

April 1, 2012

We can't keep our hands off the open mic kerfuffle. Our favorites continue. Here's [Charles Krauthammer](#).

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After all, what is Obama doing negotiating on missile defense in the first place? We have no obligation to do so. The Anti-Ballistic Missile Treaty, a relic of the Cold War, died in 2002.

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The GAFFE has moved [Marty Peretz](#) to write a column.

... But really the message, the important one, concerns us, here in America. It is that the American people can't be trusted if the president is honest with them about what he proposes. More bluntly, that the American people are not trusted by their own president. Otherwise the president would tell us the truth about his intentions. And here he is, admitting his distrust of his own people to a leader of a nasty foreign government that seeks to thwart our purposes in the Middle East and elsewhere. President Obama is in cahoots with the Russian regime against America's very body politic.

Mr. Obama's revealing comment, and the question of missile defense, and the question of Mr. Obama's bizarre desire for coziness with Vladimir Putin, is a matter about which our European allies have great concerns.

Additional "give" to Moscow on the nuclear issue was not something he admitted to the relevant senators that he was contemplating when they were weighing and approving the New Start Treaty a bare year ago. Yet it is a matter of deep interest to the Kremlin which, without any moral credit and without much material credit either, seems to be charting the cartography of another Cold War. (Remember, it pursued the last one from an impoverished base.) Mr. Obama's pliancy on the matter will encourage them to think that we are, in this matter, a patsy.

And not only in this matter, alas: Mr. Obama is presiding over what might be called a withdrawalist moment in American foreign policy. Throughout his presidency, Mr. Obama has seemed strangely unmoved by the claims and values of American nationalism as they were expressed in most of the last century—for the rights of other peoples to establish nation-states after World War I, to free Europe and Asia from the bloody rule of monstrous fascist tyrannies in World War II, to defeat the egalitarian phantasm of communism as a civilized way of life. You might say that he dislikes the 20th century and refuses to accord the lessons of its bitter experiences any pride of place in his view of the world.

I don't mean to say that the president is altogether against the use of force. In his counterterrorism policy he has been relentless. But his stewardship of the wars he inherited reveals a leader unsure of his beliefs, or else ruled by an almost cynical devotion to his own political survival. ...

Craig Pirrong remembers back in the day when Obama thought he could drive a wedge between Putin and his toady Medvedev.

... We know Barry is a slow learner. Actually, he is a no learner. Exhibit 1: energy. Exhibit 2: this whole Russian fiasco. BHO is proceeding blithely as if nothing has changed. Well, nothing has really changed, because Putin was always in charge, but Barry apparently didn't understand that. So if Obama was sincere in his earlier statements (I know, I know), he should believe that things have changed-and he should adjust course accordingly. But apparently not. He is proceeding with his grandiose Russian schemes that were predicated on exploiting an imagined split in the Russian power structure, even though it is now evident even to the dimmest of the dim that said split never existed. And he is willing to do so by actively concealing his intentions from the American people.

It is bad enough to pursue a policy that is based on a delusion that anyone remotely familiar with Russia should have known to be such. It is beyond bad to continue to pursue that policy once it has been proven to be based on a delusion. And to do so in such a deceptive way staggers the imagination.

But that's our Barry.

The NYT is of course utterly clueless on the subject, but even the WaPo, normally in the Obama Tank, [can't swallow this](#). Neither should anybody else in possession of their sanity.

Andrew Malcolm says it was the open mic comments that convinced Marco Rubio he should go ahead and endorse Romney.

... "It's been weighing on my mind all week," Rubio told Lewis, adding:

"I've never thought about this as a political calculation. I'm just sitting back here and watching a president that just got back from overseas — where he told the Russian president to work with him and give him space so he can be more flexible if he gets re-elected."

"The stakes are so high," Rubio noted.

The senator said there are others he wished had run. But they didn't. And he concluded that given the Obama threat, that Romney was "plenty conservative" and "way better than the guy who's there right now."

While Rubio endorsed Romney, [Malcolm](#) notes Medvedev endorsed Obama. ... *Strangely, Medvedev went on Russian TV Tuesday to defend Obama, which should set off car alarms across this country. "There are no secrets here," he said at a Seoul news briefing. He endorsed President Obama as "a very comfortable partner," which you may not see on any Obama TV ad.*

And the Russian leader had some advice for American politicians, presumably Romney since the other two are out of the picture now and the third never was in it.

"All U.S. presidential candidates (should) do two things," Medvedev said. "Use their head and consult their reason." He said cliched criticism "smacks of Hollywood," adding that whatever party Obama's critic belongs to, Medvedev suggests he look at the calendar: "We are in 2012 and not the mid-1970's."

Well, that's reassuring isn't it? In the eyes of the outgoing Russian president, who's been doing what he's told all these years by the incoming Russian president, a former KGB leader looking out for his dream of empire-rebuilding, Russia is not America's "No. 1 geopolitical foe," as Romney called it.

