

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC

# Nondisclosure Agreements in the Trump White House

Tyler Valeska  
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# Table of Contents

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<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
President Trump's Use of NDAs in the White House.....	1
<b>HISTORY OF GOVERNMENTAL USE OF NDAs/SUPPRESSION OF CLASSIFIED INFORMATION.....</b>	<b>4</b>
Executive Secrecy Agreements .....	4
The Eisenhower and Nixon Administrations: Executive Privilege.....	4
The Reagan Administration: Presidential Directives .....	5
Standard Form 312 .....	7
Corporate NDAs.....	7
Corporatization of the Government.....	8
President Trump's Private Use of NDAs .....	9
Trump Campaign and Transition Team NDAs.....	10
White House NDAs .....	11
<b>WHITE HOUSE NDAs AND FIRST AMENDMENT RIGHTS.....</b>	<b>13</b>
The Government's Interests .....	13
Former Government Employees' First Amendment Rights .....	14
White House NDAs as Applied to Former Government Employees .....	15
The Press's First Amendment Rights.....	21
White House NDAs as Applied to the Press.....	21
Current Governmental Employees' First Amendment Rights .....	22
White House NDAs as Applied to Current Government Employees .....	24
<b>CONCLUSION.....</b>	<b>27</b>

# Executive Summary<sup>1</sup>

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The First Amendment’s protections for speech about government help form the nucleus of American democracy. Yet since President Donald Trump’s inauguration, the White House has sought to stem the flow of information that enables such speech. Deeply unsettling are the increasing attacks on the press and its most important sources—government employees. One method the White House is employing to cut off the link between journalists and sources is unprecedented: actively limiting current and former employees’ ability to speak about unclassified material through the use of nondisclosure agreements (“NDAs”).

NDAs are commonplace in the corporate world and have been used in certain public sector contexts. But they have never been used to bar White House employees and aides from informing the people about daily happenings at 1600 Pennsylvania Ave. Until now. On October 13, 2020, the Department of Justice brought suit against Stephanie Winston Wolkoff, First Lady Melania Trump’s former unpaid aide. DOJ seeks to enforce—on behalf of the United States—an NDA Wolkoff signed, on White House stationary, as part of her agreement to work on a volunteer basis for the First Lady.

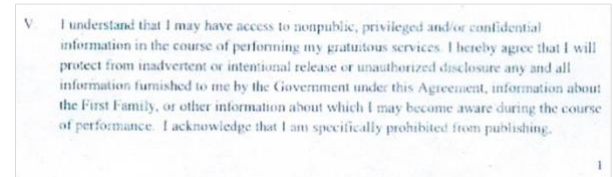
The White House NDAs’ terms far exceed the generally accepted bounds of public-employee speech restrictions. Their scope and vagueness swallow speech that is constitutionally protected; in effect, they prevent White

House employees—and, by extension, the press—from speaking and reporting on matters of significant public interest. They thus infringe on the First Amendment rights of both government employees and the press.

Historically, the Executive has enjoyed great deference in administrative and managerial matters. It is this deference that makes the White House NDAs so concerning. If courts sanction them as constitutional, the NDAs could usher in a new era of heightened speech restrictions on those best positioned to inform the public about the inner workings of government. In this paper, we examine the history of NDAs, the government’s interests in enforcing them, and the First Amendment rights implicated by enforcement.

Relying on Supreme Court precedent, we identify the constitutional boundaries of speech restrictions for public employees and show why President Trump’s White House NDAs are likely unconstitutional.

## PRESIDENT TRUMP’S USE OF NDAs IN THE WHITE HOUSE



The Wolkoff case is the first time the Trump administration has sought to enforce a White House NDA, and the first time it has sought to enforce any information agreement for stated reasons entirely unrelated to the protection of classified information.<sup>2</sup> The Department of Justice (“DOJ”) is also currently seeking to enforce standard secrecy agreements against former National Security Advisor John Bolton based on his memoir published this past summer,<sup>3</sup> but unlike the

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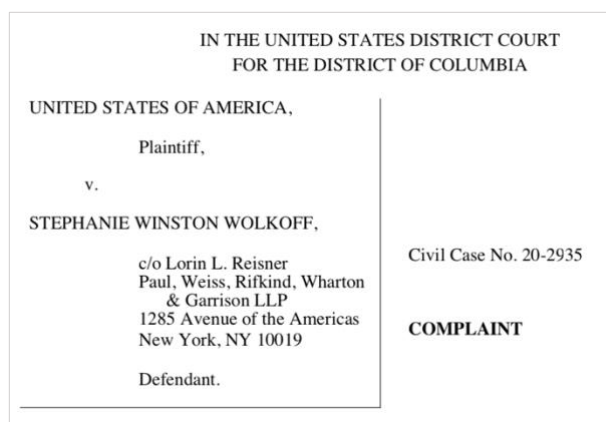
<sup>1</sup> The views represented herein reflect only those of the authors. They do not represent the institutional views of Cornell University, Cornell University Law School, or the Cornell First Amendment Clinic.

<sup>2</sup> See Michael Schmidt, *Justice Dept. Sues Ex-Aide Over Book about Melania Trump*, THE NEW YORK TIMES (October 13, 2020),

<https://www.nytimes.com/2020/10/13/us/politics/stephanie-winston-wolkoff-justice-department.html>.

<sup>3</sup> Michael Kranish, *Trump Long Has Relied on Nondisclosure Deals to Prevent Criticism. That Strategy May be Unraveling.*, WASHINGTON POST (Aug. 7, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/trump-nda-jessica->

White House NDAs, those agreements concern only classified information.<sup>4</sup> Bolton did not sign a White House NDA.<sup>5</sup> The Wolkoff suit focuses on a book Wolkoff she published about her time volunteering for the First Lady.<sup>6</sup> DOJ brings claims against Wolkoff for breach of contract and fiduciary duty, based on unauthorized disclosure of nonpublic and confidential information, and seeks a constructive trust for all profits from her book.<sup>7</sup> A DOJ spokesperson characterized Wolkoff’s White House NDA as “a contract with the United States and therefore enforceable by the United States.”<sup>8</sup>



The Wolkoff agreement—attached as an exhibit to DOJ’s complaint—is the public’s first look at a White House NDA.<sup>9</sup> But much uncertainty remains. It is unclear who has been forced to sign White House NDAs and when. And we do not know the extent to

which Wolkoff’s NDA—a gratuitous service agreement with the White House Office of the First Lady—differs in some ways from agreements paid White House employees signed. What we do know is that many employees, aides, and interns signed White House NDAs before and during their White House tenure.<sup>10</sup> They began signing White House NDAs soon after Trump took office<sup>11</sup> and continued to do so at least as late as last year.<sup>12</sup>

Some initial uses were reactionary. In the midst of multiple early 2017 leaks, President Trump had senior White House staff members sign NDAs that reportedly mirror many of the terms found in Wolkoff NDA.<sup>13</sup>

They indefinitely prohibit staff from disclosing any confidential or nonpublic information to any person outside the White House without President Trump’s consent.<sup>14</sup>

Former White House Counsel Donald McGahn reportedly convinced aides to sign the agreements after first refusing to draft or distribute them because he did not think they were enforceable.<sup>15</sup> Former Chief of Staff Reince Priebus also allegedly pressured many leery senior staff members to sign.<sup>16</sup>

In 2018, multiple current and former White House employees confirmed the administration’s use of White House NDAs. Former Press Secretary Sarah Sanders stated—inaccurately<sup>17</sup>—that “every administration prior

denson-lawsuit/2020/08/06/202fed1c-d5ad-11ea-b9b2-1ea733b97910\_story.html.

<sup>4</sup> See *infra* History of Governmental Use of NDAs/Suppression of Classified Information.

<sup>5</sup> Kranish, *supra* note 3.

<sup>6</sup> Schmidt, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Government’s Exhibit #2, United States v. Wolkoff, No. 20-2935 (D.D.C. filed Oct. 13, 2020) (“Wolkoff NDA”).

<sup>10</sup> Josh Dawsey & Ashley Parker, ‘Everyone Signed One’: Trump is Aggressive in His Use of Nondisclosure Agreements, Even in Government, WASHINGTON POST (Aug. 13, 2018, 8:43 PM), [https://www.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a\\_story.html](https://www.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a_story.html).

<sup>11</sup> *Id.*

<sup>12</sup> Asawin Suebsaeng, *Trump White House is Forcing Interns to Sign NDAs and Threatening Them With Financial Ruin*, DAILY BEAST (Feb. 21, 2019, 7:43 AM), <https://www.thedailybeast.com/trump-white-house-is-forcing-interns-to-sign-ndas-and-threatening-them-with-financial-ruin>.

<sup>13</sup> Dawsey & Parker, *supra* note 10.

<sup>14</sup> *Id.* As noted, this reporting is consistent with the terms of Wolkoff’s NDA. See *infra* White House NDAs.

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

<sup>16</sup> Report: Trump Made White House Senior Staff Sign NDAs, THE DAILY BEAST (Mar. 19, 2018, 5:14 AM), <https://www.thedailybeast.com/report-trump-made-white-house-senior-staff-sign-ndas>.

<sup>17</sup> Nancy Cook & Andrew Restuccia, *Trump Tried to Ban Top Aides from Penning Tell-All Books*, POLITICO (Aug. 13, 2018, 8:13 PM), <https://www.politico.com/story/2018/08/13/white->

to the Trump administration has had NDAs” and that “despite contrary opinion, it’s actually very normal.”<sup>18</sup> Former White House counselor Kellyanne Conway argued that White House employees signed NDAs because they were needed to ensure privacy.<sup>19</sup> But assuming accounts are accurate, not all employees were forced to sign. Former Deputy Press Secretary Hogan Gidley, for example, told reporters that he never saw an NDA in the White House and was never asked to sign one.<sup>20</sup>

#### INTRODUCTION

1. The United States of America brings this civil action for breach of contract and breach of fiduciary obligations against Defendant Stephanie Winston Wolkoff, who has published a book about the First Lady of the United States (“First Lady,” FLOTUS, or Mrs. Trump) in flat violation of Ms. Wolkoff’s contractual obligations and fiduciary duties.

