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The American Presidency: Has It Helped Us "To Form a More Perfect Union"?

By Forrest McDonald

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The Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002-4999
U.S.A.
202/546-4400

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When the Framers of the Constitution set out in 1787 to form a more perfect union, the indispensable element in their undertaking was the creation of the Presidency. One reason for this was structural: apart from the inability of Congress to collect taxes, the greatest weakness of the arrangements under the Articles of Confederation was the absence of an executive arm. Possibly a more important reason was symbolic: the new United States needed (as the nation sorely needs now) someone to whom it could look as the embodiment of public virtue and private morality—a leader who represented the best of what America aspired to be. It had such a person in George Washington, who had in fact been the Union since 1776, holding it together despite a Congress that was as corrupt, inept, and divisive as its successor is today. The Presidency was designed to institutionalize the symbolic role; but the terms of Article II of the Constitution, providing for the office, were left deliberately vague in the understanding that Washington would fill the blank spaces appropriately.

Because of the imprecision of the Constitution regarding the executive power, and also because of the varying quality of the men who occupied the Presidency, the balance of strength shifted among the three branches of the federal government for the first century until, from the 1890s to the early 1930s, a working equilibrium was reached. The balance ended during Franklin Roosevelt's New Deal; and for almost exactly forty years after Roosevelt's inauguration, Presidential power grew at a dazzling pace. Then, in reaction to the Presidencies of Lyndon Johnson and Richard Nixon, Congress reasserted itself, passing legislation aimed at making the executive branch responsible to the legislative. But while the new laws tied the President's hands, they did not reduce the responsibilities that the modern Presidency had assumed. Accordingly, deadlock and paralysis ensued, and for the foreseeable future they promise to be with us.

The problem did not merely arise from the fact that different parties controlled Capitol Hill and the White House for twenty of the twenty-four years before 1993, nor from the fact that the present incumbent is a moral and intellectual bankrupt. Rather, it is institutional, deeply rooted, and probably ineradicable. I shall attempt to justify that pronouncement by tracing the evolution of the Presidency from four perspectives:1) the Presidency and the law, 2) the Presidency and the bureaucracy, 3) the Presidency and the legislative process, and 4) the Presidency and the conduct of foreign relations.

Law Enforcement

The Constitution charges the President to "take Care that the Laws be faithfully executed," but for more than a century law enforcement was among the least important of his duties. For one thing, there were not many federal laws to enforce. Abraham Lincoln, in his first annual message, estimated that all the public laws enacted by Congress to that time could be printed in two

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Forrest McDonald is a Distinguished University Research Professor at the University of Alabama and an advisor to The Heritage Foundation's Salvatori Center for Academic Leadership. Dr. McDonald's book, *The American Presidency: An Intellectual History*, was published this year by the University Press of Kansas.

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reasonable-sized volumes. Moreover, the Justice Department was not created until 1870, and Congress refused to allow it to conduct investigations until 1909.

Since then, the corpus of federal law and the machinery for enforcement have grown enormously; but the overall trend throughout the twentieth century has been toward a breakdown of the capacity for enforcement. One major reason is the ever-growing penchant of Congress to enact bad legislation—that is, bad in the sense of being poorly crafted, or extending into areas that are best left to state and local authorities, or simply unenforceable at any level.

Another reason for the decline in law-enforcement capability is that Presidents or their attorneys general have, since Teddy Roosevelt pioneered the technique, found almost irresistible the temptation to transform enforcement into theater for short-range political advantage. Roosevelt gained himself a reputation as a "trust buster" without actually harming any trusts, and by such means became the first Vice President who, having succeeded to the Presidency upon the death of the incumbent, managed to be elected to the office. Tops in the law-enforcement-as-theater department was President Bush's deployment, in December 1989, of armed forces to invade Panama, oust President Manuel Noriega, and transport him to Florida to stand trial on drug trafficking charges. In April of 1992, he was convicted on eight of ten drug and racketeering counts; President Bush triumphantly heralded the conviction as a powerful message to drug kingpins. And thus the President won the war on drugs, thereby justifying the kidnapping and the illegal deployment of American soldiers.

