

Center for Strategic and International Studies

TRANSCRIPT

The Truth of the Matter

“Explaining the Intelligence Community Whistleblower Protection Act”

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SPEAKERS

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Bob Schieffer: I'm Bob Schieffer.

Andrew Schwartz: And I'm Andrew Schwartz of the Center for Strategic and International Studies, and this is the Truth of the Matter.

Bob Schieffer: This is the podcast where we break down the policy issues of the day, since the politicians are having their say, we will excuse them with respect and bring in the experts, many of them from CSIS, people who have been working these issues for years. No spin, no bombast, no finger-pointing, just informed discussion. And again to the truth of the matter on this episode, we will talk with Bradley Moss. Bradley specializes in litigation on matters relating to national security, federal employment, security clearance law, as well as the Freedom of Information Act and Privacy Act. Prior to joining the practice as an associate, Mr. Moss clerked for the National Security Archive. He also has served as Deputy Executive Director of the James Madison Project since 2007. And when we are talking to him, you may have guessed by now because of the story that has exploded over the last week, the whistleblower complaint involving the President of the United States. Thank you, Bradley, for getting to the truth of the matter.

Andrew Schwartz: Thank you Bradley for joining us.

Bradley Moss: Absolutely. A pleasure.

Andrew Schwartz: First, I want to make clear where exactly you are coming from. Your firm, as I understand it, actually represents this current whistleblower that's at the heart of this dispute, but as I understand it, you have walled yourself off from him. So, tell us exactly how that works.

Bradley Moss: Sure. Absolutely not a problem sir. So the way it has been set up, so the whistleblowers original attorney is Andrew Bakaj who runs his own firm known as Compass Rose. Andrew is a former CIA agent who was himself a whistleblower and has one of the few people who's ever had a whistleblower complaint substantiated in terms of having been reprimed against for making a protected disclosure. Andrew was and still remains the prime attorney representing the whistleblower. My firm's managing partner, Mark Zaid has taken on the representation in addition to Andrew through Andrew's firm, serving as what's known as an of counsel to Andrew's firm. Our firm, Mark S. Zaid, P.C. is not representing the whistleblower. I am not representing the whistleblower, and Mark and I have walled off ourselves from each other with respect to this particular case. We don't discuss the details. We don't discuss any of the strategy that he, Andrew and the whistleblower may or may not be considering and entertaining. I do not know the identity of the whistleblower. I do not know anything about this person. I don't know the substance of the complaint. I know as much as anybody reading the newspaper knows about what may or may not have been an issue, whether it's Ukraine, something more or something less.

Bob Schieffer: Well, walk us through how this whistleblower law, which is fairly new, it came in in 1998 I think.

Bradley Moss: Correct sir.

Bob Schieffer: But whistleblowing of course is old as the, as the United States of America. In fact, it goes before that. It is the place where people who had a complaint or thought they were badly treated would generally go to the press and they would examine the complaint and decide if it was legitimate and then publicize it. Now, we do have a process. Explain to us how this process works.

Bradley Moss: Sure. So a lot of this was an outgrowth from Nixon and Watergate in the 70s with all of the scandals surrounding abuse of national security authorities. One of the compromises Congress made with the executive branch was that they created these intelligence committees, which were meant to oversee the executive branch and provide some manner of oversight and scrutiny while still allowing any president, Republican or Democrat, to still conduct foreign policy and still generally be in charge of national security. In the 90s, they created a mechanism so that people within the intelligence community could bring forth complaints that were classified in and of themselves, that involved classified information, and bring that to the intelligence committees. There hadn't been a formalized process before, and there would always been concerns for people within the intelligence community of, I have something that I have seen that I believe constitutes a flagrant abuse of law or executive order with respect to an intelligence activity, but I'm bound by my secrecy agreement.

