

CONCLUSION

Whistleblowing and the American Dream

One thing is certain: The roots of whistleblowing can be found deep in the American Dream. They are not based on wealth or opportunity, but on service and a Democratic Ideal that can be traced directly back to the earliest days of the American Republic and the very first whistleblowers in the newly independent United States.

On February 19, 1777, just six months after the Declaration of Independence was signed by our Founding Fathers, the warship *Warren* was anchored outside of Providence, Rhode Island. On board, ten sailors and marines who had joined the U.S. Navy to fight for independence from Great Britain, met, not to plot a battle against the King's armies, but rather to vent their concerns about the incompetence and lack of moral integrity of the commander in chief of the Continental Navy, Commodore Esek Hopkins. Their boss not only held the top Navy job, but came from a powerful colonial family; his brother was a governor of Rhode Island and one of the original signers of the Declaration of Independence.

These sailors were devoted to fighting and winning the War for Independence. They were revolutionaries, risking their lives to build a free and independent America; they wanted nothing more than to fight and defeat their British foes. However, they feared that their commander could not successfully lead any such effort, for his tactics foreshadowed doom for the new American Navy. They blew the whistle on the mistreatment of prisoners almost 250 years before other whistleblowers exposed mistreatment of prisoners in the modern "war on terror."

The American Republic was not yet one year old. There was no First Amendment protection for freedom of speech. There were no legal protections for any whistleblowers, let alone sailors and marines who intended to expose misconduct by their commander in the middle of a war. Yet these ten men agreed to send a petition to Congress to expose misconduct by the Navy's highest officer. They became the first whistleblowers of the newly independent United States of America: Captain of the Marines John Grannis, First Lieutenant of the Marines George Stillman, Second Lieutenant of the Marines Barnabas Lothrop, First Lieutenant Roger Haddock, Second Lieutenant James Sellers, Third Lieutenant Richard Marvin, Chaplain John Reed, midshipman Samuel Shaw, ship's gunner John Truman, and ship's carpenter James Brewer.

Their petition, straightforward and written from their hearts, is found below:

On Board the Ship 'Warren'

Feb 19, 1777

Much Respected Gentlemen: "We who present this petition engaged on board the ship 'Warren' with an earnest desire and fixed expectation of doing our country some service. . . . We are ready to hazard every thing that is dear & if necessary, sacrifice our lives for the welfare of our country, we are desirous of being active in the defense of our constitutional liberties and privileges against the unjust cruel claims of tyranny & oppression; but as things are now circumstanced on board this frigate, there seems to be no prospect of our being serviceable in our present situation. . . . We are personally well acquainted with the real character & conduct of our commander, commodore Hopkins & we take this method not having a more convenient opportunity of sincerely & humbly petitioning, the honorable Marine Committee that they would inquire into his character & conduct, for we suppose that his character is such & that he has been guilty of such crimes as render him quite unfit for the public department he now occupies, which crimes, we the subscribers can sufficiently attest.

Each sailor also signed personal affidavits to Congress setting forth specific instances of misconduct committed by the commander in chief that they had witnessed. These included allegations that commodore Hopkins "treated prisoners in the most inhuman & barbarous manner," failed to attack a British frigate that had run aground (thereby permitting the enemy to escape), and stated that he would "not obey the Congress" of the United States.

Captain John Grannis agreed to secretly leave the *Warren* and present the whistleblower allegations to the Continental Congress's Marine Committee. Grannis traveled from Rhode Island to Philadelphia, presented the petitions to the Congress and testified before a special congressional subcommittee appointed to hear the whistleblower's concerns:

Q: Are you the man who signed the petition against Esek Hopkins, Esq. by the name of John Grannis?

A: Yes . . .

Q: Commodore Hopkins is charged with being a hindrance to the proper manning of the fleet, what circumstances do you know relative to this charge?

A: For my part his conduct and conversation are such that I am not willing to be under his command. I think him unfit to command . . . his conversation is at times so wild & orders so unsteady that I have sometimes thought he was not in his senses & I have heard others say the same. . . .

