

United States Department of Justice

Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022)

Section 1204(a) Report -
Closing the Law Enforcement Consent Loophole Act of 2022

November 21, 2023

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Overview

The Closing the Law Enforcement Consent Loophole Act of 2022 (Act) was passed as Title XII of the Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022).¹ The Act recognizes that the inherent power imbalance between individuals in custody or detained by law enforcement prevents truly consensual sexual activity. It created a new offense prohibiting federal law enforcement officers from knowingly engaging in sexual acts with individuals who are in custody, under supervision, or in detention, and it supports state and local officials in passing similar laws. It also requires the Department of Justice (Department) to submit an annual report to Congress regarding allegations that a government actor committed sexual misconduct while acting under color of law and the investigative outcomes of reported allegations.

Closing the Law Enforcement Consent Loophole Act of 2022

Section 1202 of VAWA 2022 creates a new offense at 18 U.S.C. § 2243(c) for a federal law enforcement officer, acting in their capacity as such, to knowingly engage in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. A violation of 18 U.S.C. § 2243(c) carries a statutory maximum penalty of up to 15 years imprisonment and, importantly, consent is not a defense to prosecution. Section 1202 of VAWA 2022 also created 18 U.S.C. § 250, a penalty statute for civil rights offenses involving sexual misconduct. Although this statute applies to all offenses in Chapter 13 of Title 18, it will often be used in connection with violations of 18 U.S.C. § 242 – which criminalizes the willful deprivation of rights under color of law – where sexual assault is the underlying constitutional deprivation. 18 U.S.C § 250 provides a graduated penalty structure depending on the nature of the sexual misconduct, with maximum sentences ranging from two years to life in prison.

Section 1203(a) of VAWA 2022 authorizes the Department to provide grants to states that have passed laws (1) making it “a criminal offense for any person acting under color of [State] law . . . to knowingly engage in a sexual act with an individual who is under arrest, in detention, or otherwise in the actual custody of any law enforcement officer,” and (2) prohibiting the use of consent as a defense to such an offense. VAWA 2022 authorizes annual appropriations of \$5 million for these incentive grants but, to date, Congress has not appropriated funds to implement section 1203, so the Department has not awarded any grants under this provision.

Section 1203(b) of VAWA 2022 requires grant recipients to report certain information to the Department. Because there are not yet any grant recipients, the Department does not have any information to report under section 1203(b).

¹ Violence Against Women Act Reauthorization Act of 2022, Pub. L. 117-103, 136 Stat. 49 (2022).

Section 1204(a) of VAWA 2022 directs the Department to issue a report:

- (a) **REPORT BY ATTORNEY GENERAL.** —Not later than 1 year after the date of enactment of this Act, and each year thereafter, the Attorney General shall submit to Congress and make publicly available on the Department of Justice website a report containing—
 - (1) the information required to be reported to the Attorney General under section 1203(b); and
 - (2) information on—
 - (A) the number of reports made, during the previous year, to Federal law enforcement agencies regarding persons engaging in a sexual act while acting under color of law; and
 - (B) the disposition of each case in which sexual misconduct by a person acting under color of law was reported.

Section 1204(a) of VAWA 2022 Report (1204(a) Report)

Definitions

For purposes of this 1204(a) Report:

“Federal law enforcement agencies” includes any federal agency with the authority to investigate crimes or employing individuals with: federal arrest authority; the authority to detain or incarcerate individuals for violations of criminal or administrative law; or authorization to carry a firearm. As discussed further below, offices of Inspectors General (IGs) overseeing federal agencies that meet this definition, or that themselves meet this definition, were queried regarding reports of sexual misconduct.

“Sexual misconduct” encompasses two categories as defined in 18 U.S.C. § 2246: (1) sexual acts, as defined under 18 U.S.C. § 2246(2), generally encompasses acts of penetration (with fingers, penis, object), oral sex, and intentional touching of someone under 16 years of age, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person and (2) sexual contact, as defined under 18 U.S.C. § 2246(3), generally encompasses touching, grabbing, and fondling, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

“Persons” are government actors (federal employees, contractors, and task force officers) who committed sexual misconduct during the course of their duties or by using the cloak of their government authority. It can include, but is not limited to, law enforcement officers, healthcare professionals, teachers, prosecutors, administrative law judges, or agency inspectors.

