

# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

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April 8, 2024

Admiral Linda Fagan, USCG  
Commandant of the Coast Guard  
2703 Martin Luther King Junior Avenue, SE  
Washington, D.C. 20593

Dear Admiral Fagan:

According to records my staff recently received, the United States Coast Guard (Coast Guard) has illegally prohibited personnel, including victims of sexual assaults, from disclosing to Congress information about those sexual assaults and the mishandling of investigations of those assaults. Specifically, the Coast Guard implemented non-disclosure agreements (NDAs) purporting to prohibit victims and others from disclosing information about sexual assaults and related investigations, to anyone, including Congress. As detailed below, those NDAs are both unacceptable and unlawful. Directing victims to agree not to discuss what happened to them is particularly reprehensible.

This recent revelation of prohibited NDAs comes on the heels of the Coast Guard's failure to alert Congress to its investigation of sexual assaults at the Academy through Operation Fouled Anchor, resistance to interview requests by the Committee on Commerce, Science, and Transportation (the Committee), and perplexing answers from flag officer nominees regarding future candor with Congress. The Coast Guard's actions suggest a concerted effort to conceal past sexual assaults at the Academy. Accordingly, I write to request additional information and your personal commitment to withdraw or correct any unlawful NDAs.

## Background

In 2014, the Coast Guard initiated what would become a six-year investigation—referred to as Operation Fouled Anchor—into allegations that the Coast Guard Academy (the Academy) mishandled dozens of sexual assault reports between 1988 and 2006.<sup>1</sup> The Coast Guard finalized its investigation in 2020 with a six-page report, concluding that the Academy “did not adequately investigate allegations as serious criminal matters and hold perpetrators appropriately accountable.”<sup>2</sup> The Coast Guard, however, failed to disclose Operation Fouled Anchor to the

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<sup>1</sup> Memorandum from M.F. McAllister, VADM, “Fouled Anchor” Investigation – Final Report, U.S. Coast Guard (Jan. 31, 2020).

<sup>2</sup> *Id.* at 4.

public or Congress for another two and a half years—and the Coast Guard only did so after media inquiries into the issue.<sup>3</sup> According to internal documents, the Coast Guard was concerned about releasing the results of Operation Fouled Anchor to either Congress or the public because, at least in part, it would “risk the initiation of comprehensive Congressional investigations, hearings, and media interest” and reveal that “[t]he rates of sexual assault reporting have not appreciably changed, calling into question impact of Coast Guard actions taken over the past decade to change CGA climate/etc.”<sup>4</sup>

Since last year, the Committee has been reviewing Operation Fouled Anchor and the Coast Guard’s lack of transparency. The Coast Guard deserves credit for undertaking Operation Fouled Anchor and investigating past, previously uninvestigated sexual assaults. However, this review has uncovered several ways in which the Coast Guard impeded congressional oversight.

For example, as part of this review, the Committee interviewed several Coast Guard personnel in furtherance of its constitutionally mandated duty to provide advice and consent on those Guardsmen’s promotions. The Coast Guard resisted allowing interviews of attorneys involved with Operation Fouled Anchor investigations on the grounds of privilege.<sup>5</sup> Meanwhile, in their Committee questionnaires, Coast Guard personnel seeking the Senate’s confirmation of their promotion to the level of Rear Admiral (lower half) and above provided only a conditional commitment to be honest and transparent with Congress:

**QUESTION:** “Do you agree, if confirmed, to keep this Committee . . . apprised of new information that materially impacts the accuracy of testimony, briefings, reports, [or] records . . . you or your organization previously provided?”

**ANSWER:** “Yes, in accordance with law and DHS policy and guidance.”<sup>6</sup>

When asked why they could not answer with a simple “Yes.”—as they had in the preceding four questions—the Coast Guardsmen said the Department of Homeland Security’s (DHS) Office of General Counsel directed them to provide that response. None were able to identify a DHS policy or guidance that supersedes federal laws requiring honest testimony before Congress.<sup>7</sup>

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<sup>3</sup> Blake Ellis et al., *Criminal Investigation into Coast Guard Academy Revealed Years of Sexual Assault Cover-Ups, But Findings Were Kept Secret*, CNN (Jun. 30, 2023), <https://www.cnn.com/2023/06/30/politics/coast-guard-academy-secret-sexual-assault-investigation-invs/index.html>.

<sup>4</sup> Memorandum from U.S. Coast Guard, CGA Sexual Assault Investigations – Pre-2006 Communications COAs, 3, 4 (Oct. 16, 2018); Letter from Richard Blumenthal, Chairman, S. Comm. on Homeland Sec. and Governmental Affs., Permanent Subcomm. on Investigations & Ron Johnson, Ranking Member, S. Comm. on Homeland Sec. and Governmental Affs., Permanent Subcomm. on Investigations, to Admiral Linda Fagan, Commandant, U.S. Coast Guard (Feb. 14, 2024).

