

USAWC STRATEGY RESEARCH PROJECT

**UNITED STATES NORTHERN COMMAND'S MISSION TO PROVIDE MILITARY SUPPORT  
TO CIVILIAN LAW ENFORCEMENT AGENCIES: THE CHALLENGE TO KEEP  
HOMELAND SECURITY AND CIVIL LIBERTY DANCING IN STEP WITH  
THE CURRENT LEGAL MUSIC**

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This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

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## ABSTRACT

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TITLE: UNITED STATES NORTHERN COMMAND'S MISSION TO PROVIDE  
MILITARY SUPPORT TO CIVILIAN LAW ENFORCEMENT AGENCIES: THE  
CHALLENGE TO KEEP HOMELAND SECURITY AND CIVIL LIBERTY  
DANCING IN STEP WITH THE CURRENT LEGAL MUSIC

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As part of our Nation's Homeland Security, the recently formed United States Northern Command (NORTHCOM) has the mission to provide Military Support to Civilian Law Enforcement Agencies (MSCLEA). Depending on the circumstances and the law, NORTHCOM may provide resources (personnel and/or materials) for MSCLEA and thereby involve the Department of Defense (DOD) in civilian law enforcement activities and roles. Applicable laws, such as the long-standing Posse Comitatus Act, define the legal parameters of NORTHCOM's role. NORTHCOM also considers what impact new laws, such as the recent Uniting and Strengthening America by Providing for Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act), may have on MSCLEA. The legal framework provides authority for NORTHCOM to execute the MSCLEA mission and places limitations on what specific missions NORTHCOM may perform and how it performs them.

The public debate is renewed regarding the proper balance between empowering government officials with sufficient law enforcement authority to ensure homeland security and ensuring valued civil liberties are preserved for American citizens. This debate takes place in an American society that has not historically favored use of federal troops in a civil law enforcement role. NORTHCOM constantly considers the impact of the laws applying to their civil law enforcement role to ensure their plans, training, and execution of the MSCLEA mission comply with the law; and identify potential civil liberty issues. This paper will analyze the major laws and directives impacting NORTHCOM's MSCLEA mission, legal limitations on and enablers of mission performance, and recommend a sequential methodology for reviewing legal compliance. This paper will conclude with recommendations for changes aimed at the maintenance of a proper balance between sufficient governmental authority for law enforcement and preservation of civil liberty.



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The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.

—President George W. Bush

The existing laws and directives provide sufficient authority for the United States Northern Command (NORTHCOM) to accomplish its mission to provide military support to civil law enforcement agencies (MSCLEA), do not unduly restrict the timely delivery or effectiveness of such military support, and are sensitive to protecting the civil liberty of our citizens. Before committing military forces or resources to assist civilian law enforcement authorities, the decision-maker and those executing the decision to provide such military support will face a number of fundamental issues and determinations. Making the correct determinations and successfully resolving the issues rest significantly on the ability to identify and understand the legal basis for committing military forces or resources in support of civilian law enforcement agencies, define the legally permitted scope of such military support, and then execute the MSCLEA mission within the defined scope.

As it has done since its formation, NORTHCOM continually considers the impact of applicable laws and directives on its plans, training, and execution of actions to accomplish its MSCLEA mission. As NORTHCOM works the legal parameters of specific MSCLEA missions, the current environment includes public debate about what the proper roles should be for the military across the wide spectrum of military assistance to civilian authorities. This debate generally intensifies when the type of support involves assistance to civilian law enforcement authorities. There remains a historical preference and political sensitivity against employing U.S. military forces in domestic security situations where there is a likelihood of confrontation or conflict with U.S. civilians, i.e., performing civilian law enforcement functions. There appears, however, a divergence in public sentiment regarding whether current laws and directives strike a proper balance between the strategic interests in homeland security and civil liberty. Military leaders and staffs are responsible for understanding and operating within the established parameters for MSCLEA.

This paper will include a general overview of NORTHCOM's "military assistance to civilian authorities" (MACA) mission with the intent of placing the subordinate MSCLEA mission in

context of NORTHCOM's numerous missions. The basic components and legal authority for the MSCLEA mission and the military assistance for civil disturbances (MACDIS) mission will be discussed to demonstrate the expansive continuum of activities across which NORTHCOM must be prepared to support civilian law enforcement agencies. This will include analysis of the current laws and directives that establish the legal parameters for the MSCLEA and MACDIS missions. This paper will identify the Department of Defense (DOD) criteria for evaluating civil law authorities' requests for MSCLEA, and recommend a supplemental methodology for reviewing such requests and ensuring the criteria are met. There will be concluding recommendations for changes aimed at the maintenance of a proper balance between sufficient governmental authority for law enforcement and preservation of civil liberty.

It will address challenges that NORTHCOM may face in performing its MSCLEA mission and recommend ways to resolve or minimize such issues. The purpose of the discussion in this writing is twofold: demonstrate that NORTHCOM is legally empowered under existing law and directives to execute its MSCLEA mission with full and proper respect for our citizens' civil liberty and provide military operators in the field an aid for analyzing MSCLEA missions.

