

Calling a Reluctant Robert Mueller as a Witness in Upcoming Hearings – A High Stakes Gamble - *InsiderNJ*

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Robert Mueller has been subpoenaed to testify before two separate congressional committees on Wednesday, July 17, 2019. According to news accounts, his testimony will be limited to two hours before the House Intelligence Committee and two hours before the House Judiciary Committee. Mueller clearly does not want to testify because he has already proclaimed that he will adhere to the confines of his report and he required a subpoena from the House Committees before he agreed to appear.

Despite having been paid by the public to conduct the investigation and write his report, Mueller can best be characterized as a reluctant, if not, a hostile witness. He has received scathing criticism from some commentators for adopting an imperious attitude by directing the public to read his report and figure out his conclusions on their own, and by resisting a voluntary appearance on Capitol Hill to explain the conclusions.

All of the above is the stuff of high drama. Indeed I have already seen cable network advertisements alerting their viewers to the dramatic event of Mueller's testimony next week. Yet this event is fraught with peril for all parties.

For the Democrats, it will be like a trial lawyer calling a hostile witness at trial. It is a strategic move that is not taken lightly because it is a high risk/high reward exercise. The witness may be terse or even dismissive of any questions, and getting an answer can be like pulling teeth. Mueller's testimony can blow up on the democrats if he adopts an attitude that the report is self-explanatory, and the democrats are trying to create a spectacle.

To be effective, the questioner must engage in meticulous preparation and frame the questions in such a disciplined way that the witness cannot evade the answer. For example, questions will have to address the helpful contents of the reports to the democrats, even if Mueller is forced to only read or paraphrase his report and the answer.

By way of example only, these are the type of questions that should produce helpful information:

1. Did your report find evidence of Russian interference with the 2016 presidential election? If so, please explain in detail;
2. Did your report find that the interference was directed by the Russian government? If so, please explain in detail;
3. Did your report find some evidence of a connection between the Russian interference and the Trump campaign? If so, please explain in detail;
4. Did your report find evidence of obstructive acts engaged in by Donald Trump which could be the basis of obstruction of justice charges? If so, please explain in detail.
5. Did your report find evidence of a corrupt intent by Donald Trump regarding the obstructive acts which could be the basis of an obstruction of justice charge? If so, please explain in detail.

After asking the straight forward questions where Mueller is somewhat locked in by the contents of the report, the questioner can be more aggressive and try to push Mueller to draw conclusions outside of the four corners of the findings in the report, such as:

1. Would you have sought an indictment for obstruction of justice, absent the prohibition in the Department of Justice guidelines that precluded such action against a sitting president. Please explain.
2. Do you agree with the manner in which Attorney General Barr characterized your findings in his initial press conference? Please explain.
3. Do you believe Attorney General Barr was correct when he said the report contained no evidence that constitutes the “crime” of obstruction of justice. Please explain.
4. Do you agree with Donald Trump’s claim that your report exonerated him of obstruction of justice?
5. Your report details overwhelming evidence of Russian interference in our election. Do you believe that the United States Government has taken the necessary steps to confront similar interference in the 2020 presidential election? If not, please explain.

Whether Mueller will loosen up and answer the second type of questioning is uncertain, but the questions are worth asking after the democrats elicit enlightening information from the earlier questioning. Worst case, Mueller may decline to answer them but the point will be made merely by asking the question.

The challenge facing the republicans is different. They certainly can surgically make points from Mueller in certain areas where his report supports Trump, such as the finding of “no collusion” as to Russian interference. But, if they attack him by impugning his integrity or the good faith of his investigation, Mueller may erupt against an unfair or misleading Republican question and be more critical of Trump than he would be after a Democratic question. A seasoned trial lawyer might advise the republicans to ask a few safe questions and get him off the witness stand as quickly as possible. However wise this advice might be, people often crave their “15 minutes of fame,” especially the hard-core ideologists who may throw caution to the wind in order to prove what tough guys they are. As they say in baseball, if you take too long a lead off first base, you will get picked-off.

This is also a dangerous situation for Robert Mueller. He is dedicated public servant and is a man of profound principle. He undoubtedly utilized his best efforts to conduct a rigorous investigation which left no stone unturned, and authored a fair report – however legalistic or complex it may read to the non-lawyer. But his position that the public and the Congress should read and interpret his report themselves without any explanation smacks of arrogance. His duty to his country supersedes his personal and professional code of conduct, and if he persists in fighting every question by responding that the answer is in the report, he risks sounding like Frank Sinatra singing, “I did it my way.” Such an attitude could leave him a legacy not as a man of principle, but as a prideful and stubborn old man.

As was noted above, calling a very reluctant Mueller before two separate House Committees is a high-risk exercise. But if the questioning is both artful and persistent, I believe that the general public stands to gain important information it did not know before, and that educational reward is well worth the risk. And the impact of the Mueller testimony could well determine whether the House proceeds to an impeachment inquiry.

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