All the more reason for Americans to relax then, spend more money on teachers' unions and drastically reduce national defense spending, including cuts to U.S. troop strength of at least 100,000, as Obama vows. ...

[American Crossroads](#) has a new ad using the open mic faux pas.

Time to look at the other half of our wonderful week. [Mark Steyn](#) on the healthcare court hearings.

... A land of laws decays almost imperceptibly into a land of legalisms, which is why America has 50 percent of the world's lawyers. Like most of his colleagues, lifetime legislator John Conyers (a congressman for 47 years) didn't bother reading the 2,700-page health care bill he voted for. As he said with disarming honesty, he wouldn't understand it even if he did:

"They get up and say, 'Read the bill.' What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?"

It would be churlish to direct readers to the video posted on the Internet of Rep. Conyers finding time to peruse a copy of Playboy while on a commuter flight to Detroit. So let's take him at his word that it would be unreasonable to expect a legislator to know what it is he's actually legislating into law. Who does read the thing? "What happened to the Eighth Amendment?" sighed Justice Scalia the other day. That's the bit about cruel and unusual punishment. "You really want us to go through these 2,700 pages? Or do you expect us to give this function to our law clerks?"

He was making a narrow argument about "severability" – about whether the court could junk the "individual mandate" but pick and choose what bits of Obamacare to keep. Yet he was unintentionally making a far more basic point: A 2,700-page law is not a "law" by any civilized understanding of the term. Law rests on the principle of equality before it. When a bill is 2,700 pages, there's no equality: Instead, there's a hierarchy of privilege microregulated by an unelected, unaccountable, unconstrained, unknown and unnumbered bureaucracy. It's not just that the legislators who legislate it don't know what's in it, nor that the citizens on the receiving end can ever hope to understand it, but that even the nation's most eminent judges acknowledge that it is beyond individual human comprehension. A 2,700-page law is, by definition, an affront to self-government.

If the Supreme Court really wished to perform a service, it would declare that henceforth no law can be longer than, say, 27 pages – or, at any rate, longer than the copy of Playboy Congressman Conyers was reading on that commuter flight.

C'mon, Justice Kennedy. Obamacare vs. Playboy: It would be a decision for the ages – and an act of bracing constitutional hygiene.

Jennifer Rubin too.

I'm with [David French](#) on this:

"While we still don't know the outcome of the Obamacare case, that hasn't stopped some on the left from piling on Solicitor General Donald Verrilli for allegedly "choking" during oral arguments. While I haven't argued in front of the Supreme Court, I've had more than my share of state and federal appellate arguments, and these armchair quarterbacks are overlooking a few factors. First, it's tough for any advocate to compare well to Paul Clement. Virtually any fair-minded liberal or conservative can tell you that Clement is just about the best in the business — one of the great oral advocates of our generation. This was his Superbowl, and he delivered a performance about as "clutch" as anyone can deliver. Second — and more importantly — it's tough for anyone to perform brilliantly when your argument is weak on the merits."

I'll add a few final thoughts and look forward to the opinion in a few months.

First, the desire to impugn Verrilli stems, maybe understandably, from the frustration on the left (How can we be losing this?!) and the lack of understanding as to how courts make their decisions. Many eloquent advocates lose a lot of Supreme Court cases because a good advocate can make a marginal case better but rarely can he save one with a central defect. At this level of judicial advocacy it's too hard to hide the ball. ...

Washington Post
The 'flexibility' doctrine

by Charles Krauthammer

"On all these issues, but particularly missile defense, this can be solved, but it's important for him [Vladimir Putin] to give me space. .. This is my last election. After my election, I have more flexibility."

— Barack Obama to Dmitry Medvedev, open mike, March 26

You don't often hear an American president secretly (he thinks) assuring foreign leaders that concessions are coming their way, but they must wait because he's seeking reelection and he dares not tell his own people.

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It's unfathomable. In trying to clean up the gaffe, [Obama emphasized](#) his intent to "reduce nuclear stockpiles" and "reduce reliance on nuclear weapons." In which case, he should want to *augment* missile defenses, not weaken, dismantle or bargain them away. The fewer nukes you have for deterrence, the more you need nuclear defenses. If your professed goal is nuclear disarmament, as is Obama's, eliminating defenses is completely illogical.

Nonetheless, Obama is telling the Russians not to worry, that once past “my last election” and no longer subject to any electoral accountability, he’ll show “more flexibility” on missile defense. It’s yet another accommodation to advance his cherished Russia “reset” policy.

Why? Hasn’t reset been failure enough?

Let’s do the accounting. In addition to canceling the Polish/Czech missile-defense system, Obama gave the Russians accession to the World Trade Organization, signed a START Treaty that they need and we don’t (their weapons are obsolete and deteriorating rapidly), and turned a scandalously blind eye to their [violations of human rights](#) and dismantling of democracy. Obama even gave Putin a congratulatory call for winning his phony election.