#### **BACKGROUND OF NORTHCOM'S MSCLEA MISSION**

On September 11, 2001, terrorists killed nearly 3,000 innocent persons on United States soil.<sup>1</sup> These attacks in Washington, D.C., New York City, and Pennsylvania, and the continuing threat of catastrophic terrorism demonstrated the need for a thorough review of the existing strategy and organizational structure to ensure homeland security.<sup>2</sup> In April 2002, President Bush approved a revision of the Unified Command Plan and directed the formation of a new combatant command, NORTHCOM, to focus solely on ensuring homeland security in accordance with U.S. law.<sup>3</sup> On October 1, 2002, NORTHCOM was established to provide unity of command among the U.S. Armed Forces for homeland defense and military assistance to civil authorities.<sup>4</sup> Thus, NORTHCOM was born as a U.S. regional combatant command with its headquarters at Peterson Air Force base, Colorado Springs, Colorado. NORTHCOM's area of responsibility includes the forty-eight contiguous states and the District of Columbia, Alaska, Canada, Mexico, the Gulf of Mexico, the Caribbean Sea and its island nations and possessions (including Puerto Rico, the Virgin Islands, the Bahamas, and Cuba), and the Pacific and Atlantic Oceans within about 500 miles of the United States.<sup>5</sup> It is noted that the State of Hawaii and the Alaskan forces presently remain within the United States Pacific Command's responsibility, and Greenland is within the United States European Command.



In recognizing that “homeland security” may have various meanings for different people, The National Strategy for Homeland Security defines it as “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”<sup>6</sup> While this national document does not further define the subcomponents of homeland security, the Vice Chairman of the Joint Chiefs of Staff and DOD further divided the homeland security mission into two functional areas: homeland defense and civil support.<sup>7</sup> “Homeland defense” includes the military protection of U.S. territory, domestic population, and critical defense infrastructure and assets from external threats and aggression.<sup>8</sup> This consists of familiar DOD warfighting functions such as combat air patrols and maritime defense operations.<sup>9</sup> “Civil support” includes support to U.S. civil authorities for domestic emergencies and for designated law enforcement and other activities.<sup>10</sup> The correct recognition of the specific type of homeland security mission greatly impacts the resolution of issues under the applicable law. Recognizing the continuing development of homeland security doctrine,<sup>11</sup> a brief discussion of the components of homeland defense and civil support is necessary to place NORTHCOM’s MSCLEA mission in context.

NORTHCOM states that its mission is to conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests within the assigned area of responsibility [homeland defense]; and as directed by the President or Secretary of Defense, provide military assistance to civil authorities including consequence management operations [civil support].<sup>12</sup> Under the homeland defense mission, there are basically three subordinate mission areas: air, space, and missile defense; land defense; and maritime defense.<sup>13</sup> The primary capabilities associated with the homeland defense mission are critical infrastructure protection,<sup>14</sup> anti-terrorism and force protection,<sup>15</sup> information operations,<sup>16</sup> continuity of Government and operations,<sup>17</sup> and cyber defense.<sup>18</sup>

Within the civil support mission, Military Assistance to Civil Authorities (MACA) is generally addressed under three categories: Military Support to Civil Authorities (MSCA), Military Assistance for Civil Disturbances (MACDIS), and Military Support to Civil Law Enforcement Agencies (MSCLEA).<sup>19</sup> The MSCA category includes environmental incidents,<sup>20</sup> response to natural and manmade disasters,<sup>21</sup> national special events,<sup>22</sup> and domestic chemical, biological, nuclear, and explosive (CBRNE) consequence management.<sup>23</sup> The MACDIS category includes military forces providing law enforcement support at the President’s direction to suppress insurrections, rebellions, and domestic violence that exceed the capabilities of civil law enforcement.<sup>24</sup> The MSCLEA category includes national critical infrastructure protection, national special security events, maritime security, support for

combating terrorism, counter drug operations, border patrol/mass immigration, and general support to law enforcement agencies.<sup>25</sup>

Within the foregoing framework of NORTHCOM's many and varied missions, the focus turns to NORTHCOM's military role in providing support and assistance to civilian law enforcement agencies. As the terminology for homeland defense and civil support continues to evolve, military support and assistance to civilian law enforcement agencies may be extended beyond the MSCLEA category as presently described above. The analysis herein will address the MACDIS and MSCLEA categories, since these two categories have the greatest potential for NORTHCOM's activities, measures, and mission executions to involve supporting civil law enforcement agencies or directly performing police functions in extraordinary circumstances. Further, in MACDIS or MSCLEA missions, military forces are likely to face operational and tactical decisions regarding the use of force against U.S. citizens.

### **EVALUATING AND APPROVING REQUESTS BY CIVIL AUTHORITIES FOR MILITARY ASSISTANCE**

Applying to all Combatant Commands, Department of Defense (DOD) Directive 3025.15 announces as a matter of policy that DOD shall cooperate with and provide military assistance to civil authorities as directed by and consistent with applicable law, Presidential Directives, and Executive Orders.<sup>26</sup> This directive specifically governs all DOD military assistance provided to civil authorities within the 50 states, District of Columbia, Puerto Rico, U.S. possessions and territories, or any political subdivision thereof.<sup>27</sup> While the directive sets forth the evaluation standard for DOD approval authorities, commanders and staffs at all levels should use the evaluation standard for making decisions or providing recommendations up the chain of command.<sup>28</sup> NORTHCOM's criteria for evaluating all requests for military support, to include MSCLEA and MACDIS missions, is contained in this directive.