2. In 2017, Ms. Wolkoff volunteered to serve as an advisor to the First Lady in the East Wing, where she would assist the First Lady on policy initiatives, speeches, and other matters, without monetary compensation, *see* Gratuitous Services Agreement § I (attached as Exhibit A) (“Agreement” or “GSA”). In August 2017, the parties memorialized their agreement in a GSA wherein Ms. Wolkoff promised to maintain strict confidentiality over “nonpublic, privileged and/or confidential information” that she might obtain during her service under the Agreement. *Id.* § V.

3. Ms. Wolkoff agreed, among other things, “that [she was] specifically prohibited from publishing, reproducing or otherwise divulging any such information to any unauthorized person or entity in whole or in part.” *Id.* She also promised not to disclose her “work with FLOTUS and [the Office of the First Lady] . . . to any person or entity to whom disclosure has not been authorized in writing by FLOTUS, the Chief of Staff to the First Lady or the Office of the White House Counsel,” and to refrain from “us[ing] or referenc[ing] [her] gratuitous services in connection with any merchandising or other commercial activity.” *Id.* §§ VII, XI. Further, Ms. Wolkoff affirmatively committed to “take all reasonable measures to protect” the nonpublic, privileged and/or confidential information that she might receive “from unauthorized disclosure.” *Id.* § V.

Reports of White House NDA usage continued into 2019, when incoming White House interns were asked to sign agreements as part of their orientation.<sup>21</sup> The White House allegedly did not provide interns with their own copies of the agreements and characterized their required signing as an “ethics training.”<sup>22</sup>

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house-staff-non-disclosure-agreements-books-776313 (citing lawyers and ethic experts for the premise that Trump’s White House NDAs have no modern precedent).

<sup>18</sup> Jeremy Stahl, *Is it Normal for White House Officials to Sign Nondisclosure Agreements?*, SLATE (Aug. 14, 2018, 10:23 PM), <https://slate.com/news-and-politics/2018/08/trump-white-house-ndas-are-these-nondisclosure-agreements-normal.html> (reviewing the historical precedent for NDAs in the White House compared to the Trump administrations’ use).

<sup>19</sup> Julia Manchester, *White House Spokesman: I’ve Never Seen an NDA in Trump White House*, THE HILL (Oct. 15, 2018), <https://thehill.com/hilltv/rising/401908-white-house-spokesman-ive-never-seen-an-nda-the-trump-white-house>.

<sup>20</sup> *Id.*

<sup>21</sup> Suebsaeng, *supra* note 12.

<sup>22</sup> *Id.*



# History of Governmental Use of NDAs/Suppression of Classified Information

## EXECUTIVE SECRECY AGREEMENTS

Many past administrations have used NDAs on the campaign trail and during the transitional period between presidential administrations; none have carried them over to the White House.<sup>23</sup> This practice is partially attributable to the widespread belief that NDAs restricting disclosure of unclassified information are not legally enforceable for government employees, who work for the people rather than any administration or officeholder.<sup>24</sup>

While the Trump White House NDA is unprecedented in its scope and duration, previous administrations have regulated the disclosure of information by executive branch employees.<sup>25</sup>

Many presidents have availed themselves of executive privilege, the constitutional power that best supports the use of White House NDAs. Executive privilege allows the president to keep information from other branches of government.<sup>26</sup> The privilege is properly asserted if it is determined that the protection of certain government communications is in the public interest.<sup>27</sup> It includes the deliberative process privilege, which protects “communications and documents evidencing the ‘predecisional’ considerations of agency officials.”<sup>28</sup> Confidentiality interests in the president’s internal

communications with White House advisors, such as policy deliberations, have long been protected under this privilege.<sup>29</sup> Traditionally, presidents have asserted executive privilege by citing a combination of deliberative process and national security needs, which often merit maximum protection.<sup>30</sup>



## THE EISENHOWER AND NIXON ADMINISTRATIONS: EXECUTIVE PRIVILEGE

The term “executive privilege” was coined during the Dwight D. Eisenhower administration,<sup>31</sup> when President Eisenhower asserted it more than forty times.<sup>32</sup> He believed that candid advice was necessary for executive branch deliberations, arguing that subjecting advisors to subpoenas by other branches would limit candor and, in turn, hurt the public interest.<sup>33</sup> He broadened the privilege by invoking it on behalf of the entire executive branch, rather than just himself and senior White House officials.<sup>34</sup> He went so far as to claim that all advice to the president—on matters public or private—was

<sup>23</sup> Orly Lobel, *Trump’s Extreme NDAs*, THE ATLANTIC (March 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/>.

<sup>24</sup> Dawsey & Parker, *supra* note 10.

<sup>25</sup> Lobel, *supra* note 23.

<sup>26</sup> Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon’s Shadow, 83 MINN. L. REV. 1069, 1069 (1999).

<sup>27</sup> U.S. v. Nixon, 418 U.S. 683, 713–15 (1974) (*Nixon I*).

<sup>28</sup> Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, at 20, CONGRESSIONAL RESEARCH SERVICE (December 15, 2014), <https://fas.org/sgp/crs/secretary/R42670.pdf>.

<sup>29</sup> *Id.*; see Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484–90 (1982).

<sup>30</sup> Rozell, *supra* note 26, at 1071.

<sup>31</sup> Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92. L. REV. 489 (2007).

<sup>32</sup> Mark J. Rozell, *The Law: Executive Privilege: Definition and Standards of Application*, 29 PRESIDENTIAL STUD. Q. 918, 923 (1999); see also Congressional Testimony, Statement of Mark J. Rozell on the Presidential Records Act, “Executive Privilege and the Modern Presidents” (Nov. 6, 2001), available at [https://fas.org/sgp/congress/2001/110601\\_rozell.html](https://fas.org/sgp/congress/2001/110601_rozell.html).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 923.

beyond the purview of disclosure requests by the other branches.<sup>35</sup>

In response to this expansive approach, members of Congress sought to narrow the scope of executive privilege.<sup>36</sup> Ironically, President Richard Nixon assisted in this effort after entering office, issuing standard procedures for when the privilege could be used—ostensibly to limit the power of the privilege.<sup>37</sup> Nixon nonetheless later invoked the privilege multiple times during his presidency to hide incriminating information about his administration’s wrongdoings.<sup>38</sup> He argued that disclosing the incriminating materials violated the president’s “generalized interest in confidentiality.”<sup>39</sup> The Watergate proceedings<sup>40</sup> marked the first time that the Supreme Court recognized a “presumptive privilege” for presidential communications and established that the privilege is structurally rooted in the Constitution’s separation of powers.<sup>41</sup>

The Court determined that the confidentiality of the president’s communications with his close advisors is protected under Article II,<sup>42</sup> but that the privilege is qualified and not absolute.<sup>43</sup> A balancing test is required when competing public values are implicated,<sup>44</sup> and the privilege is limited to “communications ‘in performance of a President’s responsibilities . . . of his office.’”<sup>45</sup> The privilege allows the president and important executive branch officials to withhold, under certain circumstances, sensitive material from Congress and the courts.<sup>46</sup> The president can thus, for example,

sometimes preserve the confidentiality of information and documents that pertain to executive-congressional relations if subject to a congressional investigation.

## THE REAGAN ADMINISTRATION: PRESIDENTIAL DIRECTIVES

President Ronald Reagan created a modern framework for expanded secrecy via two national security directives: Executive Order 12356 (“E.O. 12356”) and National Security Directive 84 (“NSD 84”). E.O. 12356 marked the first time in forty years that a president moved to restrict access to government information and to facilitate classification.<sup>47</sup> The order tipped the scales balancing the public’s right to know and the government’s interest in secrecy in favor of the latter.<sup>48</sup> It lowered the standard for classification to information designated as “confidential”<sup>49</sup> and eliminated the previous requirement that government demonstrate “identifiable damage”<sup>50</sup> to security interests before classification.<sup>51</sup> It also allowed agencies to classify or reclassify information after receiving a FOIA request.<sup>52</sup>

Much like President Trump, President Reagan was particularly concerned about White House leaks. He responded by issuing restrictive policies for federal officials’ interactions with the press.<sup>53</sup> The policies required, *inter alia*, that any contact with the press touching on classified information receive advance approval from a senior White House official, and that the employee submit a memorandum detailing all

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 923–24. The standards Nixon introduced cabined invocation of executive privilege to “only the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise.” *Id.* at 924.

<sup>38</sup> Rozell, *supra* note 26, at 1071.

<sup>39</sup> *Nixon I*, 418 U.S. at 713.

<sup>40</sup> Nixon’s use of executive privilege resulted in two prominent cases: *Nixon I* and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (*Nixon II*).

<sup>41</sup> *Nixon I*, 418 U.S. at 705–06, 708, 711.

<sup>42</sup> *Nixon II*, 433 U.S. at 447.

<sup>43</sup> *Nixon I*, 418 U.S. at 705–06, 708.

<sup>44</sup> *Nixon II*, 433 U.S. at 447.

<sup>45</sup> *Id.* at 449.

<sup>46</sup> *Nixon I*, 418 U.S. at 708.

<sup>47</sup> Mark J. Rozell., *Executive Privilege in the Reagan Administration: Diluting a Constitutional Doctrine*, 27 *PRESIDENTIAL STUD. Q.* 760, 762 (1997).