“Act under color of law” is to use one’s government authority to facilitate misconduct, whether it be on-duty or off-duty.

“Disposition” is reported as the investigative outcome following a report of sexual misconduct under color of law to a federal law enforcement agency.

Data

The 1204(a) Report includes data regarding reports of sexual misconduct to federal law enforcement agencies and the investigative outcomes of those reports from the enactment date (March 15, 2022) through the end of Fiscal Year (FY) 2022 (September 30, 2022), unless otherwise noted. Following the appropriation of funding for the grants authorized by section 1203(a) of VAWA 2022, the Department would anticipate making incentive grants and receiving reports from recipients under section 1203(b) of VAWA 2022 for inclusion in future 1204(a) Reports.

Data regarding reports of sexual misconduct made to law enforcement agencies and investigative outcomes for this 1204(a) Report were provided by the Federal Bureau of Investigation (FBI) and the federal IG community.

The FBI has jurisdiction to investigate all allegations of misconduct committed under color of law, which includes government actors in federal, state, local, and Tribal government. IGs investigate federal government actors, including employees, contractors, and task force officers at their respective agencies. Reports of sexual misconduct by federal government actors should generally have been reported to FBI, the relevant IG, or both.

Table 1 lists allegations received by FBI and the investigative outcomes of those reports. The FBI received 49 allegations of sexual misconduct by a government actor under color of law. The majority of those were alleged to have been committed by non-federal actors. All of the allegations against federal actors were referred for prosecution. Approximately one-third of the allegations against non-federal actors were referred for prosecution.

Table 1
Allegations of Sexual Misconduct Under Color of Law
Reported to the FBI from March 15, 2022 to September 30, 2022

	Allegations	Federal Actor	Non-Federal Actor
Total Allegations	49	8	41
<i>Referred to Prosecuting Entity</i>	23	8	15
<i>Closed Without Referral</i>	24	0	24
<i>Investigation Ongoing</i>	2	0	2

Fifty-seven federal IGs serving 58 agencies² responded to the Department’s request for information and meet the definition of law enforcement agency for the purposes of the 1204(a) Report.³ Nine IGs did not provide data in this reporting cycle.⁴

² One IG serves both the Federal Reserve Board and the Consumer Financial Protection Bureau.

³ IGs were designated as law enforcement agencies based on self-reported responses to Department inquiries.

⁴ The IGs serving the following nine agencies did not report in this cycle: U.S. Agency for International Development, United States Capitol Police, Commodity Futures Trading Commission, Corporation for Public Broadcasting, Defense Intelligence Agency, U.S. Equal Employment Opportunity Commission, U.S. House of Representatives, U.S. National Archives and Records Administration, and U.S. Social Security Administration.

Agencies of Federal IGs Responding to Department 1204(a) Report Request for Information	
U.S. Ability One Commission	U.S. Department of Justice (Department or DOJ)
U.S. Department of Agriculture (USDA)	U.S. Department of Labor (Labor)
AmeriCorps	Legal Services Corporation (LSC)
Amtrak/National Railroad Passenger Corporation (Amtrak)	Library of Congress (LoC)
Appalachian Regional Commission (ARC)	National Aeronautics and Space Administration (NASA)
Architect of the Capitol	National Credit Union Administration (NCUA)
Central Intelligence Agency (CIA)	National Endowment for the Arts (NEA)
U.S. Department of Commerce (Commerce)	National Labor Relations Board (NLRB)
Consumer Financial Protection Bureau (CFPB)	National Reconnaissance Office (NRO)
U.S. Department of Defense (DoD)	U.S. National Science Foundation (NSF)
Denali Commission	National Security Agency (NSA)
U.S. Department of Education (ED)	U.S. Nuclear Regulatory Commission (NRC)
U.S. Department of Energy (DoE)	U.S. Office of Personnel Management (OPM)
U.S. Environmental Protection Agency (EPA)	Peace Corps
Export-Import Bank of the United States (EXIM)	Pension Benefit Guaranty Corporation (PBGC)
Federal Communications Commission (FCC)	U.S. Postal Service (USPS)
Federal Deposit Insurance Corporation (FDIC)	U.S. Railroad Retirement Board (RRB)
Federal Housing Finance Agency (FHFA)	U.S. Securities and Exchange Commission (SEC)
Federal Reserve Board	U.S. Small Business Administration (SBA)
Federal Trade Commission (FTC)	Smithsonian Institution
U.S. General Services Administration (GSA)	Special Inspector General for Afghanistan Reconstruction (SIGAR)
U.S. Government Accountability Office (GAO)	Special Inspector General for Pandemic Recovery (SIGPR)
U.S. Government Publishing Office (GPO)	Special Inspector General for the Troubled Asset Relief Program (SIGTARP)
U.S. Department of Health and Human Services (HHS)	U.S. Department of State (State)
U.S. Department of Homeland Security (DHS)	Tennessee Valley Authority (TVA)
U.S. Department of Housing and Urban Development (HUD)	U.S. Department of Transportation (DoT)
Office of the Director of National Intelligence (ODNI) ⁵	U.S. Department of the Treasury (Treasury)
U.S. Department of the Interior (DOI)	U.S. Treasury Inspector General for Tax Administration (TIGTA)
U.S. International Development Finance Corporation (DFC)	U.S. Department of Veterans Affairs (VA)

