXAMINER (Sept. 12, 2017 04:01 P.M.) https://www.washingtonexaminer.com/rand-paul-senators-who-oppose-my-aumf-amendment-oppose-the-constitution.

[148] *See, e.g.*, Gene Healy and John Glaser, *Repeal, Don't Replace, the AUMF*, CATO INSTITUTE, https://www.cato.org/policy-report/julyaugust-2018/repeal-dont-replace-aumf (last visited Oct. 1, 2018).

[149] *See supra* note 12.

[150] General David Petraeus, Former CIA Director, Address at the Aspen Ideas Festival (June 30, 2017), *in* Conor Friedersdorf, *David Petraeus Sends Mixed Messages on War Powers*, THE ATLANTIC, (June 30, 2017), https://www.theatlantic.com/politics/archive/2017/06/david-petraeus-the-aumf-is-stretched-beyond-recognition/532443/.

domestically "to prevent any future acts of international terrorism against the United States"[151] However, whether such broad interpretation and plain misuse of the AUMF would pass constitutional muster is an open question.

The seminal case on the limits of the President's war powers is *Youngstown Sheet & Tube Co. v. Sawyer*.[152] The *Youngstown* case was set against the backdrop of the Korean conflict[153] and a dispute between America's steel companies and their employees over collective bargaining agreements.[154] The dispute between the steel companies and their employees arose in the latter part of 1951,[155] and in April 1952, the union that represented the employees gave notice of their intention to strike throughout the nation, which would have resulted in the closure of America's steel mills.[156] Given that steel was a component of substantially all weapons and other war materials, and a nation-wide strike could jeopardize the war effort, the President issued an executive order directing the Secretary of Commerce to seize the steel mills and continue their operation.[157] The Supreme Court shortly thereafter reviewed the matter, declared the limits of the President's power, and found the President's actions to exceed his constitutional authority. The Court ruled that the President's power "must stem either from an act of Congress or from the Constitution itself."[158] The Court ultimately determined that there was no Congressional act that authorized the President's seizure of the nation's steel mills[159] and the President lacked such

[151] *Id*.
[152] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("*Youngstown*").
[153] Also known as the Korean War. *See supra*, note 100; *see also*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 603, 72 S. Ct. 863, 894 (1952) (Frankfurter, J., concurring) (referring to the Korean War as the "Korean conflict").
[154] *Id*. at 582.
[155] *Id*.
[156] *Id.* at 583.
[157] *Id*.
[158] *Youngtown*, 343 U.S. 579, 585 (1952).
[159] *Id*. at 585-86.

authority under his inherent war powers as the Commander-in-Chief or any other power granted him by the Constitution itself.[160] Given that the Third Amendment expressly provides that authorization to quarter soldiers during war time must be "in a manner prescribed by law"[161] and the President is no lawmaker,[162] the authorization to quarter troops must stem from an act of Congress alone, which is where the AUMF is implicated.

Since "'the preeminent canon of statutory interpretation requires [the court] to "presume that [the] legislature says in a statute what it means and means in a statute what it says there"'"[163] and "Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II[,] . . . the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.'"[164]

Given that the AUMF constitutes an express Congressional authorization for the President to "use all necessary and appropriate force against . . . persons . . . to prevent any future acts of international terrorism,"[165] and the Supreme Court has shown great deference when deciding matters concerning national security,[166] it seems that the President could simply argue that the domestic quartering of soldiers was to prevent future acts of terrorism under the Congressional authority granted him by the AUMF.[167]

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[160] *Id.* at 587-88.
[161] *See supra* note 5.
[162] *Youngstown*, 343 U.S. 579, 587 (1952).
[163] *Janko v. Gates*, 741 F.3d 136, 139-40 (D.C. Cir. 2014) (quoting *Bedroc Ltd., LLC v. Unites States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004)).
[164] *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (*Hamdi III*) (citing *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*), *vacated*, 542 U.S. 507 (2004) (agreeing with *Hamdi III* that the AUMF authorized the detention of U.S. citizens, but declaring that an enemy combatant should be given the opportunity to challenge their status as an enemy combatant).
[165] *See supra* note 143.
[166] *See supra* note 164.
[167] Consider that the Supreme Court, in addressing the detention of U.S. citizens as enemy combatants under the AUMF stated, "it is of no moment that the AUMF does not use specific language of detention. Because detention to

While that may seem like a bold conclusion, consider that President Trump has expressed a deep-seated distrust of those adhering to Islamic faith.[168] Then-candidate Trump went so far as to declare that he would deport any Muslim refugees accepted into the United States under the Obama Administration because "we cannot take a chance that the people coming over here are going to be ISIS-affiliated."[169] Given that some of these refugees may eventually obtain status as permanent residents or citizens, and the President is no longer empowered to forcibly relocate U.S. citizens to concentration camps,[170] an alternative could be proposed by the Government to bring the concentration camps to the U.S. citizens (and non-citizens). This could be achieved by placing soldiers in every immigrant or Muslim home under the pretext of domestic security. To further bolster the argument that such action would be within Presidential power, consider that Justice Jackson noted that "a seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and

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prevent a combatant's return to the battlefield is a fundamental incident of waging war . . . ." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality) (*Hamdi VI*).

