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People Who Could Not Keep Silent. The Founding Fathers of Whistleblowing

ABSTRACT

The dilemma between loyalty to an organization and exposing irregularities within it has been observed since 1777, when whistleblowing activities were first documented, when ten sailors affected by mistreatment and feelings of injustice decided to report these irregularities to the most powerful commander in the Continental Navy, Esek Hopkins. Since then, there have been many examples of whistleblowing in the US. Each whistleblower, acted in the name of the greater good, often risking his or her name, reputation and even his or her family's safety. The first reports were unique because no one knew the institution of whistleblowers, and their activities were often synonymous with denunciation and lack of loyalty to the employer. Over time, attitudes began to change, regulations began to emerge to protect whistleblowers, and even organizations began to stand up to protect their rights. Instead of condemnation, their attitude began to be met with admiration and approval. Whistleblowers began to be rewarded for their activity. Whistleblowing is beginning to become the norm and standard of a democratic state of law. It is understood that a well-built compliance policy, transparent and clear operating rules play a huge role in the success of an organization. A brief presentation of selected stories of whistleblowers is intended to give an idea of the development of this institution. The research methodology used in this article primarily involves the historical-descriptive method.

Key words: Whistleblower, history of whistleblowers, whistleblower, compliance, informing, whistleblowing procedures

A whistleblower is an active citizen who, having witnessed an unlawful act, seeks its elimination. Such individuals play an important role in a democratic state where the idea of civil society is alive.

The protection of whistleblowers is essential to promote transparency and fairness, especially the detection of illegal acts. Over the years, employees who are aware of irregularities, for fear of reprisals, have often refused to say anything. Therefore, to effectively prevent such situations, the need for legal protection of those, who report irregularities has arisen. When we talk about whistleblowing, it is about actions done in the public interest, out of loyalty to colleagues and to one's organization. We see or suspect violations and we report them. We feel that boundaries have been crossed that should not have been crossed, and we report it to the appropriate people. The whistleblower must act in good faith. This means that the whistleblower must believe that the information which is provided is true and that they are reporting a behavior or phenomenon that is contrary to some rules, the violation of which constitutes a danger to others. In addition, a whistleblower informs about such behavior that, if undertaken in connection with an activity, may cause harm to someone because it violates a specific legal or ethical framework. The whistleblower system assumes that awareness of irregularities occurring in an organization is a necessary element for its proper functioning. Therefore, while building the compliance system in our organization we act to systematize certain processes to minimize the risk of serious violations.¹

Whistleblowing may also be described as an act of opposition involving a public accusation against an organization that requires being disloyal to that organization. This definition differs from others in several ways, but primarily it puts the emphasis on non-compliance, is based on the ethical dilemma of conflicting loyalties, and strictly formulates the dilemma in terms of confidentiality and ownership rights to information. These characteristics result in a definition in which motive plays no role and which requires that the decision to disclose information to an outside party be made by free choice.²

Regardless of the focus we place when defining whistleblowing institutions, the most important thing is the effect – the disclosure of irregularities.

However, this has not always been the case, and it should be emphasized that the current awareness of the need to protect whistleblowers has undergone a long evolution. For a long period of time, whistleblowers were treated exclusively

¹ D. Tokarczyk, *Whistleblowing i wewnętrzne postępowania wyjaśniające*, Warszawa 2020, pp. 18-20.

² P.B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, *Journal of Business Ethics*, Springer 1999, pp. 78.

negatively, as denouncers. And although they acted in good faith, reporting serious wrongdoing they often suffered severe penalties for doing so.³

The meaning of whistleblower comes from the English phrase “to blow the whistle” and refers to the method of alarming (calling for help) formerly used by police officers. According to other interpretations, the term can also be associated with the world of sports – signaling by the referee in situations, in which there is a need to intervene, among others: sports referees as well as law enforcement officials, to alert or draw attention to abnormal/illegal behavior.

A whistleblower is a person (an employee in the broad sense of the word) who, having regard to the good of his or her workplace and (or) the public good, provides (first to his or her superiors, then - if this does not work – to other instances, law enforcement agencies or the media) information about irregularities related to the functioning of his or her organization.⁴ Transparency International stresses that whistleblowing rules should apply to all individuals at risk of retaliation. According to research conducted by the European Commission, the lack of protection of whistleblowers in public procurement alone exposes the EU to losses of about 8 million Euros per year on average⁵.

