



Could the Third Amendment Thwart the Surveillance State?

As the weapons of the surveillance states grow more and more sophisticated and the courts and Congress conspire to deprive the people of their right to be free from unwarranted searches and seizures, there is a suggestion that the unheralded Third Amendment may be deployed as a shield against the attacks.

For example, in a [September 29 op-ed](#) written for the *Los Angeles Times*, California state lawmaker Mike Gatto has proposed that the Third Amendment be construed in a novel way to thwart the progress of the federal government's goal of placing every American under surveillance. Gatto, calling his theory a "redcoat solution to government surveillance," writes, "Perhaps another route is available, using an amendment so rarely cited that the American Bar Assn. called it the 'runt piglet' of our Constitution. It's the 3rd Amendment, which prohibits the federal government from lodging military personnel in your home."

Then, Gatto presents his case for applying the right of Americans to be free from forcibly housing members of the armed forces:

The National Security Agency is part of the Department of Defense and therefore of our nation's military. By law, the NSA director must be a commissioned military officer, and per its mission statement, the NSA gathers information for military purposes. That's strong evidence that NSA personnel would qualify as soldiers under the 3rd Amendment.

And why did the framers prohibit the government lodging soldiers in private homes? Besides a general distaste for standing armies, quartering was costly for homeowners; it was also an annoyance that completely extinguished a family's sense of privacy and made them feel violated. Sound familiar?

It does sound familiar.

Particularly with regard to the police, which in many key considerations likely would qualify as a standing army in the eyes of our Founding Fathers.

Steadily and speedily, the force of the militarized police is denying citizens the protections of fundamental civil liberties afforded us by the Bill of Rights. While there remain legions of law





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enforcement officers devoted to protecting and serving their fellow citizens, the federal government's proffer of powerful, free (or almost free) weapons, vehicles, gear, and tactical training is making the allure of becoming an unofficial branch of the armed forces irresistible to local police forces.

In the pages of *The New American*, this author and his colleagues have catalogued local law enforcement's increasing use of federally funded surveillance equipment to spy on Americans in direct violations of their rights protected by the Fourth Amendment.

As I wrote [in April 2015](#), "From lightly used federal weapons and vehicles to state-of-the-art surveillance technology, there seems to be little local police are lacking in their quest to become full-fledged precincts of the nationwide network of federal law enforcement." I went on to report that more than two dozen cities across the country had purchased a surveillance and tracking tool called a Stingray with funds provided by the federal government, with "about 50 other cities refusing to disclose whether or not they own one of these expensive surveillance devices."

In an essay published in the *Wall Street Journal* in August 2013, Radley Balko presented chilling and convincing evidence of the blurring of the line between cop and soldier:

Driven by martial rhetoric and the availability of military-style equipment — from bayonets and M-16 rifles to armored personnel carriers — American police forces have often adopted a mind-set previously reserved for the battlefield. The war on drugs and, more recently, post-9/11 antiterrorism efforts have created a new figure on the U.S. scene: the warrior cop — armed to the teeth, ready to deal harshly with targeted wrongdoers, and a growing threat to familiar American liberties.

Balko rightly connects the menace of the martial police with the decline in liberty and a disintegration of legal boundaries between sheriffs and generals:

Americans have long been wary of using the military for domestic policing. Concerns about potential abuse date back to the creation of the Constitution, when the founders worried about standing armies and the intimidation of the people at large by an overzealous executive, who might choose to follow the unhappy precedents set by Europe's emperors and monarchs.

Ars Technica recently published an article examining Gatto's unorthodox approach to restoring the prohibition on searches and seizures via the Third Amendment. In that piece, the authors cite academic support for the suggested strategy:

Steven Friedland, a law professor at Elon University, wrote up a similar argument to Gatto's in February 2014. He was joined by Glenn Reynolds, a University of Tennessee law professor, in yet another pro-Third Amendment argument from March 2015.

As Friedland concluded:

The Third Amendment no longer will be the forgotten amendment if it is considered to interlock with the Fourth Amendment to provide a check on some domestic mass surveillance intruding on civil life, particularly within the home, business or curtilage of each. In the digital era, the dual purposes of the Amendment should be understood to potentially limit the reach of cyber soldiers and protect the enjoyment of a private tenancy without governmental incursion.

While the Third Amendment gambit is intriguing and possibly constitutionally convincing, given the habit of the courts and Congress to ignore the Constitution, widening the scope of the surveillance rather than reducing it, it is unlikely that any tack, no matter how novel or well-reasoned it may be,



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would ever derail the train of tyranny.

It remains the obligation of the states and the people to step into the breach and enforce the terms of the contract that created the federal government. Most urgent is the need for state lawmakers to follow the counsel of James Madison to “refuse to cooperate with officers of the Union” when they attempt to enforce any act not falling within their constitutionally enumerated powers.





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