Such theatrics, together with repeated revelations of law violations by Presidents and exposés of the many ways congressmen set themselves above the law (and Clinton is going to campaign for Rostenkowski because he is a valuable member of the House), have resulted in a collapse of public trust in the law, in law makers, and in law enforcers. And without that trust, as John Locke taught and the Framers of the Constitution understood well, there can be no government of laws.

In modern times it has come to be expected that Presidential excesses will be restrained by the Supreme Court, but the fact is that Court orders to the President are recent and probably transient phenomena and run counter to the history of the relationship between the two branches. Apart from the defiance of John Marshall by Presidents Jefferson and Jackson, there were no major clashes between the Court and the Presidency before the Civil War; and when they came it was evident that the judiciary was, as Hamilton had described it, "the least dangerous" branch of the federal authority.

The commonsense passivity or restraint displayed by the judges accorded with the doctrine of the "political question," which is more or less a subdivision of the doctrine of the separation of powers. Theoretically, each branch has its proper sphere of action; certain activities are the function of the political branches—those that are elected, namely the legislative and the executive—whereas the adjudication of "cases and controversies" between individuals or groups who have "standing" is a function of the judiciary.

Only in 1974, when the Court ordered President Nixon to turn over the White House tapes, did the judiciary give a direct command to a President. Nixon would doubtless have defied the order, except that six days later the House Judiciary Committee referred three articles of impeachment to the full House. Clearly the threat of action by the other political branch led the President to bow to the judiciary.

Some of the President's constitutionally enumerated powers seem to contradict the "take care" clause, namely those authorizing him to grant pardons and reprieves. The most important applications of the pardoning power have been blanket pardons or amnesties. Jimmy Carter, for

example, issued an amnesty for Vietnam war draft evaders. The granting of amnesties amounts to a wholesale dispensation of the law.

Another way in which Presidents decline to enforce laws is through "impoundment"—a selective refusal to spend money that Congress has appropriated. Impoundment has been going on since Jefferson's time. The most publicized ones, those made by the Nixon Administration, were sometimes justified on statutory or constitutional grounds, but more often it was assumed that the power simply inhered in the Presidency. In the wake of his reelection in 1972 by the largest margin in modern history, Nixon began a campaign of impoundments designed to end various congressional programs in their entirety. Some congressmen feared that the whole domain of public spending would come to be ruled by Presidential prerogative.

To prevent that, in 1974 Congress enacted the Congressional Budget and Impoundment Control Act. Under the act, impoundments were subject to veto by either House of Congress. The act might have been challenged on constitutional grounds, but Gerald Ford (when he became President) chose to regard the act as a new source of authority for impounding funds, and he used it to make more than a hundred policy impoundments a year, whereas Nixon had never exceeded a few dozen in a year. Congress reacted by making expenditures mandatory and by making appropriations ever more rigid—which, in a curious way, impaired the enforcement of another congressional mandate. Back in 1946, Congress had charged the President with maintaining a healthy economy—which included restricting government expenditures. By closing off impoundment as a Presidential tool, Congress was denying the President a way to enforce one major law by enacting another that contradicted it.

Presidency & Bureaucracy

By most accounts, the quality of the personnel in federal service, at least at the upper levels, was high from 1789 until 1829, after which time government jobs began to be distributed through the "spoils system." Andrew Jackson thought the spoils system was an improvement over the old way, in which educated elites had looked upon office "as a species of property." "The duties of all public officers," he declared, "are... so plain and simple that men of intelligence may readily qualify themselves for their performance." Besides, he believed, "more is lost by the long continuance of men in office than is generally to be gained by their experience." But the system did produce a great deal of corruption and ineptitude.

Then, in 1883 reformers won out with the Pendleton Act and later with amendments to it. Chester Arthur and every succeeding President but one through Coolidge issued executive orders extending the "classified service," as it was called, meaning civil service jobs filled through examinations and held during good behavior. By 1928 about eighty percent of positions below policy-making level were covered.

Accompanying the expansion of civil service was an expansion of the regulatory functions of the federal government, which took place on two distinct tracks. One was through independent agencies, regulatory bodies unattached to any executive department. The first of these, the Interstate Commerce Commission, was established in 1887. Today there are thirty-two independent agencies that are classified as "major" and twenty-three that are classified as "minor." More commonly, expansion of regulatory functions took place inside the framework of executive departments. As of 1992, there were nearly 800 regulatory agencies operating inside the executive departments. All these units represent a delegation of executive power from the President to entities which are not necessarily responsible to him—or to anyone.