⁵ The inspector general serving the ODNI is the Office of the Inspector General of the Intelligence Community (IC IG).

Table 2 lists allegations received by non-Department federal IGs and the investigative outcomes of those reports.⁶ Eleven IGs reported receiving 195 allegations of sexual misconduct by a federal actor (employee, contractor, or task force member) under color of law. Forty-four IGs serving 45 agencies reported zero allegations of sexual misconduct.⁷

Table 2
Allegations of Sexual Misconduct Under Color of Law
Reported to Federal IGs from March 15, 2022 to September 30, 2022

Agency	Complaints Received	Referred for Prosecution	Referred to Internal Affairs/OPR	Closed Without Referral	Investigation Ongoing
USDA	2	1	1 ⁸	0	0
HHS	10	0	N/A ⁹	10	0
DHS	112	2	104	6	2
ODNI	1 ¹⁰				
DOI	20	3	11	4	1
Peace Corps	2	1	1	0	0
USPS	3	0	1	2	0
SEC	1	1	0	0	0
Transportation	2	1	1	0	0
TIGTA	8	2	6	0	0
VA	34	14	9	9	2

⁶ Data from two of the 57 IGs is not included in Table 2. The Department’s IG is reported separately in Table 3 and the DoD IG is excluded because DoD IG does not collect this data for the entire DoD. Allegations of sexual misconduct regarding DoD active duty and civilian employees can be made in a variety of ways that would not be reported to the DoD OIG. Additionally, DoD reports data on sexual misconduct involving members of the armed forces in its Department of Defense Annual Report on Sexual Assault in the Military online at <https://www.sapr.mil/reports>.

⁷ The IGs serving the following 45 agencies reported zero complaints or allegations: U.S. Ability One Commission, AmeriCorps, Amtrak, ARC, Architect of the Capitol, CIA, Commerce, CFPB, Denali Commission, ED, DoE, EPA, EXIM, FCC, FDIC, FHFA, Federal Reserve Board, FTC, GSA, GAO, GPO, HUD, DFC, Labor, LSC, LoC, NASA, NCUA, NEA, NLRB, NRO, NSF, NSA, NRC, OPM, PBGC, RRB, SBA, Smithsonian Institution, SIGAR, SIGPR, SIGTARP, State, TVA, Treasury.

⁸ USDA OIG explains that when a complaint is referred to USDA OIG Investigations or Audit and that entity declines to open an inquiry, the complaint is referred to the USDA OIG Agency Liaison Officer (ALO) within the specific USDA sub agency. This party is the established party within each agency with whom USDA OIG corresponds (including sending and receiving allegations). While not an internal affairs office or office of professional responsibility, sometimes the ALO is within an internal compliance or regulatory branch of the agency and other times the ALO is in the Human Resources Employee and Labor Relations Branch. This referenced instance refers to a matter where an allegation was declined by USDA OIG and then referred to the agency specific ALO.

⁹ HHS OIG is the internal component within HHS that investigates all allegations of employee misconduct. It does not refer allegations to another component.

