February 11, 2015

Streetwise Professor posts on how President Trainwreck wants to spread disaster to the internet.

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Kevin Williamson writes on the budget process.

President Obama has submitted a budget proposal to Congress. There are many possible responses that Congress might offer in return. The correct one is this: "Thank you for your input, Mr. President. But we'll take it from here."

We have three branches of government for a reason, and the Constitution invests each branch with certain powers and responsibilities, establishing divisions within government that have shown themselves, for more than a couple of centuries now, to be extraordinarily prudent. The president is not a prime minister, nor is he the republican model of government's ersatz king. He is the chief administrative officer in the federal government and commander-in-chief of the armed forces. He is given special responsibilities in the matter of foreign relations, notably in the negotiation of treaties and the making of war, though in both cases his authority is limited by that of the legislative branch, which can reject a proposed treaty and has the power to declare (or decline to declare) war.

He does not have any special constitutional role when it comes to budgets. The Constitution invests the House with the power to initiate revenue bills and the Senate the power to propose or concur with amendments to such bills. The president has a relatively large role in external affairs; in internal affairs, particularly matters of taxing and spending, Congress should — should — play the dominant role. Which is not to say that the president shouldn't propose a budget plan, if he thinks he has some good ideas. (This one doesn't, though he may think that he does.) But Congress is under no special obligation to act on them, or to give them any special consideration.

One of the problems with our currently lopsided mode of government — in which the president is the central player in government across the board — is that we have come to think of the president as the national actor and Congress as the national reactor. ...

John Fund and Hans Von Spakovsky on Eric Holder's politicization of Justice.

Departing attorney general Eric Holder's claim this week in a press conference that there has "been no politicization" of the Justice Department under him makes it appear as if he is living in a Potemkin-like state of denial in the main Justice building. Holder went so far as to claim that he had been forced to clean up the department he took over from the Bush administration. "You want to look at a Justice Department that's been politicized, you look at the one I inherited," he claimed.

When we were researching our recent book on Holder's six-year tenure at Justice, we talked to numerous career employees who were shocked at how much further Holder had gone than any previous administration in politicizing Justice. One longtime lawyer in the Civil Rights Division told us that Holder had

racialized and radicalized the Division to the point of corruption. They embedded politically leftist extremists in the career ranks who have an agenda that does not comport with equal protection or the rule of law; who believe that the ends justify the means; and who behave unprofessionally and unethically. Their policy is to intimidate and threaten employees who do not agree with their politics, and even moderate Democrats have left the Department because they were treated as enemies by administration officials and their lackeys.

Holder said that the "notion" that DOJ has been politicized is "totally inconsistent with the facts." But the facts show that the politicization started almost immediately, such as when political appointees at Justice ordered the dismissal of the New Black Panther Party voter-intimidation case at the beginning of 2009 because they did not want to enforce the Voting Rights Act against black defendants, ending the race-neutral enforcement of the law. ...

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As attorney general, Holder has had a chance to atone for his bad pardon recommendations by pushing commutations for low-level federal inmates who don't have cozy connections with Democratic heavyweights. But he has been slow to use the pardon attorney's office to champion relief for low-level drug offenders -- many of them minorities -- sentenced to decades behind bars thanks to the excesses of federal prosecutors. Holder can be brutal when black communities charge racial profiling by beat cops, who don't work for Washington, but not on overzealous federal law enforcement under his own jurisdiction.

In his first term, Obama issued one commutation. Finally, in December 2013, Obama commuted the sentences of eight crack offenders serving draconian federal mandatory minimum terms. That was great. But then in April, Holder announced a clemency initiative for nonviolent low-level drug offenders who had served at least 10 years and stayed out of trouble. There have been 11 commutations since then -- which makes the new initiative a cover for the administration's paucity on pardons and commutations.

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Streetwise Professor
Obama Bigfoots Net Neutrality: Wasn't Screwing Up Health Care Enough of a Legacy?
by Craig Pirrong

Last week the Chairman of the Federal Communications System announced that the FCC will pursue net neutrality regulation by subjecting the Internet to Title II of the Federal Cable and Telecommunications Act. This will essentially treat the Internet as a utility, rather than as an information service as has been the case since 1996. Like telecoms, Internet Service Providers would effectively become common carriers subject to a panopoly of restrictions on the prices they can charge and their ability to control access to their infrastructures.