<sup>48</sup> *Id.*

<sup>49</sup> Exec. Order No. 12356, 47 Fed. Reg. 14,875, at § 1.1(a)(3). The order allowed for “confidential” designation if an “unauthorized disclosure . . . reasonably could be expected to cause damage to the national security.”

<sup>50</sup> Exec. Order No. 12065, 43 Fed. Reg. 28,949, at § 1-104.

<sup>51</sup> Rozell, *supra* note 47.

<sup>52</sup> Exec. Order No. 12356, § 1.6(d), 47 Fed. Reg. 14,874, 14,880 (Apr. 2, 1982).

<sup>53</sup> Rozell, *supra* note 47, at 763.



information disclosed.<sup>54</sup> The policies also mandated that administration officials investigate leaks by “all legal methods.”<sup>55</sup> These changes generated substantial negative media coverage, and in response the Reagan administration eliminated the controversial provisions from the policies.<sup>56</sup>

President Reagan’s attempts to control access to information continued throughout his presidency. One year after implementing E.O. 12356, Reagan issued NSD 84 as something of an addendum.<sup>57</sup> NSD 84 and its implementing nondisclosure agreements applied to every agency of the government that dealt with “classifiable” information, and to former and current government employees alike.<sup>58</sup> NSD 84 mandated that all persons with authorized access to classified information be required to sign a nondisclosure agreement.<sup>59</sup> The nondisclosure agreements restricted federal employees from disclosing any information that was “classified or [was] classifiable” to Congress or to the public.<sup>60</sup> The term “classifiable” was not defined.<sup>61</sup> Its vagueness substantially broadened the amount of restricted government information.<sup>62</sup>

As with E.O. 12356, vociferous bipartisan criticism followed the implementation of NSD 84.<sup>63</sup> Members of Congress argued that the directive violated government officials’ First Amendment rights and that the term

“classifiable” was overly broad.<sup>64</sup> Critics contended that the term’s vagueness would chill the disclosure of executive information to the other branches.<sup>65</sup> Members of Congress argued that, by permitting information to be classified after the fact, NSD 84 amounted to a ham-handed effort to punish whistleblowers who disclosed information that embarrassed government officials.<sup>66</sup>

In response to the criticism, the Reagan administration narrowed the agreement’s scope to “unmarked classified information . . . in the process of a classification determination”<sup>67</sup> and defined “classifiable” as applying to federal employees “who know, or reasonably should know” that the unclassified material is being reviewed for classification.<sup>68</sup> Congress in turn enacted legislation that blocked funding to implement President Reagan’s standard forms under NSD 84.<sup>69</sup> The legislation prohibited any standard form agreement that concerned information other than information specifically marked as classified, contained the term “classifiable,” or obstructed an individual’s ability to disclose information to Congress.<sup>70</sup>

The use of “classifiable” in the agreements and the responsive legislation were simultaneously challenged in court. A federal district court for the District of Columbia found the legislation unconstitutional due to its impermissible restriction on the president’s ability to

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Statement of Thomas Emerson, to the Legislation and National Security Subcommittee of the Committee on Government Operations of the U.S. House of Representatives on the Constitutionality of the Presidential Directive on Safeguarding National Security Information of March 11, 1983, at 608. Downloaded as: “Review of the President’s National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use.”

<sup>58</sup> *Id.* at 618; see also Neil Roland, *Reagan Agrees to Nine-Month Ban on Secrecy Pledge*, UPI (Dec. 22, 1987), <https://www.upi.com/Archives/1987/12/23/Reagan-agrees-to-nine-month-ban-on-secrecy-pledge/3070567234000/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Peter Raven-Hansen and William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VIRGINIA L. REV. 834, 924 n.464 (1994).

<sup>62</sup> Stahl, *supra* note 18.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Roland, *supra* note 58.

<sup>66</sup> *High Court to Review Congress’ Access*, DAILY NEWS (Bowling Green, Ky.), Oct. 31, 1988, at 16, available at <https://news.google.com/newspapers?id=KT01AAAIBAJ&sjid=FkgEAAAIBAJ&pg=4574%2C5784700>. Republican Senator Chuck Grassley stated that NSD 84’s practical effect was “not to maintain secrecy but to place a blanket of silence over federal workers.” *Id.*

<sup>67</sup> Stahl, *supra* note 18.

<sup>68</sup> Roland, *supra* note 58.

<sup>69</sup> *High Court to Review Congress’ Access*, *supra* note 66, at 16.

<sup>70</sup> U.S. General Accounting Office, *Information Security: Federal Agency Use of Nondisclosure Agreements* 11 (1991).

execute the obligations imposed upon him “by his express constitutional powers and the role of the Executive in foreign relations.”<sup>71</sup> However, while the court ruled in favor of the Reagan administration with regard to the legislation, it acknowledged that the term “classifiable” was vague and that government officials’ First Amendment rights were “potentially impaired.”<sup>72</sup> It therefore allowed the plaintiffs’ First Amendment challenges to the agreements to proceed. As the case wound its way through the appellate process, members of Congress put intense pressure on the Reagan administration to water down the agreements: Senator Chuck Grassley went so far as to urge federal employees to disregard the agreements they had signed.<sup>73</sup> As a result, the administration dropped the “classifiable” language from NSD 84’s implementing nondisclosure agreements.<sup>74</sup>

### STANDARD FORM 312

The modern manifestation of the Reagan administration secrecy agreements is Standard Form 312 (“SF 312”).<sup>75</sup> It applies to government employees and contractors who have been granted security clearances for classified information.<sup>76</sup> It is indefinite in duration and prohibits the unauthorized disclosure of classified information in the interest of national security.<sup>77</sup> Classified information is defined as “marked or unmarked classified information, including oral communications, that is classified under” any statute “that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination.”<sup>78</sup>

Before President Trump took office, SF 312 was the government agreement most closely resembling a corporate NDA. Of course, there is a critical difference between these types of private and public agreements.

Corporate employers have broad legal latitude to restrict employees’ speech rights through mutual agreements between private parties. Government employers, on the other hand, are bound by constitutional constraints, including the First Amendment.

Despite this difference, the proliferation of NDAs in the private sector is instructive in understanding why and how the White House is using them now.



### CORPORATE NDAs

In the business context, NDAs are designed to protect a company’s business interest in shielding its proprietary information from competitors.<sup>79</sup> In the early 20th century, employers in various industries began to use NDA clauses in employment contracts to protect their companies’ inner workings and reputations.<sup>80</sup> These clauses constitute a legally binding contract that typically precludes employees from disclosing sensitive

<sup>71</sup> Nat’l Fed’n of Fed. Emps. v. United States, 688 F.Supp. 671, 685 (D.D.C. 1988) (Gasch, J.).

<sup>72</sup> *Id.* at 683; see also U.S. General Accounting Office, *supra* note 70 at 12.

<sup>73</sup> Stahl, *supra* note 18.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Standard Form 312, Classified Information Nondisclosure Agreement, available at <https://fas.org/sgp/othergov/sf312.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> E.J. Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE (Mar. 19, 2019, 6:17 PM), <https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856/> (citing attorneys and other legal experts describing the terms and uses for NDAs in the corporate context).

<sup>80</sup> *Id.*

information—as defined by the employer.<sup>81</sup> Usage first became widespread among Silicon Valley tech companies in the 1970s and has exploded in recent years to include a broad field of industries.<sup>82</sup> Breach of an NDA subjects employees to termination and, in some cases, significant financial penalties.<sup>83</sup>

The extensive use of private NDAs has drawn increasing reprobation in recent years, particularly in light of the #MeToo movement.<sup>84</sup> One prominent example is the 2020 Democratic presidential primary debates, in which candidate Michael Bloomberg faced hostile questions and criticisms about NDAs that several female employees had signed as part of settlements for sexual harassment complaints against Bloomberg.<sup>85</sup> Bloomberg’s company was sued multiple times over hostile work environment allegations, but the NDAs kept the content of the allegations and resulting settlements private.<sup>86</sup> The Bloomberg example is unfortunately emblematic of a broader trend of secrecy agreements preventing women from speaking out about workplace sexual harassment; as a result, there is a nascent effort in the legal community to limit or ban the use of NDAs, at least for these purposes.<sup>87</sup>

## CORPORATIZATION OF THE GOVERNMENT

Tracking the long-term expansion of private NDAs, the federal government has increasingly “corporatized” over the last few decades. Intelligence agencies adopted the government-as-business metaphor as a guiding principle as far back as the 1940s, viewing policy makers as their customers.<sup>88</sup> In the 1960s, Secretary of Defense Robert McNamara introduced the Planning, Programming and Budgeting System, a program designed by the Rand Corporation<sup>89</sup> that structured defense agencies to analyze and respond to demands of its market consumers: the American people.<sup>90</sup> The 1990s saw further proliferation of businesslike approaches to government that were designed to implement corporate practices into public administration.<sup>91</sup> Former Vice President Al Gore put it bluntly: “[A] lot of people don’t realize that the federal government has customers. We have customers. The American people.”<sup>92</sup>

That sentiment still permeates the Executive Branch today. Jared Kushner, a senior adviser and the president’s son-in-law, set forth the Trump administration’s *modus operandi* as it assumed power in 2017: “The government should be run like a great American company. Our hope is that we can achieve successes and efficiencies for our customers, who are the citizens.”<sup>93</sup> Kushner’s statement came shortly after

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<sup>81</sup> *Id.*

<sup>82</sup> Lobel, *supra* note 23.

<sup>83</sup> Dickson, *supra* note 80.

<sup>84</sup> *Id.*

<sup>85</sup> Lauren Egan, *#MeToo Moment: Bloomberg on Debate Hot Seat for Comments about Women, NDAs*, NBC NEWS (Feb. 19, 2020, 10:25 PM), <https://www.nbcnews.com/politics/politics-news/bloomberg-hot-seat-comments-about-women-non-disclosure-agreements-n1139411>.