All civil authorities' requests for DOD military assistance are assessed by DOD approval authorities against the following six criteria: legality (compliance with laws), lethality (potential use of lethal force by or against DOD forces), risk (safety of DOD forces), cost (who pays and impact on DOD budget), appropriateness (whether the requested mission is in DOD's interest to conduct), and readiness (impact on the DOD's ability to perform its primary mission).<sup>29</sup> The directive places added emphasis and importance on the first and last criteria: legality and appropriateness. If a DOD component has any doubt or uncertainty regarding the legality or appropriateness of providing the requested military support, then such requests must be forwarded to the Secretary of Defense for review and approval even if a review is not otherwise required at this level.<sup>30</sup>

The type of DOD assistance or support involved impacts identification of the designated DOD approval authority in a particular case. Further, DOD Directive 3025.15 changes the approval authority previously designated in older directives in certain cases, even though the older directives otherwise remain effective.<sup>31</sup> The Secretary of Defense has reserved the authority to approve military support to civil authorities involving: civil disturbances, responses to acts of terrorism, and support that will result in a planned event with the potential for confrontation with specifically identified individuals and groups or will result in the use of lethal force.<sup>32</sup> Further, any military support requiring the deployment of a Combatant Command's forces or equipment must be coordinated with the Chairman of the Joint Chiefs of Staff.<sup>33</sup> The Chairman determines whether there is a significant issue requiring Secretary of Defense approval. Any orders involving the use of the Combatant Command's force or equipment must be issued through the Chairman.<sup>34</sup>

Specific to MSCLEA missions and all support requests from law enforcement agencies, the Secretary of Defense is the approval authority for any request for potentially lethal support (ie., lethal to the public, a member of law enforcement, or a Service member).<sup>35</sup> Lethal support includes loans of any arms, combat and tactical vehicles, vessels or aircrafts, or ammunition. Further, if there is a potential for confrontation between law enforcement and certain identified civilian individuals or groups or between DOD personal and civilian individuals or groups, then the Secretary of Defense is the approval authority.<sup>36</sup> Specific to MACDIS missions, the employment of active duty military forces in domestic civil disturbances are federally initiated by the President or Attorney General and authorized only by the President.<sup>37</sup> The Secretary of Defense personally approves deployment orders prepared by the Joint Staff.<sup>38</sup>

#### **OVERVIEW OF LEGAL BASIS FOR MILITARY SUPPORT IN DOMESTIC SECURITY**

*The National Strategy for Homeland Security* highlights that state and federal laws have been used to promote and safeguard our security and liberty throughout U.S. history.<sup>39</sup> The expressed challenge is employing the laws to win the war on terrorism and provide domestic security, while always protecting civil liberties. Where the existing laws are found to be inadequate in light of the terrorist threat, new laws should be carefully crafted in accord with the national strategy and remain vigilant against incursions on fundamental freedoms.<sup>40</sup> In considering this overview of the legal basis for employing military forces in domestic security, two questions remain in the forefront: are the laws adequate and do the laws strike the proper balance between federalism and individual freedoms?<sup>41</sup>

The U.S. Constitution establishes the fundamental justification for utilizing military forces in all aspects of homeland security. In the Preamble, the Constitution specifically states that its purposes include to insure domestic tranquility and provide for the common defense.<sup>42</sup> In furtherance of these ends, Article I, Section 8 of the Constitution, grants Congress the legislative authority to provide for the common defense and general welfare of the United States; declare war; raise and support armies, provide and maintain a navy; and provide for calling forth the militia to execute the laws, suppress insurrections, and repel invasions.<sup>43</sup> Article II, Section 3 empowers the President and Commander in Chief with executive authority to take care that the laws be faithfully executed; and Article IV, Section 4 requires the federal government to protect the States against domestic violence upon request.<sup>44</sup> The legal basis for military support in domestic security generally derives from a Congressional statute or the President's executive authority.

### **LEGAL CONSIDERATIONS FOR MSCLEA**

Congress, the President, and those under the Commander in Chief use various documents to memorialize the controlling rules and to issue guidance. While some of these laws, directives, and policies are applicable to all categories of MSCLEA, specific rules and guidance will apply for different military support depending on the type of mission. A mission analysis is critical to fully understand applicable law. The rules may well change based on such factors as the following: type of support being requested; any potential threat or risk of harm in providing the support; alternative sources for the support from private contractors or local, state, or civilian federal authorities; who is requesting the support; who is receiving the support; when and where will the support be provided; what is the anticipated duration of support; who is the lead agency; who is the approval authority for the support; and who is paying for the support. The type of mission determines the applicable legal rules, rules for use of force, any applicable restrictions, chain of command for the support and approval authorities, and funding sources.<sup>45</sup>

### **LIMITATIONS ON DIRECT ASSISTANCE**

The Posse Comitatus Act (PCA) is the principle statute defining the limits on MSCLEA missions of all types. The PCA is a criminal statute and provides:

Whoever, except in cases and under circumstance expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title imprisoned not more than two years, or both.<sup>46</sup>

The PCA prohibits on its face the use of the Army and Air Force personnel to execute civil laws of the United States, unless there is specific Congressional or Constitutional authority to do so. This prohibition applies also to Navy personnel and Marines as a matter of DOD policy.<sup>47</sup> Both title 10, *United States Code*, chapter 18, *Military Support for Civilian Law Enforcement Agencies*, and DOD Directive 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, specify the extent of the restrictions in the PCA and the many circumstances when military support is permissible.<sup>48</sup>

Some writers have called for the repeal or modification of the PCA for various reasons: an inflexible method to achieve a policy goal of prohibiting armed forces from enforcing civil law, it outlived its usefulness and unduly inhibits DOD in supporting new domestic security challenges, or it is confusing and may inappropriately cause inaction by federal troops in domestic operations.<sup>49</sup> When Congress recently passed the Homeland Security Act of 2002, it endorsed the PCA with the following:

The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law. Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.<sup>50</sup>

In March of 2003, the Commander of NORTHCOM similarly expressed: "We believe the [Posse Comitatus] Act, as amended, provides the authority we need to do our job, and no modification is needed at this time."<sup>51</sup> On May 29, 2003, when DOD reported to Congress on the results of its legal review directed by the President, DOD concluded that the Posse Comitatus Act would not in any way impede the nature or timeliness of its response.<sup>52</sup> For the time being, the MSCLEA mission will be, and NORTHCOM remains confident can be, accomplished within the full force and effect of the PCA. Thus, a review of what military support can and cannot be provided under the PCA is merited.