In return? Russia consistently watered down or obstructed sanctions on Iran, completed Iran’s nuclear reactor at Bushehr, provides to this day Bashar al-Assad with [huge arms shipments](#) used to massacre his own people (while rebuilding the Soviet-era naval base in the Syrian port of Tartus), conducted a virulently anti-American presidential campaign on behalf of Putin, pressured Eastern Europe and threatened Georgia.

On which of “all these issues” — Syria, Iran, Eastern Europe, Georgia, human rights — is Obama ready to offer Putin yet more flexibility as soon as he gets past his last election? Where else will he show U.S. adversaries more flexibility? Yet more aid to North Korea? More weakening of tough Senate sanctions against Iran?

Can you imagine the kind of pressure a reelected Obama will put on Israel, the kind of anxiety he will induce from Georgia to the Persian Gulf, the nervousness among our most loyal East European friends who, having been left out on a limb by Obama once before, are now wondering what new flexibility Obama will show Putin — the man who famously proclaimed that the “greatest geopolitical catastrophe” of the 20th century was Russia’s loss of its Soviet empire?

They don’t know. We don’t know. We didn’t even know this was coming — until the mike was left open. Only Putin was to know. “I will transmit this information to Vladimir,” Medvedev assured Obama.

Added Medvedev: “I stand with you.” A nice endorsement from Putin’s puppet, enough to chill friends and allies, democrats and dissidents, all over the world.

WSJ

[Where's an Open Mic When We Really Need It?](#)

Obama was admitting his distrust of his fellow Americans to a leader of a nasty government that seeks to thwart our purposes.

by Martin Peretz

When President Obama blurted out to Russian President Dmitry Medvedev that he couldn't do serious business during an election year, the New York Times characterized it as a "moment of political candor." It seems to me, actually, to be a moment of political contempt—for the issues

at hand as well as for the demos itself. Mr. Medvedev meanwhile was in familiar territory: Dissembling is the routine of the elected Russian dictatorship.

We are the big boys, Mr. Obama seemed to be telling Mr. Medvedev— or rather Prime Minister Vladimir Putin and I are, and you, Medvedev, are the messenger, to whom, as the newspaper photograph shows, I confide. "I will deliver this information to Vladimir," responded the second man in the Kremlin.



Another news picture shows an image from the back, the two presidents walking together, the American chief executive with his big right hand firmly on his Russian junior partner's much slighter shoulder.



And what was the message to Vladimir? Mr. Obama was proffering the Russians "more flexibility" on missile defense, which he couldn't do, he said, in an election year.

But really the message, the important one, concerns us, here in America. It is that the American people can't be trusted if the president is honest with them about what he proposes. More bluntly, that the American people are not trusted by their own president. Otherwise the president would tell us the truth about his intentions. And here he is, admitting his distrust of his own people to a leader of a nasty foreign government that seeks to thwart our purposes in the Middle East and elsewhere. President Obama is in cahoots with the Russian regime against America's very body politic.

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And not only in this matter, alas: Mr. Obama is presiding over what might be called a withdrawalist moment in American foreign policy. Throughout his presidency, Mr. Obama has seemed strangely unmoved by the claims and values of American nationalism as they were expressed in most of the last century—for the rights of other peoples to establish nation-states after World War I, to free Europe and Asia from the bloody rule of monstrous fascist tyrannies in World War II, to defeat the egalitarian phantasm of communism as a civilized way of life. You might say that he dislikes the 20th century and refuses to accord the lessons of its bitter experiences any pride of place in his view of the world.

I don't mean to say that the president is altogether against the use of force. In his counterterrorism policy he has been relentless. But his stewardship of the wars he inherited reveals a leader unsure of his beliefs, or else ruled by an almost cynical devotion to his own political survival.

In Afghanistan, Mr. Obama "surged"—it was, after all, the good war, support for which gave him political cover for his opposition to the war in Iraq, which was the bad war. But no sooner did the president escalate the war in Afghanistan than he was setting dates and orders for the troops' withdrawal. And withdraw they will.

But if Mr. Obama wanted to wind down the war, why did he wind it up? Why did the dove dissemble as a hawk? After all, the notion that U.S. troops and the small number of NATO comrades have achieved anything lasting in battle is frivolous, and it is an insult added to pain for the administration to say anything else in order to comfort kin.

The president's Afghan policy was divided against itself, and it puts one bitterly in mind of John's Kerry's warning about being "the last man to die for a mistake," the words on which he impaled his own war, the war in Vietnam. And meanwhile in Iraq, the bad war, there are many reasons for (if you will pardon the expression) hope: Hard as it is for Democrats to admit, President Bush's war in Iraq won a modicum of victories for democracy and pluralism in the Muslim world. And from that improving situation President Obama hastily fled.

The president is running for a second term. The Republican Party is having a different conversation. This leaves Mr. Obama free to abscond with the election without facing the issue of the real role of America in the world.

What exactly are his intentions, for example, about the threat of a nuclear Iran? It is, once again, hard to say. He told the American Israel Public Affairs Committee that he is against containment, which is what he knew Aipac wanted to hear. But his false faith in the efficacy of sanctions and diplomacy will land him right in the lap of containment—unless he chooses force. Will he support Israel's use of force? Will he use American force?

