The Washington Post

The Constitution won't let Trump silence White House aides

No matter how much the president loves them, the government can only enforce nondisclosure agreements for classified information.

President Trump would prefer if Omarosa Manigault Newman were not allowed to talk about this 2017 White House meeting or any others. (Michael Reynolds/EPA-EFE/Pool/Shutterstock)

By **Mark S. Zaid**
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August 14, 2018 at 1:08 p.m. GMT-4

President Trump appears to be quite agitated about a tell-all book released this week by former senior adviser Omarosa Manigault Newman.

“Wacky Omarosa already has a fully signed Non-Disclosure Agreement,” the president tweeted Monday. (He would go on to call her “that dog” Tuesday morning.)

Part of the outrage on the president’s part seems to be over Manigault Newman breaking what Trump saw as a promise not to talk about her time working for him. White House counselor Kellyanne Conway told ABC News: “We have confidentiality agreements in the West Wing — absolutely we do.” And Manigault Newman claims in her book that Trump’s reelection campaign offered her a $15,000-a-month salary in exchange for signing a confidentiality agreement.

But such NDAs for government workers, when they go beyond prohibiting the disclosure of classified information, are unconstitutional on their face. I know, because I have litigated more pre-publication-review classification challenges against the government during the past 25 years than any other attorney. For decades, courts have made it clear that the government may not censor unclassified material, “contractually or otherwise.” Legal challenges during the 1970s and 1980s against the CIA settled the question that the government has no legitimate interest under the First Amendment in censoring unclassified information.

Neither law nor precedent, however, appears to have dissuaded Trump from trying to mirror his private practices in a public arena. As a New York business executive, he relied for decades upon NDAs to ensure that those closest to him never uttered a word about what they saw or were told about him. One such agreement, between adult-film star Stormy Daniels and Trump’s then-attorney Michael Cohen, is the subject of ongoing litigation by Daniels, who says she had an affair with Trump in 2006 and now wants to discuss the details of it. Now the president’s inner campaign and transition circle, particularly those without significant government experience who followed him to the White House, are trying to proactively silence public employees in the same way he customarily imposed speech restrictions on his private employees.

I have reviewed one document that is purportedly a version of the White House NDA. It appeared to be nothing more than a Trump Organization document that was modified to apply to White House staff — in fact, it still had a provision that in any litigated dispute, the parties agreed that New York state law would apply,

language that no standard federal document would ever have used. It was also publicly reported that one early draft of a White House NDA contained a provision that imposed a $10 million fine to be paid to the federal government if the signatory shared confidential information. While the term "confidential" in D.C. parlance is part of the national security classification framework, in these NDAs, it referred to potentially derogatory and unclassified information pertaining to the president.

These NDAs also ignored earlier guidance from the Office of Management and Budget that any NDAs should contain whistleblower protection provisions, clauses that would be contrary to the clear message desired by this administration. The omission of such protective language could give the impression that protecting Trump's reputation outweighs exposing misconduct or even unlawful activities.

In customary aggressive Trump fashion, his campaign entity, Donald J. Trump for President Inc., rather than the U.S. government, has reportedly filed for arbitration against Manigault Newman seeking millions for a violation of a 2016 NDA. The NDA allegedly required her to keep proprietary information about the president, his companies or his family confidential and to never "disparage" the Trump family "during the term of your service and at all times thereafter." This clause is in direct conflict with the legal precedents governing federal employees, but how an arbitration body will interpret constitutional questions is anyone's guess.

Of course, no one should be surprised that Trump has embraced such protective tactics. In an April 2016 interview with The Washington Post, the future president said he supported making federal employees sign NDAs.

"I think they should," Trump said. ". . . When people are chosen by a man to go into government at high levels, and then they leave government and they write a book about a man and say a lot of things that were really guarded and personal, I don't like that."

No known prior administration has relied upon the use of NDAs to try to silence public employees, because any such document was correctly perceived as legally unenforceable and problematic on so many levels. I never came across any

similar attempts in my time in Washington during President Bill Clinton's first term. The only comparable agreement that I'm aware of is one congressional intelligence committee staffers are requested to sign that prohibits post-employment discussion of committee procedures. The constitutionality of such an agreement is also suspect, but no known legal challenge has ever been made.

In 1961, President John F. Kennedy said the "very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings." Those words came in a speech before the American Newspaper Publishers Association, in which Kennedy supported the right of a free press to criticize his administration while working together to protect national security.

Times have certainly changed.