<sup>5</sup> See, e.g., Email from U.S. Coast Guard Staff to Committee Staff (Nov. 14, 2023) (on file with the Committee).

<sup>6</sup> See Senate Questionnaires of all nominees to Rear Admiral or higher at Pt. D Q. 5 (some questionnaires used the variation “in accordance with law and Department of Homeland Security policy”) (on file with the Committee) (emphasis altered from original).

<sup>7</sup> E.g., 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 1621 (perjury).

Another example occurred with the Coast Guard's apparent initial lack of cooperation with an ongoing DHS Inspector General investigation of Operation Fouled Anchor over the last three months.<sup>8</sup> At the Committee's request, last year the DHS Inspector General opened an investigation of Operation Fouled Anchor.<sup>9</sup> In January, the DHS Inspector General warned you that actions of the Coast Guard Investigative Service (CGIS) risked interfering with the integrity of its investigation, although the Coast Guard has publicly claimed otherwise.<sup>10</sup> The Vice Commandant responded that certain matters the Inspector General intended to cover in the investigation of Operation Fouled Anchor were outside that investigation's scope, and therefore, the Coast Guard would "continue to rapidly pursue" those matters.<sup>11</sup> Making matters worse, in March, DHS Secretary Mayorkas directed CGIS to continue investigating those matters he claimed "have no nexus to Operation Fouled Anchor."<sup>12</sup> However, it is for the Inspector General, not the Coast Guard or the Secretary, to determine the scope of the Inspector General's investigation and what activities may jeopardize it.

A final example—and one reason that the Coast Guard may have been successful in hiding the Operation Fouled Anchor investigation from Congress and the public for so long—was that it had at least some of those involved in Operation Fouled Anchor either sign an NDA or orally agree to an NDA, forbidding them from speaking about the investigations. This included not only investigators but also "victims, subjects, and witnesses."<sup>13</sup>

As explained in more detail below, NDAs that restrict communication with Congress constitute an Anti-Deficiency Act violation, a prohibited personnel practice, and a felony (if done knowingly and willfully). These NDAs purport to restrict Coast Guardsmen's communications with anyone, including Congress, and thus are plainly illegal. The NDAs also omit legally required language protecting federal employees' constitutional right to provide information to Congress and other officials.

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<sup>8</sup> Although the existence of an ongoing inspector general investigation is ordinarily not public information, the Coast Guard announced the existence of this investigation in a blog post in February. AJ Pulkkinen, *Strengthening Coast Guard Culture*, MY CG (Feb. 6, 2024), <https://www.mycg.uscg.mil/News/Article/3667756/strengthening-coast-guard-culture>.

<sup>9</sup> Letter from Senator Maria Cantwell, Chair, S. Comm. on Commerce, Science, & Transp., Sen. Ted Cruz, Ranking Member, S. Comm. on Commerce, Science, & Transp., Sen. Tammy Baldwin, Chair, S. Comm. on Commerce, Science, & Transp., Subcomm. on Oceans, Fisheries, Climate Change, & Manufacturing, and Sen. Dan Sullivan, Ranking Member, S. Comm. on Commerce, Science, & Transp., Subcomm. on Oceans, Fisheries, Climate Change, & Manufacturing, to the Honorable Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec. (Sept. 19, 2023) (on file with the Committee).

<sup>10</sup> Letter from the Honorable Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., to Admiral Linda Fagan, Commandant, U.S. Coast Guard (Dec. 26, 2023); Pulkkinen, *supra* note 8.

<sup>11</sup> Letter from Admiral S.D. Poulin, Vice Commandant, U.S. Coast Guard, to the Honorable Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec. (Jan. 16, 2024) (on file with the Committee).

<sup>12</sup> Letter from the Honorable Alejandro Mayorkas, Secretary, Dep't of Homeland Sec., to the Honorable Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec. (Mar. 11, 2024) (on file with the Committee); *see also* Letter from the Honorable Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., to the Honorable Alejandro Mayorkas, Secretary, Dep't of Homeland Sec. (Mar. 27, 2024) (on file with the Committee).

<sup>13</sup> Email from U.S. Coast Guard Staff to Committee Staff (Jan. 12, 2024) (on file with the Committee).



[Anti-Deficiency] Act.”<sup>16</sup> It imposes strict penalties for a violation: (1) *requiring* those officers and employees “be subject to appropriate administrative discipline” up to and including termination,<sup>17</sup> (2) making it a felony punishable by up to two years in prison for knowingly and willfully doing so,<sup>18</sup> and (3) requiring the agency that incurs the deficiency to report the deficiency and any corrective action “immediately to the President and Congress.”<sup>19</sup> As discussed below, at least two different appropriations riders prohibit the NDAs the Coast Guard implemented in Operation Fouled Anchor, making their implementation and enforcement Anti-Deficiency Act violations.