Bradley Moss: It's classified. I can't just walk into a Congress person's office without putting myself at risk. So, Congress created, and this was in 1998, the Intelligence Community Whistleblower Protection Act, which sounds like a great piece of protection for whistleblowers but is actually a bit of a misnomer. The statute does not provide protection against retaliation. All the statute provides is a mechanism, a series of procedures that someone within the intelligence community can utilize to properly and lawfully bring something to the attention of Congress. The way it works and what appears to have happened here is you file the complaint with the Inspector General of the intelligence community, someone who was politically appointed by the president. That individual has 14 days to review the complaint and decide whether or not it is credible and implicates what is known under the statute as an urgent concern.

Bradley Moss: An urgent concern being, like I said, a serious or flagrant abuse of law or executive order with respect to an intelligence activity that is not merely a difference of opinion on public policy matters. And the statute very specifically says, this just can't be, "I saw that the president's talking about reducing sanctions on Russia and I don't like that." That is excluded by statute. So the ICIG has 14 days. If they validate the complaint, which the person did here, the Inspector General is Michael Atkinson, he was

appointed by President Trump in 2018. When that is validated, it gets sent up to the DNI, the Director of National Intelligence, who has seven days to transmit it to the intelligence committees. In the 21 year history of this statute, no DNI has ever declined to forward on the complaint to the intelligence committees. It is always just a pro forma matter. They're basically the proxy. It's like if you take a package to UPS to send to your mother, UPS doesn't get to review the package and decide if they're going to send it. They just serve as the intermediary. This situation was different.

Bob Schieffer: And let me just summarize and correct me if I go off the track here of ...

Bradley Moss: No problem.

Bob Schieffer: Of what this complaint we now know was about apparently a telephone call that the president made to officials in Ukraine. We now know from the reporting on the *Washington Post* and the *New York Times* that shortly before he made this phone call, he instructed his own chief of staff to withhold, instruct the government to withhold about 400, was it million?

Andrew Schwartz: Million.

Bradley Moss: Million.

Bob Schieffer: Million dollars in aid to Ukraine. And then according to the allegations, some say he pressured, some say he mentioned, but in any case, he brought up Joe Biden and Joe Biden's son who happened to work for a firm in Ukraine. And basically what the critics say he did was threatened to withhold this aid unless the government of Ukraine investigated Joe Biden and his son. And there is no evidence at this point that either Biden or his son did anything illegal here. But that's where we are now.

Bradley Moss: Correct.

Bob Schieffer: And where this thing has exploded. So, what happens now in this process?

Bradley Moss: So, we're in a bit of uncharted territory here. We've never had this particular situation, and the problem that we face and what happened here was the DNI sought guidance, because the individual against whom the complaint was being raised was apparently the president. They sought guidance from the Justice Department's Office of Legal Counsel on whether or not the Intelligence Community Whistleblower Protection Act could apply to the president, because the president doesn't fall within the supervision of the DNI. The president is the DNI's boss. And it was apparently, and again we're just working off what's been disclosed between its press or the letters that have come out from the DNI, that the justice department's opinion was, no, this statute does not apply to the president, so the DNI is not statutorily mandated to transmit the complaint. So now we're at a political law jam here between the executive branch, which says we're not required by this law to forward this on to the intelligence committees, and the Congress saying,

"Well, yes you are, and even if the statute doesn't require it, we're demanding it as part of our oversight authority," and potentially now in the context of an impeachment investigation.