The issue is an extremely complex one, and moreover, one that has been subjected to a barrage of simplistic, propagandistic, rhetoric. To cut through the rhetoric to see the economics, I recommend this article by Gary Becker, Dennis Carlton, and Hal Sider.

Becker, Carlton, and Hal characterize the goals of net neutrality as follows:

In the FCC's view,

its proposed net neutrality rules would "prohibit a broadband Internet access provider from discriminating against, or in favor of, any content, application or service." Broadband access providers would be prohibited from: (1) prioritizing traffic and charging differential prices based on the priority status; (2) imposing congestion-related charges; (3) adopting business models that offer exclusive content or that establish exclu- sive relationships with particular content providers; and (4) charging content providers to access the Internet based on factors other than the bandwidth supplied. [References omitted.]

In a nutshell, NN rules and Title II would limit the pricing policies of ISPs, limit their ability to regulate access to their networks, and limit their ability to vertically integrate upstream or downstream (e.g., by purchasing content providers).

The motivation for all of this is a belief that the broadband industry is not competitive, and that price discrimination, access limitations, and vertical integration are means of exercising market power to the detriment of consumers downstream and suppliers of content upstream.

As Becker *et al* point out, however, evidence that competition is weak is lacking. Most consumers have choices of broadband providers, and the development of wireless services such as 4G is increasing consumer choice. (Personally, I would estimate that I have gone from relying 100 percent on wired access to 50 percent wired-50 percent wireless. The focus of Facebook and other social media and content suppliers on mobile indicates how important wireless is becoming.) Moreover, there is considerable switching of suppliers, which is further indication of competition.

Further, as a general matter, price discrimination is often-one might say usually-welfare enhancing when there products are differentiated and the costs of these products differ. Different forms of content utilize different amounts of bandwidth. Services vary in their need for speed (e.g., streaming vs. ordinary web-browsing vs. email). It is more costly to deliver bandwidth-intensive services. Limiting the ability to charge prices that reflect differences in cost and value lead to misallocations in the use of existing bandwidth capacity, and tend to reduce incentives to invest in capacity. Moreover, the "two-sided" nature of the Internet tends to make price discrimination welfare-improving. (This paper by Weismen and Kulick makes the very useful distinction between "differential pricing" and "price discrimination." The former is based on differences in cost, the latter on differences in demand elasticity across customers.) In addition, when there are strong economies of scale, price discrimination (e.g., Ramsey pricing) can be a first-best or second-best way of allowing producers to cover fixed costs.

Put differently, net neutrality/common carrier access treats the internet as a commons which limits the use of prices to allocate scarce resources. Yes there can be cases in which this is beneficial (as in a textbook natural monopoly, but sometimes not even then), but suppressing the price system and price signals is usually a horrible idea. The rebuttable presumption should be that we rely more, not less, on prices to allocate scarce resources and provide incentives to consume, produce, and invest. Net neutrality betrays a strong animus to the price system and the use of prices to allocate resources.

Vertical arrangements are also frequently looked on with deep suspicion. I wrote about this a lot in the context of exchange ownership of clearing some years ago. But usually vertical arrangements, including restrictive contracts and vertical integration, are contractual means to address inefficiencies in price competition. They are typically ways of internalizing externalities or constraining opportunistic behavior. Moreover, they are often particularly important in information-intensive goods, because of the difficulties of enforcing property rights in information and the pervasiveness of free riding on information goods.

Some of the horror stories NN advocates tell involve an ISP denying access to a service or content downstream consumers value high: usually the story involves a small startup proving a bandwidth intensive service that can't afford to pay premium access charges. But in a world where venture capital and other forms of funding is constantly on the lookout for the next big thing, these concerns seem vastly overblown. Moreover, permitting ISPs to own content providers is one way of addressing this issue. The demand for ISP services is derived from the value customers get from the content and services an ISP delivers. It is self-defeating for them to exclude truly valuable content because it reduces demand, and they have incentives to structure pricing and terms of access and vertical arrangements with content providers to maximize value. If there are gains from trade, in a reasonably competitive market there are strong forces pushing entities at all segments of the value chain to reap those gains.