<sup>86</sup> Benjamin Swasey & Juana Summers, *Bloomberg: 3 Women Who Made ‘Complaints About Comments’ Can Seek NDA Releases*, NPR (Feb. 21, 2020, 4:35 PM), <https://www.npr.org/2020/02/21/808280695/bloomberg-women-who-made-complaints-about-comments-can-now-seek-nda-releases>.

<sup>87</sup> Dickson, *supra* note 80.

<sup>88</sup> Andrew L. Brooks, *The Customer Metaphor and the Defense Intelligence Agency*, 2–3 (2016).

<sup>89</sup> Carol L. DeCandido, *Evolution of Department of Defense Planning, Programming, and Budgeting System: From SECDEF McNamara to VCJCS Owens*, at ii, ARMY WAR COLLEGE (1996), <https://www.hsdl.org/?view&did=447081>.

<sup>90</sup> Samuel M. Greenhouse, *The Planning-Programming-Budgeting System: Rationale, Language, and Idea-Relationships*, 26 PUB. ADMIN. REV. 271, 272 (1966).

<sup>91</sup> One prominent example is President Clinton’s doomed 1994 proposal to establish a public corporation to carry out the Federal Aviation Administration’s air traffic functions. See Bart Elias, *Air Traffic Inc.: Considerations Regarding the Corporatization of Air Traffic Control*, at 6, CONGRESSIONAL RESEARCH SERVICE (May 16, 2017), <https://fas.org/sgp/crs/misc/R43844.pdf>.

<sup>92</sup> Albert Gore, *From Red Tape to Results: Creating a Government that Works Better & Costs Less* 43 (1993).

<sup>93</sup> Ashley Parker & Philip Rucker, *Trump Taps Kushner to Lead a SWAT Team to Fix Government with Business Ideas*, THE WASHINGTON POST (March 26, 2017, 10:00 PM), [https://www.washingtonpost.com/politics/trump-taps-kushner-to-](https://www.washingtonpost.com/politics/trump-taps-kushner-to-lead-swat-team-to-fix-government-with-business-ideas/)

President Trump unveiled the new White House Office of American Innovation—consisting of former business executives with little-to-no political experience—with the mission statement to harvest strategies and ideas from the business world and implement those ideas into the government.<sup>94</sup> It is hardly surprising, then, that one of the Trump White House’s first steps was to bring NDAs, a hallmark of private sector employment agreements, into federal government, particularly given President Trump’s longstanding affinity for the use of NDAs in his business and personal affairs.

### PRESIDENT TRUMP’S PRIVATE USE OF NDAs



President Trump and the Trump Organization have utilized NDAs as standard practice for decades. President Trump has publicly confirmed his use of NDAs in business proceedings, boasting that

his agreements were “so airtight” that “[he] never had a problem” with unauthorized disclosures.<sup>95</sup> He has routinely required employees and associates to sign NDAs prohibiting them from revealing information about the Trump Organization.<sup>96</sup> These NDAs have typically included a non-disparagement clause, designed to prevent the employee from disclosing any disparaging secrets about Trump or his family.<sup>97</sup> One such agreement prohibits employees indefinitely from disclosing information “of a private, proprietary or confidential nature or that Mr. Trump insists remain private or confidential.”<sup>98</sup> Those bound by the

agreement must return or destroy any confidential information in their possession upon Trump’s request.<sup>99</sup>

President Trump has aggressively enforced his private NDAs through litigation. In 2013, his Miss Universe pageant sued a former contestant after she claimed the pageant was rigged.<sup>100</sup> The organization won a \$5 million judgment based on a non-disparagement provision in the contestant’s contract that prohibited any conduct that would bring “public disrepute, ridicule, contempt or scandal or might otherwise reflect unfavorably” on President Trump and associated businesses.<sup>101</sup> In 1996, President Trump brought an unsuccessful suit against Barbara Corcoran, a New York businesswoman, who he claimed breached a confidentiality agreement.<sup>102</sup>

President Trump has likewise liberally employed and enforced NDAs in his personal life. One prominent example is the lawsuit he brought in 1992 against his ex-wife, Ivana Trump, for allegedly breaching the nondisclosure portion of their divorce documents.<sup>103</sup> He argued that her romance novel, *For Love Alone*, was based on the couple’s marriage and violated the divorce settlement NDA.<sup>104</sup> The suit was settled out of court.<sup>105</sup> In 2018, Stephanie Clifford publicly challenged the validity of an NDA (signed days before the 2016 election) intended to keep secret her alleged extramarital affair with President Trump.<sup>106</sup> The agreement included a financial penalty of \$1 million for each breach of its terms.<sup>107</sup> Ultimately, the president agreed not to enforce the agreement following intense public scrutiny.<sup>108</sup> Last year, during an unplanned trip to

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lead-a-swat-team-to-fix-government-with-business-ideas/2017/03/26/9714a8b6-1254-11e7-ada0-1489b735b3a3\_story.html.

<sup>94</sup> *Id.*

<sup>95</sup> Julie Pace & Chad Day, *For Many Trump Employees, Keeping Quiet is Legally Required*, AP NEWS (June 21, 2016), <https://apnews.com/14542a6687a3452d8c9918e2f0bf16e6> (describing Trump’s previous use of NDAs).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Vanessa Romo, *Stormy Daniels Files Suit, Claims NDA Invalid Because Trump Didn’t Sign At the XXX*, NPR (Mar. 7, 2018, 10:17 AM), <https://www.npr.org/sections/thetwo-way/2018/03/07/591431710/stormy-daniels-files-suit-claims-nda-invalid-because-trump-didnt-sign-at-the-xxx>.

<sup>107</sup> *Id.*

<sup>108</sup> James Hill, *Trump Won’t Enforce Stormy Daniels Nondisclosure Agreement*, ABC NEWS (September 8, 2018,

Walter Reed National Military Medical Center, President Trump required doctors and staff to sign NDAs before they could be involved in his treatment.<sup>109</sup>

And just this summer, the president attempted to enforce an NDA against his niece, Mary Trump, to prevent publication of a damaging family memoir.<sup>110</sup> Mary Trump signed the agreement as part of a 2001 inheritance settlement, but the president was unable to prevent the book from being published.<sup>111</sup> In an interview, Mary Trump accused the president of routinely using NDAs as swords to silence critics, leaning on “his power, his position and his money and his apparently endless supply of lawyers to run out the clock. Or just to outspend people who can’t afford it.”<sup>112</sup> She described his NDAs as “a weapon to advance his own agenda.”<sup>113</sup>

## TRUMP CAMPAIGN AND TRANSITION TEAM NDAs

President Trump’s reliance on NDAs extended to his 2016 presidential campaign. His campaign team required the majority of staffers and associates to sign NDAs—including volunteers and even the distributor of his “Make America Great Again” hat.<sup>114</sup> As noted above, use of NDAs has become relatively common in presidential campaigns.<sup>115</sup> For example, former Senator Hillary Clinton’s 2016 presidential campaign also required employees to sign NDAs.<sup>116</sup>

Under the Trump Campaign NDA, employees are prohibited from disclosing any “confidential” information that is in “any way detrimental to the Company [referring here to the corporate campaign enterprise], Mr. Trump, any Family Member, any Trump Company or any Family Member Company.”<sup>117</sup> The Campaign NDA also has a “[n]o [d]isparagement” clause requiring that signatories not “demean or disparage publicly the Company, Mr. Trump, any Family Member, any Trump Company or any Family Member Company.”<sup>118</sup> Both clauses are indefinite, applying during the term of the service and “at all times thereafter.”<sup>119</sup>

Mirroring President Trump’s business NDAs, the Campaign NDA defines “confidential information” as “all information (whether or not embodied in any media) of private, proprietary or confidential nature or that Mr. Trump insists remain private and confidential.”<sup>120</sup> The provision lists examples of confidential information, including any information related to the personal life or finances of Trump, his family members, Trump companies, and family member companies.<sup>121</sup> It also encompasses a broad range of communications—including meetings, conversations, notes “and other communications” of Trump and associates.<sup>122</sup>

The president’s campaign relied on these NDAs in unsuccessfully pressuring former White House staffers Cliff Sims and Omarosa Manigault Newman not to publish tell-all books about their employment under Trump, ultimately taking Newman to arbitration.<sup>123</sup>

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6:40 PM), <https://abcnews.go.com/Politics/trump-enforce-stormy-daniels-nondisclosure-agreement/story?id=57697574>.

<sup>109</sup> Carol E. Lee and Courtney Kube, *Trump Asked Walter Reed Doctors to Sign Nondisclosure Agreements in 2019*, NBC NEWS (Oct. 8, 2020, 8:23 PM), <https://www.nbcnews.com/politics/donald-trump/trump-asked-walter-reed-doctors-sign-non-disclosure-agreements-2019-n1242293>.

<sup>110</sup> Kranish, *supra* note 3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Pace & Day, *supra* note 96.

<sup>115</sup> *Supra* Executive Secrecy Agreements.

