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The Whistle-Blowers of 1777

By STEPHEN M. KOHN

Washington

FORTY years ago today, The New York Times began publishing the Pentagon Papers, a seminal moment not only for freedom of the press but also for the role of whistle-blowers — like Daniel Ellsberg, who leaked the papers to expose the mishandling of the war in Vietnam — in defending our democracy.

Today, the Obama administration is aggressively pursuing leakers. Bradley E. Manning, an Army private, has been imprisoned since May 2010 on suspicion of having passed classified data to the antisecrecy group WikiLeaks. Thomas A. Drake, a former official at the National Security Agency, pleaded guilty Friday to a misdemeanor of misusing the agency's computer system by providing information to a newspaper reporter.

The tension between protecting true national security secrets and ensuring the public's "right to know" about abuses of authority is not new. Indeed, the nation's founders faced this very issue.

In the winter of 1777, months after the signing of the Declaration of Independence, the American warship *Warren* was anchored outside of Providence, R.I. On board, 10 revolutionary sailors and marines met in secret — not to plot against the king's armies, but to discuss their concerns about the commander of the Continental Navy, Commodore Esek Hopkins. They knew the risks: Hopkins came from a powerful family; his brother was a former governor of Rhode Island and a signer of the declaration.

Hopkins had participated in the torture of captured British sailors; he "treated prisoners in the most inhuman and barbarous manner," his subordinates wrote in a petition.

One whistle-blower, a Marine captain named John Grannis, was selected to present the petition to the Continental Congress, which voted on March 26, 1777, to [suspend Hopkins](#) from his post.

The case did not end there. Hopkins, infuriated, immediately retaliated. He filed a criminal libel suit in Rhode Island against the whistle-blowers. Two of them who happened to be in Rhode Island — Samuel Shaw, a midshipman, and Richard Marven, a third lieutenant — were jailed. In a petition read to Congress on July 23, 1778, they pleaded that they had been “arrested for doing what they then believed and still believe was nothing but their duty.”

Later that month, without any recorded dissent, Congress enacted America’s first whistle-blower-protection law: “That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.”

Congress did not stop there. It wanted to ensure that the whistle-blowers would have excellent legal counsel to fight against the libel charges, and despite the financial hardships of the new republic, it authorized payment for the legal fees of Marven and Shaw.

Congress did not hide behind government secrecy edicts, even though the nation was at war. Instead, it authorized the full release of all records related to the removal of Hopkins. No “state secret” privilege was invoked. The whistle-blowers did not need to use a Freedom of Information Act to obtain documents to vindicate themselves. There was no attempt to hide the fact that whistle-blowers had accused a Navy commander of mistreating prisoners.

Armed with Congress’s support, the whistle-blowers put on a strong defense, and won their case in court. And true to its word, Congress on May 22, 1779, provided \$1,418 to cover costs associated with the whistle-blowers’ defense. One “Sam. Adams” was directed to ensure that their Rhode Island lawyer, William Channing, was paid.

Nearly two centuries later, the Supreme Court justice William O. Douglas, praising the founders’ commitment to freedom of speech, wrote: “The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information.”

A 1989 law was supposed to protect federal employees who expose fraud and misconduct from retaliation. But over the years, these protections have been completely undermined. One loophole gives the government the absolute right to strip employees of their security clearances and fire them, without judicial review. Another bars employees of the National Security Agency and the Central Intelligence Agency from any coverage under the law. And Congress has barred national security whistle-blowers who are fired for exposing

wrongdoing from obtaining protection in federal court.

It is no surprise that honest citizens who witness waste, fraud and abuse in national security programs but lack legal protections are silenced or forced to turn to unauthorized methods to expose malfeasance, incompetence or negligence.

Instead of ignoring and intimidating whistle-blowers, Congress and the executive branch would do well to follow the example of the Continental Congress, by supporting and shielding them.

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