The PCA only applies to certain military persons. Active duty personnel in the Army, Air Force, Navy, and Marines; reservists on active duty, active duty for training, or inactive duty for training; National Guard personnel in Federal Service; and DOD civilian employees when under the direct command and control of a military officer fall within the terms of the PCA.<sup>53</sup> The PCA does not apply to a member of the National Guard when not in Federal Service, members of the Coast Guard, members of the military who are "detailed" to another federal agency pursuant to

a specific statute, or an active duty military member when off duty and acting in a private capacity.<sup>54</sup>

The application of the PCA may depend on where the military support is actually provided. The PCA generally does not prohibit the use of military forces or support outside the United States. Acknowledging that Congress' intent was to limit military involvement in domestic affairs and was not to limit military forces or support in operations external to the United States, federal courts have consistently held that the PCA does not have extraterritorial effect.<sup>55</sup> In 1989, a Department of Justice Office of Legal Counsel Memorandum also opined that the PCA does not apply outside the territory of the United States and has only domestic effect.<sup>56</sup> However, as a matter of DOD policy, The Secretary of Defense or the Deputy Secretary of Defense must approve, on a case-by-case basis, any military support to law enforcement authorities outside the territorial jurisdiction of the United States and such request must be supported by compelling and extraordinary circumstances.<sup>57</sup>

The PCA applies only to those types of military support and assistance that constitute actions to "execute the laws" under the meaning of the PCA. The PCA generally prohibits only direct military involvement in civilian law enforcement activities. Such traditional law enforcement functions as search, seizure, or arrest are usually prohibited, and such military support as providing information, equipment, and facilities are usually permitted. Specific statutes, court cases, and directives define more fully what does or does not constitute direct military involvement.

#### PERMISSIBLE INDIRECT ASSISTANCE FOR MSCLEA

Congress in title 10, *United States Code*, chapter 18, *Military Support for Civilian Law Enforcement Agencies*, provides the framework for the Secretary of Defense's authority to direct MSCLEA missions. The Secretary of Defense may provide information collected during the normal course of military training or operations to federal, state, or local civilian law enforcement officials, if the information may be relevant to a violation of law within their jurisdiction.<sup>58</sup> In the planning and execution of military training or operations, DOD personnel are required to the extent practicable to consider civilian law enforcement information needs and to promptly provide intelligence information, consistent with national security, relevant to drug interdiction or other civilian law enforcement matters.<sup>59</sup> The Secretary of Defense may provide military equipment and facilities to civilian law enforcement agencies and specifically may provide any DOD material or expertise for preparation or response to an emergency involving chemical or biological agents.<sup>60</sup> The military may make DOD personnel available to train civilian law

enforcement officials in the operation and maintenance of equipment and provide expert advice.<sup>61</sup> The Secretary of Defense may provide DOD personnel for the maintenance and operation of equipment.<sup>62</sup>

Congress reinforced the PCA and directed the Secretary of Defense to prescribe regulations to ensure that any military activity does not include or permit direct participation by any member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless otherwise authorized by law.<sup>63</sup> In all the foregoing MSCLEA missions, the Secretary of Defense must ensure that the provision of any such military assistance does not adversely affect the military preparedness of the United States.<sup>64</sup> Finally, the civilian law enforcement agency receiving the support must reimburse DOD, unless the support is provided in the normal course of military training or operations or results in a benefit to DOD that is substantially equivalent to what would otherwise have been obtained from military operations or training.<sup>65</sup>

Court decisions have focused on three tests to determine whether military personnel's assistance to civilian law enforcement authorities has violated the PCA. First, the actions of the military personnel must be passive and not active.<sup>66</sup> Second, the military personnel's actions must not pervade the activities of the civilian law enforcement officials.<sup>67</sup> Third, the military personnel cannot subject citizens to the exercise of military power that is regulatory, proscriptive, or compulsory.<sup>68</sup> This has the purpose of preventing military personnel from controlling a citizen's liberty, issuing directives or commands directly to citizens, or exerting any coercive or confrontational force over citizens. When the PCA applies to the circumstances, then these tests are used to determine whether there has been a violation of the PCA.