<sup>116</sup> *Id.*

<sup>117</sup> Trump Organization Nondisclosure Agreement (released in 2016, obtained through BuzzFeed News) [CLAUSE 1, PP. 1-2].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Veronica Stracqualursi & Pamela Brown, *Trump Claims He’s Suing ‘Various People’ For Violating Confidentiality Agreements*, CNN (Aug. 31, 2019, 4:37 PM),



There, the campaign has suggested that Newman should pay nearly \$1 million to cover the costs of an advertisement the campaign ran to respond to claims made in her book.<sup>124</sup> Meanwhile, former campaign worker Jessica Denson is currently litigating a class action suit against the Trump campaign, seeking to have its NDAs voided on First Amendment grounds.<sup>125</sup> She summarized her lawsuit to *The Washington Post*: “These NDAs are representative of the levers of fear that this campaign and administration wield over people. And if this lever of these NDAs is lifted, it is significant not only for the direct effect it has on people who have signed it, but for a general environment of people who are afraid to speak out.”<sup>126</sup>

### WHITE HOUSE NDAs

President Trump’s White House NDAs differ immensely from the practices of previous administrations, bearing much more resemblance to a corporate agreement than a typical governmental restriction on classified information. Reporting characterizes the agreements as similar to those “typically given to reality show contestants.”<sup>127</sup> Based on the Wolkoff NDA and reporting on agreements that other employees signed, we know that the general framework for the terms is as follows:

It applies indefinitely.<sup>128</sup> It bans employees from any unauthorized disclosure of “nonpublic, privileged and/or confidential information.”<sup>129</sup> This includes information about the Trump family,<sup>130</sup> and reportedly about Trump businesses.<sup>131</sup> The Wolkoff NDA restricts disclosure of “any and all information furnished” by the government, “information about which [signatory] may become aware during the course of performance,” and “the contents of [the NDA] and of [signatory’s] work with FLOTUS and OFL.”<sup>132</sup> Unauthorized disclosures include “publishing, reproducing, or otherwise divulging” information “to any unauthorized person or entity in whole or in part.”<sup>133</sup> These provisions reportedly mirror NDAs other staffers signed, prohibiting unauthorized disclosure of confidential work. An early draft prohibited individuals from revealing “confidential information” in any form, defined as “all nonpublic information [learned or accessed] in the course of . . . official duties in the service of the United States Government on White House staff.”<sup>134</sup> It is unclear if this exact language was used in any final versions of the NDA, but it is consistent with the Wolkoff NDA’s scope. Some of the agreements reportedly reference the possibility of monetary damages of unspecified amount,<sup>135</sup>

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The early draft imposed a \$10 million penalty, but this provision was not included in the version staffers signed.<sup>137</sup> And unlike the Trump Campaign NDA, the

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<https://www.cnn.com/2019/08/31/politics/madeleine-westerhout-trump-lawsuits/index.html>.

<sup>124</sup> Maggie Haberman, *Trump Campaign Suggests Omarosa Manigault Newman Pay for \$1 Million in Ad Spending*, THE NEW YORK TIMES (October 13, 2020), <https://www.nytimes.com/2020/10/13/us/politics/trump-campaign-omarosa.html>.

<sup>125</sup> Kranish, *supra* note 3. The First Amendment issue presented by Denson’s lawsuit differs materially from that addressed here because, unlike the White House, the Trump campaign is a private (or at least quasi-private) entity. In defending the lawsuit, the campaign’s legal team has characterized the agreement as a “standard business confidentiality agreement.” *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*; Cook & Restuccia, *supra* note 17.

<sup>128</sup> Wolkoff NDA at 2–3; Ruth Marcus, *Trump Had Senior Staff Sign Nondisclosure Agreements*, THE WASHINGTON POST (Mar. 18, 2018, 3:56 PM), [\[nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79d-f3d931db7f68\\\_story.html\]\(https://www.washingtonpost.com/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79d-f3d931db7f68\_story.html\) \(citing sources who claimed to have seen and/or signed Trump White House NDA drafts\).](https://www.washingtonpost.com/opinions/trumps-</a></p></div><div data-bbox=)

<sup>129</sup> Wolkoff NDA at 2.

<sup>130</sup> *Id.*

<sup>131</sup> Marcus, *supra* note 129.

<sup>132</sup> Wolkoff NDA at 2–3.

<sup>133</sup> *Id.*

<sup>134</sup> Marcus, *supra* note 129.

<sup>135</sup> Cook & Restuccia, *supra* note 17.

<sup>136</sup> Alison Frankel, *Trump NDAs Can’t Silence ex-White House Officials: Legal Experts*, REUTERS (Mar. 19, 2018, 5:24 PM), <https://www.reuters.com/article/us-otc-nda/trump-ndas-cant-silence-ex-white-house-officials-legal-experts-idUSKBN1GV2UT>.

<sup>137</sup> *Id.*

White House NDA does not include a non-disparagement clause.<sup>138</sup>

As discussed in the following section, the White House NDA has profound constitutional implications for the dissemination of critical information about the inner workings of the executive branch. Speech about what happens in the White House will usually involve a matter of public concern. Suppressing information relevant to an administration's competency or ethics information from the electorate harms the public interest. The last four years have served as a strenuous reminder of how much newsworthy conduct and conversation takes place behind closed doors in the West Wing. A blanket ban against sharing that information with the people—the polis charged with holding the president electorally accountable—is antithetical to the core values underlying the First Amendment.<sup>139</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> In addition to constitutional challenges, the White House NDAs could be challenged on contractual grounds. Given the vagueness of their terms, it is unlikely that former employees

were, at the time of signing, capable of knowingly, intelligently, and voluntarily waiving their constitutional rights. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

## White House NDAs and First Amendment Rights

The First Amendment generally restrains the government's ability to punish or limit speech. But its protections are circumscribed when the speech intrudes on certain governmental functions. These functions enjoy special solicitude because they drive our government's operational purpose: enactment of the people's democratic will. In other words, the executive branch requires some latitude in implementing the agenda on which the governing administration was elected.

To this end, the government must operate as an employer.<sup>140</sup> And in that role, it must exercise some power to restrict speech based on a person's status as a government employee.<sup>141</sup> This means that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."<sup>142</sup> However, this power is not unbounded.<sup>143</sup>

Government employees, both current and former, retain First Amendment speech rights despite their employment by the government.<sup>144</sup> The press's First Amendment rights are also implicated when government employees are prohibited from speaking.

In this section, we examine the government's interests in regulating employee speech, the protections afforded to the press in receiving speech, and former and current government employees' speech rights. After setting forth the relevant doctrinal frameworks, we apply them

to the White House NDAs as enforced against hypothetical employee speakers.

We conclude that the NDAs are unconstitutional in a wide range of potential applications.

### THE GOVERNMENT'S INTERESTS

The government's right to restrict its employees' speech derives from certain interests the government maintains as an employer. One such interest is in cultivating an efficacious work environment. For example, the Freedom of Information Act ("FOIA") exempts from disclosure the advice, recommendations, and opinions of government officials that are derived from deliberative, consultative, and decision-making processes of the government.<sup>145</sup> The considerations underlying this exemption dovetail with those underlying executive privilege and other instances of government secrecy, such as the closure of Supreme Court conferences.<sup>146</sup> Protecting deliberative speech between presidents and their closest advisors allows for candid discussion of sensitive matters without concern that comments will later be publicized.<sup>147</sup>

In addition to its interests as an employer, the government has an interest in national security, and it is this interest where the First Amendment offers employees the least protection: "[When] there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged . . . the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect."<sup>148</sup> However, courts have struggled with the

<sup>140</sup> See generally Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713 (1987).

<sup>141</sup> See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 *SUP. CT. REV.* 301, 303 (2015).

<sup>142</sup> *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 465 (1995).

<sup>143</sup> *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

<sup>144</sup> These employees also enjoy statutory whistleblower protections for disclosure of certain information in limited contexts (such as to Congress). These protections are

acknowledged in the Wolkoff NDA. This paper addresses only the NDAs' constitutional dimension.

<sup>145</sup> 5 U.S.C. § 552(b)(5) (2016); see *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

<sup>146</sup> Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 *U. PITT. L. REV.* 579, 621 (1986).

<sup>147</sup> *Nixon I*, 418 U.S. at 705.

<sup>148</sup> *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953); see also *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1981) ("That Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable.").

vagueness of the word “security.” In *New York Times v. United States* (hereinafter “the *Pentagon Papers* case”), Justices Black and Douglas stated that the term should not be used in order to “abrogate the fundamental law embodied in the First Amendment.”<sup>149</sup> Although courts and Congress often defer to the executive in matters of national security, that deference is not absolute, and government invocations of security interests are met with particular skepticism when fundamental rights—especially the rights of free political discussion and of the press—are implicated.<sup>150</sup> The Court in the *Pentagon Papers* case not only recognized the competing values, interests, and rights at stake, but also illustrated that the presumption against prior restraints extends to cases in which the restricted speech relates to matters of national security.<sup>151</sup>

## FORMER GOVERNMENT EMPLOYEES’ FIRST AMENDMENT RIGHTS



Generally speaking, the First Amendment prevents the government from restricting expression because of its content.<sup>152</sup> Thus, content-discriminatory laws are presumptively unconstitutional and must pass strict

scrutiny—meaning the regulation must be narrowly tailored and further a compelling governmental interest.<sup>153</sup> A law is content discriminatory on its face if it applies to particular speech because of the topic being discussed.<sup>154</sup>

Former government officials receive the full protections of the First Amendment, but these protections may be curtailed as a consequence of government employment. One way the government has historically prevented

disclosure of information by former employees is through prior restraints. Prior restraints—a preventive restriction on expression before it occurs—are considered “the most serious and the least tolerable infringement on First Amendment rights,”<sup>155</sup> and the government must rebut “a heavy presumption against” any prior restraint’s “constitutional validity.”<sup>156</sup> “A long line of [Court decisions] makes it clear that [the government] cannot require all who wish to disseminate ideas to present them first to [government] authorities for their consideration and approval, with a discretion . . . to say some ideas may, while others may not, be disseminate[d].”<sup>157</sup> The government may nonetheless impose such a restraint if it fits “one of the narrowly defined exceptions” and if the government provides “procedural safeguards that reduce the danger of suppressing constitutionally protected speech.”<sup>158</sup>

Given that the government routinely imposes prior restraints on speech based on content through its classification system, one might wonder whether such a system is unconstitutional.<sup>159</sup> The classification system first came under scrutiny in the landmark case *Snepp v. United States*, where the Supreme Court addressed the constitutionality of the CIA’s prepublication review requirement.<sup>160</sup> Frank Snepp was a former CIA agent who had published a book, *Decent Interval*, which detailed CIA operations in Vietnam. Snepp failed to submit his manuscript for prepublication review and approval to the CIA, as contractually required. The Court found the prepublication review requirement to be a reasonable means to protect classified information, denying Snepp’s argument that the prior restraint was

<sup>149</sup> 403 U.S. 713, 719 (Black, J., concurring).