[168] *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2437-2438 (2018) (Sotomayor, J., dissenting) (citing to President Trump's repeated statements alluding to a desire to keep Muslims out of the country and to find a "'lega[l]' way to enact a Muslim ban"); Jenna Johnson, *Donald Trump would 'strongly consider' closing some mosques in the United States*, THE WASHINGTON POST (Nov. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/?utm_term=.d51e7de02fff (Then Presidential Candidate Trump discussed the "absolute hatred" coming from mosques and the he would consider closing mosques throughout the United States.); *Donald Trump calls for halt on Muslims entering the US*, AL JAZEERA (Mar. 11, 2016), https://www.aljazeera.com/news/2015/12/donald-trump-calls-halt-muslims-entering-151207220200817.html; Gregory Kreieg, *Trump's history of anti-Muslim rhetoric hits dangerous new low*, CNN (Nov. 30, 2017) https://www.cnn.com/2017/11/29/politics/donald-trump-muslim-attacks/index.html.

[169] Hunter Walker, *Donald Trump has big plans for 'radical Islamic' terrorists, 2016 and 'that communist' Bernie Sanders*, YAHOO NEWS (Nov. 19, 2015) https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html ("'They're going to be gone. They will go back. … I've said it before, in fact, and everyone hears what I say, including them, believe it or not,' Trump said of the refugees. 'But if they're here, they have to go back, because we cannot take a chance. You look at the migration, it's young, strong men. We cannot take a chance that the people coming over here are going to be ISIS-affiliated.'").

[170] *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.") (Presumably, this would apply equally to the forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of *religion*.)

the burden of persuasion would rest heavily upon any who might attack it."[171] Moreover, the Supreme Court, as recently as 2018, upheld "a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy . . . masquerade[d] behind a facade of national-security concerns."[172]

The fact that the AUMF gives the President unprecedented Congressional approval to do almost anything he deems necessary to prevent terrorism,[173] and the Judiciary has expressed deferential consideration[174] of the joint-decision making of the President and Congress,[175] it seems that a broad interpretation of the "in a manner to be prescribed by law" clause of the Third Amendment would permit quartering of soldiers in private homes under the AUMF.[176]

B. In A Manner [Explicitly] Prescribed By Law

Assume the above example of the President quartering troops domestically under the authority of the AUMF. Since the AUMF does not state, "The President has authority to quarter soldiers in private homes," if the Supreme Court were to find that the prescription authorizing the quartering of soldiers need be explicit and specific, then the AUMF would seemingly not suffice for such Presidential act. "The Supreme Court has long counseled that while the Executive should be 'indulged the widest latitude of interpretation to sustain his exclusive function to command the

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[171] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
[172] *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).
[173] *See supra* note 165.
[174] *See e.g., Youngstown*, 343 U.S. 579, 635-37 & n.2 (1952) (Jackson, J., concurring) ("[W]here as here the President does act with statutory authorization from Congress, there is all the more reason for deference.")
[175] *See supra* note 171.
[176] This conclusion does not consider the necessary argument that such an action might be precluded by the First Amendment Establishment Clause, the Fifth Amendment Takings Clause, or the Posse Comitatus Act, 18 U.S.C. § 1385. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) ("[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425-26 (2015) ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use.' . . . Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. . . . .").

instruments of national force, at least when turned against the outside world for the security of our society,' he enjoys 'no such indulgence' when 'it is turned inward.'"[177] This lack of deference to the Executive is because the Supreme Court has found that "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'"[178] However, the Supreme Court has also determined that "there is no bar to this Nation's holding one of its own citizens as an enemy combatant."[179]

While there is no bar to holding citizens deemed to be enemy combatants under certain circumstances, the Supreme Court, when assessing the plain meaning of a statute, has stated, "when that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act."[180] "The 'absurd result' exception to the plain meaning rule is, however, narrow and limited to situations 'where it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone.' Absent an absurd result, the plain meaning of the statute will be applied unless such an application is contrary to the apparent intention of Congress."[181] The quartering of soldiers in the homes of U.S. citizens and residents certainly appears to meet this narrow exception.