The core of whistleblowing lies in the dilemma between being loyal for the organization or exposing some wrongdoing in it. To make it all much harder reporting wrongdoing typically causes consequences for the whistleblower and for the organization itself. Unfortunately, many whistleblowers face tragic personal consequences. To make it more complicated, in many cases of whistleblowing reporting wrongdoing typically entails serious consequences. They affect both whistleblowers as well as their families and friends.⁶ For this reason, in many cases, employees who are aware of irregularities, precisely for fear of retaliation, will not be able to say anything and report irregularities. The consequences of such “silence” are long-term for the organization and for society as a whole. The need to provide legal protection for people who signal existing violations was born out of this trend. Today, all over the world, every day millions of people report irregularities, violations, fraud. This attitude strengthens democracy and protects the interests of businesses from huge financial losses.

3 Z. Góral, *Afera watergate i jej znaczenie historyczne dla rozwoju sygnalistów*, [w:] *Ochrona Sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, red. B. Baran, M. Ożóg, Warszawa 2021, s. 319-320.

4 G. Makowski, *Wprowadzenie*, [w:] *Sygnaliści w Polsce okiem pracodawców i związków zawodowych*, red. G. Makowski, M. Waszak, Warszawa 2016, s. 9-15.

5 M. Sieradzka, *UE nakazuje chronić sygnalistów*, *Komentarz praktyczny*, Lex/el.

6 E. Ceva, M. Bocchiola, *op.cit.*, pp. 4-5.

However, the development of legal protection for whistleblowers has progressed very slowly throughout history.⁷

Many whistleblowers become known to the public not so much for the fight against corruption, but because of the very negative consequences that affected them or the reputational damages they supposedly caused to their organizations.

The fact is that if it were not for the actions taken by people with a very highly developed sense of responsibility and integrity, who reported irregularities without being guaranteed any legal protection or knowing what the consequences of their actions would be, we would not have a situation today where legal protection for whistleblowers is ensured. It is thanks to their courage and concern for the welfare of the public that today we can analyze legal standards for the protection of whistleblowers, create procedures within organizations and improve compliance systems.

The first documented whistleblowers were 10 American sailors, who reported the misconduct of the most powerful commander in the Continental Navy, Esek Hopkins. The sailors, on a call to arms against Britain, gathered below the deck of the USS Warren on February 19, 1777, and signed a petition to the Continental Congress documenting their commander's abuses. Ultimately, the Continental Congress supported the whistleblower officers and suspended outright and later fired Hopkins. Hopkins brought a defamation case against the 10 petitioning Signal Officers and 2 went to jail. However, they appealed to the Continental Congress for help, writing that they had been arrested for doing what was their duty. In response, the Continental Congress passed a law protecting the men – and future whistleblowers.⁸

The term “whistleblowing” made its appearance in the public debate in the late 1950s to present the idea of a referee who stops the action when players have committed a foul, or of a British bobby who blows his whistle to call attention to a criminal.⁹ At the beginning it was used for describing professionals who stubbornly reported threats to the safety of the customers to finally become a way of describing the public exposure of examples of corruption or frauds.

Until 1971, the term WHISTLE BLOWER was used and reserved mainly for a person, who introduces a warning through the use of a whistle for. It was used first in the United States by Ralph Nader. He was an American politician and social activist, who changed the meaning of this word to the one we know today.¹⁰

⁷ Z. Góral, op. cit. pp. 320-321.

⁸ A *Timeline of U.S. Whistleblowing*, <https://www.employmentlawgroup.com/timeline-us-whistleblowing/> [dostęp: 12.07.2022 r.].

⁹ E. Ceva, M. Bocchiola, *Is Whistleblowing a Duty?*, Cambridge 2019, pp. 3.

¹⁰ *Skąd się wzięli sygnaliści? – czyli krótka historia o idei whistleblowing*, <https://abd-group.pl/skad-sie-wzieli-sygnalisci-czyli-krotka-historia-o-idei-whistleblowing>, (12.07.2022).

Since the first recorded case of whistleblowing came from the US in 1777 the purpose of this study is to introduce the profiles and history of selected American individuals who contributed to the development of the institution of whistleblowers and led to the development of legal norms designed to ensure their due protection, regardless of the legal regime in which they operate. By showing the stories, bearing in mind the caliber of irregularities that were revealed, one can easily see the level of risk that they bore each time. It is thanks, among other things, to their activity that today we can talk about legal regulations protecting whistleblowers.