Suppressing price signals and limiting the ability to craft creative arrangements to capture gains from trade are bad ideas, except under exceptional circumstances. So color me deeply skeptical on NN. Other features inherent in intrusive regulatory systems like Title II due to public choice considerations only deepen that skepticism. Such systems are extremely conducive to rent seeking. Though usually sold as ways to enhance competition, in practice they are typically exploited by incumbents to restrict competition. They tend to be strongly biased against innovation-precisely because much innovation of the creative destruction variety is intensely threatening to incumbents who have an advantage in influencing regulators. Classical Peltzman-Becker models of regulation show that regulators have an incentive to suppress cost-justified price differentials in order to redistribute rents, thereby creating distortions.

Other than that, NN and Title II are great.

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I guess not. No price is to high to pay to stick it to the evil Republicans. And if you get stuck too, well, omelet, eggs, and all that. You are expendable when there's a legacy at stake.

What comes out of the FCC as a result of Obama's arm-twisting will be a beginning, not an end. It will no doubt set off a flurry of legal challenges.(Among lawyers and lobbyists, as always in such things, there is much rejoicing.) Congress may get involved, and although Obama can block anything for the next two years, it may take longer than that to finalize the rules (look at how long it is taking to get a simple-by-comparison position limit rule through the CFTC), and a new president in 2017 might not be so enamored with burnishing Barry's legacy. Well, one can hope, can't one? Looking for silver linings here.

I had thought that old school Progressive and New Deal style regulation had been largely discredited in the 70s and 80s. Indeed, Democrats (including Carter and Ted Kennedy) played vital roles in dismantling regulations in transportation in particular. But Obama is going all back to the future, and attempting to impose a regulatory paradigm that was all the rage when men all wore fedoras to what is arguably the most dynamic and innovative industry ever. Because, legacy.

National Review

Responding to Obama's Budget

A return to normal order is in order: In budgetary matters, Congress should play the dominant role.

by Kevin D. Williamson

President Obama has submitted a budget proposal to Congress. There are many possible responses that Congress might offer in return. The correct one is this: "Thank you for your input, Mr. President. But we'll take it from here."

We have three branches of government for a reason, and the Constitution invests each branch with certain powers and responsibilities, establishing divisions within government that have shown themselves, for more than a couple of centuries now, to be extraordinarily prudent. The president is not a prime minister, nor is he the republican model of government's ersatz king. He is the chief administrative officer in the federal government and commander-in-chief of the armed forces. He is given special responsibilities in the matter of foreign relations, notably in the negotiation of treaties and the making of war, though in both cases his authority is limited by that of the legislative branch, which can reject a proposed treaty and has the power to declare (or decline to declare) war.

He does not have any special constitutional role when it comes to budgets. The Constitution invests the House with the power to initiate revenue bills and the Senate the power to propose or concur with amendments to such bills. The president has a relatively large role in external affairs; in internal affairs, particularly matters of taxing and spending, Congress should — should — play the dominant role. Which is not to say that the president shouldn't propose a budget plan, if he thinks he has some good ideas. (This one doesn't, though he may think that he does.) But Congress is under no special obligation to act on them, or to give them any special consideration.

One of the problems with our currently lopsided mode of government — in which the president is the central player in government across the board — is that we have come to think of the president as the national actor and Congress as the national reactor. As Charles C. W. Cooke pointed out in a recent episode of "Mad Dogs and Englishmen," the media and the political classes inevitably will greet the president's budget proposal as the starting point in a negotiation between the branches, meaning that if Congress has ideas of its own — which it should — then this will be received as resistance to the president, whose implicit authority in this theater, as in practically all others, is simply assumed. It is for this reason that we find ourselves in the odd position that when Congress disagrees with the president, it is Congress that is characterized as "obstructing." Never mind, for the moment, that obstruction is a fundamental feature of American governance, and a very useful one — why should the president, regardless of his party, be deferred to as though that were the natural order of things?

Part of this is a result of the truncated attention span of the American public and the media. There is only one president, so he is relatively easy to keep up with. There are 535 members of Congress, a mess of committees and subcommittees, various obscure legislative processes, etc. In the great tragedy of American politics, the president is Hamlet, while the House and the Senate are Rosencrantz and Guildenstern — or Guildenstern and Rosencrantz; it is difficult to keep them straight. Part of it is also the lamentable and nearly universal human gravitation toward paternalistic rulers, the endless procession of Big Men who have endured from caveman days to the present. Members of Congress, who ought to be jealous of their own prerogatives, have all too often abased themselves before the heroic presidency, especially when the president is a member

of their own party, and especially especially when deferring to the executive liberates them from making difficult and potentially unpopular decisions.

