

United States Senate  
WASHINGTON, DC 20510

October 5, 2022

**VIA ELECTRONIC TRANSMISSION**

The Honorable Merrick Garland  
Attorney General  
Department of Justice

The Honorable Christopher Wray  
Director  
Federal Bureau of Investigation

Dear Attorney General Garland and Director Wray:

Congress has a constitutional responsibility to ensure that the Executive Branch executes the law and uses taxpayer money appropriated to it in accordance with congressional intent. In furtherance of that constitutional responsibility, Congress has an obligation to investigate the Executive Branch for fraud, waste, abuse and gross mismanagement – acts which undermine faith in the American people’s governmental institutions. Those constitutional and legislative responsibilities apply to this letter to you. In the course of my constitutional duties, I’ve always invited current and former government employees to contact me and my office to confidentially report allegations of fraud, waste, abuse and gross mismanagement by FBI and Justice Department officials. As a result, my office has received a significant number of protected communications from highly credible whistleblowers.

Lawful, protected whistleblower disclosures provided to my office include allegations and records that show hundreds of FBI employees have retired or resigned because of sexual misconduct allegations against them and that they did so in order to avoid accountability.<sup>1</sup> The allegations and records paint a disgraceful picture of abuse that women within the FBI have had to live with for many years.<sup>2</sup> This abuse and misconduct is outrageous and beyond unacceptable.

For example, according to an internal unclassified Justice Department document from the Office of Disciplinary Appeals titled “Retirements and Resignations During Unwelcome Sexual

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<sup>1</sup> Even though the disclosures are lawful, protected disclosures, I am not publicly releasing the documents out of concern for unlawful retaliation.

<sup>2</sup> Although the documents cited in this letter do not delineate between male and female employees who suffered under sexual misconduct, allegations provided to my office, as well as news reports cited in this letter, make clear that female employees are the primary victims.

Conduct Adjudications,” as of December 23, 2020, the Justice Department reviewed the FBI’s disciplinary case database, Javelin, “to observe patterns and offer recommendations in light of the recent *Associated Press* news article, ‘*Under the Rug: Sexual Misconduct Shakes the FBI’s Senior Ranks*’” which referenced eight sexual misconduct allegations against FBI officials in five years.<sup>3</sup> The results of the Justice Department review are very troubling, to say the least. The Justice Department reviewed 8,686 summaries in Javelin and found that from 2004 to December 23, 2020, “665 FBI employees, including 45 [Senior Executive Service (SES)]-level employees have retired or resigned following an FBI or [Justice Department Office of Inspector General (OIG)] investigation into alleged misconduct, but prior to [the Office of Professional Responsibility’s (OPR)] issuance of a final disciplinary letter.”<sup>4</sup> Although the text is limited to “alleged misconduct,” it’s been alleged to my office that the data involved an element of sexual misconduct, which comports with the purpose of the Javelin review that was done because of the *Associated Press* article. The committee welcomes any clarity the Justice Department is able to provide.

The document further states, “Of those 45 SES-level employees, there is only one instance where an SES-level employee retired or resigned after the FBI or DOJ-OIG completed an investigation into an alleged violation of Offense Code 5.20, *Unwelcome Sexual Conduct*, but before OPR issued a final decision letter, (former SAC James Hendricks).”<sup>5</sup> Notably, this data point didn’t include examples of violations of Offense Code 5.21, *Unprofessional Conduct-Off Duty* and Offense Code 5.22, *Unprofessional Conduct-On Duty*, which can include sexual misconduct elements. To make matters worse, some of the SES-level employees could have received bonuses before retirement.<sup>6</sup>

Importantly, the document also notes, “[t]his dataset does not include retirements or resignations which occurred during an ongoing misconduct investigation or prior to the initiation of a formal investigation.”<sup>7</sup> In other words, it appears that the number of retirements and resignations could be much higher than 665 individuals. The FBI must provide Congress a precise number of retirements and resignations based on an element of sexual misconduct because, as the document notes, one of the cases referenced in the *Associated Press* article isn’t referenced in the FBI’s disciplinary case precedent, which indicates the Javelin database might have incomplete data.<sup>8</sup>