**The Lloyd-LaFollette Act of 1912.** Second, the NDAs violate the Lloyd-LaFollette Act of 1912. Arguably the nation’s first whistleblower protection law, the Lloyd-LaFollette Act of 1912 provides that “[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”<sup>20</sup> By their plain language—“I am not to discuss this investigation or any other matter concerning this investigation with *any* persons outside CGIS unless prior authorization has been received”—the Operation Fouled Anchor NDAs prohibit signatories from taking such actions, and therefore violate the Lloyd-LaFollette Act.

**Anti-Gag Rider.** Third, the NDAs violate the Anti-Gag Rider, and therefore the Anti-Deficiency Act. Since Fiscal Year 1998, each annual appropriations Act has included a provision to enforce the Lloyd-LaFollette Act, commonly known as the Anti-Gag Rider. In pertinent part, the rider provides,

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress . . . .<sup>21</sup>

Therefore, whenever an officer or employee of the United States has prohibited or prevented a federal employee from communicating with Congress, pursuant to the Anti-Gag Rider, they have made an unauthorized expenditure of government funds, giving rise to an Anti-Deficiency Act

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<sup>16</sup> Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33 (2001).

<sup>17</sup> 31 U.S.C. § 1349(a).

<sup>18</sup> 31 U.S.C. § 1350. Such conduct may also be subject to article 134 of the punitive articles of the Uniform Code of Military Justice. 10 U.S.C. § 934.

<sup>19</sup> 31 U.S.C. § 1351. The agency must also report the violation to the Comptroller General. *Id.*

<sup>20</sup> 5 U.S.C. § 7211.

<sup>21</sup> Consolidated Appropriations Act, 2023, Pub. L. 117-328, Div. E, Title VII, § 713. The Anti-Gag Rider also protects against whistleblower retaliation. *Id.*

violation. As previously stated, the NDAs clearly attempt to prohibit Guardsmen who agreed to them from communicating directly with Congress regarding Operation Fouled Anchor, putting those NDAs at odds with the Anti-Gag Rider and triggering an Anti-Deficiency Act violation.

**The Grassley Anti-Gag Rider.** Fourth, the NDAs violate the Grassley Anti-Gag Rider, and therefore the Anti-Deficiency Act. Named for its sponsor, Senator Chuck Grassley, the Grassley Anti-Gag Rider prohibits use of federal funds to “implement or enforce” any NDA, nondisclosure policy, or nondisclosure form that does not include the following text verbatim:

**These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.<sup>22</sup>**

The Operation Fouled Anchor NDAs omit this mandatory language, rendering them illegal, unenforceable, and triggering an Anti-Deficiency Act violation. Although these NDAs violate the Appropriations Clause and the Anti-Deficiency Act by violating the Anti-Gag Rider and the Grassley Anti-Gag Rider, the Coast Guard has taken none of steps required by the Anti-Deficiency Act.

**The Whistleblower Protection Enhancement Act of 2012.** Fifth, the Operation Fouled Anchor NDAs may violate the Whistleblower Protection Enhancement Act of 2012. This Act reinforced the Grassley Anti-Gag Rider by making it a prohibited personnel practice for an employee in the civil service to “implement or enforce” an NDA without the precise language of the Grassley Anti-Gag Rider.<sup>23</sup> Appropriate discipline is required for a prohibited personnel practice and can include removal, reduction in grade, and debarment from federal employment.<sup>24</sup> It is unclear whether any civilian Coast Guard or other DHS personnel, such as civilian attorneys in DHS’s Office of General Counsel, were involved with implementing or enforcing Operation Fouled Anchor NDAs. However, the NDAs do not include this key language, thus if any civil servants participated in implementing or enforcing the NDAs it would give rise to a prohibited personnel practice by those personnel.

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<sup>22</sup> *E.g., id.* § 743.

<sup>23</sup> 5 U.S.C. § 2302(b)(13).

<sup>24</sup> 5 U.S.C. § 1215(a)(3)(A). The Office of Special Counsel is charged with investigating allegations of prohibited personnel practices by civil servants, including the nearly 7,000 civil servants employed by the Coast Guard, and recommending appropriate disciplinary action. 5 U.S.C. §§ 1212(a)(2), 1214.

**The Military Whistleblower Protection Act.** Last, the Coast Guard’s NDAs violate the Coast Guard’s own whistleblower protection regulation implementing the Military Whistleblower Protection Act. The Military Whistleblower Protection Act, which dates back to 1956, provides that “No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.”<sup>25</sup> The Coast Guard’s regulations implementing the law provide that “No person within the Department of Homeland Security may restrict a member of the Coast Guard from lawfully communicating with a Member of Congress or an Inspector General.”<sup>26</sup> The NDAs, which impose a blanket prohibition on disclosure outside of CGIS, prohibit those who agreed to them from communicating about Operation Fouled Anchor with either Members of Congress or inspectors general, clearly violating both the law and the regulation.