Where is an open mic when we need one? It is ironic that this president, who is committed to the programmatic pacification of Russian anxiety about defensive nuclear policy, has wasted more than three years in trying to talk with the regime of the ayatollahs about its craving for an offensive atomic capability.

More likely than not, Saudi Arabia and Turkey are already embarked on a scientific campaign to match Tehran's not-all-that-hidden military accomplishments and ambitions. When these come close to maturing, President Obama's cares about Russian missile anxieties will mean less than nothing.

Mr. Peretz was editor in chief of the New Republic from 1974 until 2011.

Streetwise Professor

Slow Learner? No Learner

by Craig Pirrong

Once upon a time, Obama had a great idea. He would reset relations with Russia. The linchpin of his strategy was a plan to focus attention on the alleged reformer Medvedev, and to freeze out Putin, [whom Obama publicly dissed as a dinosaur](#):

' On the eve of a trip to Moscow, [Barack Obama](#) chided [Vladimir Putin](#), [Russia](#)'s prime minister, today for keeping "one foot in the old ways of doing business". By contrast, he said Putin's handpicked successor as president understands that cold war behaviour is outdated.

In a White House interview with The Associated Press, the president said he will meet with both Putin and Dmitry Medvedev, Russia's president, on his trip, in hopes they can "move in concert in cooperating with us on some critical issues." ...

... Asked why he intends to meet Putin, Obama said the former president "still has a lot of sway ... and I think that it's important that even as we move forward with President Medvedev that Putin understand that the old cold war approaches to US-Russian relations is outdated — that's it's time to move forward in a different direction".

"I think Medvedev understands that. I think Putin has one foot in the old ways of doing business and one foot in the new, and to the extent that we can provide him and the Russian people a clear sense that the US is not seeking an antagonistic relationship but wants cooperation on

nuclear non-proliferation, fighting terrorism, energy issues, that we'll end up having a stronger partner overall in this process," he said. '

Barry and Dmitri became big buddies. They went out for burgers and everything.

Of course it was all a delusion. Medvedev was a Potemkin president. No doubt Vladimir and his *siloviki* pals were doubled over in laughter at Obama's naiveté and gullibility.

The mask came off in September, when the charade came to an end and Vladimir resumed his rightful place. Then Vladimir launched into an election campaign during which he fulminated against the United States. Really, if you followed the campaign, you would have concluded that Vladimir believes that the United States is Russia's Number One Geopolitical Foe.

And you would have concluded right.

But did the scales fall from Barry's eyes? Did he decide that the Reset was based on a faulty premise? Did he recognize that since a man who by Obama's own estimation has one foot (three, actually) in the Cold War past, who viscerally hates the US, was going to dominate Russian politics for the foreseeable future, that it was pointless to continue his attempted rapprochement?

Of course not! It's almost as Barry never noticed. Barry told Burger Buddy Dmitri-now demoted to Vladimir's errand boy-to tell Vladimir that after his "last election" he would have flexibility to make a deal that would be to Vladimir's liking. Foot in the past? Huh? Meet the new boss, same as the old boss. Putin's electoral rhetoric? What rhetoric? Obstructionism in Syria that even his own Secretary of State called "despicable"? Whatever.

We know Barry is a slow learner. Actually, he is a no learner. Exhibit 1: energy. Exhibit 2: this whole Russian fiasco. BHO is proceeding blithely as if nothing has changed. Well, nothing has really changed, because Putin was always in charge, but Barry apparently didn't understand that. So if Obama was sincere in his earlier statements (I know, I know), he should believe that things have changed-and he should adjust course accordingly. But apparently not. He is proceeding with his grandiose Russian schemes that were predicated on exploiting an imagined split in the Russian power structure, even though it is now evident even to the dimmest of the dim that said split never existed. And he is willing to do so by actively concealing his intentions from the American people.

It is bad enough to pursue a policy that is based on a delusion that anyone remotely familiar with Russia should have known to be such. It is beyond bad to continue to pursue that policy once it has been proven to be based on a delusion. And to do so in such a deceptive way staggers the imagination.

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Investors.com

[What's really behind Marco Rubio's endorsement of Romney?](#)

by Andrew Malcolm



Mitt Romney's been racking up some big-name endorsements recently -- Jeb Bush, Bush 41 and, most notably, Marco Rubio, the freshman, tea party senator from Florida.

We've long been dubious about the impact of political endorsements. The campaigns, however, collect them like jewels and put them out on a strategic schedule designed to maximize exposure and possible effect on voters, who happen to be listening.

Most intriguing was Rubio's this week. Issued by him, not the campaign, and executed during a TV interview with Fox News' Sean Hannity in the evening, not your standard platform to maximize publicity.

But why now? we wondered.