From the point of view of the President as administrator, the twentieth century has witnessed repeated attempts by Presidents to gain control of the sprawling federal bureaucracy, often over

the opposition or foot-dragging of Congress and always over the opposition of the bureaucracy itself. One area of leverage lies within the President's appointment and removal powers. The appointment power, though having been shrunk through the workings of the merit system, remains formidable. The removal power is a mixed affair. In 1926 the Supreme Court rendered a full-scale decision on the subject, holding in *Myers v. United States* that the President's power to remove his appointees was virtually absolute. Nine years later, however, the Court restricted the President's removal power somewhat by holding that the commissioners of the independent agencies were not subject to arbitrary removal by the President.

The battle for control of administration had actually long since been joined in a more direct way. It began, as so much did, with Theodore Roosevelt. Roosevelt appointed a commission to study the scientific work being done by federal agencies and to recommend means of coordinating that work. Nothing came of the commission's report, but Roosevelt was so pleased by the prospects for administrative reform that he appointed another commission, headed by Charles Keep. The Keep Commission attracted considerable publicity by exposing corruption, duplication, overlap, and a total lack of system. It learned that sizable numbers of civil servants were underemployed, many having almost nothing to do. It encountered powerful bureaucratic resistance to change; for example, most office workers were loath to use typewriters (the average government employee used twenty-three pencils a month) and bookkeepers were disdainful of the new adding machines. The Keep Commission made eleven formal proposals, none of which Congress acted upon. Indeed, many congressmen were incensed by the commission's very existence, for it represented a serious effort by the executive to assert authority over administration. (Those who would "reinvent government" more often merely reprise a history of which they are willfully ignorant.)

William Howard Taft, however, was given an opportunity for seeking administrative control. Congress was in a stew about the frequency of deficits (eleven small deficits in seventeen years), and it authorized Taft to study the bureaucracy to identify ways to reduce expenditures. The real problem was, as Taft told Congress, that "the United States is the only great Nation whose Government is operated without a budget." Instead, the various departments drew up estimates of their required expenditures and submitted them directly to the appropriate congressional committees. Taft proposed to bring the budgetary system under the supervision of the President—which would place the entirety of the Administration under Presidential management. Congress refused to go along with the plan, but in the Economy Act of 1933 Congress did grant the authority to Franklin Roosevelt.

At first Roosevelt made little of the authority, but after his reelection in 1936 he set in motion a plan to concentrate executive power. He appointed a commission, chaired by Louis Brownlow, which drew up a blueprint for reorganization that would place all federal agencies under the direct and exclusive command of the President. The report met a storm of criticism in Congress, which was just then fighting over Roosevelt's court-packing scheme, and cries of "dictator!" were heard—but eventually most of the proposals were enacted. That, together with Roosevelt's re-election for third and fourth terms, the great concentration of power in Washington during World War II, and the commencement soon afterward of the Cold War, brought into existence what political scientists call the Institutional Presidency.

The Institutional Presidency, streamlined somewhat by the work of the Hoover Commission, actually worked for a time. But then came Johnson and Nixon, who paralyzed the government by pushing it beyond its limits. Johnson was more masterful at having his way with Congress than any of his predecessors except Jefferson and FDR, but he believed that no problem was beyond the remedy of passing a law. The policies he pushed through, moreover, were rarely thought out. Johnson White House aide Joseph Califano said afterward that "often we didn't

know where to put a program... and we didn't particularly care... we just wanted to make sure it got enacted. That's one reason," he added in an understatement, "why the government is disorganized now."

Most disruptively, Johnson shifted administration away from the federal government to what has been called indirect or "third-party government." Responsibility for attaining congressionally mandated goals was increasingly delegated to government-sponsored enterprises, endowments, contractors, nonprofit corporations, and quasi-private businesses. Grants to these entities were funneled through a large number of federal agencies; the budgets of the largest departments came to support four indirect workers for every one listed on the federal payroll.