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<sup>3</sup> Retirements and Resignations during Unwelcome Sexual Conduct Adjudications (Dec. 23, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> See also, Jim Mustian, *Under the Rug: Sexual Misconduct Shakes FBI’s Senior Ranks*, *Associated Press* (Dec. 10, 2020) <https://apnews.com/article/fbi-sexual-misconduct-investigation-a0d33e4770acef8ff5f4a48f0267202c>.

<sup>6</sup> For example, the *Associated Press* article notes that Roger C. Stanton “retired in late 2018 after the investigation determined he sexually harassed [a] woman and sought an improper relationship.” The Justice Department document notes that Stanton “received an SES bonus approximately one month before retiring and was still on a three-year service agreement (CSA) for relocation bonuses when he retired on 12/31/2018. HR Source reflects a remaining balance of approximately \$22,000.”

<sup>7</sup> Retirements and Resignations during Unwelcome Sexual Conduct Adjudications (Dec. 23, 2020).

<sup>8</sup> According to the document, the Stanton matter, *supra* at note 6, was not referenced in the disciplinary database.

As a result of this bad conduct, the Justice Department recommended several actions to address the problem. The first recommendation is to “fast-track all investigations and adjudications of unwanted sexual conduct in order to minimize the likelihood of subject-employees reaching retirement eligibility during a pending disciplinary inquiry.”<sup>9</sup> The second recommendation was to “conduct an independent audit of all unwanted sexual complaints received by [the FBI’s inspection division] vs. inquiries actually opened...”<sup>10</sup> It is unclear if these, as well as the other, recommendations have been fully implemented as needed and, if so, what the results are.

I’ve also been provided an unclassified Justice Department document dated January 6, 2022, titled “Inconsistent Adjudication of Non-Consensual Sexual Misconduct.”<sup>11</sup> That document relates to Director Wray’s emailed directive on December 11, 2020, advising all employees about the FBI’s zero-policy stance on sexual harassment and sexual misconduct. That document notes the following concern, “[r]ecent sexual misconduct cases appear to show OPR’s application of this directive has resulted in seemingly random penalties and disparate treatment, potentially compromising the consistency, fairness, and due process of the FBI’s disciplinary system.”<sup>12</sup> The document notes that OPR “may elect to adjudicate sexual misconduct under Offense Code 5.22, *Unprofessional Conduct – On Duty*, which has maintained the same 7-day standard penalty across all iterations. Equally concerning, OPR may also adjudicate an employee’s disciplinary matter under Offense Code 5.20, even if more appropriately adjudicated under 5.22, thus subjecting the employee to a higher penalty.”<sup>13</sup> In other words, the same misconduct can result in very different penalties.<sup>14</sup> The document further notes that “[t]his inconsistency has compounded since Director Wray’s December 2020 email” and states the following,

Though the sample size during the relevant period is limited, OPR’s penalties for analogous employee misconduct appear random, ranging from a 7-day suspension to dismissal, with little or no explanation. The only discernable pattern appears to be that higher-graded employees, especially supervisors, are more likely to have their sexual misconduct case adjudicated under Offense Code 5.22, and therefore subjected to lesser penalties; whereas, lower-graded

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<sup>9</sup> Retirements and Resignations during Unwelcome Sexual Conduct Adjudications (Dec. 23, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> Inconsistent Adjudication of Non-Consensual Sexual Misconduct (Jan. 6, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The 2022 document notes that since December 2020, OPR has substantiated 12 cases related to sexual misconduct: 6 cases were adjudicated under Offense Code 5.20; all 6 employees ranged from GS-09 to GS-13, 1 GS-11 was a supervisor; 3 employees were dismissed, and 3 employees received suspensions between 14 and 30 days. Regarding the employee who received a 30-day suspension, “OPR initially imposed a 10-day suspension, which it inexplicably increased after being directed by the EAD, HRB to remove impermissible derogatory information.” The document notes that 6 cases were adjudicated under Offense Code 5.22; 5 employees ranged from GS-13 to GS-15, 1 employee was Senior Executive Service (4 employees were supervisors). All 6 employees received suspensions between 7 and 30 days; no employees were dismissed. One employee also violated Offense Code 5.21 and received a 10 day suspension that was reduced to 5 days on appeal.

