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Schiff's claim that the whistleblower has a 'statutory right' to anonymity

By **Salvador Rizzo**

November 20, 2019 at 3:00 a.m. EST

"I am concerned about a bad-faith effort to out a whistleblower who has a statutory right to remain anonymous."

— **Rep. Adam B. Schiff (D-Calif.), in a closed-door deposition of Lt. Col. Alexander Vindman, Oct. 29, 2019**

"The whistleblower has a right to anonymity. There are public reports that the life of the whistleblower has been threatened. We do not want this committee used, or this testimony used, to try to exact political retribution against the whistleblower."

— **Schiff, in a closed-door deposition of National Security Council official Tim Morrison, Oct. 31, 2019**

"The whistleblower has the right, a statutory right, to anonymity. These proceedings will not be used to out the whistleblower."



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— Schiff, in a public hearing with Vindman, Nov. 19, 2019

Does the whistleblower who filed a complaint about President Trump have a “statutory right” to remain anonymous, as Schiff claims?

It's not a right spelled out in any statute. But national security experts warn that disclosing the whistleblower's identity could expose him to danger and retribution, and chill whistleblowing in general.

The Facts

A male CIA analyst filed a detailed complaint about Trump's July 25 phone call with the president of Ukraine and related events. Trump asked the Ukrainians to “look into” former vice president Joe Biden, a potential Democratic opponent in the 2020 election, and to investigate a debunked conspiracy theory that Ukrainians (and not Russians) interfered in the 2016 U.S. election, according to a White House record of the call.

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The president and some Republicans in Congress have called for the whistleblower's unmasking even though the House impeachment inquiry into Trump has moved well beyond the initial tip. The central facts in the whistleblower's complaint have been corroborated by documents, text messages, public testimony from senior government officials and Trump's own words.

No matter. Trump suggested that the whistleblower be investigated and has relentlessly attacked him in tweets and public remarks. "We must determine the Whistleblower's identity to determine WHY this was done to the USA," Trump tweeted.

An attorney for the whistleblower raised concerns about his client's safety after Trump said Sept. 26: "I want to know who's the person that gave the whistleblower, who's the person that gave the whistleblower the information, because that's close to a spy. You know what we used to do in the old days when we were smart? Right? With spies and treason, right? We used to handle them a little differently than we do now."

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The CIA has taken security measures to protect the analyst, who has continued to work at agency headquarters on Russia and Ukraine issues, The Washington Post reported.

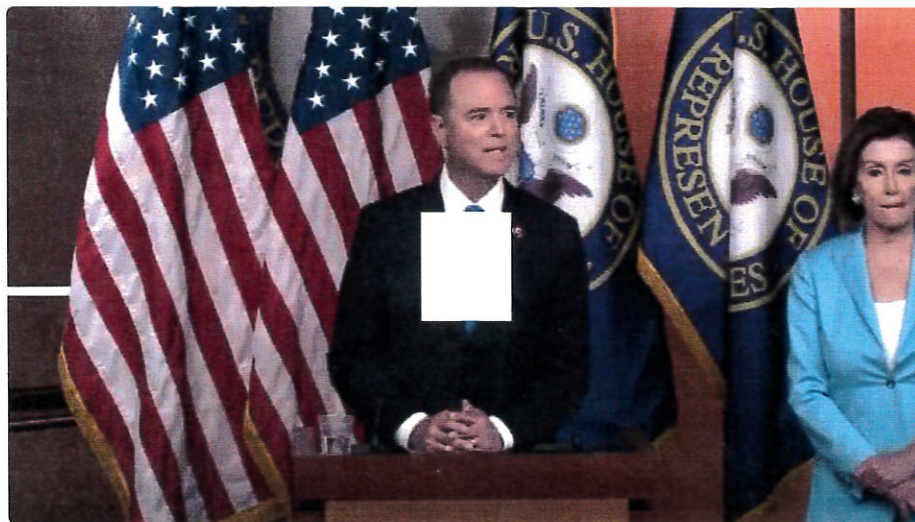
Schiff, who is leading the impeachment inquiry as chairman of the House Intelligence Committee, has said at least twice that the whistleblower has a “statutory right” to anonymity. When Republicans ask questions that might touch on the whistleblower’s identity, Schiff usually interjects to tell witnesses to be careful with their answers. (In September, Schiff was arranging for the whistleblower to give testimony, but after threats started to emerge, those plans were scuttled and Schiff said the whistleblower’s safety would be “at grave risk.”)

**Adam Schiff**

@RepAdamSchiff

The President's continued attacks on the whistleblower are an incitement to violence — and a threat to our democracy.

Let's be clear: the whistleblower did everything right. They followed all appropriate laws and procedures. And they have every legal right to remain anonymous.



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Federal laws and directives give cover to intelligence community members who report wrongdoing such as waste, fraud and abuse. For those protections to kick in, a whistleblower's complaint must be based on a reasonable belief and be communicated through proper channels. In Trump's case, the whistleblower filed his complaint Aug. 12 to the intelligence community's inspector general, Michael Atkinson, as an "urgent concern" under federal law.