<sup>150</sup> *Id.* at 719–20.

<sup>151</sup> *Id.*

<sup>152</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 2227. Alternatively, a law can be content discriminatory if it cannot be justified without reference to the speech’s content. *Id.*

<sup>155</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>156</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

<sup>157</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (quotation marks omitted).

<sup>158</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

<sup>159</sup> Indeed, the modern prepublication review regime is currently being challenged as unconstitutional under the First Amendment. *See* Notice of appeal, *Edgar v. Ratcliffe*, No. 20-1568 (4th Cir. 2020).

<sup>160</sup> 444 U.S. 507 (1980).

unconstitutional. Crucially, the Court’s ruling in *Snepp* did not extend to unclassified information.<sup>161</sup>

The Court did not squarely address the constitutionality of the classification system itself in *Snepp*, but the D.C. Circuit did so a few years later in *McGehee v. Casey*.<sup>162</sup> As in *Snepp*, the employee in *McGehee* signed an agreement with the CIA that barred him from revealing classified information without prior approval.<sup>163</sup> However, unlike in *Snepp*, the employee in *McGehee* did submit his manuscript to the CIA for prepublication approval, portions of which the CIA censored.<sup>164</sup> The court applied a two-part test which heavily resembled strict scrutiny.<sup>165</sup> First, the court determined whether the restriction protected a “substantial government interest unrelated to the suppression of free speech.”<sup>166</sup> Then, the court examined whether the restriction was “narrowly drawn to ‘restrict speech no more than is necessary to protect the substantial government interest.’”<sup>167</sup> Applying these principles, it determined that the government had a compelling interest in protecting information important to national security.<sup>168</sup> The court also found that the regulation was narrowly drawn—since the classification system was not overly vague and required a reasonable probability of harm—and thus concluded that the classification system did not violate the First Amendment.<sup>169</sup> Importantly, the court noted that there was no government interest in censoring unclassified material, and therefore the government could not censor it.<sup>170</sup>

When classified material is not at issue, the First Amendment generally proscribes governmental discrimination of speech based on content or viewpoint.

While viewpoint discrimination is often seen as a subset of content discrimination—“the distinction [between the two] is not a precise one”<sup>171</sup>—it is considered an especially egregious species.<sup>172</sup> In cases addressing viewpoint discrimination, the Court has expressed an extremely low tolerance for the government imposing any particular point of view.<sup>173</sup>

## WHITE HOUSE NDAs AS APPLIED TO FORMER GOVERNMENT EMPLOYEES

A former government official challenging the White House NDAs’ constitutionality would have a strong case. The NDAs are prior restraints that do not sufficiently cabin governmental discretion. They are also content based and therefore must survive strict scrutiny.

The White House NDAs are ex ante restrictions on the communication of non-classified information obtained through governmental employment. In other words, the NDAs prohibit discussing certain non-classified information about the Trump White House obtained through employment, and thus restrict speech based on its content. And because they require governmental permission for such discussions, they are prior restraints on speech. But unlike the restrictions at issue in *McGehee*, the White House NDAs extend well beyond classified information.

The White House NDAs do not provide adequate standards or procedural safeguards to justify their prior restraint on speech. The Wolkoff NDA requires signatories to “direct all questions about the sensitivity of any such information or any other issue concerning disclosure of information to the Office of White House

<sup>161</sup> *McGehee v. Casey*, 718 F.2d 1137, 1142 (D.C. Cir. 1983).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1141.

<sup>164</sup> *Id.*

<sup>165</sup> See *id.* at 1142–43. Oddly, the court did not label the test strict scrutiny.

<sup>166</sup> *Id.* at 1142 (internal quotation marks omitted).

<sup>167</sup> *Id.* at 1143.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1141.

<sup>171</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

<sup>172</sup> *Id.* at 829.

<sup>173</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (“[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).



Legal Counsel.”<sup>174</sup> It likewise bars disclosures about the NDA or Wolkoff’s work with the First Lady that “have not been authorized in writing by FLOTUS, the Chief of Staff to the First Lady or the Office of the White House Counsel.”<sup>175</sup> This language includes no standards that might cabin governmental discretion. White House Counsel could thus refuse to authorize disclosure of a host of information falling into broad categories—such as nonpublic information—which the government has no legitimate interest in suppressing.<sup>176</sup> Nor does the White House NDA require White House Counsel to make an authorization determination within any specific time frame, or provide for any mechanism to challenge a denial of authorization.<sup>177</sup> *Snepp* and *McGehee* provide the government no shelter, given that the White House NDAs target unclassified information.<sup>178</sup>

There are further constitutional defects. The Wolkoff NDA bans unauthorized disclosure of all “information about the First Family,” about Wolkoff’s “work with FLOTUS,” and about the contents of the NDA itself.<sup>179</sup> And Newman, the former campaign and White House staffer now in arbitration against the Trump campaign, reportedly refused to sign a White House NDA which would have prohibited her from disclosing information about a broad variety of categories, including the “assets, investments, revenue, expenses, taxes, financial statements, actual or prospective business ventures, contracts, alliances, affiliations, relationships, affiliated entities, bids, letters of intent, term sheets, decisions, strategies, techniques, methods, projections, forecasts, customers, clients, contacts, customer lists, contact lists, schedules, appointments, meetings, conversations, notes and other communications” of “Trump, Pence, any

Trump or Pence Family member, any Trump or Pence company, or any Trump or Pence Family Member Company.”<sup>180</sup> The language in the Wolkoff and Newman<sup>181</sup> NDAs baldly prevents discussion based on topic, thus discriminating based on content.

Determining that the White House NDAs are content based does not end the inquiry. Content discriminatory restrictions are upheld if they pass strict scrutiny. This means that the White House NDAs must serve a compelling governmental interest, a potentially insurmountable hurdle for the government given the *McGehee* court’s assessment that there is no governmental interest in protecting unclassified information. However, this analysis would depend on the specific situation at issue, as the governmental interest will change depending on the circumstances of any particular NDA enforcement scenario. A separate and even more daunting obstacle for the government is the requirement of narrow tailoring, a difficult problem for the government given the NDAs’ remarkably broad terms.

Consider the following hypothetical: a White House aide who signed an NDA sits in on a conversation between Trump and Secretary of State Mike Pompeo. Pompeo informs Trump that killing Iranian Major General Qassim Soleimani would be “disastrous” for Middle Eastern policy.<sup>182</sup> The next day, Trump orders an air strike which kills Soleimani. Shortly after, the aide leaves the administration and wants to reveal to a newspaper what she heard. The White House gets word that the former aide has contacted a journalist and threatens to enforce the NDA if the former aide

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<sup>174</sup> Wolkoff NDA at 3.

<sup>175</sup> *Id.*

<sup>176</sup> See *Cox*, 379 U.S. at 557 (collecting cases where prior restraints were invalidated for failure to limit governmental discretion).

<sup>177</sup> See *Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965) (setting forth procedural requirements for prior restraints); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (requiring that speech subject to authorization be reviewed within thirty days).

<sup>178</sup> See *supra*.

<sup>179</sup> Wolkoff NDA at 2–3.

<sup>180</sup> Dawsey & Parker, *supra* note 10.

<sup>181</sup> Assuming that reporting on the NDA Newman allegedly refused to sign is accurate.

<sup>182</sup> This fictitious hypothetical is loosely drawn from Soleimani’s assassination earlier this year. See *The Killing of Gen. Qassim Soleimani: What We Know Since the U.S. Airstrike*, NEW YORK TIMES (Jan. 4, 2020), <https://www.nytimes.com/2020/01/03/world/middleeast/iranian-general-qassem-soleimani-killed.html>.

discloses Pompeo’s statement. Would the NDA violate the First Amendment if enforced in this way?

If the NDAs were narrowly tailored—which they are not, based on what we know<sup>183</sup>—one might argue that the NDA could pass strict scrutiny as applied here. The argument would hinge on the premise that keeping deliberations of this type private furthers a compelling government interest because it allows officials to speak their minds without fear of the public scrutinizing every idea.<sup>184</sup> This line of argument borrows from the executive privilege that presidents invoke to shield information from other branches of government.<sup>185</sup> Here, if every opinion Pompeo expresses to Trump could potentially become public, Pompeo may be more reserved with his advice in order to avoid the perception of discord within the White House.<sup>186</sup> There is perhaps a colorable argument to be made that a narrowly tailored NDA might survive strict scrutiny in this scenario, given that the Secretary of State is one of the president’s closest advisors.