employees are seemingly more likely to be adjudicated under Offense Code 5.20, and have a statistically greater likelihood of being dismissed for their sexual misconduct. This may give the appearance the FBI is not holding its supervisors accountable for unwelcome sexual conduct.<sup>15</sup>

If the Justice Department and FBI can't ensure the equal application of the law within its own ranks, how can they be trusted to apply the law equally against the American people?

Further, the 2022 Justice Department document notes that Director Wray and Deputy Director Abbate have not aggressively moved to solve the sexual misconduct problems at the FBI:

The Director and Deputy Director statements may be insufficient notification to employees that they intend for increased standard penalties for non-consensual sexual misconduct. In Merit Systems Protection Board case *Parker v. Department of Navy*, 50 M.S.P.R. 343 (1991), the court held, "where an agency has consistently imposed a certain range of penalties for a certain type of offense, the agency may not start enforcing a more stringent penalty without giving its employees fair notice of its change in policy." *Id.* at 354-355. Although the standard penalty for Offense Code 5.20 has increased over time, the maximum penalty range has always included dismissal. These Director-level communications may not be viewed as "fair notice" where they state that severe sanctions, including dismissal, may be imposed but do not describe an actual increase in the standard penalty for substantiated 5.20 offenses.<sup>16</sup>

Congress and the American people would like to know what Director Wray and Deputy Director Abbate have done to solve this issue.

Simply put, these two documents show a systemic failure within the Justice Department and FBI to protect female employees from sexual harassment and sexual misconduct in the workplace and a failure to sufficiently punish employees for that same misconduct. FBI employees should not have to suffer under daily abuse and misconduct by their colleagues and supervisors. Congress has an obligation to perform an objective and independent review of the Justice Department's and FBI's failures and determine the accuracy of the data contained in the documents so that the American people know and understand what, if any, changes have been

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* See also, Jim Mustian and Eric Tucker, *We mean it: FBI takes on sexual misconduct in its ranks* Associated Press (June 11, 2021) <https://apnews.com/article/government-and-politics-sexual-misconduct-business-ecd5df47a077a9de8e9ec03708be5168>

made to solve these significant problems. Accordingly, please answer the following no later than October 14, 2022:

1. With respect to the document titled “Retirements and Resignations during Unwelcome Sexual Conduct Adjudications,” please describe in detail how you have implemented the following recommendations that it lists and provide all records:
  - a. Fast-track all investigations and adjudications of unwanted sexual conduct in order to minimize the likelihood of subject-employees reaching retirement eligibility during a pending disciplinary inquiry.
  - b. Conduct an independent audit of all unwanted sexual conduct complaints received by INSD<sup>17</sup> versus inquiries actually opened to demonstrate the FBI does not tolerate unwanted sexual conduct. If discrepancies are discovered, immediately open the unresolved matters and address the failures to initially open the complaints.
  - c. Conduct an independent audit of all unwanted sexual conduct allegations opened by INSD to compare the timeliness of investigations in SES-subject versus non-SES-subject cases.
  - d. Emphasize the enforcement policy prohibiting “ex parte” communications to alleviate the perception that OPR matters involving SES employees are influenced by off-the-record discussions.
  - e. Increase training to ensure employees are aware of the FBI’s zero tolerance toward unwelcome sexual conduct, and understand their obligation to report any instances of alleged unwanted sexual conduct.
  - f. Create a working-group to consider options for deterring unwanted sexual conduct amongst FBI senior management, including the imposition of a contractual obligation requiring all SES bonuses be repaid to the FBI should an SES employee voluntarily depart service during a pending disciplinary inquiry involving allegations of unwanted sexual conduct.
  - g. Engage an outside auditor well-versed in sexual harassment cultural assessments to determine if the FBI can take additional actionable steps to model supportive practices of world-class institutions.
2. With respect to the document titled “Inconsistent Adjudication of Non-Consensual Sexual Misconduct,” please describe in detail how you have implemented the following recommendations that it lists and provide all records:
  - a. The FBI Offense Codes and Penalty Guidelines should be updated to comport with the statements made by Director Wray and Deputy Director Abbate, thereby serving as proper notification to all FBI employees. Specifically, the definition for Offense Code 5.20 should be modified to include the particular criteria OPR applies to determine what conduct is considered “unwelcome