By directive, certain types of direct military assistance are prohibited, unless there is a specific exception otherwise stated in the directive. In accordance with statutory law, the Secretary of Defense has prohibited the use of military personnel for the following forms of direct military assistance: interdiction of a vehicle, vessel, aircraft, or other similar activity; a search or seizure; an arrest, apprehension, stop and frisk, or similar activity; or surveillance or pursuit of individuals as undercover agents, informants, investigator, or interrogators.<sup>69</sup>

#### PERMISSIBLE DIRECT ASSISTANCE FOR MSCLEA

There are circumstances when the PCA does not apply and direct military involvement in law enforcement functions is permitted. Under the "military purpose doctrine," military personnel may directly engage in law enforcement functions when the primary purpose is to further a military interest or foreign affairs, even though civilian authorities may receive an incidental

benefit.<sup>70</sup> Examples of where the military purpose doctrine applies include: investigations and actions to enforce the Uniform Code of Military Justice; investigations and other actions that are likely to result in administrative proceedings by DOD, investigations and other actions related to the Commander's inherent authority to maintain law and order on a military installation or facility; protection of classified military information or equipment; protection of DOD personnel, DOD equipment, and official guest of DOD; and such other actions that are undertaken primarily for a military or foreign affairs purpose.<sup>71</sup>

Direct military assistance to civilian law enforcement is permitted in immediate response to prevent loss of life or wanton destruction of property, to restore governmental functioning and public order when sudden and unexpected civil disturbances occur, or to protect federal property and federal government functions.<sup>72</sup> This "emergency authority" is reserved for extraordinarily unusual circumstances and may be used only if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization through the chain of command.<sup>73</sup> While applying this "emergency authority," the responsible DOD officials and commanders must use all available means to seek authorization from the President.<sup>74</sup> The "emergency authority" arises as an extension of the President's Constitutional authority under Article II to take care that the laws be faithfully executed and applies only when all civilian law enforcement is overwhelmed.

While the primary responsibility for protecting life and property and maintaining law and order in U.S. communities rests with the civilian federal, state, and local governments; the President has Constitutional authority and statutory authority to use military forces to suppress insurrections and domestic violence. The President's authority is defined in statutes commonly referred to as the "Insurrection Statutes."<sup>75</sup> By directive, DOD refers to this mission set cumulatively as MACDIS and doctrinally considers MACDIS distinct from MCCLEA (as discussed above).<sup>76</sup> The MSCLEA mission remains the focus herein. A brief discussion of MACDIS is merited, however, since it is a type of permissible direct military assistance to civilian law enforcement and may involve military forces directly performing domestic police functions.

When military forces are used for MACDIS in accord with the Insurrection Statutes and the applicable directive, the PCA and its limitations do not apply. Direct military assistance is not only permitted, but the President orders it. The Insurrection Statutes allow the President to use military forces to enforce domestic law when one of the following circumstances exists: (1) an insurrection in a State against its government and the state legislature or its governor requests federal military assistance from the President;<sup>77</sup> (2) an unlawful obstruction, assemblage, or rebellion against federal authority making it impracticable to enforce the federal



laws by the ordinary course of judicial proceedings;<sup>78</sup> (3) an insurrection, domestic violence, or conspiracy obstructs federal law, or hinders the execution of State and federal laws and deprives citizens of Constitutional rights, and the State authorities refuse, are unable, or fail to protect these rights.<sup>79</sup> Before the President invokes his authority under the Insurrection Statutes, he must immediately issue a proclamation ordering the insurgents to disperse and retire peaceably to their homes within a specified time.<sup>80</sup> The President authorizes use of military forces for MACDIS through an Executive Order directing the Secretary of Defense to act in a specified civil jurisdiction under specific circumstances.<sup>81</sup>

Finally, there are a significant number of other statutes in addition to the better-known Insurrection Statutes that permit direct military assistance in civilian law enforcement as Congressional exceptions to the PCA. These other statutes are too numerous to fully discuss within the context of this paper. NORTHCOM's analysis of a MSCLEA mission should include a review and determination concerning whether the circumstances require use of military forces under any of the following statutes: protection of national parks and certain other federal lands (16 U.S.C. Sec. 23, 78, & 593); enforcement of the Fishery Conservation and Management Act of 1976 (16 U.S.C. Sec. 1861(a)); assistance in the case of crimes against foreign officials, official guests of the United States, and other internationally protected persons (18 U.S.C. Sec. 112 & 1116); assistance in the case of crimes against members of Congress (18 U.S.C. Sec. 351); assistance in the case of crimes involving nuclear materials (18 U.S.C. Sec. 831); protection of the President, Vice President, and other designated dignitaries (18 U.S.C. Sec. 1751 and the Presidential Protection Assistance Act of 1976); actions taken in support of the neutrality laws (22 U.S.C. Sec. 408 and 461-462); removal of persons unlawfully present on Indian lands (25 U.S.C. Sec. 180); execution of quarantine and certain health laws (42 U.S.C. Sec. 97); execution of certain warrants relating to enforcement of specified civil rights laws (42 U.S.C. Sec. 1989); removal of unlawful enclosures from public lands (43 U.S.C. Sec. 1065); protection of the rights of a discover of a guano island (48 U.S.C. Sec. 1418); support of territorial governors if a civil disorder occurs (actions in support of certain customs laws (50 U.S.C. Sec. 220); detection and monitoring of aerial and maritime transit of illegal drugs (10 U.S.C. Sec. 124); and assistance in a National Special Security Event (10 U.S.C. Sec. 331-335).<sup>82</sup>

#### **METHODOLOGY FOR ASSESSING REQUESTS FOR MSCLEA**

With assignment of a MSCLEA mission, NORTHCOM will cooperate with civilian law enforcement officials to the extent practicable, while respecting historic tradition and laws

limiting direct military involvement in civilian law enforcement activities.<sup>83</sup> As demonstrated above, NORTHCOM forces may assist civilian law enforcement authorities in a wide variety of circumstances. MSCLEA has recently undergone a significant growth due the U.S. war on drugs and the global war on terrorism.<sup>84</sup> Since the civilian law enforcement's demand for DOD support has increased, a short methodology for ensuring that the first DOD criteria (legality) is satisfied. The suggested methodology below supplements and does not in any way replace the DOD criteria under DOD Directive 3025.15. It is intended as a tool for reviewing a MSCLEA request or mission.