Q: Had you liberty from Commodore Hopkins . . . to leave the frigate you belong to?

A: No. I came to Philadelphia at the request of the officers who signed the petition against Commodore Hopkins & from a Zeal for the American cause.

Q: Have you, or to your knowledge either of the signers aforesaid any difference or dispute with Commodore Hopkins since you or their entering into service?

A: I never had, nor do I believe that either of them ever had. I have been moved to do & say what I have done & said from love to my country . . .

On March 26, 1777, the Marine Committee concluded its investigation and presented the matter to the full Continental Congress, including all the papers signed by the officers of the *Warren*. After considering the matter, Congress backed up its whistleblowing sailors and passed the following resolution: “Resolved, That Esek Hopkins, be immediately and he is hereby, suspended from his command in the American Navy.”

Congress listened to the voices of the whistleblowers and suspended the highest-ranking naval officer. John Hancock, the president of the Continental Congress, and the most famous signer of the Declaration of Independence, certified the resolution and ordered that it be served on Hopkins. Hopkins remained under suspension for over nine months. He never appeared before Congress to refute the allegations. On January 2, 1778, Congress voted to fully terminate Hopkins’s service, and he was subsequently removed from the U.S. Navy.

Unfortunately, the incident did not end with the commodore’s removal from office. Hopkins sought revenge against the whistleblowers—both during his short remaining stint as commodore and after he was stripped of his command. Upon learning of the letters signed by the ten sailors and the fact that the information was being delivered to the Continental Congress, Hopkins sprung into action during his last days as commander. He used his authority to pressure the sailors to change their testimony, and he organized a rump military prosecution for one of the petitioners, Lieutenant Marvin. Marvin, a follower of Thomas Paine, was accused of being the “prime mover in circulating” the petition. Hopkins ordered Marvin arrested and tried by a court-martial.

The military court consisted only of Hopkins' supporters, including his own son. Hopkins was permitted to personally question the accused. If found guilty, Marvin's only appeal would be to Hopkins himself. Marvin's sole crime: having "signed" "scurrilous papers" "against his Commander in Chief."

At his court-martial Marvin stood strong. He did not plead for mercy or back down from his actions. Indeed, he readily admitted to his crime of signing the petition against Hopkins. He told the prosecutors that the accusations brought forth against the commander "were of such a nature that we thought it was our duty to our Country to lay them before Congress."

Hopkins grilled Marvin as to who else had signed the petition and what specific information was provided to Congress. Marvin would not turn in his fellow sailors or tip off Hopkins as to the allegations provided to Congress. Instead, he stated, "I refuse answering to that until such time as I appear before Congress or a Committee authorized by them to inquire into the affair."

It was no surprise when Marvin was found guilty of treating the commander with the "greatest indignity" by "signing and sending to the Honorable Continental Congress several unjust and false complaints." Commodore Hopkins immediately affirmed the findings of the court-martial and ordered Marvin expelled from the Navy. America's first whistleblower was fired from his job.

Hopkins was not satisfied with merely firing the ringleader of the whistleblowers. On January 13, 1778, the former commodore sued the ten whistleblowers for conspiracy and criminal libel. Hopkins demanded ten thousand pounds in retribution, and the whistleblowers could be jailed if found guilty. Hopkins hired a well-known Rhode Island attorney, Rouse J. Helme, and filed his "writ of attachment" in the Rhode Island Inferior Court of Common Pleas. Only two of the ten sailors, Shaw and Marvin, were actually served with the complaint. The others resided outside of the jurisdiction of the Rhode Island court. Therefore, they escaped the retaliatory lawsuit.

Even though the United States was still in the middle of its War for Independence, Hopkins used his resources and connections in an attempt to destroy the lives of two sailors who had the courage to file allegations of serious wrongdoing with the Continental Congress. Shaw and Marvin were both arrested, held in jail, and forced to post an "enormous bail."

