"What We Learned from Lafayette Square: A Discussion of the Insurrection and Home Rule Acts"

District of Columbia Bar: District of Columbia Affairs Community
Panel Discussion
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Remarks of

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There are four means by which the President may deploy armed force in the District of Columbia in the name of the United States:

1. He may order the use of the numerous federal agencies – all parts of the Executive branch, and thus ultimately reporting to the President – that have some responsibility for law enforcement (and some of which were present in Lafayette Square). These include (a) the FBI, (b) the Secret Service, (c) the National Parks Police, (d) the Federal Bureau of Prisons, and (e) the U.S. Marshals Service, among others. Uniformed members of all of these agencies are permitted to carry arms in at least some circumstances. And none requires a special declaration of emergency to carry out their assigned functions. On the other hand, none of them has authority to act outside of those functions.
2. He may federalize the D.C. Metropolitan Police Department, pursuant to D.C. Code § 1-207.40 (the Home Rule Charter);
3. He may order the deployment of the D.C. National Guard, which is under federal control (see generally, Title 32 U.S.C.); and
4. He may invoke the Insurrection Act of 1807 (10 USC § 253) to deploy armed forces, despite the Posse Comitatus Act (which generally forbids the use of the military "to execute the laws" on U.S. soil).

Each of the last three has certain prerequisites, but they all seem to lie within presidential discretion that is rarely challenged much less second-guessed by the Courts.

1. To federalize the MPD, the President must determine only that "special conditions of an emergency nature exist." There are procedural requirements with which he must comply – including the obligation to inform Congress within 48 hours – but there is no provision for enforcement of those requirements, and nothing suggesting that if they are not met, the decision is void or voidable.
2. To deploy the National Guard, he must simply declare that there is need for the Guard to maintain security or good order. There is no requirement that a state of emergency need be officially announced, although that is probably a formality: the courts have been exceptionally deferential to the executive in declarations of emergencies, frequently referring to the President's "unreviewable discretion."
3. To use armed forces, he must find that violence is such as to prevent citizens from enjoying constitutional rights. This authority has been used very sparingly over the course of history, but

it clearly does not require that the deployment be at the invitation of the Governor of the State involved. Indeed, during the civil rights era Presidents Kennedy and Johnson invoked this authority to force integration of public schools over the objection of those Governors.

It is arguable that the Insurrection Act is inapplicable to the District of Columbia, since the Act repeatedly refers to violence occurring "in any State," and the term "State" is NOT defined to include the District (10 USC § 255) (it includes Guam and the V.I., but not D.C. and not Puerto Rico). But that is probably because the President already has the requisite authority to mobilize the National Guard on his own initiative.

All of this, of course, constitutes serious derogations from the principle of Home Rule, and further illustrates the degree to which the District is entirely subservient to our federal overlords.

The President did NOT use these powers in dealing with the events of Lafayette Square, there is little doubt that he has these authorities, and is free to use them as I have outlined.

Questions

1. What would it take to fix the problems that you outlined?

Obviously were the District to become a State, some of the issues I have discussed would instantly evaporate. The municipal police force would operate without the threat of being coopted in service of the national government, and the commanding officer of the National Guard would be the governor, not the Secretary of the Army.

But: there are still circumstances in which the National Guard could be deployed without the consent of the State Governor (under the National Defense Authorization Act of 2007), and the Insurrection Act would still give the President nearly unbridled discretion to deem violence to be sufficiently serious as be tantamount to insurrection, justifying the use of armed troops, even were the District a State.

Short of statehood, certainly the Home Rule Charter could be amended to remove the authority to federalize the Metropolitan Police, as Cong. Norton has proposed. Given, however, the disregard that seems to characterize this administration's and the Senate's attitude toward the District, it seems unlikely that such a bill could become law until 2021, at the earliest.

2. Can there be any argument that the President has abused his discretion?

Probably not. Generally speaking, the President's invocation of national security is not judicially reviewable. *See*, *for example*, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1848); *Alabama v. United States*, 373 U.S. 545 (1963). This deference would seem applicable to the federalization of the MPD, the deployment of the National Guard, and the invocation of the Insurrection Act.

While the deference is not absolute – see *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) – that decision itself suggests that national security decisions that do not present direct conflicts with constitutional or statutory rules are within the zone of the president's maximum authority.

In no reported case has the president's invocation of the Insurrection Act been successfully challenged as *ultra vires*.

3. How unusual is it that the President would invoke the Insurrection Act over the objection of a State governor?

It is quite unusual, but not unprecedented. The Act was triggered 13 times in the 20th century (it has not yet been invoked in the 21st). Governors did not invite, or consent to, the use of federal military force in four of those instances. All of them involved efforts to integrate public schools: Arkansas in 1957 (Pres. Eisenhower), and Mississippi in 1962 and Alabama twice in 1963 (Pres. Kennedy).

The most recent use of the Act was by Pres. (GWH) Bush in 1992, when at the invitation of the State's Governor, troops were sent to Los Angeles, CA, to assist in quelling the riots following the Rodney King verdict.