The checklist for assessing a MSCLEA request or mission includes the following steps:

1. Analyze the MSCLEA mission; answer the who, what, why, when, how long, and where for the underlying mission; and use the specified and implied tasks to fully understand the type of mission involved.
2. Identify the approval authority in accord with DOD Directive 3025.15 and ensure the correct approval authority directs military assistance (highlighting that the Secretary of Defense is the approval authority, if lethal force is potentially involved).
3. Evaluate the MSCLEA request under the six criteria set forth in DOD Directive 3025.15 (with emphasis on the legality and appropriateness criteria).
4. Determine whether the MSCLEA mission requires direct or indirect (passive) military assistance.
5. If indirect (passive) assistance is required, confirm that it is permitted under 10 U.S.C. Secs. 371-375 or DOD Directive 5525.5.
6. Determine whether the Posse Comitatus Act (PCA) applies and precludes provision of the assistance. Note, three elements must all exist for the PCA limitations to apply: (1) no Constitutional or statutory exception covers the specific military assistance, (2) members of the Armed Forces (regular or reserve units) are providing the military assistance, and (3) the military assistance involves direct law enforcement.
7. If direct military assistance is required, determine whether the military purpose doctrine under DOD Directive 5525.5, the emergency authority under DOD Directive 5525.5, the conditions for MACDIS under the Insurrection Statutes (10 U.S.C. Sect. 331-335) and DOD Directive 3025.12 exists, or any other specific federal statute applies.
8. Review fiscal implications, determine who pays, and satisfy any record requirements for reimbursement under 10 U.S.C. Sec. 377 and DOD Directive 5525.5.

## **IMPACT OF THE PATRIOT ACT**

The President requested and Congress passed the Uniting and Strengthening America by Providing for Appropriate Tools required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). There is concern that this new law diminishes the civil rights of the American people and violates the U.S. Constitution. Further, for many people, the PATRIOT Act has become a catch-all phrase for a range of controversial and unrelated policies. Some believe the PATRIOT Act expanded the instances when military forces will domestically perform law enforcement functions. While the PATRIOT Act was sweeping legislation with several controversial provisions, it did not expand the authority of military forces or DOD in MSCLEA missions. It did expand the power of civilian federal law enforcement (mainly the Federal Bureau of Investigation, Central Intelligence Agency, and Department of Justice) to obtain information, gather evidence, and share information.

NORTHCOM is not a police auxiliary and does not independently conduct domestic law enforcement operations, and is generally not the first responder. NORTHCOM does not secure airports and does not secure the United borders for custom purposes. NORTHCOM does not train and maintain operational forces for the MSCLEA mission. The PATRIOT ACT does not enhance the authority of NORTHCOM in regards to MSCLEA. The PATRIOT Act has increased the concern and sensitivity of U.S. citizens over the potential erosion of their civil liberties. In executing MSCLEA, NORTHCOM must still share the commitment to protect and preserve the civil rights and liberties of all Americans.

## **CHALLENGES IN EXECUTING MSCLEA MISSIONS**

MSCLEA missions can create challenges for the military forces called upon to perform them. The skill sets generally required to accomplish law enforcement related missions do not generally correlate to the primary warfighting skills needed to fight and win the Nation's wars. Military and domestic security missions often differ in terms of roles, duration, and capabilities that are employed. Unlike in a military mission, DOD or NORTHCOM are usually not the lead agency in MSCLEA and has some discretion to decline the requested military support. In a military mission, DOD usually cannot decline the mission and most of the time is the lead agency. Leaders will often, therefore, face unique and different challenges in MSCLEA missions. NORTHCOM does not maintain trained and ready forces to perform MSCLEA, but will look elsewhere for the provision of personnel if needed. Hopefully, through the unity of command provided by NORTHCOM, the necessary skill sets and judgment for MSCLEA will continue to develop with experience.

While DOD has created a new organization to address MSCLEA missions, it has not specifically adjusted its force structure to perform MSCLEA missions. This does not suggest that DOD should pursue independent and distinct force structure solely dedicated to the MSCLEA missions. A review of force structure should continue to determine what component of the Armed Forces is best positioned to perform this mission. The challenge is that some MSCLEA missions require only basic military skills, and the missions do not provide significant training value. Further, while performing MSCLEA, military personnel's opportunities for combat training are reduced. Additionally, some MSCLEA call for specific police and law enforcement skills. A review must ensure that NORTHCOM has the ability to tailor the proper force to execute MSCLEA. The art will be for DOD to balance the training and readiness for domestic security and military missions outside the United States.

## **CONCLUSION**

There are a myriad of laws, directives, and policies governing NORTHCOM's MSCLEA mission. While the present statutory and directive scheme is cumbersome, NORTHCOM does possess sufficient authority to accomplish its mission to provide military support to civil law enforcement agencies. The cumbersome requirement to find specific authority for the particular MSCLEA mission provides is itself a check that aids in the protection of civil liberties. The general limitations of the PCA continues to engender close scrutiny whenever military forces may potentially be directly involved in civil law enforcement functions. When local, state, and federal law enforcement authorities are truly overwhelmed or lives are threatened, there is sufficient authority to employ military resources when necessary. The PCA also provides a shield for DOD to properly decline civil law enforcement requests for military support. NORTHCOM can be fully and timely accomplish its MSCLEA mission and the PCA does not need to be repealed.