- Bradley Moss: We want to know what transpired here, and I want to caution everyone before deciding what the scope of the complaint may or may not be. All we have are leaks. The whistleblower has not talked publicly, the legal team for the whistleblower has not talked publicly. This could all be about Ukraine. This could be about something more or something less. There might be multiple calls, there might be emails. All we have are these leaks from individuals who are not the whistleblower describing what they say is the substance of the complaint.
- Andrew Schwartz: Bradley, let me jump in here for a second. I want to back up. Does the complaint that the whistleblower makes to the IG and within the DNI, does it have to involve classified information?
- Bradley Moss: It does not have to, but it often does. The reason to have the process was to ensure that if classified information is implicated, it's transmitted securely and without exposing it to unauthorized individuals.
- Andrew Schwartz: So what are some of the things that the complaint could be about if it wasn't classified information? You said it can't be a disagreement about policy, but what are some of the things that it could be about?
- Bradley Moss: Oh, I mean if it is just about these phone calls, the mere discuss ... The context of a discussion between a President of the United States and a foreign leader on matters of foreign policy are going to implicate any number of classification issues, because it is a discussion about foreign government information. It's a discussion implicating our national security objectives and our foreign policy and diplomatic efforts. That kind of information is routinely withheld under, for example, FOIA as implicating classified information to ensure that the executive can do its job to negotiate with foreign leaders.
- Andrew Schwartz: Right. But again, as you said, we don't know what's in this complaint. All we know is reporting from three major newspapers. And what we do know is this point is that there's a political brouhaha going, but you're our first guest who's not from CSS and we called you because you're the expert in this area of law.
- Bradley Moss: And I appreciate it.
- Andrew Schwartz: And we wanted to really get down to the truth of the matter. And what we want to understand is this process. So, where we are now with this 1998 law for the whistleblowers, has there ever been a complaint against a President of United States before this one?

Bradley Moss: Under that statute, as far as I'm aware, and I believe the DNI's letter confirm this, no, there never before been a complaint. And part of the reason why that more than likely is is that it's very difficult to fashion a set of facts that would satisfy the statutory definition, because of the president's inherent constitutional authority in national security matters. There's such a vast amount of discretion he would have, it would literally have to be the perfect storm of facts that could ever fit that standard, such as if the leaks are true, basically extorting a foreign government saying, "I've got this money of yours that's been appropriated. I'm not giving you anything until you meet with my private lawyer, Rudy Giuliani, and you start an investigation into my likely political opponent, Joe Biden and his son." That is using the power of the presidency and the power of the federal government's appropriated moneys to achieve a personal political objective against domestic opponent.

Bob Schieffer: One other thing, talking about the discretion the president has, it's my understanding that the president, and I guess he's the only person in the government, but he can declassify anything.

Bradley Moss: Correct. The president could declassify the nuclear codes today if he wanted to, and absent impeachment or the 25th amendment, no one would have the authority to stop him.

Bob Schieffer: So Congress is now demanding, explain to us what they're demanding.

Bradley Moss: So ...

Bob Schieffer: And what do they have a right to?

Bradley Moss: Well, that's where it gets a little gray, a bit of a gray area, because again, we're in uncharted waters. No one really knows how this will work. Congress is demanding at a minimum that the DNI, when he comes to testify on Thursday, provide them with some context, some substance about what the scope of the whistleblower's complaint was and the basis for the IG's determination that this did implicate an urgent concern. And in the IG's letter disputing the assessment by the DNI, he wrote that this issue, whatever the underlying concern is. And again, we still don't know, the issue goes to the heart of the DNI's authorities and responsibilities to protect the nation and safeguard American citizens. So, Congress is going to want some understanding of what exactly is going on here and is the president abusing his position and authority to protect himself from scrutiny that would otherwise implicate impeachment concerns.

Bradley Moss: And so if the DNI box on Thursday, if the DNI comes for in this hearing and doesn't give much of anything, you're going to see subpoenas for the records. There's going to be probably, you know, concurrent litigation either coming from the House Judiciary under the rubric of impeachment and the House Intelligence Committee under the rubric of the Intelligence Community Whistleblower Protection Act, going after these records, demanding production to the congressional committees. That doesn't mean

it goes to the public, because again, this still replicates classified information, so it still has to be safely secured, but produced to Congress so they can consider it in the context of their general oversight authorities and quite possibly a specific and select committee for impeachment.

Bob Schieffer: And let me preface this next question by saying, again, going back to what you said at the beginning, we don't really know at this point what this involves except for the leaks. But if the Congress, if this moved to impeachment and if the Congress decided this was a violation of something, what would it be a violation of? And again, the Congress would have to vote on that.

