

House Democrats' Strategy Toward the Mueller Report Needs to be More Aggressive - *InsiderNJ*

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Ask any football fan – particularly a Giants' fan – about their worst experiences in watching a pro football game, and most will tell you it is when their team squanders a lead by going into the prevent defense late in the game. To those who are not football fans, the prevent defense is a defensive alignment where the defense late in the game seeks to prevent the offense from scoring a touchdown or completing a long pass on a single play by allowing short gains in the hope that the clock will run out before the offensive team overcomes their lead. It is excruciating to sit and watch the offensive team march down the field while the defense is relatively passive with five defensive backs and a minimal pass rush. In my experience as fan, the dreaded prevent defense is unsuccessful more often, than not. In fact, watching the Giants give away a lead in the 4th quarter while employing the dreaded prevent defense is the only time I still scream at the TV.

As I wrote on this website immediately after the Mueller Report was released, the report contains devastating evidence of obstruction of justice:

[A]s a trial lawyer let me suggest how it might play out at trial: the prosecution would start out with the fact that Trump tried to influence James Comey, the director of the FBI, about not investigating Michael Flynn and also tried to pressure Comey into stating that Trump was not under criminal investigation. After Comey did not buckle under the presidential influence, he summarily fired him through an emissary. This set in motion a series of events resulting in the appointment of a Special Counsel of unquestioned integrity and ability, Robert Mueller. Once Mueller was appointed Trump recognized the legal quagmire he

was in and according to the Mueller report stated: “Oh my God. This is terrible. This is the end of my Presidency. I’m fucked.”

Understand how a skilled prosecutor would utilize this direct quote during any obstruction trial. He or she would put it up on a screen and ask a jury to view every one of Trump’s subsequent statements and/or actions through the lens of the quotation. His attempt to pressure White House Counsel Don McGahn to fire Mueller; his pressuring officials to convince Attorney General Jeff Sessions to resign; his leaning on his media people to draft misleading statements about the June 16 meeting with several Russians at Trump Tower; his dangling a potential for a pardon to Paul Manafort or others prosecuted by Mueller; his criticism of Michael Cohen after he began cooperating – all of this and the other acts laid out in the report would be portrayed as acts of desperation given Trump’s outburst that he was screwed! And there would be heavy emphasis on the testimony of former White House Counsel Don McGahn, which was extracted after painstaking questioning by the Mueller team, because McGahn has no motive to lie.”

Significantly, within the past two weeks over 800 former federal prosecutors have signed a public letter stating that they believe the evidence contained in the Mueller Report as to obstruction of justice is sufficient to bring criminal charges against an ordinary citizen: “Each of us believes that the conduct of President Trump described in Special Counsel Robert Mueller’s report would, in the case of any other person not covered by the Office of Legal Counsel policy against indicting a sitting President, result in multiple felony charges for obstruction of justice.”

For better or for worse, in Volume II of his Report, Mueller states that he decided not to make “a traditional prosecution or declination decision” because of the long-standing Department of Justice policy against indicting a sitting president. Once he determined he could not indict Donald Trump, Mueller concluded it would be fundamentally unfair to render a judgment that obstruction had been committed when no charges could be brought, since there is no way to contest a finding where there is no underlying charge. However, Mueller took pains to point out that “while this report does not conclude the President committed a crime, it also does not exonerate him.” And Mueller expressly passes the ultimate decision to Congress where the report states: “we concluded that Congress has authority to prohibit a President’s corrupt use of his authority in order to protect the integrity of the administration of justice.”

Despite this avalanche of evidence, the democratic leadership appears to view the impeachment suggestion in the Mueller Report like a rattle snake by backing away from even an impeachment inquiry. The problem has been compounded because of the inability of the House Judiciary Committee to procure the public testimony of a seemingly reluctant Robert Mueller. Hopefully, when questioned, Mueller will elaborate on his findings as to obstruction of justice and confirm that he believes his Report contains sufficient evidence of obstruction of justice for the House to consider the impeachment remedy, if it is so inclined. The hesitancy on the part of the House leadership to consider impeachment proceedings in the wake of the Mueller Report is undoubtedly rooted in raw politics. Although there will be clearly enough votes in the House to impeach Trump, there will be insufficient votes in the Republican-dominated U.S. Senate to convict where there is a need for a vote of 2/3 for conviction.

The expressed fear is that an unsuccessful trial of the impeachment in the Senate will only embolden and empower Trump in the presidential election in 2020. The problem is that the Trump forces are already emboldened by the disingenuous narrative created by Attorney General Barr when he unfairly mischaracterized the Mueller Report and the false claim by Trump that he was “exonerated” as to both collusion and obstruction. Furthermore, according to the Trump/Barr narrative, all investigations should be concluded, and the entire matter should be considered “case closed.”

Since the release of the Report, we have seen the White House arrogantly refuse to comply with subpoenas for documents they are legally required to turn over and direct present and former White House officials, such as former White House Counsel Don McGahn, to not even honor a testimonial subpoena based on some previously discredited arguments as to executive privilege and “immunity.” Under direction from the White House, the Internal Revenue Service has refused to provide Trump’s tax returns to the House Ways and Means Committee pursuant to a lawful request under Federal Code, 26 USC 6103(f).

At this juncture, my visceral reaction is that I am watching the dreaded prevent defense unfold. Although the House Committees are fighting back by litigating the White House’s refusal to honor subpoenas in court, to my mind this is not enough pressure. It has the feel of the game slipping away which is usually what happens when the prevent defense is employed. The terror of an impeachment hearing smacks of “betting everything on the election,” to borrow a phrase from Congressman Jarred Huffman of California. In my view, the Dems have to be more aggressive and at least set the stage for an impeachment proceeding. They can do this by bringing Robert Mueller before the Judiciary Committee and inquiring about his decision-making and view of the evidence as it relates to obstruction of justice. The time is also propitious to open a formal inquiry as to impeachment in the Judiciary Committee. This preliminary step will not require the introduction of Articles of Impeachment. Turning up the pressure against Trump in this forceful but measured way will signal the public that the Dems are not merely running out the clock, and will strengthen their legal position during any litigation to enforce the subpoenas in Federal Court.

Now is not the time to pay it safe, hold our breath, and hope that the clock runs out. A more aggressive strategy is necessary. Whether it is time for an all-out blitz will abide future events.

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