Thanks to the [Daily Caller's Matt Lewis](#), we now know. Like millions of other Americans, Rubio listened with shock this week to President Obama's open mic plea to the president of Russia seeking "space" during this campaign before his "last election" so he could be more flexible in future Sino-American dealings, especially regarding American missile defenses.

Charles Krauthammer has [a brilliant analysis right here on this site](#) of the defense aspect of Obama's blunder and his future plans.

Who else has the Chicago Democrat sought "space" from to help capture four more years in the White House unfettered from ever facing American voters again? As [we immediately noted here](#), this inadvertent presidential revelation (along with understanding Russian nods and comradely arm pats) plays right into Romney's constant campaign refrain of 'Do you want this guy doing whatever he wants for four more years?'

This now vivid concern, combined with the drying cement of the nearly complete Republican race, were wake-up calls for the Florida senator. "It's been weighing on my mind all week," Rubio told Lewis, adding:

"I've never thought about this as a political calculation. I'm just sitting back here and watching a president that just got back from overseas — where he told the Russian president to work with him and give him space so he can be more flexible if he gets re-elected."

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Investors.com

[Defending his whispers with Obama, Medvedev has advice for Romney now](#)

by Andrew Malcolm

Now, in addition to carrying no-longer-secret messages from President Obama back to Vladimir Putin, Dmitri Medvedev is offering campaign advice to American presidential candidates. This reset in bilateral relations is turning out great for the Russians.

First, just by looking mean they get newbie Democrat Obama to give up the Eastern European missile defense shield with no quid pro quo. Who'd have thought the country that broke the financial back of the Soviet Union in the 1980's would give up on that defense against Iranian missiles so easily? Unless they read Obama's thoughts on the military and defense systems from long ago.

Then, the Kremlin sends out the smiley good cop, puppet Medvedev, to keep Obama talking and act all re-set friendly-like, even though they give nothing away on Iran, Syria, anything, really. And the American falls for it, just as the Russians told Tehran he would.



While Putin gets "reelected" to a new six-year term starting in May and already he's talking restoring Russia's military and pride vs those Americans.

Now, [as we noted here Tuesday morning](#) in a story and video, they've got Obama appealing soto voce to Putin (see photo above) for understanding and 'space' until after the Nov. 6 election when the American can be more flexible about even his alternate Wal-mart missile defense system.

But, oops, the mics were hot during their private confab and now the world knows Obama was the supplicant, seeking Russia to be patient and quiet during campaign season so they can do some kind of missile defense deal later that Obama doesn't want voters to know about now.

And, btw, what's left to be flexible about? Despite a media desire to wish this one away, you can bet your White Sox cap we'll hear a lot more about this Obama slip in weeks to come.

Already, Republican Mitt Romney, who's been after Obama's appease-and-apologize foreign policy all along, jumps on Obama's hot mic gaffe because it fits with his meme about the awful things the ex-state senator could do in a second, unrestrained term.

"Russia is not a friendly character on the world stage," Romney observed. "And for this president to be looking for greater flexibility, where he doesn't have to answer to the American people in his relations with Russia, is very, very troubling, very alarming."

Because Americans have this crazy notion that their president works for them, this window into Obama's behind-the-back Chicago kind of bargains with Russians makes many wonder now what additional side deals he's cooking up with others--if they'll just lay low and not make trouble

for his billion-dollar campaign through the fall. Did he hint something to the Taliban? He also met in Seoul with China's Hu Jin Tao.

Strangely, Medvedev went on Russian TV Tuesday to defend Obama, which should set off car alarms across this country. "There are no secrets here," he said at a Seoul news briefing. He endorsed President Obama as "a very comfortable partner," which you may not see on any Obama TV ad.

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All the more reason for Americans to relax then, spend more money on teachers' unions and drastically reduce national defense spending, including cuts to U.S. troop strength of at least 100,000, as Obama vows.

Romney, on the other hand, vows to add 100,000 active duty troops. "It's a dangerous world," he told Jay Leno last night. But maybe the Russians haven't heard that.

Orange County Register

[Just reading Obamacare cruel and unusual punishment](#)

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by Mark Steyn

Since the retirement of Sandra Day O'Connor, Swingin' Anthony Kennedy has been the swingiest swinger on the Supreme Court, the big Numero Cinco on all those 5-4 white-knuckle nail-biting final scores. So naturally court observers have been paying close attention to his interventions in the ObamaCare oral arguments. So far he doesn't sound terribly persuaded by the administration's line:

"The government is saying that the federal government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases, and that changes the relationship of the federal government to the individual in a very fundamental way."

As John Hinderaker wrote at the Powerline blog, "In that last observation, Kennedy seems to be channeling Mark Steyn." Which is true. As I wrote in National Review only two or three issues back, "I've argued for years in these pages that governmentalized health care fundamentally transforms the relationship between citizen and state in ways that" – and here's the bit Justice Kennedy isn't quite on board with yet – "make it all but impossible to have genuinely conservative government ever again." So I'm naturally heartened to hear him meeting me halfway. This was one of the highlights of a week that a shellshocked Jeffrey Toobin, crawling out from under the rubble of the solicitor general's presentation, told CNN viewers was "a train wreck" for the government's case.