Bradley Moss: So, if they were trying to fashion it in the context of an article of impeachment, I mean there's a couple of different options. You could argue that it's an conspiracy to extort. You could argue it's straight forward abuse of power and politicization of law enforcement. The wonders of impeachment and the wonders of being, you know, Congress, and their Article 1 authority is they have a lot of discretion to fashion their own rules for impeachment. They're not bound by federal law and federal criminal provisions.

Bob Schieffer: Because they are the ones who decide what is impeachable.

Bradley Moss: Correct. Correct. And because impeachment and conviction in the Senate is so difficult and is such a high burden to meet, I think basically what the framers concluded was that giving this level of political discretion wouldn't unduly burden the executive, because even if Congress was trying to go overboard, the Senate would be the check on that to say you may have enough to ... This is slimy and sleazy and unethical, but we're not going to all abandon the president to convict. That's what happened in the 90s with Bill Clinton, and that could quite possibly happen here depending on where the facts lead us.

Andrew Schwartz: So, moving forward, the DNI is being called to testify. Is this a public hearing on Thursday?

Bradley Moss: This one is going to be public. It's not quite clear how much, if anything, he will say.

Andrew Schwartz: Why couldn't Congress subpoena the whistleblower to a closed hearing and ask the whistleblower directly what this is all about?

Bradley Moss: So there's a couple of problems with that. One, you have to assume that the whistleblower wants to do that right now, because he or she is probably trying to stay as under the radar as possible so that no one knows that this is the person who raised this concern.

Andrew Schwartz: So they can project their job.

Bradley Moss: Correct. I don't know if that person still works in the U.S. government.

Andrew Schwartz: Right.

Bradley Moss: Obviously if that person does or has any desire to ever return to the U.S. government, being exposed as the whistleblower here would be the end of their career.

Andrew Schwartz: Well what protections does the whistleblower actually have under this law?

Bradley Moss: So if someone were to try to fire this person, there is a set of administrative protections for reprisal that was put into place during the Obama administration. It was called PPD 19, it was the Presidential Policy Directive 19, came out right before Edward Snowden did his leaks and was later codified into law by Congress. It just provides an administrative process, no right to go to court. Administrative process though to bring claims of retaliation for making what is called a protected disclosure, which this complaint under the ICWPA would have been a protected disclosure. So it's always possible that if this person was fired merely for doing this disclosure, they could appeal and they could be restored to their position, but they'd be a pariah and their supervisors, you'd always have to worry, are they just looking for any reason, any excuse to fire you. Oh, you were late three days a row, you're fired. You know, kind of situation.

Bradley Moss: So there's an obvious reason why this person does not want to be outed. So that's one reason, one possible problem with subpoenaing them. The other one is they would then be serving two different masters. They have Congress subpoenaing them, but if this person is still a federal employee, they are still bound by the executive branch. They'd still have to get approval somehow within the executive branch to go before Congress to testify, which would raise all kinds of other problems about exposing that "I'm the person who blew the whistle."

Andrew Schwartz: So this is really ...

Bob Schieffer: So what if that person just decided, look, this is so important, I'm not going to worry about that. I'm just going to go tell the Congress what I know. Is there anything to stop him or her from doing that?

Bradley Moss: It's an interesting question. There theoretically could be a move by the executive branch to try to enjoin that individual from being allowed to testify. They could try to seek a temporary restraining order to prevent it, because the information ...

Andrew Schwartz: On what ground?

Bob Schieffer: On the classified information.

Bradley Moss: Correct, because it's classified information that the executive branch has not authorized for dissemination to Congress and that there'd be a risk to national security. They could ...

Andrew Schwartz: ...Even to the intelligence committee that has full clearance and oversight.

Bradley Moss: Correct. And this would come ... Again comes down to a situation we've never dealt with in a court of the intelligence committees have clearance, they ... People have clearances, they have cleared facilities, but the ... Every presidency, Democrat or Republican has always held the position that the executive branch is the sole decider of what can and cannot be disseminated when it comes to classified information for purposes of your work position and it falls for purposes of criminal liability. And so if they were to try to prevent the person from going to Congress, if the person said, "I am going to go testify on Thursday or Friday," whatever day it would be, if DOJ knew in advance there's a possibility, they could try to get it stopped in court. And honestly, I haven't to slightest clue how the court would view it.