After the first documented whistleblower activity in 1777, my attention will focus on showing examples of contemporary activities and areas that have been the subject of whistleblowing in the US.

The first example of a whistleblower would be A. Ernest Fitzgerald, a long-time government employee and government whistleblower. In 1968, Fitzgerald reported a 2.3 billion dollars cost overrun involving the Lockheed C-5 transport aircraft. His testimony before Congress in 1968 and 1969 about the problems in defense contracting resulted in the renegotiation of the Air Force's contract with Lockheed Corporation and saved the government 273 million dollars.

Fitzgerald was also instrumental in the passage of the law which later led to the landmark Whistleblower Protection Act of 1989, a U.S. federal law that protects federal whistleblowers who work for the government and report agency misconduct.

Another whistleblower that should be mentioned is Frank Serpico. He was instrumental in exposing police corruption in New York City in the late 1960s and 1970s. His testimony in 1971 was the centerpiece of hearings that set off the biggest shake-up in the history of the New York Police Department.

Serpico was the first police officer in New York to present evidence to City Hall of bribe-taking estimated at millions of dollars by other Gotham police officials. His reports were ignored, resulting in a public notification to the New York Times. An article with the information they provided was published on the front page and led to the formation of the Knapp Commission to investigate police corruption.¹¹

For many years, the most famous whistleblower was Mark Felt, known by his nickname of "deep throat". Felt became famous as a whistleblower during the Watergate scandal, which resulted in Richard Nixon's resignation in 1974. He was deputy director of the Federal Bureau of Investigation and worked with Washington Post journalists Bob Woodward and Carl Bernstein at that time. Felt was extremely cautious about his activities and remained anonymous for many years. He only revealed himself after 30 years. Part of the public considered

¹¹ A *Timeline of...*, op. cit.

him a hero loyal to his work and values, and part of the public considered him a person who, for his own private motives, wanted to take revenge on Nixon.

The watergate scandal forever changed the approach to the essence of whistleblowing. And although it has not led to the exclusion of their occurrence, it has instilled in people the feeling that it is possible and necessary to react when violations of the law occur, especially if they are committed by people in leadership positions. The Watergate scandal contributed to the existence of certain changes giving rise to the regulation of legal protection of whistleblowers, since they often have access to confidential information. The watergate affair contributed to many changes. One of them was the beginning of changes that started to take place in American society, which came to understand that whistleblowers need legal protection. Whistleblowers began increasingly to be seen not as traitors, but as people sacrificing loyalty to their employer for the greater, common good. Since then, the creation of legislation to protect whistleblowers can be observed. By way of example, one can cite one of the first whistleblower laws in Congress in 1975, which included protection from retaliation for those who provided access to public information. Another example is the Privacy Act of 1974, which outlines how the government can collect, maintain, use, and disseminate information about individuals. The Ethics in Government Act of 1976, on the other hand, was inspired by the ethical shortcomings of the Nixon administration's behaviors. It raised standards for conflicts of interest and, by implication, required disclosure of the public finances of senior government officials. As a result an office of government ethics was established. This was the beginning of conscious building of compliance systems. The Freedom of Information Act of 1978 aimed at clarifying the duties of specific authorities and increasing access to public information. The same year also saw the start of the Whistleblower Protection Act, which defined the conditions for whistleblower protection taking place in corporations or public institutions. This law included a ban on retaliation against a whistleblower in the form of dismissal. Whistleblowing was taken seriously. It opened the way for whistleblowers to act safely and gave them the opportunity to report irregularities without fear of retaliation. All sectors of society – including government officials – began to understand the seriousness and need to protect whistleblowers.¹²

Next example of whistleblowing may be Daniel Ellsberg, who was a defense military analyst who in 1971 submitted to several newspapers what became famous as “The Pentagon Papers”. The Pentagon Papers are a top-secret Pentagon study of the US government's decision-making on the Vietnam War.

¹² Z. Góral, *op. cit.*, pp. 320-326.

The study exposed that although the policies used in the war were deemed to be unwinnable, the war was escalated.

Another story is Daniel Ellsberg, who first handed the documents to the Senate Foreign Relations Committee, but when nothing occurred, he disclosed them to several press sources in 1971.