Nixon's contribution to the mess was more subtle. At first he showed little interest in administration, saying that "All you need is a competent Cabinet to run the country at home. You need a President for foreign policy." Soon, however, the department heads "went off and married the natives," and Nixon came to regard the bureaucracy as his veriest enemy. To counteract it, he vastly enlarged the executive office staff, doubling it to more than 4,000. In his bitter opposition to bureaucracy, he "built his own."

One direct byproduct of the bureaucratization of the White House was a breakdown of internal communication and the development of "deniability." Fragmentation of communication and "deniability" operations not only prevent the President from managing his own or the larger bureaucracy; they also cut him off from responsibility.

In the meantime, somewhere along the line the federal government ceased to be the large and unwieldy but still manageable organism that John F. Kennedy had inherited. It was, rather, a huge, amorphous, nameless blob, like a creature out of science fiction. Such minor improvements as Ronald Reagan was able to make were negated under George Bush, who just did not seem to care. Bill Clinton, who made a campaign promise to cut White House and executive staff by one-quarter, announced during his third week in office that he had done so; but the action was illusory, since a) nearly half the cuts were of personnel on "loan" to the White House from other executive agencies who were simply returned to their parent agencies, and b) Clinton did not include in his base figures employees of the Trade Representative's Office and the Office of Management and Budget, who constitute nearly a third of the Presidential staff. To date the only "permanent" change has been the creation of another advisory body—the Council of Economic Advisers.

Presidency & Legislation

The Constitution vests the President with a share in the enactment of legislation in two ways: negatively through the veto and positively through the charge that "from time to time" he "recommend... such Measures as he shall judge necessary and expedient." As for the veto, the early Presidents used it sparingly. One early veto, however—Jackson's veto of the Maysville Road bill—had momentous consequences. Jackson claimed that in disapproving the proposed appropriation to build a road he was acting on constitutional as well as policy grounds, since the road was entirely in Kentucky and thus the expenditure was not for the general welfare, as the Constitution required. His real reason was less principled, namely to take a shot at his despised political enemy, Senator Henry Clay of Kentucky.

The political implication was not lost on Members of Congress. When coupled with Jackson's subsequent claim that he had a right, as the sole representative of all the people, to be consulted prior to the enactment of legislation, the veto struck congressmen as a usurpation and a power play—a power play because the President could use the threat to veto pork-barrel projects in particular congressional districts to coerce individual legislators.

To frustrate Presidential meddling in what Congress considered to be its own preserve, congressmen developed the practice of adding "riders" to legislation. The Framers had been familiar with the eighteenth-century English practice of heading off a veto by adding unrelated substantive features to appropriations bills or vice versa. The practice was so generally discredited that the Framers thought it unnecessary to prohibit it in the Constitution. Bills were restricted to one subject, and everyone accepted that unwritten rule. From the middle third of the nineteenth century onward, however, the insertion of riders became the norm in America.

After the Civil War, a new dimension, again concerning appropriations and the veto power, entered the relationship between the President and Congress. Historically, in England and America, it was a cardinal principle that government could not take money from one taxpayer and give it to another except in payment for supplies or services; but from the Grant Administration onward, Congress began to violate the principle.

Over the course of time, executive vigilance against congressional raids on the treasury greatly strengthened the prestige of the Presidency, but the passage of legislation loaded with riders repeatedly frustrated the President's endeavors. To overcome this problem, it has frequently been suggested, beginning with Grant, that the President should be given an item veto by constitutional amendment. It was rumored on several occasions that President Bush would put the item veto to a test in the courts, but he never saw fit to do so. The notion has a certain appeal in an age of runaway deficit financing, but in addition to shifting responsibility for appropriations from the House, where it is *constitutionally* lodged, to the President, it has an insuperable political objection: at a time when the primary function of congressmen has become the arranging of favors and money for constituents and political action committees, the item veto could be used by the President to reduce Congress to the status of a puppet show.

As for the recommending power, the early Presidents and their Cabinet officers drafted bills and helped steer them through Congress, but after the War of 1812 the legislative impetus shifted to Congress and remained there until the end of the century (Lincoln was a partial exception). The style of the Presidency in regard to legislation changed dramatically with Theodore Roosevelt. He insisted that there must be "progressive regulation" of "our gigantic industrial development," and toward that end he proposed a whole variety of laws. He had some success by carefully working with the old guard in Congress, but what was more important was a tactic he employed, one that grew naturally from his exuberant soul and his sanguine spirit. He played to the crowd by urging reform and claiming responsibility for it—even when the measures were not actually reforms. Roosevelt's showmanship in pretending to be the fountain of reform legislation transformed the expectations Americans had for their Presidents and opened the door for the emergence of the Legislative Presidency.

