

The Make it Safe Coalition's Steering Committee, a trans-ideological, non-partisan working group of whistleblower and accountability advocates championing good government policies, prepared the below proposals for your review.

We would welcome your interest in making the federal government a safer place for whistleblowers. We would be delighted to provide you with more information concerning any of these recommendations. As President-elect Biden takes office, we remain ready and willing to serve as a resource and brain-trust to discuss whistleblowing policy. The MISC Steering Committee achieved consensus on the other, additional recommendations.

The recommendations printed below have been categorized into "Day One" and "Day One-Hundred" proposals to ease reader clarity. Those previously accepted as recommendations from the pre-election Biden Policy Committee are starred.

### **DAY ONE:**

\* **Recommendation 1:** Issue an Executive Order requiring agencies to cooperate fully with investigations by the Office of Special Counsel (OSC) and Offices of Inspectors General (OIG), and at a minimum to provide substantive explanations for disregarding OIG recommendations in whistleblower retaliation cases.

*Rationale:* The Trump Administration's adversarial relationship with the accountability agencies has taken a toll on the federal workforce. As Glenn Fine, the former IG of the Department of Justice and more recently the former acting IG for the Department of Defense, told the House Committee on Oversight and Reform's Subcommittee on Government Operations: "Recently, we've seen a disturbing trend of the [Defense Department] disagreeing with the results of our investigation or not taking disciplinary action in whistleblower reprisal cases without adequate or persuasive explanations. Failure to take action sends a message to agency managers that reprisal will be tolerated and also to potential whistleblowers [that they] will not be protected."<sup>[1]</sup> When an OIG validates allegations of whistleblower reprisal, inaction by the agency chief significantly deters whistleblowing and allows bad actors to continue violating civil service laws unabated.

Similarly, there have been repeated instances when OSC and OIG are investigating allegations of whistleblower reprisal, and agencies decline to provide timely responses (or responses at all) to the investigators with impunity. This can significantly delay completion of investigations and relief. The Biden Administration must rebuild its relationship with the accountability agencies and take a strong stand against

whistleblower retaliation; this is a prime opportunity to stick up for both embattled watchdogs and whistleblowers alike.

**\* Recommendation 2:** Issue an Executive Order directing executive branch agencies to comply with all requests from the Office of Special Counsel to “stay” whistleblower retaliation and other prohibited personnel practices while it investigates complaints.

*Rationale:* Temporary relief is by far the most effective way to reduce unnecessary conflict and allow whistleblowers to survive throughout investigations that regularly last years. It is also the most significant tool the OSC possesses to convince agencies to end retaliation voluntarily. The OSC may request an agency voluntary stay adverse employment actions against a whistleblower when “(1) OSC has reasonable grounds to believe that a personnel action that was taken or will be taken constitutes a prohibited personnel practice; and (2) absent a stay, the employee will be subjected to immediate and substantial harm, such as removal, suspension for more than 14 days, or geographic reassignment.”<sup>[2]</sup> Furthermore, the Special Counsel may petition the Merit System Protection Board (MSPB) to seek their enforcement of a stay request. However, because the Merit System Protection Board has sat memberless for years, the OSC has been unable to petition the Board for enforcement pursuant to 5 U.S.C. § 1214, resulting in thousands of whistleblowers being left in the lurch after agencies deny the OSC’s voluntary stay requests. Some whistleblowers have suffered through investigations lasting the majority of the Trump Administration—and others have been dissuaded from requesting a stay at all because the OSC cannot enforce a stay if one is granted.

**\* Recommendation 3:** Issue an Executive Order prohibiting the implementation of nondisclosure policies, forms, or agreements that conflict with anti-gag laws that already exist in statute.

*Rationale:* Anti-gag laws, passed through virtually all appropriations acts since FY 1988 and the Whistleblower Protection Enhancement Act of 2012, prohibit the federal government from implementing or enforcing nondisclosure agreements and other management communications or policies restricting employees’ speech rights when those gags do not include statutorily required language reminding employees that their whistleblowing rights supersede the conveyed restrictions. When these anti-gag laws aren’t followed, whistleblowers are chilled at best and “outed” at worst.

Unfortunately, enforcement of these anti-gag laws is a magnet for cynicism. They are enforced by the Office of Special Counsel, but the high frequency of gag orders has outpaced OSC’s capacity for correction. Good government groups have documented a handful the Trump Administration’s many violations.<sup>[3]</sup> If agencies were bound by the

President of the United States to adhere to existing anti-gag laws, this problem would significantly decrease, meaning whistleblowers would feel more comfortable to come forward, face less risk for retaliation, and be better able to maintain their confidentiality.

**Recommendation 4:** Repeal Executive Order 13597 (Donald Trump, 2020), which creates a new Schedule F in the civil service.