And yet, and yet... If you incline to the view that Obamacare is a transformative act, isn't there something slightly pitiful about the fact that the liberties of more than 300 million people hinge on the somewhat whimsical leanings of just one man? I mean, Kennedy seems a cheery enough cove, but who died and made him the all-powerful Sultan of Swing? "It is a decision of the Supreme Court," explained Nancy Pelosi a few years back in more congenial times for the Democrats. "So this is almost as if God has spoken."

That's not how earlier Americans saw it: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court," wrote Abraham Lincoln, "the people will have ceased to be their own rulers."

Which they have. Or it would not have come to this.

In February, George Jonas wrote up north that Canadians enjoyed more rights and freedoms in the days before all their rights and freedoms got written down in a big ol' "Charter of Rights and Freedoms" (1982). At this point, many readers will object that the constitutional documents of some effete pansy ninny monarchy like Canada are entirely irrelevant to a strapping butch manly self-reliant republic like America. Three words:

Ruth Bader Ginsburg. Finding herself with a bit of time on her hands, Justice Ginsburg swung by Cairo last month to help out the lads from the Muslim Brotherhood building the new Egypt: "I would not look to the United States Constitution if I were drafting a constitution in the year 2012," she advised them. Instead, she recommended the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights. That's why the fate of the republic will come down to a 5-4 vote. Because four-ninths of the constitutional court think the American constitutional order is as déclassé as a 2006 BlackBerry.

"There seems to be an inverse relationship between written instruments of freedom, such as a Charter, and freedom itself," mused George Jonas. "It's as if freedom were too fragile to be put into words: If you write down your rights and freedoms, you lose them." That was generally the view of the Britannic part of the English-speaking world until the late 20th century: What's unwritten is as important, if not more so, than what is.

The Constitution of Australia, for example, makes no mention of the office of Prime Minister. The job exists only through custom and convention understood from the United Kingdom, where, likewise, it existed only through custom and convention: "statutory recognition" in London didn't come till 1937 – or over two centuries after dozens of blokes had been doing the job.

By contrast, on the Continent, where many constitutions date all the way back to the disco era (Greece, 1975; Portugal, 1976; Spain, 1978), if the establishment wants to invent a new "right" – i.e., yet another intrusion by government – it goes ahead and does so. If it happens to conflict with this year's constitution, they rewrite it. The United States is the only Western nation in which our rulers invoke the Constitution for the purpose of overriding it – or, at any rate, torturing its language beyond repair.

Thus, in this week's debate on whether Obamacare is merely the latest harmless evolution of the interstate commerce clause, the most learned and highly remunerated jurists in the land chewed over the matter of whether a person, simply by virtue of being born, was participating in a "market."

Had George III shown up at the Constitutional Convention to advance that argument with a straight face, the framers would have tossed aside the quill feathers and reached for their muskets.

A land of laws decays almost imperceptibly into a land of legalisms, which is why America has 50 percent of the world's lawyers. Like most of his colleagues, lifetime legislator John Conyers (a congressman for 47 years) didn't bother reading the 2,700-page health care bill he voted for. As he said with disarming honesty, he wouldn't understand it even if he did:

"They get up and say, 'Read the bill.' What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?"

It would be churlish to direct readers to the video posted on the Internet of Rep. Conyers finding time to peruse a copy of Playboy while on a commuter flight to Detroit. So let's take him at his word that it would be unreasonable to expect a legislator to know what it is he's actually legislating into law. Who does read the thing? "What happened to the Eighth Amendment?" sighed Justice Scalia the other day. That's the bit about cruel and unusual punishment. "You really want us to go through these 2,700 pages? Or do you expect us to give this function to our law clerks?"

He was making a narrow argument about "severability" – about whether the court could junk the "individual mandate" but pick and choose what bits of Obamacare to keep. Yet he was unintentionally making a far more basic point: A 2,700-page law is not a "law" by any civilized understanding of the term. Law rests on the principle of equality before it. When a bill is 2,700 pages, there's no equality: Instead, there's a hierarchy of privilege microregulated by an unelected, unaccountable, unconstrained, unknown and unnumbered bureaucracy. It's not just that the legislators who legislate it don't know what's in it, nor that the citizens on the receiving end can ever hope to understand it, but that even the nation's most eminent judges acknowledge that it is beyond individual human comprehension. A 2,700-page law is, by definition, an affront to self-government.

If the Supreme Court really wished to perform a service, it would declare that henceforth no law can be longer than, say, 27 pages – or, at any rate, longer than the copy of Playboy Congressman Conyers was reading on that commuter flight.

C'mon, Justice Kennedy. Obamacare vs. Playboy: It would be a decision for the ages – and an act of bracing constitutional hygiene.