The man who went through the door was Woodrow Wilson. Wilson was the consummate outsider, an obscure state governor and former academician who was elected in 1912 with 41.8 percent of the popular vote in a race against the sitting President and a third-party candidate. The Democrats gained control of both Houses of Congress for the first time in a generation and the second since the Civil War, and there were 114 freshman Democratic Congressmen ripe for leadership. As for Wilson himself, he believed that the President should play the part of a "prime minister, as much concerned with the guidance of legislation as with the just and orderly execution of law"; and he had an almost messianic conception of himself. The combination was extremely effective for about two years.

The Republican Presidents of the 1920s continued the practice of drafting legislation and following its progress through Congress, but it was Franklin Roosevelt who turned legislation into a wholesale operation. During the hundred days in 1933, he pushed through major legislation on

a scale that would stand as the epitome of the Legislative Presidency. His honeymoon with Congress lasted for five full years.

But not even FDR could continue the pace forever. Having reached the pinnacle of legislative power and having taught the people to look to the President as the fountain of legislation that would remedy every problem, Roosevelt went too far and committed political blunders that made it impossible not only for himself but for his successors to fulfill the expectations he had aroused.

Harry Truman added an innovation to the Legislative Presidency—the submission of an annual legislative agenda, formulated for presentation in the State of the Union address and followed by detailed bills over the course of the following months. Few of his major proposals were enacted, but all his successors followed his precedent.

The abdication of legislative responsibility by Congress has since been institutionalized. By the 1980s, as many as 10,000 bills were being introduced in a session. In such circumstances, it was obviously impossible for Members of Congress even to read, let alone give serious consideration to, more than a small fraction of the proposals on which they voted. Their ever-growing staffs—from about 4,300 in the 1950s to 11,500 in 1973 to 32,000 in 1990—assumed responsibility for briefing the congressmen, staking out positions, writing their speeches, and advising them how to vote. Similarly, neither the President nor his ever-growing staff could read all the legislation that crossed his desk for consideration; the overwhelming mass of material made it necessary for him to sign and swear to enforce legislation that he had never read. Moreover, much of the drafting of legislation was farmed out to private-sector lawyers and lobbyists, and the more detailed and specific legislation was written in incomprehensible language.

Because of the legislative vacuum, as it has developed over time, Presidents have increasingly resorted to the issuance of executive orders. The courts hold that these have the force of law only when they are justified by the Constitution or when the power has been delegated by Congress, but in practice most executive orders are either upheld or unchallenged. Just how many executive orders have been issued is unknown: they have been numbered consecutively since 1907, and late in 1990 Executive Order 12,735 was issued; but there are also fractured numbers, so the total might be as many as 50,000.

All this is an outgrowth of what Theodore Roosevelt called the Stewardship Presidency, which boils down to the proposition that the President can do whatever he decides is in the interest of the country. Presidents, of course, have been most effective at aggrandizing their powers when the nation has been in a state of emergency. Between the Civil War and the Korean conflict, Congress and the courts proved willing during "war" time to cede, and Presidents proved eager to accept, powers virtually amounting to a suspension of the Constitution. Many non-war emergencies have also been declared, and Presidents commonly have neglected to declare them ended. FDR declared thirty-nine emergencies during his first six years in office, and in 1971 Congress was surprised to learn that the national emergency proclaimed during the banking crisis of March 1933 was still nominally in effect. So too were emergencies declared by Truman in 1950. Legislation passed in 1976 and revised in 1985 provided that Congress could terminate a Presidentially declared state of emergency by joint resolution, though as of now it has not yet seen fit to exercise the power.

That legislation was part of the general reaction against the high-handed ways of Johnson and Nixon, in which Congress tried to reassert the authority it had been forfeiting for four decades. Another was the Ethics in Government Act, creating the office of independent counsel, and yet another was the Congressional Budget and Impoundment Control Act of 1974. What the 1974 act did, besides curtail impoundments, was to set up a complex two-track budget system (one

congressional, the other executive) that in effect assured that nobody was responsible or accountable. Runaway deficits were the inevitable result.

