

# Northcom Raises Legal, Constitutional Questions

by Carl Osgood

Since Sept. 11, there has been increasing pressure from both within and without the Bush Administration to expand the role of the U.S. military in “homeland defense.” To this ostensible end, Secretary of Defense Donald Rumsfeld announced, on April 17, the formation of a new unified military command, the U.S. Northern Command, to—as Rumsfeld put it—“help the [Defense] Department better deal with natural disasters, attacks on U.S. soil, or other civil difficulties. It will provide for a more coordinated support to civil authorities such as the FBI, FEMA [Federal Emergency Management Agency], and state and local governments.”

Rumsfeld described the new command as “assigned to defend the American people where they live and work, and it will be functioning in a supporting role to civil authorities as occasions arise.” Northern Command’s geographic area of responsibility will include Mexico and Canada, as well as the United States and parts of the Caribbean, including Cuba.

*EIR* Founding Editor Lyndon LaRouche warned (*EIR*, May 17, 2002) that in the current context of strategic policy-making, the creation of Northern Command “is clearly a proposal to ‘cross the Rubicon,’ ” a reference to Julius Caesar’s 49 BC march into Rome that ultimately led to the establishment of the Roman Empire under Augustus Caesar in 31 BC. The danger, today, stems from the possibility that, under this new arrangement, the Pentagon might become a tool of Attorney General John Ashcroft. LaRouche pointed to the doctrine of law encompassed by the 1878 Posse Comitatus Act which “may be properly viewed as the U.S. government’s recognition of the danger of allowing the circumstances under which corrupt elements of the Federal government might act to establish a military dictatorship in the U.S.A.”

LaRouche is not alone in his concerns. Military experts and state legislators consulted by *EIR* have raised numerous questions as to the Constitutionality of the Northern Command. One expert argues that, if the intent of the Northern Command is to facilitate the use of Federal troops in emergency situations, the required legal authorities already exist under Title 10 and Title 32 of the U.S. Code. If, however, the intent is to deploy Federal troops to assist other Federal departments, such as Treasury or Justice, in the enforcement of civil law, then Constitutional and legal problems arise.

## Erosion of Posse Comitatus

The deployment of Federal troops for civil law enforcement purposes is strictly prohibited by the Posse Comitatus



*Virginia Republican Senator John Warner, Chairman of the Senate Armed Services Committee, wrote to Defense Secretary Rumsfeld last year, recommending "limited use of the military beyond that permitted by existing law" to respond to the Sept. 11 attacks.*

Law, formally known as Title 18, section 1385 of the U.S. Code. It simply reads, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army [later amended to include the Air Force, then extended to the Navy and Marines by Defense Department regulation] as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." The act has specific application to regular military forces functioning under Title 10, and Title 10 provides exceptions, such as for disaster recovery assistance. Title 10 also defines circumstances under which the regular military forces can provide assistance to law enforcement, such as the provision of equipment and training.

The National Guard, when functioning under state status, is governed by Title 32, and is not subject to the Posse Comitatus Act. The National Guard only comes under Posse Comitatus when it is Federalized under Title 10. The Coast Guard is normally under the Department of Transportation, and itself has significant law enforcement authorities and responsibilities, and is therefore also not subject to Posse Comitatus.

The law has its genesis in the aftermath of the contested Presidential election of 1876, when Federal troops on duty in the South were used to guard polling places. No prosecutions have ever taken place under the law, and exceptions have been made to it during its history, such as the deployment of troops to end rioting in Chicago in 1919 and against the "Bonus marchers" in Washington, D.C. in 1932. In the 1970s, Federal courts drew the distinction between active participation of the military in law enforcement activities, and passive assistance, such as the lending of equipment, in a series of cases that arose in the aftermath of the 1973 standoff at Wounded Knee, South Dakota between Federal law enforce-

ment authorities and the American Indian Movement.

Real erosion of the *posse comitatus* principle came with the deployment of the military in drug interdiction in the early 1980s. Later on, border duty and investigative support were added.

Matthew Carlton Hammond, writing in the Summer 1997 issue of the *Washington University Law Quarterly*, argues that such exceptions "blur the traditional line between civilian law enforcement and the role of the military." He notes that drug interdiction and border control have been properly the responsibility of civilian agencies and that investigative support is reminiscent of the military surveillance conducted in the 1960s and condemned by the Congress and the Supreme Court "as an improper use of the military."

Hammond also makes the point that law enforcement officers are trained to de-escalate a situation and only use deadly force as a last resort. Soldiers, on the other hand, are trained when to use or not to use deadly force, and escalation is the rule. Once someone has been identified as the enemy, soldiers have no need to be concerned about individual rights or any aggressive acts by that person before using deadly force. He argues that the use of the military in civil situations should only be to address emergencies, of short-term duration, when state and local agencies need help to protect property and save lives. In fact, Hammond proposes a rewrite of the Posse Comitatus Act specifically to define such use of the military.