DOD has the challenge to balance domestic and overseas missions with a renewed emphasis on homeland defense. While NORTHCOM has an expanded MSCLEA mission, it also has an opportunity to assist in safeguarding and protecting its fellow citizens and their civil liberties. While this is a large responsibility, changes in the law are not required for NORTHCOM to fulfill this duty in the MSCLEA arena.

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## ENDNOTES

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<sup>2</sup> Ibid.; George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 5-7.

<sup>3</sup> George W. Bush, *The National Strategy for Homeland Security* (Washington, D.C.: The White House, July 2002), 44-45.

<sup>4</sup> Eberhart, iii.

<sup>5</sup> George W. Bush, *Unified Command Plan 2002* (Washington, D.C.: The White House, April 30, 2002)(with Change 1 dated 30 July 2002 and Change 2 dated 10 January 2003), 13.

<sup>6</sup> Bush, *National Strategy for Homeland Security*, 2.

<sup>7</sup> International and Operational Law Department, *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General's School, 2004), 35; Department of Defense, *Report to Congress on The Role of the Department of Defense in Supporting Homeland Security* (Washington, D.C.: U.S. Government Printing Office, September 2003), 1.

<sup>8</sup> Ibid.

<sup>9</sup> International and Operational Law Department, 355.

<sup>10</sup> Department of Defense, *Report to Congress on The Role of the Department of Defense in Supporting Homeland Security*, 1.

<sup>11</sup> Joint Chiefs of Staff, *Joint Doctrine for Homeland Security*, Joint Pub 3-26 (2<sup>nd</sup> Draft) (Washington, D.C.: U.S. Joint Chiefs of Staff, 11 September 2003).

<sup>12</sup> Eberhart, 12 and 15.

<sup>13</sup> Ibid., 13-15; Department of Defense, *Report to Congress on The Role of the Department of Defense in Supporting Homeland Security*, 4; Joint Chiefs of Staff, 1-8.

<sup>14</sup> Department of Defense, *Critical Asset Assurance Program (CAAP)*, Department of Defense Directive 5160.54 (Washington, D.C.: U.S. Department of Defense, January 20, 1998).

<sup>15</sup> Department of Defense, *DOD Antiterrorism (AT) Program*, Department of Defense Directive 2000.12 (Washington, D.C.: U.S. Department of Defense, August 18, 2003).

<sup>16</sup> Department of Defense, *Information Assurance*, Department of Defense Directive 8500.1 (Washington, D.C.: U.S. Department of Defense, October 24, 2002); DOD Directive 5160.54, 4-6.

<sup>17</sup> Department of Defense, *Continuity of Operations (COOP Policy and Planning)*, Department of Defense Directive 3020.26 (Washington, D.C.: U.S. Department of Defense, May 26, 1995), 1-2.

<sup>18</sup> Executive Order 13231, *Critical Infrastructure Protection in the Information Age*, 15 July 1996.

<sup>19</sup> Eberhart, 15-18; Department of Defense, *Report to Congress on The Role of the Department of Defense in Supporting Homeland Security* (Washington, D.C.: U.S. Department of Defense, September 2003), 4; Joint Pub 3-26 (2<sup>nd</sup> Draft), I-7 to I-9.

<sup>20</sup> Department of Defense, *Oil and Hazardous Substances Pollution Prevention and Contingency Program*, Department of Defense Directive 5030.41 (Washington, D.C.: U.S. Department of Defense, June 1, 1977), 2-4.

<sup>21</sup> *Stafford Act Federal Response Plan*, U.S. Code, title 42, secs. 5121-5204 (2003).

<sup>22</sup> Department of Defense, *Military Support to Civil Authorities (MSCA)*, Department of Defense Directive 3025.1 (Washington, D.C.: U.S. Department of Defense, January 15, 1993), 3-6.

<sup>23</sup> Department of Defense, *DOD Response to Improvised Nuclear Device Threats*, Department of Defense Directive 3150.5 (Washington, D.C.: U.S. Department, March 24, 1987), 1-2; Department of Defense, *DOD Response to Radiological Accidents*, Department of Defense Directive 3150.8 (Washington, D.C.: U.S. Department, June 13, 1996), 2-4; *Prohibited Transactions Involving Nuclear Materials*, U.S. Code,, title 18, sec. 831.

<sup>24</sup> Eberhart, 17-18; Department of Defense, *Report to Congress on The Role of the DOD in Supporting Homeland Security*, 4.

<sup>25</sup> *Ibid.*

<sup>26</sup> Department of Defense, *Military Assistance to Civil Authorities*, Department of Defense Directive 3025.15 (Washington, D.C.: U.S. Department, February 18, 1997), 2.

<sup>27</sup> *Ibid.*

<sup>28</sup> International and Operational Law Department, 356.

<sup>29</sup> DOD Directive 3025.15, 3.

<sup>30</sup> *Ibid.*, 5.

<sup>31</sup> International and Operational Law Department, 356.

<sup>32</sup> DOD Directive 3025.15, 3.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, 5.