Accusations against Ellsberg under the Espionage Act of 1917 were dismissed in 1973 due to government failures and unlawful collection of evidence.

Influenced and inspired by the activity of Daniel Ellsberg, Perry Fellwock became famous as another whistleblower. He was a National Security Agency (NSA) analyst who in a 1971 journal interview, using the nickname Winslow Peck, uncovered the real history of the agency and its global network of secret surveillance.

Working from an undeclared office and with a budget bigger than the CIA, the NSA played a key role in almost every major global geopolitical and military event of the Cold War, with nearly no public oversight.¹³

Another whistleblower, who seems to be important, was Karen Silkwood. She was a research laboratory analyst and trade union leader at a nuclear plant in Oklahoma. She was worried about health and safety issues at the plant. In 1974, Silkwood testified before the Atomic Energy Commission about her concerns.

On a few occasions, Silkwood found that her apartment was polluted with high levels of plutonium. The highest concentrations were in her bathroom and in a sandwich in her fridge.

Silkwood died in a mystery car crash in November 1974 while on her way to meet with a New York Times reporter and an official from her union's national office.¹⁴

Citing examples of US whistleblowers, it is worth to mention the most important legal guarantees that emerged in the 1970s and 1980s. One can point to a number of laws that provide legal guarantees for people who disclose information about the negative impact of activities undertaken by the company where they work. Negative activities are those that affect health, disease, the environment, etc. These include the Toxic Substances Control Act, the Toxic Substances Control Act of 1976, the Solid Waste Disposal Act Comprehensive Environmental Act of 1976., or the Response, Compensation and Liability Act (CERCLA) of 1980.¹⁵

¹³ C. Apaza, *Whistleblowing and the Federal Employee: Effective Legal Protection*, Open Communication and Organizational Attitude. PA Times, ASPA. Special Section, 2008, pp. 6-7.

¹⁴ *A Timeline of...*, op. cit.

¹⁵ *Historia prawa chroniąca sygnalistów*, <https://sygnalista24.info/historia-prawa-chroniaci-sygnalistow>, (12.07.2022).

The legal regulations indicated are only exemplary, since the legislative heritage in this matter is much greater. Now in retrospect, it is obvious that the actions of whistleblowers, although risky at the time, did not go unnoticed and influenced the development of legal culture.

Giving examples of whistleblowers, there is also Linda Tripp. She was the former government official who secretly recorded her phone calls with White House intern Monica Lewinsky, in which the trainee denied having intimate physical relations with President Bill Clinton. Lewinsky's accusations of a connection with the president caused a public scandal in the mid-1990s and led to the impeachment of the Democratic president.

Tripp became friends with Lewinsky when they were both working in the Pentagon's public affairs office. Tripp, who said she was acting on the advice of a literary agent, began secretly recording phone calls with the much younger girl.

In January 1998, Tripp revealed the tapes to independent counsel Kenneth Starr, who was investigating Clinton Whitewater, in exchange for immunity from charges of unlawful wiretapping.¹⁶

Another example of whistleblower may be Edward Snowden. He was a computer specialist working for the Central Intelligence Agency (CIA) and then for the National Security Agency (NSA). He created the biggest intelligence leak in the National Security Agency's history in 2013 when he released classified information without authorization.

Snowden's disclosures revealed a number of global surveillance programs, many run by the NSA and a global alliance of intelligence agencies with the assistance of several telecommunication companies. Snowden had special access to sensitive information about the specifics of the global surveillance network through which the US Secret Service monitors telecommunications systems around the world. This control has been known to some extent since the Cold War. However, no evidence has ever been presented regarding how this system works. In the follow-up to the September 11 terrorist attack, the NSA increased its global systems of surveillance, winding up by monitoring normal citizens, who were not associated with criminal organizations. Snowden figured that in the name of national security, the US government was illegally abusing the rights of millions of Americans, as well as unsuspecting foreign citizens. Snowden first tried to raise his doubts with his colleagues, but none of them, while likewise alarmed, were ready to risk their jobs and lives to make the public disclosure. Other members of the NSA have brought up similar concerns before, but all have been terminated, and in some cases prosecuted and accused of being spies, among other things. Concluding that the situation could not be

¹⁶ A *Timeline of...*, op. cit.

modified inside the NSA, Snowden made deals with Guardian and Washington Post journalists to inform them about the mass surveillance system to be known as PRISM. He then went to Honk Kong, where he finally met with journalists in person, thus disclosing his personal identity, and released appropriate secret papers.