Shaw and Marvin were not men of means. They had nowhere to turn, except to plead for help from the Continental Congress. On July 8, 1778, the two whistleblowers wrote an impassioned letter to the Congress:

Your petitioners, not being persons of affluent fortunes but young men who have spent most of their time in the service of their country in arms against its cruel enemies since the commencement of the present war, finding themselves

arrested for doing what they then believed and still believe was nothing but their duty, held to bail in a state where they were strangers, without connections that can assist them in defending themselves . . . against a powerful as well as artful person who by the advantages of his officers and of the present war hath amassed great wealth—do most humbly implore the interposition of Congress in their behalf in such way and manner as the wisdom of that most august body shall direct and order . . .

The petition was read to Congress on July 23, 1778. A special “Committee of Three” was appointed to review the matter. After a seven-day review, the committee reported back to the Continental Congress. History was made.

On July 30, 1778, the Continental Congress came to the defense of Marvin and Shaw. The Congress, without any recorded dissent, passed a resolution that encouraged all citizens to blow the whistle on official misconduct. Perhaps for the first time in world history—and unquestionably for the first time in the history of the United States—a government recognized the importance of whistleblowers in exposing official misconduct of high-ranking officials working for the government itself. The act of Congress could have been written today:

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 persons in the service of these states, which may come to their knowledge.”

The Continental Congress was also sympathetic to the personal plight of Shaw and Marvin. The Founding Fathers understood that finding whistleblowers guilty of criminal libel was counter to the framework of the new Republic. Congress authorized the government to pay the legal costs and attorney fees for Shaw and Marvin so that the two men would have excellent lawyers and be able to fully defend themselves in the Rhode Island courts.

Moreover, the Congress did not hide behind government secrecy edicts, even during time of war. Instead, the Congress authorized the full release of government records related to the appointment and removal of Hopkins as commander in chief, as well as the various papers of the Marine Committee as related to the information provided by the ten sailors. No “state secret” privilege was invoked, and Marvin and Shaw did not even need to use a Freedom of Information Act to obtain documents necessary to vindicate their whistleblowing.

Just like in modern whistleblower cases, documentary evidence can make or break a case. In 1778, the Founding Fathers understood this simple fact

and made sure that Marvin and Shaw had the necessary evidence to defend their actions before a jury of their peers. The Founding Fathers went beyond passing a law endorsing whistleblowers. They spent scarce federal monies to defend and protect the sailors who had the courage to blow the whistle to the Congress.

With the help of the Congress, Shaw and Marvin were able to retain top-notch legal assistance. Their main lawyer at the trial was William Channing—a distinguished Rhode Island attorney who had been recently elected as the attorney general for the state. His father-in-law was William Ellery, one of the signers of the Declaration of Independence. Interestingly, Ellery had attended the initial examination of Grannis when he testified before the Marine Committee and was the member of the Congress responsible for transcribing Grannis's testimony.

The criminal libel trial lasted five days. Shaw and Marvin “relied almost entirely for their case upon” the information provided to them by the Congress, including “copies of letters from President John Hancock and others” to Commodore Hopkins, along with the “depositions of the officers and men on the *Warren* who had signed the petition to Congress against Hopkins.”

The jury ruled for the whistleblowers. The defendants were vindicated and Hopkins was ordered to pay their court costs.

In May, 1779, the Congress “examined the accounts of Samuel Shaw and Richard Marvin for expenses incurred in defending an action at law brought against them by Esek Hopkins” authorized the payment of “fourteen hundred and eighteen dollars and 7/90 to be paid to Mr. Sam. Adams,” of which \$500 was set aside for William Channing.

Despite his so-called “court-martial,” Marvin also received his full sailor's pension for his service during the Revolutionary War.

Whistleblowers and the Birth of the First Amendment

It was not by accident that the Founding Fathers, some of the very people who voted to defend the *Warren* whistleblowers, enshrined “freedom of speech” and the “right to petition” as the first governing principle of the Bill of Rights: “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances.”