- <sup>37</sup> Ibid., 6.
- <sup>38</sup> Robert R. Ivany, *How the Army Runs, A Senior Leader Reference Handbook* (Carlisle, PA : U.S. Army War College, 2003-2004), 466.
- <sup>39</sup> Bush, *National Strategy for Homeland Security*, 47.
- <sup>40</sup> Ibid., 48.
- <sup>41</sup> Ibid.
- <sup>42</sup> *U.S. Constitution*, preamble.
- <sup>43</sup> Ibid., art. 1, sec. 8.
- <sup>44</sup> Ibid., art. 2, sec. 3; Ibid., art. 4, sec. 4.
- <sup>45</sup> International and Operational Law Department, 356.
- <sup>46</sup> *Posse Comitatus Act, U.S. Code*, title 18, sec. 1385 (2003).
- <sup>47</sup> Department of Defense, *DOD Cooperation with Civilian Law Enforcement Officials*, Department of Defense Directive 5525.5 (Washington, D.C.: U.S. Department of Defense, January 15, 1986), 1, 6, and 21.
- <sup>48</sup> Ibid., 11-23; *Military Support For Civilian Law Enforcement Agencies, U.S. Code*, title 10, secs. 371-382 (2003).
- <sup>49</sup> Matthew C. Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, Washington University Law Quarterly 75, no. 2 (Summer 1997), 953; Dana K. Chipman, *Countering Terrorism in the Heartland – Can We Afford Posse Comitatus Any Longer?*, Strategy Research Project (Carlisle Barracks: U.S. Army War College, April 7, 2003), 6-17; Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?*, Carlisle Papers in Security Strategy (Carlisle Barracks: U.S. Army War College, September 2003), 1-24.
- <sup>50</sup> *Homeland Security Act of 2002*, sec. 780.
- <sup>51</sup> General Accounting Office, *Needs to Assess the Structure of U.S. Forces for Domestic Military Missions*, (Washington, D.C.: U.S. General Accounting Office, July 11, 2003), 4-5.
- <sup>52</sup> Ibid.
- <sup>53</sup> DOD Directive 5525.5, 17-18; title 10, *U.S. Code*, sec. 375.
- <sup>54</sup> Ibid.; *Jackson v. Alaska*, 572 P.2d 87 (Alaska 1987); Assistant Attorney General William Rehnquist, *Assignment of Army Personnel to the Department of Transportation*, memorandum for Department of Justice, Washington, D.C., 1971.
- <sup>55</sup> *United States v. Cotton*, 471 F.2d 744 (9<sup>th</sup> Cir. 1973); *D'Aquino v. United States*, 192 F.2d 338 (9<sup>th</sup> Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Chandler v. United States*, 117 F.2d 921

(1<sup>st</sup> Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); compare *United States v. Kahn*, 35 F.3d426 (9<sup>th</sup> Cir. 1994).

<sup>56</sup> Office of the Assistant Attorney General, *Extraterritorial Effect of the Posse Comitatus Act*, memorandum for General Brent Snowcroft, Washington, D.C., 3 November 1989.

<sup>57</sup> DOD Directive 5525.5, 6. Paragraph 8.1 provides: "Such requests for exceptions to policy outside the territorial jurisdiction of the United States should be made only when there are compelling and extraordinary circumstances to justify them."

<sup>58</sup> *Use of Information Collected During Military Operations*, U.S. Code, title 10, sec. 371.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Use of Military Equipment and Facilities*, U.S. Code, title 10, sec. 372.

<sup>61</sup> *Training and Advising Civilian Law Enforcement Officials*, U.S. Code, title 10, sec. 373.

<sup>62</sup> *Maintenance and Operation of Equipment*, U.S. Code, title 10, sec. 374.

<sup>63</sup> *Restriction on Direct Participation by Military Personnel*, U.S. Code, title 10, sec. 375.

<sup>64</sup> *Support Not to Affect Adversely Military Preparedness*, U.S. Code, title 10, sec. 376.

<sup>65</sup> *Reimbursement*, U.S. Code, title 10, sec. 377.

<sup>66</sup> *United States v. Rasheed*, 802 F.Supp. 312 (D. Haw 1992); *United States v. Red Feather*, 392 F.Supp. 916 (W.D.S.D. 1975).

<sup>67</sup> *United States v. Hartley*, 678 F.2d 961 (11<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Hayes v. Hawes*, 921 F.2d 100 (7<sup>th</sup> Cir. 1990).

<sup>68</sup> *United States v. Yunis*, 681 F.Supp. 891 (D. D.C. 1988);.

<sup>69</sup> DOD Directive 5525.5, 17-19.

<sup>70</sup> *Ibid.*, 15.

<sup>71</sup> *Ibid.*, 14-23.

<sup>72</sup> *Ibid.*; Department of Defense, *Military Assistance for Civil Disturbances (MACDIS)*, Department of Defense Directive 3025.12 (Washington, D.C.: U.S. Department, February 4, 1994), 5.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Insurrection Statutes*, U.S. Code, title 10, secs. 331-335 (2003).

<sup>76</sup> DOD Directive 3025.12, 1-6.



<sup>77</sup> *Federal Aid for State Governments, U.S. Code*, title 10, sec. 331.

<sup>78</sup> *Use of Militia and Armed Forces to Enforce Federal Authority, U.S. Code*, title 10, sec. 332.

<sup>79</sup> *Interference with State and Federal Law, U.S. Code*, title 10, sec. 333.

<sup>80</sup> *Proclamation to Disperse, U.S. Code, U.S. Code*, title 10, sec. 334.

<sup>81</sup> DOD Directive 3025.12, 4.

<sup>82</sup> Center for Law and Military Operations, *Domestic Operational Law (DOPLAW) Handbook for Judge Advocates* (Charlottesville, VA: U.S. Center for Law and Military Operations, 15 April 2001), 22-23.

<sup>83</sup> Eberhart, 17-18.

<sup>84</sup> Center for Law and Military Operations, 7.



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