Congress ought to have some institutional self-respect, defend its proper role in domestic affairs, and show a little love for the best of its traditions.

That means a return to “regular order,” especially on budgetary matters. That means no grand bargain with the president, just the boring, laborious, unglamorous process of sending twelve appropriations bills through the committee process and then bringing them to the floor of each legislative chamber, formally conferencing to work out differences between the houses, and then presenting their work to the president. If he vetoes one or all of those appropriations bills, he vetoes it, and the process begins again — from the beginning. The president can offer his usual non-argument for why he should be deferred to — “I won” — and 535 members of Congress can answer in kind.

Political outcomes matter, especially in the short run. But political process matters, too, especially in the long run. And the distortion of the American processes of government — mutilating a republic until it resembles a perverse blend of Gaullist rule-by-fiat, mob rule, and beauty pageant — will prove expensive and destructive in the long run, for Americans of all political persuasions. Democrats who are for the moment enamored of the caesaro-papist presidency should meditate for a moment on the prospect of a President Walker, President Jindal, or President Paul.

National Review

Eric Holder’s State of Historic Denial

Holder politicized the Department of Justice to an extent never before seen.

by John Fund & Hans A. von Spakovsky

Departing attorney general Eric Holder’s claim this week in a press conference that there has “been no politicization” of the Justice Department under him makes it appear as if he is living in a Potemkin-like state of denial in the main Justice building. Holder went so far as to claim that he had been forced to clean up the department he took over from the Bush administration. “You want to look at a Justice Department that’s been politicized, you look at the one I inherited,” he claimed.

When we were researching our recent book on Holder’s six-year tenure at Justice, we talked to numerous career employees who were shocked at how much further Holder had gone than *any* previous administration in politicizing Justice. One longtime lawyer in the Civil Rights Division told us that Holder had

racialized and radicalized the Division to the point of corruption. They embedded politically leftist extremists in the career ranks who have an agenda that does not comport with equal protection or the rule of law; who believe that the ends justify the means; and who behave unprofessionally and unethically. Their policy is to intimidate and threaten employees who do not agree with their politics, and even moderate Democrats have left the Department because they were treated as enemies by administration officials and their lackeys.

Holder said that the “notion” that DOJ has been politicized is “totally inconsistent with the facts.” But the facts show that the politicization started almost immediately, such as when political appointees at Justice ordered the dismissal of the New Black Panther Party voter-intimidation case

at the beginning of 2009 because they did not want to enforce the Voting Rights Act against black defendants, ending the race-neutral enforcement of the law.

It was pure politics that dictated the policy that no cases be filed under the National Voter Registration Act to enforce the requirement that states maintain the accuracy of their voter rolls. It was pure politics when Holder rejected the opinion of Justice's Office of Legal Counsel — an opinion held since the Kennedy administration — that legislation intended to give the District of Columbia a voting member of Congress is unconstitutional.

Holder could make better use of his time reading the report released by his own Inspector General (IG) in 2013 about the Civil Rights Division. It is a disturbing, sad commentary on the mismanagement and misbehaver of the people who work there, problems that were greatly exacerbated by the present administration. Holder complained about hires "for political reasons" during the Bush administration.

Yet he fails to acknowledge that the hiring in the career ranks of that division has been 100 percent, unapologetically political during his tenure, as outlined in a series of articles that looked at the résumés of everyone hired there. Justice's own IG found that one office in the division "passed over candidates who had stellar academic credentials with some of the best law firms in the country" in order to hire others they preferred, a majority of whom came from just five advocacy organizations that are political allies of the Obama administration.

Holder claims that his people have been "dedicated to doing things only on the basis of the facts and the law." That is certainly not what a number of federal judges have thought about the abusive cases that Justice has brought under the Freedom of Access to Clinic Entrances Act with the intention of intimidating the pro-life movement. Many of these prosecutions have been thrown out for lack of evidence and for violating the First Amendment rights of peaceful protesters. A Florida case that was dismissed led the judge to wonder whether the prosecution was the "product of a concerted effort between the government and the [abortion clinic] . . . to quell [the defendant's] activities rather than to enforce the statute." In other words, the judge believed the defendant had been targeted for her political beliefs.