Whistleblowing embodies the heart and soul of the First Amendment. It establishes the right of the people to expose wrongdoing and empowers them with the right to demand that powerful leaders remain accountable. The *Warren* incident demonstrates that the Founding Fathers were not only aware of “whistleblowing,” but that they strongly supported it.

Former Supreme Court Justice Louis Brandeis hit the nail on the head when he described the early American political culture and influential personalities whose struggles led to the passage of the First Amendment: “Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.”

Justice Brandeis went on to describe those who fought for the First Amendment as: “[C]ourageous, self-reliant men” whose “confidence in the power of free and fearless reasoning” rested at the heart of “popular government. . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth . . . they knew that order cannot be secured merely through fear of punishment . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . . They eschewed silence coerced by law . . .”

Justice Brandeis could well have been referencing the sailors and marines on the *Warren*, who risked courts martial and criminal libel charges to blow the whistle on their commander in chief. His description seems to fit the personality of the courageous whistleblowers far more than the nameless and faceless bureaucrats who harass or make decisions to fire these employees.

As understood by the Founding Fathers, the First Amendment established a credo at the very heart of American politics that valued the contributions of whistleblowers: “The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information.”

If whistleblowers are silenced, if voters cannot learn about the corruption of their leaders, if investors cannot learn the truth about companies they rely upon for their retirement security or their child’s education, what then is the future of the American Dream? On the reverse side, if ordinary workers are empowered to do their job honestly, even when they are faced with pressure to cut corners on safety, sell defective products, or lie to obtain lucrative government contracts, what then of the American Dream? Is it one to be proud of—to aspire toward?

In Conclusion

Corruption is a cancer on all Democratic institutions. It converts the “rule of law” to the “rule of backdoor influence.” Greed trumps justice.

When the United States was born, the Founding Fathers believed, almost religiously, that freedom of speech would protect the people from corruption.

So much so that in the middle of the Revolution they protected whistleblowers who exposed malfeasance in the top leadership of the newly created Continental Navy. After the Revolutionary War they incorporated the right to criticize the government and expose wrongdoing into the heart of the *First* Amendment to the Constitution. During the Civil War, when the existence of the United States was again under attack, the leaders of the Union enacted the first modern whistleblower law (the False Claims Act) to empower citizens to defend key laws in court, use these legal proceedings to expose and defeat corruption in public contracting, and obtain monetary rewards for taking the risk to expose wrongdoing. The role of the people in defending democratic institutions from the destructive impact of corruption was clearly recognized, endorsed, and encouraged by the founders and saviors of American democracy.

Over the past fifty years, a national framework for protecting people who courageously step forward and report corruption has developed. The framework is extremely complex and consists of numerous federal and state laws, but is also plagued by loopholes and technicalities that cause unnecessary hardship to many employees.

But despite many personal hardships, change has come for whistleblowers. There are now four *qui tam* reward laws covering a sizable segment of society. The False Claims Act and IRS whistleblower law now covers fraud in the public-sector economy. The Dodd-Frank Act now covers fraud in trading securities and commodities. State governments are slowly following the federal lead, and a majority of states now have *qui tams* covering public procurement.

Slowly, antiretaliation laws are being modernized. The new laws passing through Congress almost uniformly permit employees access to federal court proceedings and reasonable damages. Reforms are slowly fixing infamous tricks and technicalities used to undermine whistleblowers—such as mandatory arbitration agreements and the failure to protect internal disclosures.

Today the key to obtaining protection as a whistleblower is navigating the maze: finding the best laws, becoming fully aware of the traps and pitfalls facing any whistleblower, and ultimately using these laws effectively to ensure real protection. At some point there will be a change in corporate culture. At some point corporations, government agencies, and most judges will acknowledge the benefits of strongly promoting employee disclosures of wrongdoing. We are not there yet—not even close. But the legal framework for changing this culture is coming into place, and a growing number of whistleblowers are landing on their feet.