Right Turn

[A week to remember at the Supreme Court](#)

by Jennifer Rubin

I'm with [David French](#) on this:

While we still don't know the outcome of the Obamacare case, that hasn't stopped some on the left from piling on Solicitor General Donald Verrilli for allegedly "choking" during oral arguments. While I haven't argued in front of the Supreme Court, I've had more than my share of state and federal appellate arguments, and these armchair quarterbacks are overlooking a few factors. First, it's tough for any advocate to compare well to Paul Clement. Virtually any fair-minded liberal or conservative can tell you that Clement is just about the best in the business — one of the great oral advocates of our generation. This was his Superbowl, and he delivered a performance about as "clutch" as anyone can deliver.

Second — and more importantly — it's tough for anyone to perform brilliantly when your argument is weak on the merits.

I'll add a few final thoughts and look forward to the opinion in a few months.

First, the desire to impugn Verrilli stems, maybe understandably, from the frustration on the left (*How can we be losing this?!*) and the lack of understanding as to how courts make their decisions. Many eloquent advocates lose a lot of Supreme Court cases because a good advocate can make a marginal case better but rarely can he save one with a central defect. At this level of judicial advocacy it's too hard to hide the ball.

Second, all the "novel" tests that Obamacare defenders offer to provide a limiting principle aren't so novel after all. They nearly all depend on one of a few logical errors: confusing the health-care *insurance* market and health-care market; making a dubious factual distinction that only the health-care market (or even less convincingly, the health-care insurance market) concerns a "must-have" item (What about shelter? Clothing? Food?); or falsely asserting that another method of accomplishing the same ends (e.g. tax at the point of usage) blesses the method the government in fact employed (the individual mandate). Believe me, the left (meaning not just the government but collective liberal legal scholars) have had months and months to figure out a limiting principle that had *constitutional* significance and couldn't do it. In the months leading up to the oral argument I never heard a persuasive one, even from liberal lions such as Larry Tribe.

Third, as the [Post editorial board writes](#), "there's a kind of cynicism, or at least intellectual laziness, in asserting that this is an easy or obvious call — that no justice could possibly strike down the mandate out of honest, reasoned conviction. Solicitor General Donald B. Verrilli Jr. had his hands full defending the mandate, not because he's a bad lawyer, but because it's not an easy question."

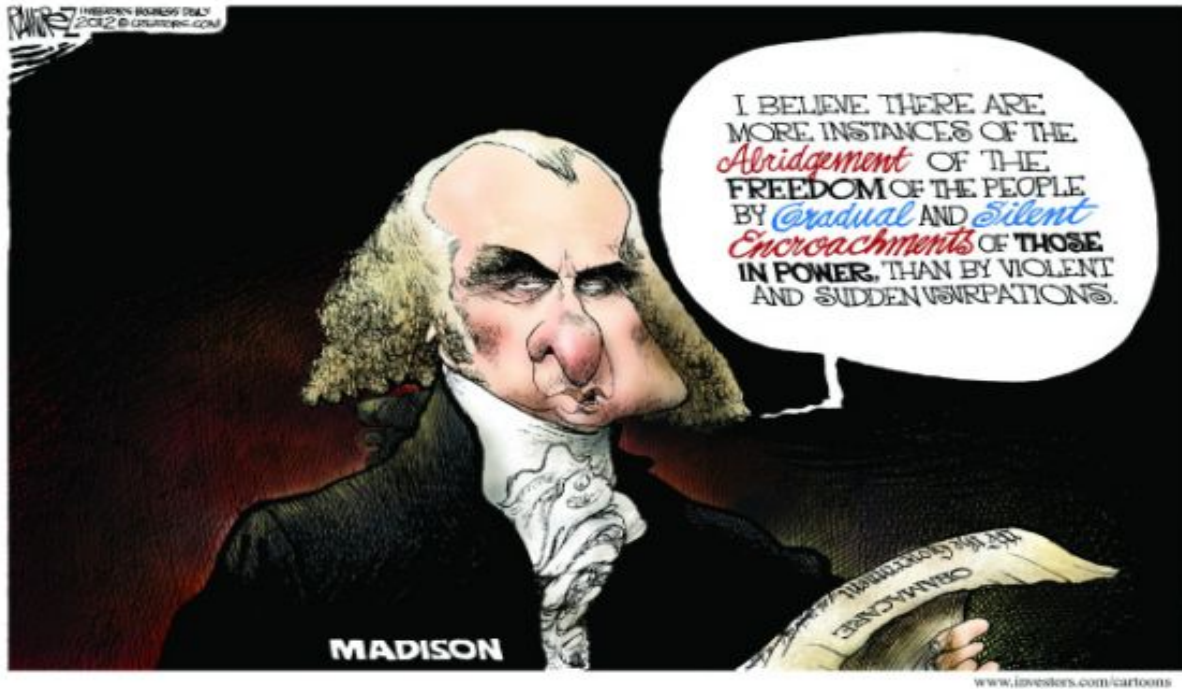
Hearing this sort of reaction from the left, a conservative legal guru e-mailed me, "Of course, the fact that the [votes of] four liberal justices were never in doubt is not partisan. The fact that one of them actually worked in the Justice Department when this matter began, assigned the case to her principal deputy, cheered the passage of the law in an email, substantially participated in

another case raising the law, and may have attended meetings where the law was discussed, even if, arguendo, not sufficient to force recusal, of course doesn't suggest any partisanship." Well, I, for one, find myself glad Justice Elena Kagan participated; no one can claim to have been short-handed.