Similar cases have been filed in the area of environmental law. At the behest of the administration's environmental allies, there was the lawsuit filed against storied guitar maker Gibson Guitar for supposedly importing prohibited wood that, the DOJ finally had to admit, was *not* prohibited. Holder's Justice Department has colluded with those same environmental groups to impose dozens of new regulatory rules through a "sue and settle" scheme by which Justice does not defend in lawsuits brought by its political friends. That allows the administration to implement the rules it wants without going through the required regulatory process, skipping public notice and review.

Holder also wants to ignore the numerous cases in which Justice has been accused of prosecutorial abuse or wrongdoing. In New Orleans, for example, in a case against local police officers, the federal judge accused the Justice Department of "grotesque prosecutorial abuse" and pointed a finger directly at Eric Holder, who presided over a major press conference announcing the indictments "with much fanfare." Holder never held a similar press conference to apologize for what his prosecutors had done or for their win-at-any-cost mishandling of the case. The judge reminded Justice that "the Code of Federal Regulations, and various Rules of Professional Responsibility, and ethics . . . do not take a holiday."

What is sad is that Holder is "proud of the historic things" he has done at Justice. Does that include the politically motivated pardons — for international fugitive Marc Rich or the unrepentant Puerto

Rican FALN terrorists — that he arranged in his prior tenure at Justice during the Clinton administration?

Through his mishandling of Operation Fast and Furious (which provoked a contempt citation from Congress), his imposition of the Clinton-era model of handling terrorism as ordinary criminal violations, his refusal to provide Congress with the information it is entitled to in its oversight function, his arbitrary refusals to enforce or defend federal laws that he and President Obama don't like, Holder politicized the department to an extent never before seen, despite his furious denials. That is not a "historic" record to be proud of.

Eric Holder and Barack Obama came into their respective offices promising transparency, openness, and adherence to the rule of law. Instead, we have seen the exact opposite from both of them, with Eric Holder acting as President Obama's enabler to violate the law and the Constitution. We need a new attorney general, one who will not repeat that behavior but instead will act to undo the enormous damage that Holder has inflicted on the professionalism of the Justice Department — an attorney general willing to rein in the president when he tries to abuse his executive authority.

San Francisco Chronicle
Eric Holder's Sorry Sense of Justice
by Debra Saunders

Thursday morning's "Building community trust" roundtable discussion in Oakland, California, with Attorney General Eric Holder, local law enforcement, elected officials and community leaders was designed to "build trust between law enforcement and the communities they serve." After brief remarks, Holder and company dismissed the press corps.

It is a courtesy, a Department of Justice spokesman explained, to allow participants to speak more candidly. And I knew that was the plan. Still, it was painful to watch as Holder spoke in favor of "body-worn cameras" for law enforcement officers who put their lives on the line and then effectively turned off media cameras that might have recorded any real dialogue, mayhap, of public officials whose polished images are on the line.

According to an email, Oakland police Chief Sean Whent "shared some of the Oakland Police Department's ongoing public safety efforts and crime strategies including the (Operation) Ceasefire violence reduction strategy, Procedural Justice training, and (the department's) involvement in youth mentoring programs." Oakland Mayor Libby Schaaf later told me, "It was a dialogue about the issue of community trust, particularly with law enforcement." A black Oakland police officer talked about growing up in Oakland. A Berkeley High student spoke about "white privilege." Schaaf said she suggested that camera use during police training might help "to uncover people's unconscious bias."

But I missed all that, so let me vent about Holder. As he readies to step down from his Cabinet post, America's top lawman will be remembered most for his skill at putting partisan politics first. Sure, he likes to don a mantle of social justice, but he doesn't walk the walk.

Holder's big hurdle to win confirmation as President Barack Obama's head enforcer in 2009 was rooted in his actions as deputy attorney general to President Bill Clinton. Holder infamously gave Clinton cover to issue his 177 out-the-door presidential pardons Jan. 20, 2001. Holder even gave a

"neutral, toward leaning positive" recommendation to a pardon for Marc Rich, who fled the country after the feds indicted him in 1983 for evading $48 million in income taxes and illegally buying oil from Iran during the 1979 hostage crisis. Ex-wife Denise Rich was a prominent Democratic donor. The pardon wiped clean charges for which the fugitive evaded trial.