In June 2013, Snowden was officially accused of breaking the Espionage Act of 1917 and stealing government assets, risking life imprisonment. Snowden is currently living in Russia, where President Putin has temporarily granted him asylum.

There probably isn't a person who doesn't know Chelsea Manning, the US Army soldier who handed over thousands of pages of military-related documents to Wikileaks in 2010.

The disclosed documents contained video footage of the July 12, 2007 raid on Baghdad and the 2009 Afghanistan raid, as well as diplomatic messages and military reports that became known as the Iraq War Log and the Afghanistan War Log. In a press release, Manning said she published the materials "to show the true price of war."

The materials were published by WikiLeaks and its media partners – The New York Times, The Guardian and Der Spiegel – between April 2010 and April 2011. The publication of the leaked materials attracted global publicity.

Manning stood trial in July 2013 and was sentenced to 35 years in prison. After US President Barack Obama commuted her sentence, she was released from prison in 2017.¹⁷

Each of the stories cited, although different, has one common denominator – the values that guided each whistleblower. These were heroism, courage and fighting for the truth in the name of the common good. Behind the personal sacrifice and public service they all exemplified, not much can be said. Their actions are understood not as an individual act of defiance motivated by personal considerations of justice, but as an organizational practice justified as a public duty by considerations of justice and responsibility. If we define whistleblowing in terms of all these examples presented above, whistleblowing could not be seen as a duty. While the moral assessment of their actions has been the subject of much debate - some critics have deemed them socially and politically risky, if not treasonous - it is quite clear that even for their supporters, what they have done goes beyond the bounds of ordinary ethics. Their actions, go further than what one should or must do. Sacrificing one's life, family and individual freedom cannot be morally expected of anyone, no matter what cause their actions may serve.

¹⁷ E. Ceva, M. Bocchiola, *op. cit.*, pp. 4-6.

When we talk about whistleblowing, we are talking about actions taken in the public interest, out of loyalty to colleagues and organizations. We see or suspect violations and report them. We feel that boundaries have been crossed that should not be crossed and report it to the appropriate people. A whistleblower must act in good faith. This means that the whistleblower must believe that the information he or she is reporting is true and that he or she is reporting a behavior or phenomenon that is contrary to some principle, the violation of which poses a threat to others. In addition, a whistleblower reports behavior that, if taken in connection with an activity, could cause harm to someone because it violates a certain legal or ethical framework. The whistleblower system assumes that awareness of irregularities occurring in an organization is a necessary element for its proper functioning. Therefore, when building a compliance system in our organization, we work to systematize certain processes in order to minimize the risk of serious violations.

Human nature has always felt the need to build the right ethical patterns and function based on the principles of honesty and truth. Therefore, it is more important to be aware of the actions that were taken by whistleblowers who were not guaranteed legal protection.

In my opinion, making considerations about evaluating the actions of whistleblowers is pointless, because the attitude of these people, insofar as it is a manifestation of pure intentions and acting in the name of the common good, no longer deserves not only seriousness, but above all proper and effective legal protection.

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SUMMARY

People Who Could Not Keep Silent. The Founding Fathers of Whistleblowing

The short stories of whistleblowers in the US described in this article clearly and lucidly show that there has long been a disconnect between hiding irregularities and turning a blind eye to abuse by superiors or fraud and dishonest activities by co-workers. The dilemmas between loyalty to the employer and disclosure of irregularities have diminished with time. All due to the development of civil society and the corresponding state policy, which consisted of introducing regulations to protect whistleblowers. Through such action, the public observed acceptance on the part of the state and, in a way, encouraged whistleblowing of even the smallest violations. As can be seen from the stories described, the seriousness of violations is often very high and can threaten state security and public order. The values which guided each whistleblower had one common denominator, which was loyalty and the desire to operate in a transparent and clear environment. And if their actions are understood not as an individual act of defiance motivated by personal considerations of justice, but as an organizational practice justified as a public duty by considerations of justice and responsibility, we can face the core of whistleblowing. The development of whistleblower institutions shows that the more legal protection state institutions provide, the more irregularities come to light. Only the building and development of civil society in tandem with legal protection for whistleblowers can succeed.