*Rationale:* The President and agency leaders have long been exempted under Schedule C from civil service rules—including whistleblower protections—with respect to their confidential policy team. This Executive Order, however, expands the merit system loophole to virtually all federal workers whose actions affect the public, including all those involved with setting policy, preparing regulations, exercising discretion on enforcement of regulations, engaged in collective bargaining for the agency, or *anyone working for* a supervisor with a GS-13 grade or higher. This essentially is an Executive Order to eliminate the civil service merit system except for low-level administrative functions. It cannot coexist with a non-partisan, professional federal labor force.

\* **Recommendation 5:** Announce plans to work with Senator Charles Grassley and the United States Special Counsel to host a bipartisan Rose Garden ceremony honoring whistleblowers for National Whistleblower Day (July 30<sup>th</sup>). (So long as such an event this year would comply with public health guidance.)

*Rationale:* Senator Grassley has asked every President since Ronald Reagan to host a Rose Garden ceremony on National Whistleblower Day honoring federal whistleblowers. Following this recommendation would immediately display President-elect Biden's commitment to reverse the Trump administration's dangerous trend of whistleblower suppression and retaliation. Because Senator Grassley is the Republican Co-Chairman of the Senate Whistleblowing Caucus, accepting his request would help restore the centuries'-old bipartisan support for federal whistleblowers that President Trump shattered. Additionally, including Special Counsel Kerner in the public identity of the event would help provide badly needed credibility within the executive branch for the Office of Special Counsel, which President Trump has rendered effectively toothless.

**Recommendation 6:** The White House Office of Presidential Personnel should ensure that all candidates for presidential appointment honor, understand, and value whistleblower protections.

*Rationale:* When PPO evaluates candidates for presidential appointments, the office should include a survey question asking whether or not that candidate will protect lawful whistleblowers inside their workforce from retaliation. The office should also include a survey question asking whether or not that candidate has ever been found to

have retaliated against a whistleblower. Only candidates who commit to honoring whistleblowers' protections and have never been the subject of substantiated retaliation investigations should be considered for appointment.

**Recommendation 7:** Notify all federal employees of the administration's commitment to honoring their whistleblowing rights and protections.

*Rationale:* The Biden administration must take immediate steps to change the executive branch's anti-whistleblower culture by communicating to all federal employees that they not only will be protected against retaliation but that they are expected to speak up when they witness wrongdoing. Federal employees must be made aware that one of the General Principles from the Standards of Ethical Conduct for Executive Branch employees provides: "employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."

**Recommendation 8:** Extend whistleblower-type legal protection to scientists to protect these specialists who "speak truth to power."

*Rationale:* Government scientists who reach scientific conclusions that are unpopular with political leaders or agency managers doing the bidding of regulated parties have not engaged in protected activity as currently defined in whistleblower laws. There is much work to be done to protect them from retaliation for their scientific products and conclusions.

\* **Recommendation 9:** Restore and Expand the White House Czar for Ethics position.

*Rationale:* The White House Czar for Ethics position, whose primary mission includes advocating whistleblower rights and liaising with good government stakeholders, should be revived. This highly successful role was well-staffed by Norm Eisen during the Obama administration. We recommend expanding this post to cover democracy issues writ large and providing significant staffing to the Czar. At a minimum, following this recommendation would help clean up government corruption and institutionalize the role of whistleblowers as an Administration priority. Equally significant, this post provided a safety valve to divert potential public conflicts into constructive problem solving by working with stakeholders who share advance warnings.

\* **Recommendation 10:** Nominate qualified individuals to lead the Merit Systems Protection Board who are dedicated to upholding the federal merit system.

*Rationale:* The MSPB, a quasi-judicial administrative board that adjudicates federal workers' claims, has not had a quorum for over three years. As a result, there was a

backlog of over 2,500 cases in January of 2019. Its acting chief executive told the Federal News Network in January 2020: “That 2,500 number does represent 2,500 cases where individuals are choosing to get in line to wait for a board to come. It’s a large number, by far the largest backlog there’s ever been at MSPB.” The backlog has only grown since. Appointing qualified individuals is imperative to dig out from under this backlog, alleviating a hardship thousands of federal workers currently face.

**Recommendation 11:** Direct the Labor Secretary to appoint qualified individuals to run the Department of Labor's Administrative Review Board and its members.

*Rationale:* The government requires qualified individuals to run the varying agencies, boards, and components that enforce whistleblower protections. As a start, the Secretary of Labor should promptly appoint a new Administrative Review Board that shares the administration’s commitment to whistleblower protection. Workers outside the federal government rely on this Board to enforce their whistleblowing rights under the law, and the Administrative Review Board’s decisions can be adopted by federal courts. An Administrative Review Board hostile to whistleblowers undermines the spirit of our whistleblower laws.