¹⁰ Per the respondent for the IC IG, this matter was referred to, and is currently under investigation by, the FBI. IC IG was informed of this matter to provide any necessary investigative support to the FBI, but IC IG is not the lead investigative unit and cannot provide further information on the current status and scope of this investigation.

Table 3 lists allegations of sexual misconduct by a Department actor received by the Department’s Office of the Inspector General (DOJ OIG) and the investigative outcomes of those reports.¹¹ In FY 2022, DOJ OIG received 313 complaints in which one or more of the subjects were alleged to have engaged in criminal sexual misconduct. DOJ OIG has multiple categories of investigative outcomes that are consolidated into four areas for the purpose of the 1204(a) Report.

- **Investigation:** Complaints that are opened as DOJ OIG investigations.
- **Monitored Referral:** Complaints that are referred to a Department component’s office of professional responsibility or internal affairs office, or its equivalent, to conduct an investigation of the allegations and forward a report of its completed investigation to DOJ OIG for review. Generally, monitored referrals are used for components that have an internal affairs or professional responsibility office, or its equivalent.
- **Management Review:** Complaints that do not warrant handling as a DOJ OIG investigation or monitored referral but constitute matters that the component should either be aware of or act on.
- **Miscellaneous:** This category includes: (1) allegations that have been consolidated with another complaint that was already recorded and classified in the DOJ OIG’s case management system, because the allegation or a substantially related allegation was previously reported to the DOJ OIG through a different source; (2) allegations that lack sufficient basis or detail to warrant any follow-up by either the DOJ OIG or any Department component; and (3) complaints that had not been assigned a disposition as of the end of the reporting period (FY 2022).

Table 3
Allegations of Sexual Misconduct Under Color of Law
Reported to DOJ OIG from October 1, 2021 – September 30, 2022

Component Reporting	Complaints Received	Investigation	Monitored Referral	Management Review	Miscellaneous
All DOJ	313	18	40	208	47
<i>ATF</i>	1	0	1	0	0
<i>BOP</i>	280	15	33	187	45
<i>FBI</i>	12	1	4	5	2
<i>TAX</i>	1	0	0	1	0
<i>USMS</i>	19	2	2	15	0

There were 22 DOJ OIG investigations in which the DOJ OIG referred allegations of criminal sexual misconduct to federal or state prosecutors in FY 2022.¹²

¹¹ DOJ OIG data includes all allegations of sexual misconduct reported to DOJ OIG during the covered time period. The data may involve contractors, task force officers, or grantees.

¹² The DOJ OIG referrals of allegations to prosecutors identified in this report do not necessarily arise from the complaints received by the DOJ OIG in FY 2022 (i.e., the referrals to prosecutors may arise from allegations received by the DOJ OIG during an earlier period).

Prosecutorial Information

As noted above, the FBI and federal IGs are the primary investigative entities that respond to allegations of sexual misconduct committed by federal government actors under color of law. Department prosecutors at the Civil Rights Division and United States Attorneys' Offices receive allegations of sexual misconduct committed by federal, state, local, or Tribal government actors from investigative law enforcement entities, media reports, civil attorneys, nonprofit organizations, and sometimes, directly from victims. Department prosecutors evaluate these allegations for potential federal prosecution. The process of evaluation often includes additional investigative efforts.

Allegations of sexual misconduct under color of law are typically charged under 18 U.S.C. § 242. 18 U.S.C. § 242 criminalizes willful constitutional deprivations committed under color of law that include a range of conduct. Such conduct includes unwanted sexual acts and sexual contact, but it also includes excessive force, deliberate indifference to medical needs, failure to keep from harm, and other constitutional violations.

In addition to charges under 18 U.S.C. § 242, federal law enforcement officers who knowingly engage in sexual acts with those in their custody, under their supervision, or in detention can also be charged with violating 18 U.S.C. § 2243(c). Unlike for violations of 18 U.S.C. § 242, consent is not a defense for violations of 18 U.S.C. § 2243(c).

18 U.S.C. § 2243(c) was enacted as part of VAWA 2022 and went into effect on October 1, 2022, after the close of the reporting period for this report. The Department, therefore, has not included data on such prosecutions in this Report. But it anticipates future 1204(a) Reports will include information regarding prosecutions under 18 U.S.C § 2243(c) based on allegations received by federal law enforcement agencies during the relevant reporting period.