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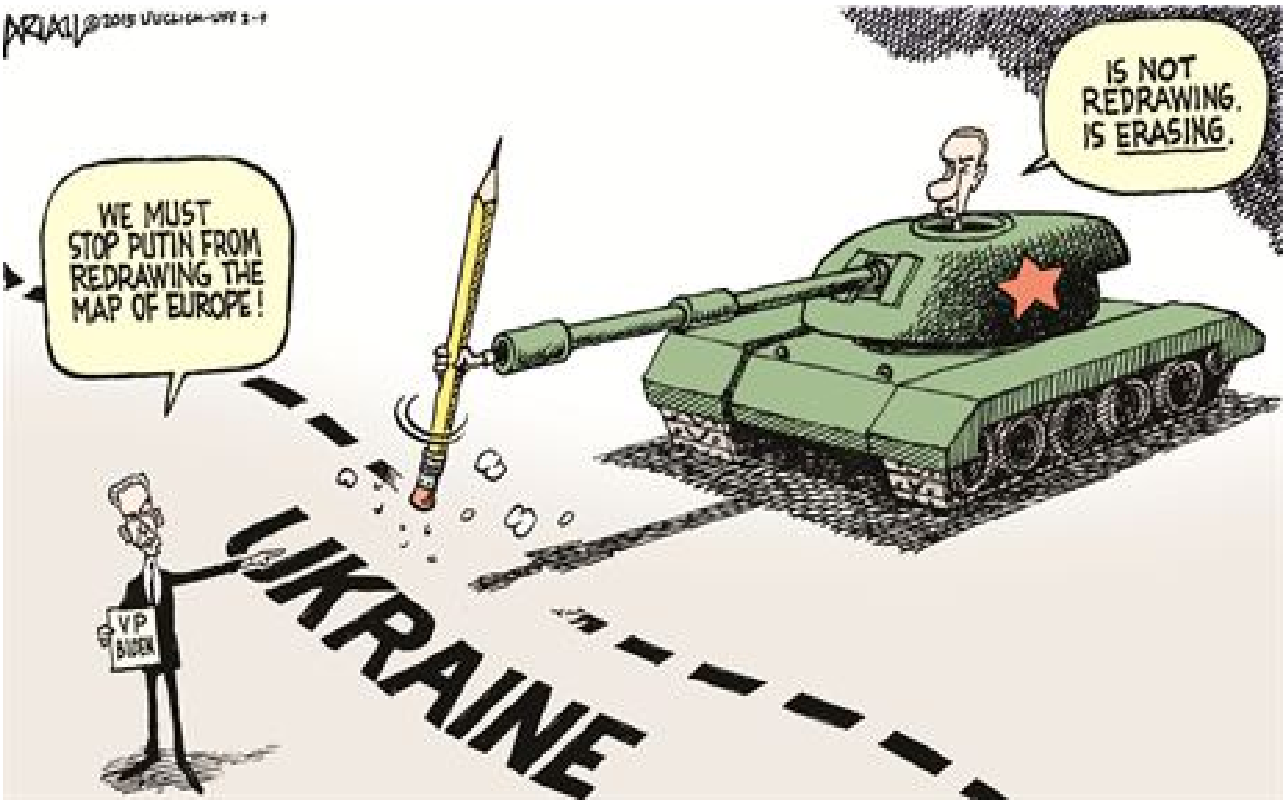
That's par for the course for Holder. Rep. Barbara Lee, a Democrat who represents Oakland, asked his Department of Justice to examine possible civil rights violations related to the Jan. 1, 2009, Bay Area Rapid Transit police officer shooting of Oscar Grant III, an unarmed 22-year-old African-American. She asked for the probe in 2010 after a jury convicted BART cop Johannes Mehserle of involuntary manslaughter. Jurors could have convicted Mehserle of voluntary manslaughter or second-degree murder but apparently bought the cop's contention that he meant to shock Grant with his Taser but mistakenly shot off his gun.

Lee asked for that probe 4 1/2 years ago. As of last month, The Washington Post reported, the Department of Justice hadn't released an official finding.