**Recommendation 12:** Direct Intelligence Community components to cooperate with Government Accountability Office investigations and audits.

*Rationale:* While GAO is a major investigative tool on Congress’ belt, the Intelligence Community currently takes the position that they only must cooperate with GAO inquiries in a small minority of cases. This is based on the mistaken legal interpretation that only SSCI and HPSCI have jurisdiction to investigate the IC, and that that jurisdiction cannot be delegated to GAO. IC agencies, as a result, vary widely in their response to GAO, sometimes fully cooperating and elsewhere refusing to provide any information to GAO even when GAO has been directly tasked by SSCI or HPSCI to do the inquiry.

### **DAY ONE-HUNDRED:**

\* **Recommendation 13:** Equip civil servants to reach settlements with their agencies by repealing Executive Order 13839 (Donald Trump, 2018), which prohibited agencies from erasing or altering personnel records without an admission of fault, including performance appraisals, as a condition of no fault settlements resolving federal employment complaints.

*Rationale:* President Trump crippled the option in civil service cases to reduce unnecessary conflict through settlements by restricting agencies from modifying personnel records as part of agreements. But clean records often are a prerequisite for an employee to be functional after withdrawing a complaint—especially considering the prevalence of poor performance appraisals being used as a retaliatory tool against whistleblowers. The result has swelled unnecessary conflict, prolonged retaliation and exacerbated an already unprecedented Merit Systems Protection Board backlog, which is already expected to significantly delay merit system enforcement well into President-elect Biden's first term. These routine, traditional provisions should be restored for settlements to be realistic in most cases. No fault settlements traditionally have been a major tool to eliminate unnecessary conflict from litigation dockets. Requiring agencies to admit fault sabotages this option.

**Recommendation 14:** Train political appointees on their subordinates' whistleblowing rights.

*Rationale:* While Inspectors General and other entities train federal workers on their whistleblowing rights and responsibilities, political appointees are not always aware of the rights and responsibilities that are applied to their workforce and receive these trainings with less frequency. However, political appointees are likely to interact with whistleblowers, usually from a position of power. It is necessary that they understand their subordinates' whistleblowing rights and protections. Therefore, they should be trained on the whistleblowing processes and protections to ensure they do not infringe others' rights or act unethically themselves.

\* **Recommendation 15:** Create a dedicated office in the Department of Labor to take over the role of handling initial investigations of relevant retaliation complaints, a role that is currently handled by the Occupational Safety and Health Administration.

*Rationale:* OSHA conducts initial investigations for retaliation complaints in 23 statutes administratively enforced by the Department of Labor. For nearly 25 years the Secretary of Labor has designated OSHA to conduct initial remedial investigations under DOL-enforced corporate whistleblower laws. The experiment has been a disaster, because the agency's highest priority has to be investigating occupational safety hazards. Further, it always is under-resourced (a separate problem to be addressed). The results are that only 2% win their cases at the preliminary OSHA level. It can take 2-3 years to lose at the OSHA, and sometimes much longer. During that time, the whistleblower is barred from pursuing an administrative due process hearing for a more realistic chance at justice and to document damages. This recommendation would plan for entrusting rights to an agency whose resources and mission are dedicated to whistleblower protection, and allow them to seek administrative due process remedies if there is no

timely ruling. Under all DOL whistleblower protection laws enacted since 2002, complainants can go to court if the DOL process is not completed within 180/210 days. But court costs often mean that many unemployed corporate employees can only afford administrative due process.

**Recommendation 16:** Assess Internal Revenue Service compliance with 2019 Taxpayer First Act whistleblower provisions.

*Rationale:* The Internal Revenue Service's whistleblower program does not adequately work with whistleblowers and keep them apprised of updates in their cases, despite mandatory notification requirements in the 2019 Taxpayer First Act. The Biden administration should assess Internal Revenue Service compliance with these requirements. And the program in general has been a huge missed opportunity to close the approximate \$400 billion annual tax gap (taxes that are owed and not paid to the Treasury). A more responsive and effective IRS whistleblower program would be a sound investment to combat tax fraud.

**Recommendation 17:** Review the whistleblowing system for inspector general personnel.

*Rationale:* The Council of the Inspectors General on Integrity and Efficiency's Integrity Committee receives whistleblowing disclosures made against inspectors general or their senior staff, but rarely conducts fulsome investigations into these whistleblowers' concerns. The Biden administration should review the processes by which the Committee investigates whistleblowing disclosures against Inspectors General, as well as their historical track record, in consultation with civil society. Additionally, Intelligence Community whistleblowers who are also inspector general personnel should be afforded the same protected channels as other Intelligence Community personnel under Presidential Policy Directive-19 and its accompanying regulations and statutes that compose the Intelligence Community whistleblowing system; the Integrity Committee should not be their only outlet for relief. The incoming Administration should emphasize this perspective—which reflects the statutory system for Intelligence Community whistleblowers—to the Intelligence Community Inspector General.