### **Senator Warner's Questions**

However, further erosion of the law has been suggested since Sept. 11. On Oct. 4, 2001, during a hearing of the Senate Armed Services Committee, Sen. John Warner (R-Va.) asked Deputy Secretary of Defense Paul Wolfowitz, if he thought that Posse Comitatus should be reviewed in light of the Sept.

11 attacks and the war on terrorism. "It seems to me," he said, "we have to bring together every asset of the United States of America, irrespective of where it comes, military, civilian and the like." Wolfowitz replied, "I agree strongly," adding that the Pentagon "can do more than anyone else in the country, because of the special capabilities we have; because of the unique organizational capabilities of the department."

In a subsequent letter to Defense Secretary Rumsfeld, Warner wrote, "Limited use of the military beyond that permitted by existing law might strengthen the nation's ability both to protect against and to respond to events of the sort which we have recently undergone."

Army Secretary Thomas White told reporters at the Pentagon on Oct. 26 that, with respect to Posse Comitatus, "we are looking at the details of the law to see if revisions are appropriate in the way it's executed or the exceptions that can be taken." Rumsfeld, however, has since retracted that position. He told the Senate Appropriations Committee on May 7, "We're not looking for any long-term or short-term change with respect to Posse Comitatus."

Even before Sept. 11, state governors were already seeing themselves as on the front line of defense against terrorist acts within the United States, based on the simple fact that in any event, the first agencies on the scene will be the local emergency services, followed by state emergency management officials, if required. Governors see the state-level National Guard as an important asset for assisting in search and rescue efforts, disaster recovery, and the maintenance of order, and are loath to give that up.

Indeed, Gen. Richard Alexander, the director of the National Guard Association, emphasized this point in a prepared statement to the Senate Appropriations Committee on April 11. He told the committee, "Use of the National Guard as a primary fusion agent in executing a balanced, integrated national domestic security strategy preserves the Constitutional role of the sovereign states and assures that governors and other state and local civil authorities remain responsible and accountable for the public safety and security of their state, territory, and local jurisdictions."

Alexander warned, "Any attempt to repeal or substantially amend the Posse Comitatus Act would be met by a firestorm of resistance from the nation's governors and state and local civil authorities." He also warned that use of Title 10 forces or the National Guard in a Title 10 status for homeland security missions would not only negatively affect the readiness of the regular Army, but would also "place Federal military personnel on a collision course with the proscriptions of the Posse Comitatus Act—an act, by the way, that is as relevant and compelling today as it was when it was enacted."

This concern about the National Guard was echoed on May 21 by Sen. Christopher Bond (R-Mo.), during a hearing of the Senate Defense Appropriations Subcommittee. He told Chairman of the Joint Chiefs of Staff Gen. Richard Myers, "It concerns me very much that the establishment of the Northern

Command does not appear to have involved sufficient input from senior National Guard leaders." Myers punted in response, telling Bond that "there will probably be a fairly heavy reliance on some National Guard capabilities," but that, since the Northern Command will not stand up until Oct. 1, it is still in the planning and implementation phase.

## **Congress Must Hold Hearings**

While Rumsfeld is denying any desire to change the laws governing use of the military inside the United States, the terms of reference for the establishment of the Northern Command contain elements that appear to violate provisions of the Constitution and Federal law. The terms of reference, promulgated as a Joint Chiefs of Staff memo on March 7, asks for, among other things, recommendations regarding mechanisms for coordination between Northcom and local, state, and Federal agencies. The memo also asks for recommendations for "appropriate roles for USNORTHCOM, the Services, the National Guard and Reserve Components, Defense Agencies, and other combatant commands with assigned forces in the USNORTHCOM AOR [area of responsibility] with respect to anti-terrorism and force protection responsibilities."

One expert told *EIR* that, because the term "terrorism" is undefined, this means, the role of Northcom in "anti-terrorism" is also undefined, and therefore unlimited in a practical sense. The memo also specifies that civil support functions, such as the National Guard's Weapons of Mass Destruction-Civil Support Teams are to be brought under Northcom, but since legislation already provides for these functions, why put them under Northcom?

More disturbing is the plan for the fusing of intelligence information between the Defense Department and law enforcement, as well as the ability to coordinate operations with non-Pentagon agencies. Both appear to be not only inappropriate, but illegal as well.

The degree to which Congress will look at this remains to be seen. The fiscal 2003 defense authorization bill passed by the House on May 9, requires the Secretary of Defense to submit a report by Sept. 1 on the implementation plan for the Northern Command. The report is to address the budget, the location of headquarters, the manning levels, the chain of command, the relationship of Northcom to the Office of Homeland Security, other Federal agencies, and the National Guard. Lastly, the report is to address "the legal implications of military forces in their Federal capacity operating on United States territory." It also is to address the status of U.S. consultations with Canada and Mexico regarding their role in the Northern Command.

Besides that, the Senate Armed Services Committee will hold a hearing on the nomination of Gen. Ralph Eberhardt, currently commander of NORAD, to command the Northern Command. Certainly, the Constitutional and legal implications of the Northern Command demand that Congress do much more than simply ask for a report.