Andrew Schwartz: Let me ask this another way. If the DNI, as expected, refuses to transmit any information, are there any legal remedies that the congressional committees have?

Bradley Moss: They can subpoena the documents and that's the ... Kind of that discussion we had earlier. They can go through their subpoena authority and ...

Andrew Schwartz: But then those can be denied also.

Bradley Moss: Well, they would be going to court on similar to the basis that we have the current litigation over Don McGahn's testimony, over the grand jury materials. You're going down that same route stuck, and you're stuck, and it partially depends on asking for an expedited process of the litigation, which the courts will sometimes do, especially if there's an impeachment angle. And if this were to go down a subpoena route, my assumption is that Jerry Nadler and the house judiciary committee would be the one running point if only because they have greater legal standing under the rubric of impeachment than the intelligence committee would have under the statute, under the ICWPA, because there is a non-frivolous argument being put forward by the DNI and by the justice department that that statute does not apply to the president. And if I were a betting man in Vegas, my money would probably be on DOJ right now, that the statute does not apply under the current language in that status.

Andrew Schwartz: Because DOJ has ruled ... The Office of Legal Counsel at DOJ has ruled that this is not urgent, right? That this is ...

Bradley Moss: Strictly from a jurisdictional standpoint. Not that it doesn't meet on the substantive merits, but only that the statutes mandatory transmittal requirement to give it to the intelligence committee can't apply to the president.

Andrew Schwartz: Okay, so going forward, where are we? What is your prediction of what's going to happen? Nobody knows what's going to happen.

Bradley Moss: My prediction is we're going to court again. My prediction, there's another set of subpoenas and an expedited set of hearings and briefing probably quickly going up to the appellate courts, possibly to the Supreme Court over this impeachment angle, over the ability of judiciary to get at this whistleblower complaint. That is if the White House doesn't back down.

Bob Schieffer: Refresh my memory on this, we know the general rule at least is that a president cannot be indicted while he is in office, but he could be subpoenaed, could he not?

Bradley Moss: Yes, so he can be ... There are ... That came out of the Clinton era. They was subpoenaed. He was, he actually testified before the grand jury. That wasn't done here and it's not clear that the congressional committees would want to go down that route, that they need his testimony. When it was done during the Clinton era, that was with the independent council serving as more of a law enforcement authority going for testimony. With Congress and with impeachment, they'll let the president respond in the context of the impeachment process itself, particularly in the Senate, if he were to want to testify. They don't need to subpoena his testimony. They want the documents.

Andrew Schwartz: Going to a broader sense of this whole ... Because this is going to bring up a larger, larger argument going forward. Whoever might be a future president, this plays to executive power and maybe a redefinition of what executive power actually is. Does it not?

Bradley Moss: Yeah, no. This is ... I mean, I'll give credit to Donald Trump, he is going to redefine what the scope of executive authority is here one way or the other, more so than any president probably since Nixon and just how far you can push the boundaries. And it's not just been on executive privilege. It's been on the anti-nepotism issue. It's been on the range of declassifying information and granting clearances to Ivanka and Jared. He has made clear he will push this as far as he can go, as allowed by article two to see to what extent Congress can and will push back, and we've seen that. We saw that with the travel ban cases. There's a lot of discretion, a lot of customs and norms we were used to over the years between presidents, no matter their party that have been pushed aside with this president because he said, I don't care about what used to be done. I don't care about patent or practices of what was nice or polite. Do I have the authority? Yes. Then I'm going forward to it and if you want to stop me, sue me.

Andrew Schwartz: Right.

Bob Schieffer: Bradley Moss, thank you for bringing us the truth of the matter on this very important issue.

Bradley Moss: Absolutely sir.

Bob Schieffer: I'm Bob Schieffer.

Andrew Schwartz: And I'm Andrew Schwartz.

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