Taken together, the Coast Guard’s actions have the appearance of a years-long concerted effort to conceal information about rapes and other sexual assaults at the Academy from Congress and the public, which Congress must take extremely seriously. In particular, the Coast Guard may have actively and unlawfully sought to prohibit its personnel from reporting those sexual assaults and their investigations, including Operation Fouled Anchor, to Congress. If agencies are allowed to silence their employees from communicating with Congress, inspectors general, and the Office of Special Counsel, they will shield waste, fraud, abuse, and even criminal activity from oversight. This is a disservice to the survivors of rape and other sexual assaults at the Academy whom the Coast Guard has already failed once. It is critical that you act quickly to put an end to the Coast Guard’s use of prohibited NDAs and take steps to prevent similar failures from occurring again.

To that end, I am referring this matter to the DHS Inspector General to investigate, the Comptroller General for review for Anti-Deficiency Act violations,<sup>27</sup> and the Special Counsel for investigation of possible prohibited personnel practices by members of the civil service.<sup>28</sup>

I am continuing to review this matter. The Standing Rules of the Senate provide the Committee on Commerce, Science, and Transportation the authority to “review and study, on a continuing basis,” matters related to the Coast Guard.<sup>29</sup> To assist in the continued review of the Coast Guard’s use of these NDAs and the role those NDAs may have played in the Coast Guard’s failure to inform Congress about Operation Fouled Anchor, please answer the following

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<sup>25</sup> 10 U.S.C. § 1034(a)(1).

<sup>26</sup> 33 C.F.R. § 53.7(a).

<sup>27</sup> See 31 U.S.C. §§ 712(1), 717(b).

<sup>28</sup> See 5 U.S.C. §§ 1212(a)(2), 1214.

<sup>29</sup> S. Rules XXV(1)(f), XXVI(8)(a)(2).

questions under your signature and provide the following documents no later than April 22, 2024:

1. Do you commit to the Coast Guard's full and unconditional cooperation with any review or investigation of Operation Fouled Anchor and related matters by this Committee, the Inspector General, the Acting Special Counsel (with regard to the civil service), or any other competent authority? If your response is anything but an unconditional "Yes," please explain.
2. Do you commit to the Coast Guard's full and unconditional cooperation with any review or investigation of the use of NDAs throughout the Coast Guard, including withdrawing or correcting any prohibited NDAs, and notifying those who agreed to them of their right to communicate with Congress, inspectors general, and relevant oversight agencies, notwithstanding those NDAs? If "yes," please describe the specific steps you plan to order and provide copies of the revised template NDA, once completed. If your answer is anything other than an unconditional "yes," please explain, including an explanation of the Coast Guard's legal position.
3. How many times has the Coast Guard requested that Coast Guard personnel sign an NDA or similar agreement that did not contain the anti-gag provision as required by appropriations law?
4. How many individuals were requested to either sign an NDA or orally agree to an NDA, as part of Operation Fouled Anchor?
5. Is it standard practice for the Coast Guard Investigative Service to request victims of a crime to either sign an NDA or orally agree to an NDA? If not, provide a narrative response explaining why sexual assault and sexual harassment victims associated with Operation Fouled Anchor were asked to either sign or orally agree to an NDA.
6. Has the victim of a crime who has either signed a Coast Guard Investigative Service NDA or orally agreed to adhere to an NDA ever had criminal, civil, or administrative action taken, or threatened to be taken, against them for violating the NDA?
7. Regarding questions five and six of Part D of the Committee's questionnaire for nominees for Senate confirmation:
  - a. Describe the origin of the response nominees provided: "Yes, in accordance with law and DHS policy and guidance," including the reference to DHS policies and guidance. In your description, please include who gave that directive, when they gave that directive, and who was involved in the decision to give that directive.

- b. What policies, guidance, or laws do you believe could ever limit a federal employee's or service member's ability to "*keep this Committee, its subcommittees, other appropriate Committees of Congress, and their respective staffs apprised of new information that materially impacts the accuracy of testimony, briefings, reports, records—including documents and electronic communications, and other information—[the nominee] or [the Coast Guard] previously provided*"? Include specific citations and copies if any applicable policies or guidance documents are not publicly available.

Thank you for your attention to this matter.

Sincerely,



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Ted Cruz  
Ranking Member

cc: The Honorable Joseph V. Cuffari, Inspector General, Department of Homeland Security  
The Honorable Gene Dodaro, Comptroller General of the United States  
The Honorable Hampton Dellinger, Special Counsel