

**POLITICS**

# The Problem With the Whistle-Blower System

As the country learned this week, authorities have too much power to decide the fate of whistle-blower claims, especially when they involve the intelligence community.

**MIKE GIGLIO** SEP 21, 2019



LEAH MILLIS / REUTERS

“I don’t think that [Edward] Snowden was a patriot,” Barack Obama said in 2013 after the former NSA contractor leaked revelations of mass surveillance to a small

group of journalists.

Obama's argument then—one that has been made many times since—was that Snowden had legal channels available to him to address his concerns, which would have protected the classified information in his leaks and, by extension, U.S. national security. In particular, Obama said, Snowden could have made use of formal whistle-blower procedures within the U.S. government. “I signed an executive order well before Mr. Snowden leaked this information that provided whistle-blower protection to the intelligence community,” Obama said. “So there were other avenues available for somebody whose conscience was stirred and thought that they needed to question government actions.”

The idea that Snowden's specific revelations could have been addressed in this way has always been a subject for debate. The broader notion that the U.S. intelligence community's whistle-blower system is inadequate, however, is a common one among whistle-blower lawyers and advocates. And the new controversy surrounding a whistle-blower complaint involving Donald Trump's communications with a foreign leader has highlighted one of the main problems: Too much power to decide the fate of such complaints lies in the hands of authorities, even when they may be implicated by the allegations.

“It's one of the biggest frustrations—that the people you're blowing the whistle on

have so much say over this,” David Colapinto, a founder and general counsel of the National Whistleblower Center, told me.

This summer, according to news reports, a member of the U.S. intelligence community lodged a whistleblower complaint with the intelligence community’s inspector general, Michael Atkinson. It referenced Donald Trump’s communications with a foreign leader, reportedly the president of Ukraine, and a promise he may have made. (*The Wall Street Journal* reported yesterday that during a July phone call, Trump repeatedly pressed Ukraine’s president to pursue discredited corruption allegations surrounding the business dealings of Joe Biden’s eldest son in the

country. There was no quid pro quo discussed during the conversation, according to the report. Trump has dismissed the complaint and the news storm surrounding it as “ridiculous” and “partisan,” and has denied wrongdoing.) Atkinson reviewed the complaint, and deemed that it was credible and met the whistle-blower statute’s definition of urgent concern. He then passed it to Trump’s acting director of national intelligence, Joseph Maguire. And that’s when the process ground to a halt.

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Maguire was supposed to pass the complaint to Congress. Instead, he has held onto it after consultations with the Justice Department, arguing that the complaint may

contain privileged communications. The controversy first came into public view last week, when Adam Schiff, the Democrat who heads the House Intelligence Committee, revealed that Maguire was refusing to send the complaint his way.

Maguire's argument is on shaky legal ground. But it points to a problem: It's hard to get around the authorities.

For instance, whistle-blowers from the intelligence community could go directly to Congress with their concerns, but in doing so they would lose whistle-blower protections afforded to them under the law. They could be fired, for example, or demoted, or lose their clearance. They could be outed.

If there is a case of reprisals against the whistle-blower by superiors, meanwhile, then the case is decided by the DNI. Such cases are full of legal and administrative hurdles and can take years to play out. “So the very agency that is being accused of the misconduct sits as the prosecutor, judge, and jury, so to speak, on the whistle-blower’s retaliation case,” Colapinto said.

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Advocates and lawyers have in the past raised two potential remedies to this problem: Create a legally protected channel for whistle-blowers to go to Congress on their own, or a way to let their complaints reach federal court. Neither has been adopted into law, however.

The recent complaint,

Colapinto told me, shows why the congressional outlet for whistle-blowers is so important. Ideally, he said, their complaints could be brought directly to the House and Senate Intelligence Committees, whose members hold security clearances and are well versed in dealing with classified material. “They are perfectly ... capable of handling classified information. That’s how they’re set up,” he said. “They do it all the time.”

He added: “[Whistle-blowers] shouldn’t have to jump through all these hoops. And now we’re seeing the abuses of that process playing out.”

*[ Read: [The Trump scandals that have slipped by Congress](#) ]*

Mark Zaid, an attorney specializing in national security who is affiliated with



the firm of the lawyer representing the whistle-blower in the case, put it this way: “The authorities created the [whistle-blower] framework, and it’s only as strong as the government allows it to be.”

Michael German, a former FBI special agent who was himself a whistle-blower and faced reprisals from his superiors within the agency, told me that the whistle-blower system is designed to keep information that might be damaging to the government from becoming public. But German, who is now a fellow at the Brennan Center for Justice, added that, for better or worse, whistle-blowers are well aware of the difficulties they will face. Most of those he has spoken with say they’re willing to take on the risk to their

careers to make sure the information becomes public or reaches the officials or elected representatives who might take the appropriate action. “I’m sure that intelligence-community employee had an understanding that by making this whistle-blower complaint, he or she was putting a target on his or her back,” he said.

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