However, given that the AUMF was voted on by Congress only three days after the 9/11 attacks and was not accompanied by a legislative report,[182] there is "no institutional view about the meaning,"[183] scope, and breadth of the statute. The Bush administration gave the AUMF a

[177] *Padilla v. Rumsfeld*, 352 F.3d 695, 713 (2d Cir. 2003) (citing *Youngstown*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)).
[178] *Id*.
[179] *Hamdi VI*, 542 U.S. 507, 519 (2004).
[180] *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).
[181] *Gardner v. Derwinski*, 1 Vet. App. 584, 587 (1991), *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd,* 513 U.S. 115, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) (internal citations omitted).
[182] Curtis A. Bradley and Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L. L. 628, 630 (2016).
[183] *Id*.

broad interpretation, which included, it argued, the authority to militarily detain U.S. citizens and residents.[184] This interpretation was upheld by the Supreme Court in *Hamdi v. Rumsfeld*.[185] The Obama administration, expanding the interpretation upheld by the Supreme Court in *Hamdi VI*, argued that "the AUMF is not limited to persons captured on the battlefields of Afghanistan."[186] While the Supreme Court did not review this interpretation, the District of Columbia Circuit courts, "with minor qualifications, . . . accepted the Obama administration's construction of the AUMF"[187] and "agreed with the Obama administration that the [AUMF] extended to 'associated forces'"[188] of Al-Qaeda (and other terrorist organizations falling within the ambit of the AUMF).[189]

While neither the Supreme Court, nor any court addressed this specific question, the Second Circuit has cited Supreme Court precedent to temper the Executive's authority under the AUMF. When addressing the detention of American citizens on American soil in *Padilla v.*

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[184] *Id*.

[185] *Hamdi VI*, 542 U.S. 507, 517 (2004) (plurality) ("[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals."); *see also*, Brief for the Respondent-Appellee at 22-23, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_47460.pdf ("Preventative detention is such 'a fundamental incident of waging war' under 'longstanding law-of-war principles' that the *Hamdi* plurality found it authorized by the AUMF even though 'the AUMF does not use specific language of detention.' [542 U.S. 507,] 519, 521 (plurality) ('Congress' grant of authority for use of "necessary and appropriate force" [in the AUMF] include[s] the authority to detain for the duration of the relevant conflict.'; *id*. at 587 (Thomas J., dissenting).")

[186] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009), ECF 1689, *available at* https://www.justice.gov/archive/opa/documents/memo-re-det-auth.pdf.

[187] *See supra* note 182, at 633.

[188] *Id*.; *see also*, *Khan v. Obama*, 655 F.3d 20, 23 (D.C. Cir. 2011); *and Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010).

[189] *See e.g.*, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, THE WHITE HOUSE, 5 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf#page=9 ("[T]he U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa'ida in Libya; al-Qa'ida in Syria; and ISIL.")

Rumsfeld[190], the Second Circuit looked to the Supreme Court's decision in *Ex parte Endo*[191] for guidance.

> The *Endo* Court first recognized that 'the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully.' It then said: 'At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government.[192]

The Second Circuit noted that "'in interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war.'"[193] In fact, the *Endo* court declared that "this Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution."[194]

Notwithstanding this apparent lack of indulgence when the President focuses his war powers domestically,[195] and the obvious absurdity that would result if a plain meaning reading[196] of the AUMF authorized domestic quartering, it would seem the Supreme Court is more likely to take a broad view of the AUMF. Given that the Supreme Court has already deemed the AUMF

[190] *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded*, 542 U.S. 426 (2004) (reversed on jurisdictional grounds).
[191] *Ex parte Endo*, 323 U.S. 283 (1944).
[192] *Padilla v. Rumsfeld*, 352 F.3d at 722 (citing *Ex parte Endo*, 323 U.S. at 298-99.).
[193] *Id*. (citing *Ex parte Endo*, 323 U.S. at 300.)
[194] *Ex parte Endo*, 323 U.S. 283, 299 (1944).
[195] *See supra* note 177 and accompanying text.
[196] *See supra* note 181 and accompanying text.

"***explicit***[197] congressional authorization for the detention of individuals,"[198] various courts, including the Supreme Court, have acquiesced to the ever broadening interpretation the Executive has given the AUMF,[199] and the liberty right at issue is already protected by the Constitutional need for a legislative act,[200] it appears the Supreme Court may permit the AUMF to stand as "explicit congressional authorization for the [quartering of soldiers]." This terrifying conclusion is drawn in spite of the Supreme Court's recent admonishment that "security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[201]

VI. CONCLUSION

In writing this Note, the author was cautioned in a humorous manner against "writing a blueprint" for the current administration to undertake the actions described herein. While initially beginning with the mindset that this far flung notion would quickly be brought to submission by the discovery of well-reasoned and cautious judicial precedent, it appears that this terrifying academic exercise could possibly become a reality through extreme judicial deference to the Executive.

[197] Even though the AUMF does not "explicitly" state that detention is permissible, it rather broadly states "all necessary and appropriate force" is permissible.
[198] *See supra* note 185 and accompanying text (emphasis added).
[199] *See supra* notes 163, 164, 185-188 and accompanying text.
[200] The requirement of authorization being exercised "in a manner prescribed by law." U.S. Const., amend. III.
[201] *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).