President & Foreign Affairs

It is in the conduct of foreign relations that Presidents have, historically, had the freest hand—and, in recent years, the greatest conflict with Congress. George Washington established the principle that the Senate's share in the treaty-making power extended only to ratifying or rejecting treaties that Presidential emissaries make, not to an active role in the conduct of diplomacy; and throughout the nineteenth century, though the Senate often asserted itself and rejected treaties or parts of them, the primacy of the President was taken for granted. During the twentieth century, Presidents have increasingly relied less on treaties and more on executive agreements, which have the force of treaties but do not require senatorial approval.

Presidents also have made war without much interference by Congress. That may surprise some of you, since the Constitution explicitly vests Congress with the exclusive power to declare war; but the fact is that, though Congress has declared war on five occasions, Presidents have sent American forces to fight on foreign soil more than two hundred times. And today a new dimension has been introduced: whether demands for "humanitarian aid" or the worldwide protection of "human rights" take precedence over constitutional provisions.

In addition to the Presidential power to make war, there are the War Powers—the suspension during wartime of constitutional safeguards for the lives, liberty, and property of the citizenry. During World War I Congress conferred near-dictatorial powers on Wilson, and during World War II it conferred truly dictatorial powers on Roosevelt. The federal courts did not interfere, even though the Bill of Rights was essentially suspended for the duration.

Roosevelt declared that "when the war is won, the powers under which I act automatically revert to the people—to whom they belong." But they did not so revert because of the advent of the Cold War, which placed the government, the economy, and society on a semipermanent wartime basis. Each of the Cold War-era Presidents assumed powers to carry on the struggle. Perhaps the strongest statement of the position was made by Nixon, who regarded Congress as "irrelevant" in matters of national security and foreign relations. Asked in a television interview whether the President "can decide whether it's in the best interests of the nation to do something illegal," he replied, "Well, when the President does it, that means it is not illegal."

Congress disagreed. In opposition to that viewpoint it enacted legislation aimed at curbing Presidential power in two broad areas. The first was an attempt—unsuccessful—to restrict secret executive agreements. The other was the War Powers Resolution, which Congress passed over the President's veto in November 1973. Its intention was to make all future armed ventures by the United States the joint responsibility of Congress and the White House. The resolution required that "in every possible instance" the President "consult with Congress" before sending American forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated." If the President should send troops into such situations, he was required to notify Congress within forty-eight hours; and if Congress did not vote to approve, the forces must be withdrawn within sixty days.

As a gesture, the War Powers Resolution was a wholesome effort to correct abuses of Presidential power, and its enactment may have caused subsequent Presidents to act somewhat less precipitously. Whether it was constitutional was debatable. If one was guided by the letter of the Constitution, the Resolution was obviously constitutional; if one was guided by constitutional usage, it was clearly unconstitutional. Every President from Ford through Bush took the latter position, and unauthorized military interventions have continued.

In other words, the efforts of Congress to fetter the Presidency in the conduct of foreign relations have failed. Presidents still do whatever they see fit. The differences since the enactment of the restrictive legislation are two. One is that Presidents sometimes find it necessary to break the law in order to implement their decisions. The other is the can of worms that George Bush opened when he professed to be conducting the Gulf War in compliance with a United Nations mandate. If Presidents in future act to carry out U.N. decisions instead of their own, we may be in deeper trouble than we are now.

Conclusion

If things are as bad as I have depicted them—and I believe that if I have erred it is on the side of understating the case—then the federal government has all but lost its capacity to govern, and nothing the Clinton Administration can accomplish is likely to bring appreciable changes, except for the worse. Our governmental system was erected upon the understanding that governments are instituted among men for the protection of the rights of the citizens in their life, liberty, and property and that governments derive their just powers from the consent of the governed. I know of no one who would argue that the people's rights to life, liberty, and property are as secure as they once were, or who would argue that our government is any longer one based upon consent. In the absence of effective government, the Union, while politically secure, is socially in an advanced state of disintegration. And though it must be conceded that the United States is still the richest, most powerful, freest, and most nearly just nation in the history of the world, it does seem to me that time is running out unless we do something soon.