

**THE CREATION OF THE UNITED STATES NORTHERN COMMAND:  
Potential Constitutional, Legal, and Policy Issues Raised By a Unified Command For The  
Domestic United States**

An Interim Report of The Constitution Project\*

On October 1, 2002, a new Unified Combatant Command, the United States Northern Command (NORTHCOM), became operational and assumed responsibility for the military's homeland security activities inside the United States. The Unified Command Plan was first adopted in 1946 to increase military effectiveness by ensuring that personnel from the Army, Navy, Air Force and Marine Corps deployed to a particular region would serve in a single combatant command under the authority of a single commander. Each combatant commander – of which there are only nine – is a senior general or admiral reporting directly to the National Command Authority. The Combatant Commanders wield significant prestige within the Department of Defense (“DOD”) and enjoy considerable autonomy within their area of responsibility. Airforce General Ralph Eberhart will serve as NORTHCOM's first commander.

The geographic scope of NORTHCOM's command will encompass the American homeland, Canada, Mexico, portions of the Caribbean, and U.S. coastal waters out to five hundred nautical miles. NORTHCOM is the first Combatant Command with exclusive geographic and operational responsibility in the domestic United States in the fifty-year history of the Unified Command Plan, and General Eberhart is the first military commander with exclusive operational authority over domestic military operations since the Civil War. For this reason alone, the creation of NORTHCOM is a remarkable moment in the history of the United States that deserves far greater attention than has been accorded to date. Part of the dearth of attention may be attributed to the relative lack of information regarding both the contours and contributions of NORTHCOM. (See [www.northcom.mil](http://www.northcom.mil)).

From an operational perspective, it is still unclear, for example, what, if any, forces will be permanently assigned to NORTHCOM, how NORTHCOM will work and train with state and local first responders, or how NORTHCOM will be integrated into an overall domestic preparedness strategy. It is also unclear how NORTHCOM would coordinate its mission with responsibilities of the new Department of Homeland Security. Moreover, significant constitutional, legal and policy issues arise from a permanent military deployment within the United States that is tasked with domestic security and defense.

The Constitution Project recognizes that the President and the Secretary of Defense are in the best position to determine the optimal Unified Command Plan in terms of organization and management. However, the Project also believes that serious planning needs to occur during

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these early stages of NORTHCOM deployment to ensure that the military's actions are consistent with its constitutional and legal obligations.

For the most part, NORTHCOM will simply provide support to civilian authorities for managing the consequences of both natural and manmade disasters ("support mission"), a duty that is both appropriate and lawful. Domestic military operations that assist civilian authorities in "support" or "consequence management" functions are standard operating procedure. The Stafford Act expressly authorizes the President to use the military to assist civilian authorities in responding to disasters. Accordingly, following the September 11<sup>th</sup> attacks, civilian authorities requested military assistance in clean up of the attack sites, flying combat air patrols, and patrolling U.S. harbors. DOD also played a major supporting role for the security that accompanied events such as the Salt Lake City Olympics, the Super Bowl and the anniversary of the September 11<sup>th</sup> attacks. In recent remarks, General Eberhart stated that the Command will continue to perform *consequence management* by maintaining its supporting role to civilian authorities, responding only when requested by civilian authorities, and being tasked by civilian authorities rather than assuming command of the governmental response to a domestic disaster.

NORTHCOM, however, is additionally charged with the mission to "deter, prevent and defeat external threats against the American homeland" ("defense mission"). This mission is the focus of the Constitution Project's attention. This interim report is not intended to draw conclusions (NORTHCOM, after all, is still a work in progress), but rather to assess, at an early stage, where additional planning and strategic thinking need to occur to reinforce our nation's basic commitment to liberty and security.

The concept of a single military command charged with protecting the entire American homeland raises the long-standing concern that a "standing army" in the United States could pose a potential threat to freedom and liberty. Congress has expressly limited domestic military operations through a series of statutes that have subordinated the military to a role of supporting civilian authorities, including other federal agencies and state and local governments. (The most well-known of these statutes, the Posse Comitatus Act, prohibits the use of the military in domestic civilian law enforcement). Emergence of dangerous transnational threats may, however, necessitate a new domestic role for the military to better preserve national security. President Bush's National Strategy for Homeland Defense recommends a review of whether the restrictions imposed by the Posse Comitatus Act should be revised, suggesting that the military could better serve the nation's current security needs by assuming certain aspects of domestic law enforcement. But a military law enforcement role, coupled with DOD's recent initiative to classify certain United States citizens as "unlawful combatants," could provide an avenue for less stringent rules of search and seizure, and detention of American citizens without due process. It is for these reasons that NORTHCOM generates novel constitutional, legal and policy issues:

- Does the President have unchecked authority to define NORTHCOM's *Defense Mission*?

Precisely how NORTHCOM will operate within the United States remains undefined. General Eberhart's statement that the military is considering special forces missions inside the United States suggests that NORTHCOM will possess operational capabilities beyond those traditionally exercised by the military in the domestic United States. This, in turn, raises the question of the President's authority to create a broad domestic military mission for NORTHCOM absent congressional approval.

Without doubt, the President and DoD possess the authority to defend the United States against an imminent attack by virtue of the President's power as Commander in Chief and DOD's statutory authority. But Congressional regulation of the domestic use of the military, through statutes like the Posse Comitatus Act and the Stafford Act, suggest limits on the President's authority to define a domestic military mission absent the exigency created by an imminent attack. To date, however, DOD has not defined the parameters of an "attack" that NORTHCOM will defend. Moreover, NORTHCOM's stated mission of "deterring" future attacks, rather than simply defending against those attacks, suggests a preemptive role for the military in the United States. Such a preemptive domestic role aimed at "potential threats" may go beyond any inherent Presidential power and thus require congressional authorization

- Will adequate safeguards exist to ensure that NORTHCOM forces operate within legal limits?

Assuming that NORTHCOM's defense mission is appropriately defined by the President and/or Congress, there remains the need to ensure that NORTHCOM's operations are carried out within legal limits. The military must put in place clear standards and procedures for determining when to deploy forces and when missions should be terminated. There should also be procedures for prompt reporting to Congress about NORTHCOM's activities.

- Should NORTHCOM be expressly precluded from intelligence gathering in the United States?

Unified Combatant Commanders traditionally maintain military intelligence units to gather operational intelligence needed to ensure the command is prepared fully to accomplish its mission. These intelligence units report directly to the Combatant Commander, circumventing established intelligence community channels. The inclusion of military intelligence units within NORTHCOM designed to gather intelligence domestically might seem necessary if NORTHCOM is to meet its mission objectives. However, allowing NORTHCOM to use intelligence gathering to guide its domestic defense mission could subvert numerous Constitutional guarantees relating to privacy and illegal search and seizure. It needs to be examined whether the only way to avoid such dangers is to prohibit or severely limit NORTHCOM's domestic intelligence-gathering .

In the months to come, the contours of NORTHCOM's mission will be further defined. At the same time, the Constitution Project will monitor NORTHCOM's activities and seek to generate discussion and consensus on the legal issues raised by those activities.