Last month, The New York Times reported that Department of Justice lawyers would not recommend filing civil rights charges against former Ferguson, Missouri, police Officer Darren Wilson in the August shooting of 18-year-old Michael Brown. How is it that the department hasn't released a finding on the 2009 BART shooting? Fellow passengers captured Grant's end on video. "The facts of that case are not hard to figure out," Kent Scheidegger of the Sacramento-based Criminal Justice Legal Foundation observed. I can only guess that when there is no partisan play to be made, the outgoing attorney general is happy to watch high-stakes criminal justice matters dangle in the wind.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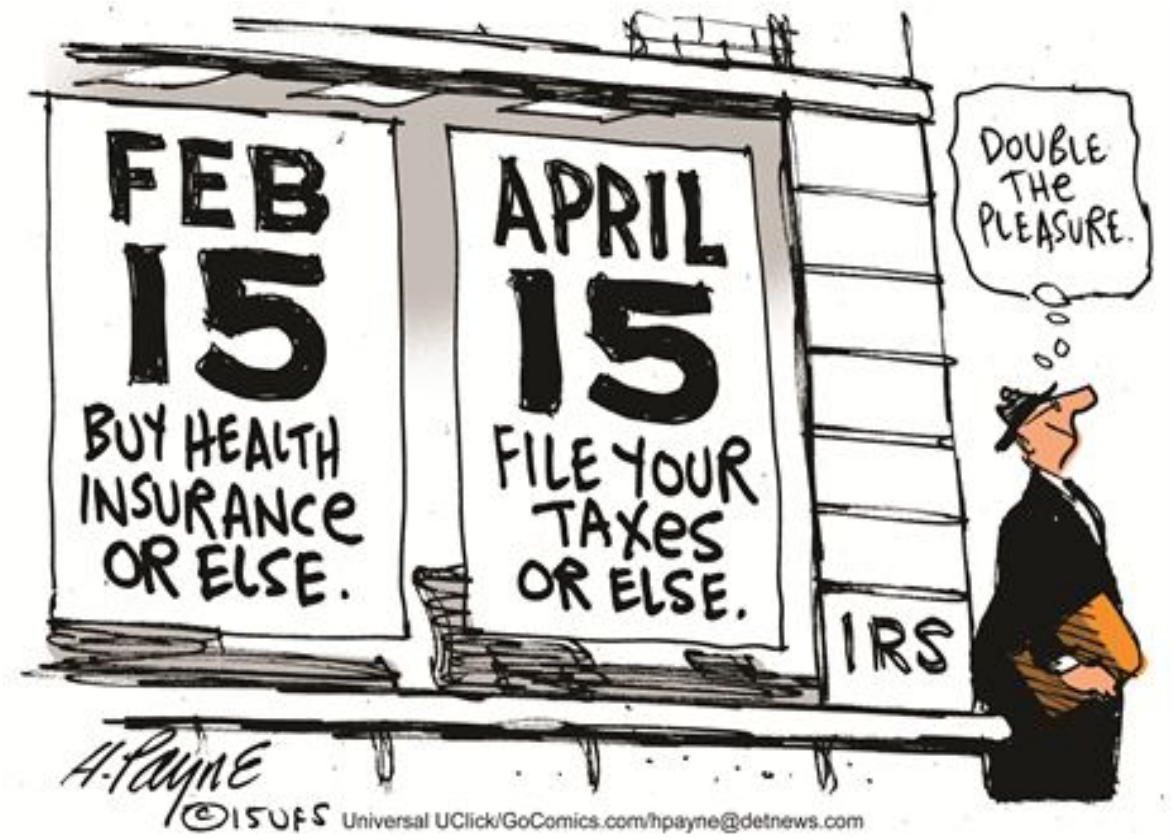
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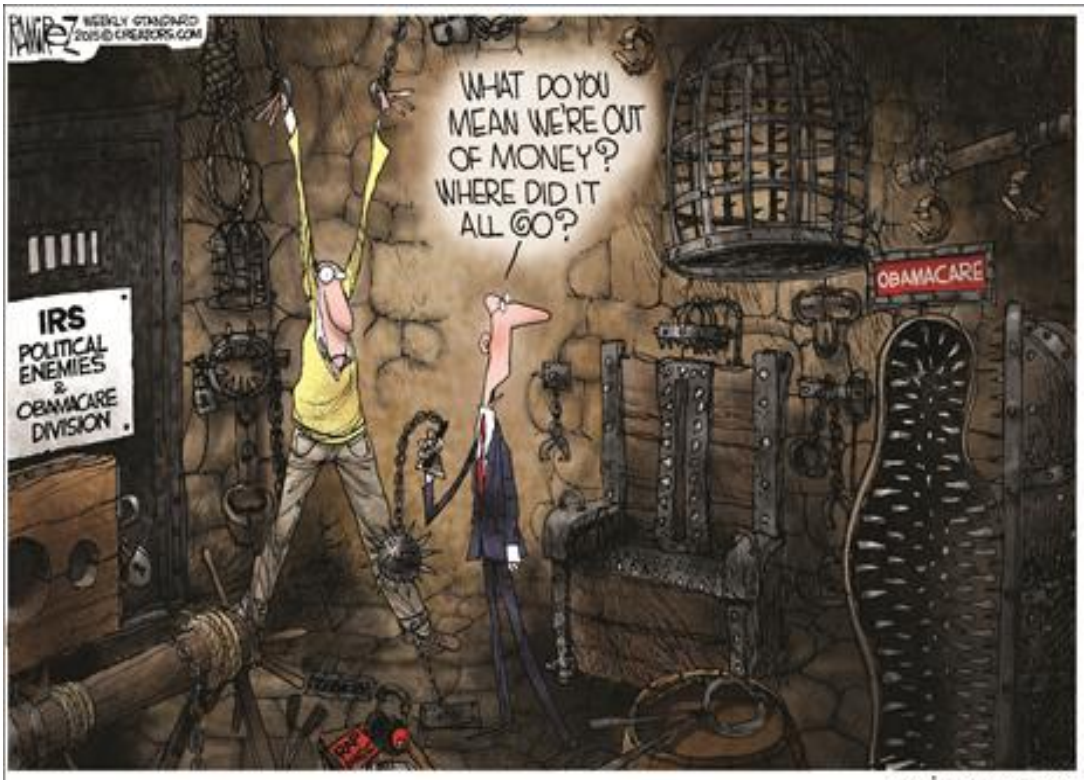
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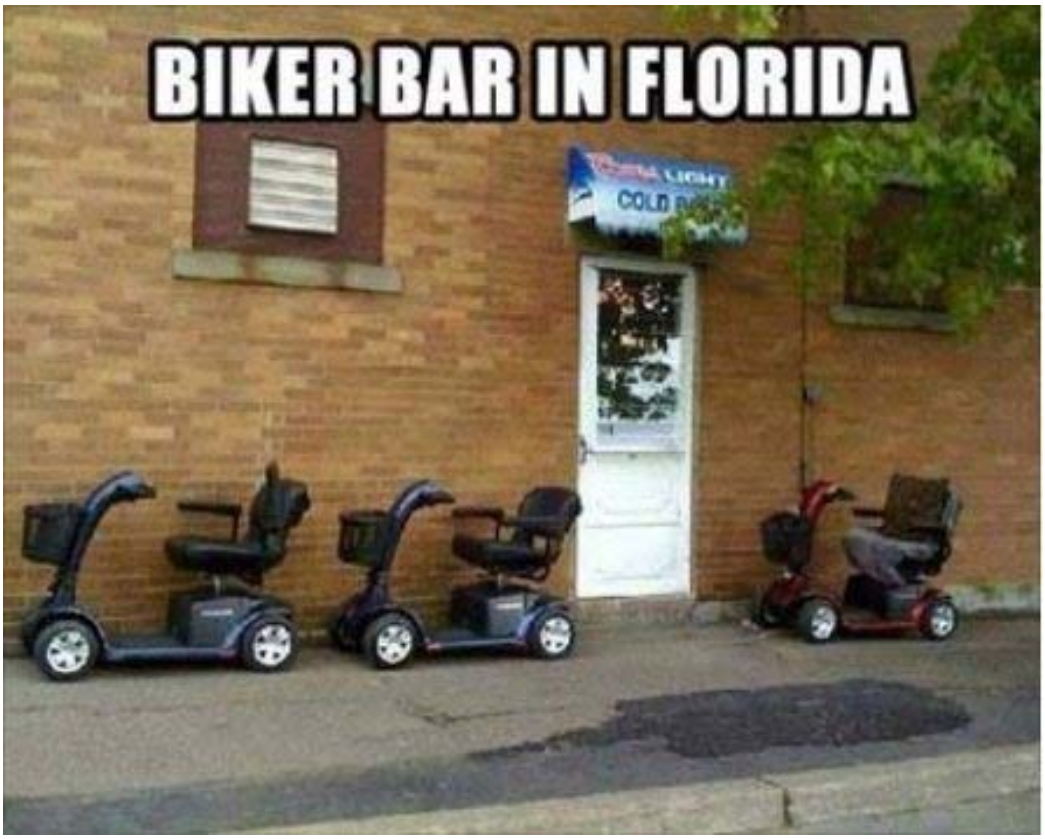
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