Fourth, the reason we can sometimes predict these things (although the percentage of 5-4 decisions and predictable votes is somewhat overblown) is because presidents have gotten very good at choosing justices who embody their philosophy of judging. It's hard to write on the Supreme Court without defaulting to the terms "liberal" and "conservative," and I regret that this terminology conveys a political disposition. In fact, "liberal" jurists view the Constitution more like a hint or a strong suggestion, but not a limitation on creation of new rights (isn't sexual orientation close enough to the ones mentioned in the Fourteenth Amendment?) or a bar to exercise new powers to meet "modern" conditions. The more important the policy objective, the more they tend to strain to find a hook on which to preserve the objective, although the Congress has no "if it is really, really important, go ahead" provision. "Conservative" judges think the Constitution was written with the intent of constraining government by devices such as federalism, enumerated rights, specific prohibitions and, of course, specified rights, including those found in the amendments. If they find a restraint, by gosh, they're going to enforce it; and if not, they're unwilling to wave vaguely at the text and say, "It's in there somewhere." Those are two very different ways of looking at the Constitution, so it is not surprising that the two camps often reach different results.

And finally, [conservatives](#) had some fun at [Justice Stephen Breyer's](#) expense this week with his less-than-dazzling display of judicial reasoning. It is hard to tell from the transcripts if he was perhaps being humorous in some of these instances. But before they get too cocky they should re-read the questioning of Justice Sonia Sotomayor and at points Justice Ruth Bader Ginsburg. They are no slouches and know their way around the briefs and the arguments. They put both sides through their paces.

Although I remain opposed to cameras in the Supreme Court (I worry less about the justices than grandstanding counsel), the near immediate provision of audio and transcripts helped ensure a national seminar on the Constitution. In doing so, the court fulfilled its responsibility to further popular understanding of and respect for the rule of law. It should consider rapid response of this type for other highly watched cases coming up on the Arizona immigration law and on racial quotas in higher education.

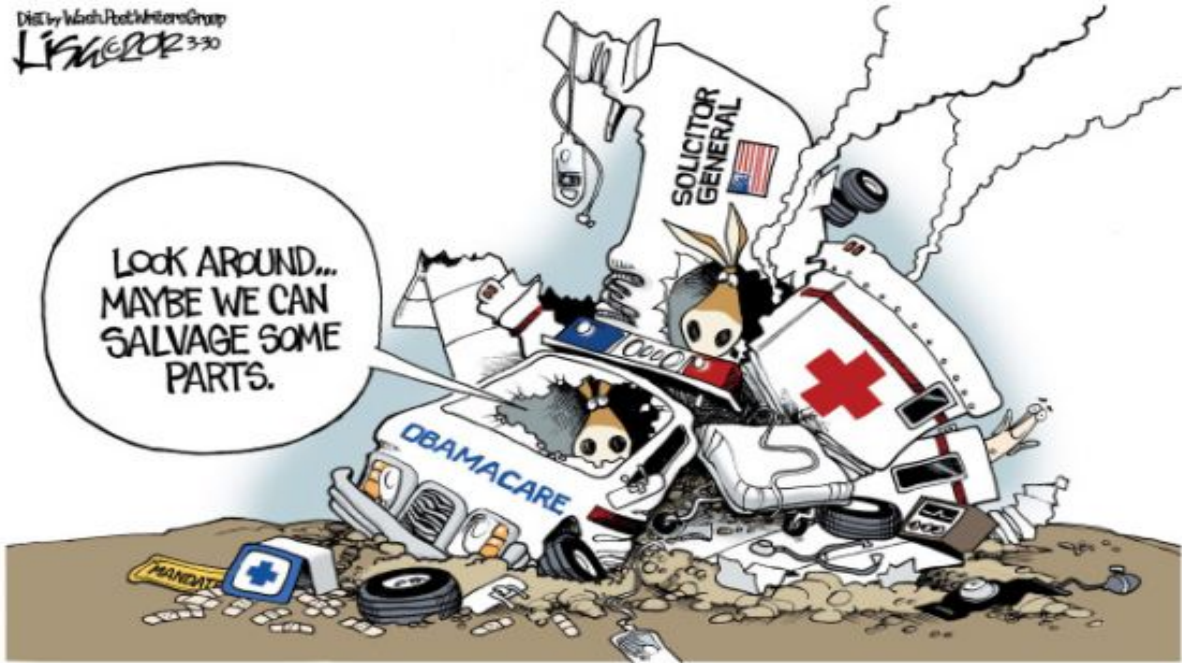


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Perspective

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...would be spent by the
Federal Government in
80 minutes.