\* **Recommendation 18:** Address the weak links and loopholes in Presidential Policy Directive-19 for Intelligence Community whistleblowers' rights.

*Rationale:* Created in 2012 by President Obama, PPD-19 was a landmark breakthrough in principle for Intelligence Community whistleblower rights. But due to loopholes and gaps in the details, the directive has not lived up to its intent. Examples permeate the Intelligence Community whistleblowing system: there are gaps in coverage for security

clearance reprisals against civil service employees, hopelessly unrealistic burdens of proof in practice due to lack of specificity, and improper restraint for lawful communications with Congress. The Congressional Intelligence Committees have developed consensus legislation—supported by the majority of the House Permanent Select Committee on Intelligence and unanimously, with bipartisan consensus, by their Senate counterpart—to correct some flaws which have made Intelligence Community whistleblowers’ rights dysfunctional. Unfortunately, these reforms were blocked by HPSCI Ranking Member Devin Nunes and Republican Senate leadership. This is a vacuum the incoming Administration must fill, along with a review of additional teeth such as independent due process and authority to reverse agency decisions. The current structure monopolizes all enforcement within an ODNI-led committee of Inspector General, which only has the authority to remand agency decisions rather than reverse them.

**Recommendation 19:** Expand Intelligence Community whistleblowers’ right to counsel and attorney-client privilege.

*Rationale:* Not all whistleblowers who participate in inspector general investigations are afforded counsel at all stages of their saga. Even when they are, their attorneys are occasionally barred from receiving the full record. The Biden Administration should declare that all complainants and witnesses in inspector general investigations are allowed to have counsel participate at all stages of investigations and provide grants for such representation. Furthermore, the Administration should require all agencies to process a complainant’s preferred counsel for access to any classified information relevant to the complaint; the Administration should request that the Director of National Intelligence issue a directive establishing a uniform process for such counsel access. Additionally, an agency that conducts prepublication review of any attorney-client communications should treat such communications as privileged and not disseminate them beyond the office conducting the review without consent.

**Recommendation 20:** Reform the prepublication review process to ensure government-wide consistency and protect writings which would traditionally be kept confidential, such as confidential whistleblowing disclosures, communications with attorneys, etc.

*Rationale:* The current prepublication review system is highly arbitrary and dependent almost entirely on individual agencies’ internal policies and practices, which creates an environment where an individual’s identity, place of work, and ideological outlook are weighed heavily in decisions which are supposed to be about whether the information is legally protected. This works additional mischief on whistleblowers and individuals involved in legal proceedings involving the government, where even otherwise

privileged communications with counsel are required to be submitted to the agency for prepublication review, and the prepublication review offices have minimal restrictions on further dissemination. As a result, employees, contractors, and former employees are put in the impossible position of having to choose between engaging in the prepublication review process or making sure that their confidential communications will not be widely shared within the agency they are often complaining about (including with the officials they are directly reporting for misconduct), which many individuals experience when they engage in the prepublication process.

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[1] Eric Katz, “Agency Officials Are Increasingly Retaliating Against Whistleblowers With Impunity, IG Says,” *Government Executive*, January 28, 2020. <https://www.govexec.com/workforce/2020/01/agency-officials-are-increasingly-retaliating-against-whistleblowers-impunity-ig-says/162716/>.

[2] United States Office of Special Counsel, *Policy Statement on Stays of Personnel Actions* (September 2018). <https://osc.gov/Documents/PPP/Policy%20Statements/Policy%20Statement%20on%20Stays%20of%20Personnel%20Actions.pdf>.

[3] Irvin McCullough and Zack Kopplin, “Gag orders at federal agencies are violating whistleblower laws,” *Washington Post*, June 8, 2018. <https://www.washingtonpost.com/news/posteverything/wp/2018/06/08/gag-orders-at-federal-agencies-are-violating-whistleblower-laws/>; Irvin McCullough and Tom Devine, “Congress could cut pay of Trump aides who try to enforce nondisclosure agreements,” *Washington Post*, February 25, 2019. <https://www.washingtonpost.com/outlook/2019/02/25/congress-could-cut-pay-trump-aides-who-try-enforce-ndas/>; Irvin McCullough and Addison Rodriguez, “The Trump administration loves gag orders. But they’re often illegal.” *Washington Post*, October 13, 2020. <https://www.washingtonpost.com/outlook/2020/10/13/trump-gag-orders-illegal/>.