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"I think the whistleblower did the right thing," acting director of national intelligence Joseph Maguire testified to the House intelligence committee Sept. 26. "I think he followed the law every step of the way."

"The Complainant followed the law in filing the urgent concern complaint, and the ICIG followed the law in transmitting the information to the Acting Director of National Intelligence on August 26, 2019," Atkinson's office said in a statement Sept. 30.

Neither the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA) nor any related statutes have language guaranteeing anonymity for whistleblowers. These laws, in conjunction with Presidential Policy Directive 19 and Intelligence Community Directive 120, provide protections from work-related retaliation. Intelligence community whistleblowers can't be demoted, fired or reassigned for legally reporting their concerns; their pay can't be cut; they can't be sent in for psychiatric exams; and their security clearance level can't be touched.

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“Nothing in the ICWPA expressly protects the anonymity of a complainant, or provides sanctions for someone who discloses it,” Stephen I. Vladeck, a professor at the University of Texas School of Law and an expert on national security law, previously told The Fact Checker. “I think the harder question is whether disclosing a whistleblower’s identity could run afoul of other statutes, such as the federal criminal laws barring efforts to intimidate witnesses.”

Irvin McCullough, a national security analyst at the nonprofit Government Accountability Project, said the ICWPA “implies anonymity as a shield from other forms of workplace retaliation.”

“While not explicit in the statute, the obvious intent of the ICWPA was to create a channel through which intelligence employees could make disclosures of urgent concerns internally, securely, and anonymously (if they so choose),” McCullough wrote in an email. “That’s reinforced by the committee report’s recognition that whistleblowers could seek anonymous guidance from their home agency when making whistleblowing disclosures. The lack of whistleblowers’ right to enforce their confidentiality may be a loophole that Congress should correct.”

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A House Democratic aide made similar points when we sought comment: “Congress has enacted laws that require agencies that are responsible for receiving whistleblower disclosures, including the inspector general for the intelligence community, have restrictions on revealing identities of whistleblowers. Congress, on a bipartisan basis, has long recognized that right. Republican members are asking witnesses to reveal the identity of an anonymous whistleblower, which would violate the law by changing the working conditions for the whistleblower. Revealing the whistleblower’s identity would be an act of retaliation because it would cause a fundamental change in the individual’s working conditions.”

Federal law expressly restricts the inspector general's office from disclosing whistleblowers' identities. It says that "the Inspector General shall not disclose the identity of the employee without the consent of the employee, unless the Inspector General determines that such disclosure is unavoidable during the course of the investigation or the disclosure is made to an official of the Department of Justice responsible for determining whether a prosecution should be undertaken."

That appears to be the lone statutory restriction on disclosing a whistleblower's identity, applicable only to the inspector general's office. We found no court rulings on whether whistleblowers have a right to anonymity under the ICWPA or related statutes. Vladeck said it is nonetheless a best practice to avoid disclosure of the Ukraine whistleblower's identity, "given the concerns about retaliation."

McCullough said, "We've stepped into bizarro-land when senior policymakers are trying to yank a CIA employee into the public spotlight in retaliation for making a whistleblowing complaint, especially when there are credible threats to that employee's personal safety."

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In his Sept. 26 testimony, Maguire, the acting DNI, said, "The inspector general is properly protecting the complainant's identity and will not permit the complainant to be subject to any retaliation or adverse consequences for communicating the complaint to the inspector general." He also said, "I am absolutely, absolutely committed to protecting the anonymity of this individual, as well as making sure that Michael Atkinson, who is our ICIG, continues to be able to do his job unfettered."

Sen. Charles E. Grassley (R-Iowa), a former chairman of the Senate Judiciary Committee who chairs the Whistleblower Protection Caucus, said in a statement Oct. 1: "This person appears to have followed the whistleblower protection laws and ought to be heard out and protected. We should always work to respect whistleblowers' requests for confidentiality."

The Pinocchio Test

Schiff's statement is on the line between Two and Three Pinocchios.

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The case for Two: The ICWPA provides a confidential process to report concerns, and some observers say it gives whistleblowers an implied right to anonymity. Outing the whistleblower could lead to the sort of workplace retribution barred by law. The whistleblower filed his complaint to the intelligence community inspector general's office, which is restricted by statute from disclosing his identity (though other officials are not).

The case for Three: The ICWPA doesn't include language granting whistleblowers a right to anonymity. Neither do other statutes, directives or court rulings that apply to the intelligence community. The argument that whistleblower-protection laws implicitly provide anonymity is more nuanced, and debatable, than what Schiff said in a nationally televised hearing. (And what good is a statutory right anyway if there's no mechanism to enforce it?)

We found the case for Three Pinocchios more compelling. Schiff says the whistleblower has a "statutory right" to anonymity, and it apparently, in Schiff's understanding, extends to congressional hearings and settings that don't involve the inspector general. That's debatable at best.

We note that the whistleblower opted for confidentiality by filing his complaint to the inspector general, that he's faced a barrage of threats, and that Maguire and Atkinson have said he followed the law and should remain anonymous.

Three Pinocchios

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