DOJ invokes this same deliberative interest in enforcing Wolkoff’s NDA.<sup>187</sup> It cites multiple portions of Wolkoff’s book.<sup>188</sup> In one, she describes “her view (based on inferences that she derived from information received during the course of her confidential position) that, had the First Lady been present at the White House during a particular period in time leading up to the issuance of the [Travel Ban], the President might not have signed Executive Order 13769 [implementing the Travel Ban].”<sup>189</sup> In another portion, she recounts a discussion with the First Lady about “the President’s decision to eliminate a ban on the importation of big

game trophies” and how the First Lady “convinced the President to put that decision on hold.”<sup>190</sup> DOJ contends that publicizing these accounts will “undermine the expectation of future Presidents and First Ladies that their confidential deliberations will be protected and preserved from the public glare.”<sup>191</sup> This justifies enforcement of the NDA, DOJ concludes, because the “President’s policy conversations are self-evidently core matters on which the President is entitled to receive confidential advice without fear that such internal deliberations will be leaked to the press.”<sup>192</sup>

DOJ’s argument seems quite weak, highlighting the limitations of the deliberative process interest.<sup>193</sup> The passage in Wolkoff’s book about the Travel Ban includes no advice given by the First Lady at all—it instead sets forth Wolkoff’s opinion on how the president might have potentially made a different policy decision had he been privy to the First Lady’s advice. This is well beyond the bounds of any governmental interest in protecting important deliberations. While the First Lady’s input regarding the trophy hunting ban could be construed as policy advice, the government’s only interest in protecting it is based “solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations.”<sup>194</sup> Because this is a far cry from an interest in protecting “military, diplomatic, or sensitive national security secrets,” the deliberative interest is diminished and must be weighed against competing values.<sup>195</sup> And there is a significant countervailing public interest at stake: informing the electorate that the president’s policy decision on trophy hunting hinged on the determinative advice of the First

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<sup>183</sup> See *infra*.

<sup>184</sup> See Rozell, *supra* note 28, at 1123.

<sup>185</sup> See *supra* Executive Secrecy Agreements.

<sup>186</sup> See *id.* at 1070.

<sup>187</sup> See Complaint, *United States v. Wolkoff*, No. 20-2935 (D.D.C. filed Oct. 13, 2020).

<sup>188</sup> See *id.* at 12.

<sup>189</sup> *Id.* Executive Order 13769 suspended entry into the United States of individuals from seven predominately Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

A later iteration of the ban was upheld by the Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> It is not even clear whether the deliberative process interest applies (or if it does, to what extent) to discussions between the President and First Lady, as opposed to the President and senior policy advisors. See Schmidt, *supra* note 2 (quoting Professor Heidi Kitrosser).

<sup>194</sup> See *Nixon I*, 418 U.S. at 706.

<sup>195</sup> See *id.*

Lady—someone with no expertise in issues related to animal conservation. Allowing these types of deliberative concerns—unrelated to highly sensitive national security matters—to prevent the release of valuable information to the public would mark a troubling elevation of executive privilege-type interests.<sup>196</sup>



Consider another hypothetical. A White House aide who has signed an NDA is sitting in on an Oval Office meeting in the wake of the September 2020 *New York Times* report

disclosing details of the president’s federal tax returns.<sup>197</sup> In the course of the meeting, Trump chuckles and says, “Isn’t it a beautiful thing that I’ve paid virtually no federal income tax in fifteen years? I’ll just call this reporting fake news and it won’t have any effect on my re-election.” The aide leaves the administration shortly after and now wants to relay the story to the *Times* to help confirm their reporting. Could the NDA be applied to prevent the former aide from disclosing Trump’s comment?

The answer would likely be no as the application would not pass strict scrutiny. There is no plausible governmental interest in hiding Trump’s embarrassing or damaging personal statements. One of the First Amendment’s goals is to prevent governmental suppression of embarrassing information.<sup>198</sup>

Thus, the government has no substantial interest in preventing information becoming public that may embarrass the president—the compelling government interest must have an interest unrelated to suppressing speech.

Instead, such information contributes to the “uninhibited, robust, and wide-open” public debate that the First Amendment is designed to encourage.<sup>199</sup> One might attempt to argue that public revelation that the president is in serious debt constitutes some sort of national security interest, but this claim is weak given that the *Times* has already published extensive details on the president’s debts drawn from his tax returns. And if anything, a president’s significant debt is itself a national security concern of which the public should be aware. Any interest the government might claim beyond mere avoidance of embarrassment would be vastly overshadowed by the public’s interest ahead of an election in vital information about the president’s financial obligations.

Regardless of the governmental interest at stake, the NDAs are not narrowly tailored and are thus unconstitutional. As noted above, they apply to all “nonpublic” information. The Wolkoff NDA also bars unauthorized disclosure of all information about the First Family, “any and all information furnished” by the government, and all “information about which [signatory] may become aware during the course of performance.”<sup>200</sup> This startlingly broad language is consistent with that of the reported Newman NDA (and other past Trump agreements), which restricted information about Trump’s family, the Pence family, or Trump’s businesses.<sup>201</sup>

<sup>196</sup> See Heidi Kitrosser, *Stephanie Wolkoff’s Revelations Are Exactly What the First Amendment Should Protect*, THE ATLANTIC (Oct. 15, 2020 6:15 AM), <https://www.theatlantic.com/ideas/archive/2020/10/first-amendment-disgrace/616745/>.

<sup>197</sup> Last month, *The New York Times* reported that President Trump’s tax returns show that he has paid no income tax in ten of the previous fifteen years. See Russ Buettner, Susanne Craig, and Mike McIntire, *Long-Concealed Records Show Trump’s Chronic Losses and Years of Tax Avoidance*, The New

York Times (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>.

<sup>198</sup> See *Pentagon Papers*, 403 U.S. at 723–24 (1971) (Douglas, J., concurring).

<sup>199</sup> See *id.* (internal quotation marks omitted) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 269–70 (1964)).

<sup>200</sup> Wolkoff NDA at 2.

<sup>201</sup> Dawsey & Parker, *supra* note 10.

These provisions would be overbroad under any circumstance since they extend well beyond what is needed to protect legitimate governmental interests.<sup>202</sup> Indeed, it is difficult to conceive of a provision more emblematic of textbook overbreadth than one restricting all “information about which” an employee “may become aware during the course of performance.” And the lack of legitimate governmental interest is particularly apparent in the ban on sharing of any information whatsoever about the First Family.

The only purpose these provisions might serve would be to protect the president’s image, which there is no legitimate governmental interest in protecting.

Perhaps even more troubling is the agreements’ infinite duration. This indefinite application<sup>203</sup> surely exceeds the timeframe necessary to protect legitimate governmental interests. Recall the earlier hypothetical involving Secretary Pompeo. While protection of the deliberative process could (at least in theory) be deemed necessary in rare circumstances to ensure that the president receives uninhibited advice, the burden on the aide’s speech need not last indefinitely to achieve that goal. Pompeo would not plausibly be discouraged from giving the president advice because of a risk that his statements will be disclosed twenty years from now. An indefinite prohibition restricts far more speech than necessary.<sup>204</sup>

Because of their overbroad scope and indefinite duration, the NDAs are not narrowly tailored and should fail strict scrutiny.

Turning now to viewpoint considerations, based on the Wolkoff NDA and other reported language, the NDAs are likely viewpoint neutral. On their face, the NDAs only prohibit speech based on the speech’s content. While Trump’s Campaign NDAs contained a clause preventing disparagement—which would be blatant viewpoint discrimination—all sources indicate that this clause is not included in any White House NDAs.<sup>205</sup> Instead, unauthorized disclosure of content the NDAs restrict would be a violation, regardless of whether the breach painted Trump in a positive or negative light. The NDAs are therefore facially viewpoint neutral. But Trump’s enforcement of the NDAs might still constitute viewpoint discrimination.

Facially neutral laws may violate the Constitution if they are applied in a discriminatory manner.<sup>206</sup> For example, prosecutors are not allowed to prosecute individuals based upon arbitrary classifications, such as race or religion, using facially neutral laws.<sup>207</sup> One such arbitrary classification includes exercising one’s First Amendment rights.<sup>208</sup> As a result, the government cannot criminally prosecute an individual based on that individual’s viewpoint. This claim is known as selective prosecution and the remedy is for the court to dismiss the criminal charges.<sup>209</sup> In a similar vein, a government official can be sued under 42 U.S.C. § 1983 for bringing a civil lawsuit or counterclaim against an individual in retaliation for that individual’s protected speech.<sup>210</sup>

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<sup>202</sup> These overbreadth concerns would render the NDAs constitutionally suspect even if they were not content discriminatory. See *United States v. Stevens*, 559 U.S. 460, 473 (2010) (holding that, in the First Amendment context, a speech restriction “may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the [restriction’s] plainly legitimate sweep.” (internal quotation marks omitted)).

<sup>203</sup> Wolkoff NDA at 2–3; see also *Dawsey & Parker*, *supra* note 10.

<sup>204</sup> A court could, however, blue-pencil the NDA such that it only applies for a reasonable period. A court may alter a contractual

provision if the contract “is susceptible of division and apportionment.” 17A Am. Jur. 2d Contracts § 394 (2020).

<sup>205</sup> Frankel, *supra* note 137.

<sup>206</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

<sup>207</sup> *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

<sup>208</sup> See *id.*

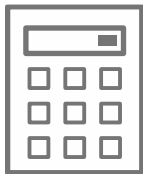
<sup>209</sup> Stephen E. Arthur & Robert S. Hunter, 1 *Federal Trial Handbook: Criminal* § 12:30 (4th ed. 2019).

<sup>210</sup> See *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1300 (11th Cir. 2019); see also *Greenwich Citizens Comm., Inc. v. Cty. Of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26, 30–

Just as the Constitution forbids selective enforcement of facially neutral criminal laws, it does not allow Trump to enforce his NDAs in a viewpoint-discriminatory manner.

facially neutral NDA is being applied in a viewpoint-discriminatory manner.

While we have located no case where a defendant has invoked this defense against a civil lawsuit, the argument logically follows as a synthesis of the above case law. If the government cannot criminally prosecute an individual because of that individual's viewpoint, and the government can be sued under § 1983 if it brings a civil suit against an individual in retaliation for that individual's viewpoint, it naturally follows that a court should prevent Trump from enforcing an NDA based on an individual's viewpoint.



