

Dershowitz: Shame on Robert Mueller for exceeding his role

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The statement by special counsel Robert Mueller in a Wednesday press conference that "if we had confidence that the president clearly did not commit a crime we would have said that" is worse than the statement made by then FBI Director James Comey regarding Hillary Clinton during the 2016 presidential campaign. Comey declared in a July 2016 press conference that "although we did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information, there is evidence that they were extremely careless in their handling of very sensitive highly classified information."

Comey was universally criticized for going beyond his responsibility to state whether there was sufficient evidence to indict Clinton. Mueller, however, did even more. He went beyond the conclusion of his report and gave a political gift to Democrats in Congress who are seeking to institute impeachment proceedings against President Trump. By implying that President Trump might have committed obstruction of justice, Mueller effectively invited Democrats to institute impeachment proceedings. Obstruction of justice is a "high crime and misdemeanor" which, under the Constitution, authorizes impeachment and removal of the president.

Until today, I have defended Mueller against the accusations that he is a partisan. I did not believe that he personally favored either the Democrats or the Republicans, or had a point of view on whether President Trump should be impeached. But I have now changed my mind. By putting his thumb, indeed his elbow, on the scale of justice in favor of impeachment based on obstruction of justice, Mueller has revealed his partisan bias. He also has distorted the critical role of a prosecutor in our justice system.

Virtually everybody agrees that, in the normal case, a prosecutor should never go beyond publicly disclosing that there is insufficient evidence to indict. No responsible prosecutor should ever suggest that the subject of his investigation might indeed be guilty even if there was insufficient evidence or other reasons not to indict. Supporters of Mueller will argue that this is not an ordinary case, that he is not an ordinary prosecutor, and that President Trump is not an ordinary subject of an investigation. They are wrong. The rules should not be any different.

Remember that federal investigations by prosecutors, including special counsels, are by their very nature one sided. They hear only evidence of guilt and not exculpatory evidence. Their witnesses are not subject to the adversarial process. There is no cross examination. The evidence is taken in secret behind the closed doors of a grand jury. For that very reason, prosecutors can only conclude whether there is sufficient evidence to commence a prosecution. They are not in a position to decide whether the subject of the investigation is guilty or is innocent of any crimes.

That determination of guilt or innocence requires a full adversarial trial with a zealous defense attorney, vigorous cross examination, exclusionary rules of evidence, and other due process safeguards. Such safeguards were not present in this investigation, and so the suggestion by Mueller that Trump might well be guilty deserves no credence. His statement, so inconsistent with his long history, will be used to partisan advantage by Democrats, especially all those radicals who are seeking impeachment.

No prosecutor should ever say or do anything for the purpose of helping one party or the other. I cannot imagine a plausible reason why Mueller went beyond his report and gratuitously suggested that President Trump might be guilty, except to help Democrats in Congress and to encourage impeachment talk and action. Shame on Mueller for abusing his position of trust and for allowing himself to be used for such partisan advantage.

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