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<sup>17</sup> This is the FBI’s Inspection Division.

sexual conduct” instead of “unprofessional conduct” under a different offense. Moreover, the 5.20 Penalty Guidelines should be updated to reflect the FBI’s heightened stance on sexual misconduct, including modification to the associated penalty ranges if deemed necessary. Adding detailed, enumerated mitigating and aggravating factors to the Penalty Guidelines may alleviate inconsistency, and may lessen the appearance of disparate treatment between supervisors and subordinates (i.e. “Supervisory employees will necessarily receive a penalty in the aggravated range”; “multiple instances of unwanted sexual touching may be grounds for dismissal”).

- b. Regardless of the charged offense, if an employee’s misconduct involves an element of non-consensual sexual conduct, it should be considered as an aggravating factor.
  - c. The FBI should develop sexual harassment training and require all FBI employees to complete the course annually in Virtual Academy. This training should include a module on Offense Code 5.20, the associated penalties, and examples.
3. Please provide the results of the Justice Department’s Sexual Harassment Steering Committee’s survey and working groups that closed in March 2022 along with the associated workforce communication and action plans.
4. With respect to the FBI specifically, please provide the following data from 2017 to the date of this letter:
- a. The number of complaints with an element of unwanted sexual conduct received by INSD versus inquiries and investigations actually opened.
  - b. The number of employees who were promoted after a complaint with an element of unwanted sexual conduct was received by the Justice Department’s Office of Inspector General or INSD.
  - c. The number of employees who were transferred (permanently or on a temporary duty assignment) after a complaint with an element of unwanted sexual conduct was received by the OIG or INSD.
  - d. The number of employees who resigned or retired while under inquiry or investigation by the OIG or INSD for a complaint with an element of unwanted sexual conduct but prior to FBI OPR’s issuance of a final disciplinary letter.
  - e. The number of employees who resigned or retired while under inquiry or investigation by the OIG or INSD for a complaint with an element of unwanted sexual conduct and who had outstanding continuing service agreement (CSA) commitments that were waived or not repaid.
  - f. The number of SES employees who received a monetary bonus (e.g., SES bonus) while under inquiry or investigation by the OIG or INSD for a complaint with an element of unwanted sexual conduct.

- g. The number of complaints with an element of unwanted sexual conduct received by INSD that were opened as inquiries or investigations and were administratively closed due to a resignation or retirement.
- h. The number of INSD inquiries and investigations, by GS level, opened under Offense Code 5.20 and later adjudicated by the FBI's OPR as 5.21, 5.22, or another offense code.
- i. The number of OIG or INSD inquiries and investigations of a complaint with an element of unwanted sexual conduct that resulted in a penalty (i.e., letter of censure, up to and including termination) issued by FBI's OPR or the Deputy Director, but that did not result in a revocation of an employee's security clearance.
- j. The number of security clearances that were suspended or revoked and not suspended or revoked for employees with an opened inquiry or investigation for a complaint with an element of unwanted sexual conduct.

Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on the Judiciary

cc:

The Honorable Richard Durbin  
Chairman  
Committee on the Judiciary

The Honorable Michael E. Horowitz  
Inspector General  
Department of Justice