Recall the earlier hypothetical where the Trump aide reveals to *The New York Times* Trump's confirmatory statement that he has paid hardly any federal income tax in fifteen years. Imagine that

the day following the story about that statement, a different aide who also signed an NDA goes on a nightly cable news program. She says that she saw copies of Trump's tax returns on the Resolute desk and, upon inspecting them, concluded that the *Times*' reporting does not accurately reflect his tax returns' contents. In both situations, the aides breached the NDA. Now imagine DOJ subsequently sues the first aide for revealing Trump's statement about not paying his taxes. Since that aide can point to a similarly situated individual who also breached the agreement (but to Trump's benefit) and who was not sued, the aide should succeed in having the lawsuit dismissed.<sup>211</sup>

More direct evidence would also suffice. For example, if Trump tweeted in response to the first aide's statement to the *Times*, "This is what low energy backstabbers get when they betray me! I'll sue this SAD aide for everything she's worth!" the aide should also be able to dismiss the lawsuit. In these scenarios, the

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31 (2d Cir. 1996); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427–28 (8th Cir. 1986); *Bell v. Sch. Bd. of Norfolk*, 734 F.2d 155, 158 (4th Cir. 1984) (Rosenn, J., concurring).

<sup>211</sup> *Cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (allowing dismissal of criminal charges if defendant shows similarly situated individuals of a different race that were not prosecuted).



## THE PRESS'S FIRST AMENDMENT RIGHTS

The First Amendment rights of the press are twofold: the right to receive speech and the right to gather news.<sup>212</sup>

Because the right to receive speech is understood as an extension of a protected speaker's right to speak, the press must establish the presence of a willing speaker in order to seek coverage by the First Amendment.<sup>213</sup>

Meanwhile, the right to gather news, albeit subordinate to the duty to obey generally applicable laws, protects news agencies from government restrictions that target newsgathering activities.<sup>214</sup>

As a corollary to the right of free speech, the Supreme Court clearly recognizes the listener's right to challenge an abridgement of speech.<sup>215</sup> Such a challenge presupposes a willing speaker. In fact, "the success of a third-party recipient's First Amendment claim is entirely derivative of the First Amendment right of the [willing] speaker subject to the challenged regulation."<sup>216</sup> Showing a willing speaker's existence is therefore essential for standing.<sup>217</sup> Once the listener shows a willing speaker, the listener's claim becomes entirely derivative of the speaker's claim.<sup>218</sup>

To show a willing speaker's existence, "a party must show at least that but for a challenged regulation of speech, a person would have spoken."<sup>219</sup> Some courts refuse to find a willing speaker where the restrained person waived the speech restriction.<sup>220</sup> For example, if a person has bound themselves to refrain from some

speech as part of a settlement agreement, that person is not a willing speaker for a right-to-receive-speech claim.<sup>221</sup> However, just because a speaker has waived their right to speak does not mean a court can presume that the speaker is not willing.<sup>222</sup> For example, if the waiver was an unconstitutional condition, courts will not presume the speaker is not willing.

## WHITE HOUSE NDAs AS APPLIED TO THE PRESS

To assert a claim that the NDAs violate the press's right to receive speech, the press would need to find a willing speaker—either a former or current government official who signed a White House NDA—and document that speaker's willingness to provide unclassified information about the president. Assuming a press plaintiff could satisfy that burden, it could demonstrate that the Trump NDAs would infringe upon its right to receive speech and gather news. Upon demonstrating a willing speaker, the press's claim becomes wholly derivative of the willing official's claim.

Consider again a former White House employee who wishes to speak to the press. By unconstitutionally infringing on the former employee's First Amendment speech in a content discriminatory manner,<sup>223</sup> the NDAs also infringe on the press's right to receive speech and gather news. The NDAs would prevent the press from receiving, among other things, information related to President Trump's relationships, decisions, conversations, and notes, as well as information related

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<sup>212</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

<sup>213</sup> *Price v. Saugerties Cent. Sch. Dist.*, 305 Fed. App'x 715, 716 (2d Cir. 2009); see also *Pa. Family Inst. Inc. v. Black*, 489 F.3d 156, 166 (3d Cir. 2007).

<sup>214</sup> *Branzburg*, 408 U.S. at 707–08.

<sup>215</sup> See *Va. State Bd. of Pharmacy*, 425 U.S. at 756–57.

<sup>216</sup> *Price*, 305 Fed. App'x at 716.

<sup>217</sup> *Pa. Family Inst.*, 489 F.3d at 166.

<sup>218</sup> *Price*, 305 F. App'x at 716.

<sup>219</sup> *Id.*; see *ACLU v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011); *Fox v. Leavitt*, 572 F. Supp.2d 135, 141 (D.D.C. 2008) ("To maintain a 'right to listen' claim, a plaintiff must clearly establish

the existence of an otherwise willing speaker, and that the challenged policies caused the speaker to be unwilling to speak.").

<sup>220</sup> *Town of Verona (Oneida County) v. Cuomo*, 2013 WL 5839839, at \*5 (N.D.N.Y. Oct 30, 2013); see *Democratic Nat. Committee v. Republican Nat. Committee*, 673 F.3d 192, 206 (3d Cir. 2012) ("A court can enforce an agreement preventing disclosure of specific information without violating the restricted party's First Amendment rights if the party received consideration in exchange for the restriction.").

<sup>221</sup> *Town of Verona*, 2013 WL 5839839, at \*5.

<sup>222</sup> *Stephens v. County of Albemarle*, 2005 WL 3533428, at \*7 (W.D. Va. Dec. 22, 2005).

<sup>223</sup> See *supra* White House NDAs as Applied to Former Government Employees.

to the president’s family and any affiliated business organizations.<sup>224</sup> In such an instance, courts would not presume that the former employee waived First Amendment rights by signing the NDA because the NDA would constitute an unconstitutional condition for the reasons set forth above.



To place this example in more tangible terms, recall the earlier hypothetical about the aide who wants to disclose to *The New York Times* that Trump confirmed that he has paid virtually no federal income tax in fifteen years. Change the facts a little

so that a *Times* reporter instead approaches the aide once she leaves the Trump administration and asks her whether Trump made any comments in her presence about his tax returns. The aide responds, “He did, and I would tell you all about it but I’m prohibited by this NDA.” The aide does not want to bring a lawsuit challenging the NDAs’ validity herself. Since the press has established a willing speaker, it may sue to invalidate the NDA on the grounds that it violates its right to receive speech. Since the NDA violates the aide’s First Amendment rights,<sup>225</sup> the press may successfully assert its derivative claim to invalidate the NDA.

### CURRENT GOVERNMENTAL EMPLOYEES’ FIRST AMENDMENT RIGHTS

Compared to former government employees, current employees enjoy narrower First Amendment protections. For example, the government may impose some restrictions on current employees’ speech on the basis of content.<sup>226</sup>

But the Supreme Court “has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”<sup>227</sup>

Whether speech is that of a private citizen or a public official is not always readily apparent. A critical consideration is whether the employee is speaking pursuant to official duties.<sup>228</sup> Generally, when an employee speaks pursuant to ordinary professional duties, “the employee is not speaking as a citizen for First Amendment purposes, and the inquiry ends.”<sup>229</sup> It is not always easy to identify what falls within the scope of “professional duties.” The Court in *Garcetti* found that an employee’s official duties are not merely those expressed in a job description, and the D.C. Court of Appeals later added in *Hawkins v. District of Columbia* that the question of whether someone speaks as a private citizen or public official cannot turn simply on the fact that the speech owes its existence to the employee’s professional responsibilities.<sup>230</sup>

The Supreme Court has recognized the special posture of public employees, who are “uniquely qualified to comment [on] matters concerning government policies that are of interest to the public at large.”<sup>231</sup>

Moreover, it has also noted the particular importance of public employee speech in cases dealing with a public corruption scandal.<sup>232</sup> Another consideration, then, is whether the speech is on a matter of public concern—“when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *infra*.

<sup>227</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

<sup>228</sup> *Id.* at 421.

<sup>229</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2373 (2014).

<sup>230</sup> See *Garcetti*, 547 U.S. at 424–25; *Hawkins v. District of Columbia*, 923 F. Supp. 2d 128, 139 (D.D.C. 2013) (“*Garcetti* carves out speech made *pursuant* to an employee’s official

duties—not speech ‘related to his official duties’ or that ‘concern[s] special knowledge gained through his employment. Indeed, as the Supreme Court has recognized, speech related to an employee’s duties—e.g., concerning special knowledge gained through employment—is often the most important to protect.”) (emphasis in original).

<sup>231</sup> *San Diego v. Roe*, 125 S. Ct. 521, 523 (2004).

<sup>232</sup> *Lane*, 134 S. Ct. at 2380. See also *Garcetti*, 547 U.S. at 425 (“Exposing governmental inefficiency and misconduct is a matter of considerable significance.”).

interest; that is, a subject of general interest and of value and concern to the public.”<sup>233</sup> Content that is not of public concern falls outside the protection of the First Amendment for public employees, whereas content that is of public concern may be protected.<sup>234</sup>

In *Pickering v. Board of Education*, a high school teacher was dismissed for publicly criticizing the local Board of Education.<sup>235</sup> The Court found that the teacher’s dismissal was unconstitutional and that the letter he wrote exposing the Board’s misdoings was constitutionally protected speech because it was on a matter of public concern.<sup>236</sup> In determining whether speech is of public concern, courts must consider the “content, form, and context of a given statement, as revealed by the whole record.”<sup>237</sup> In contrast to *Pickering*, the Court in *Connick v. Myers* did not find the majority of the employee’s speech in that case to be of public concern because the employee had a personal motive to criticize the employer that was tied to prior litigation.<sup>238</sup> However, the *Connick* Court did highlight the interest in having government service turn upon good professional performance rather than service of a particular political agenda.<sup>239</sup> Since *Connick*, the Court has reaffirmed the need to consider the motivation underlying an employee’s speech: “When speech relates both to an employee’s private interests as well as matters of public concern, the speech is protected if it is primarily motivated by public concern,”<sup>240</sup> but “[i]f the main motivation for her speech was furthering [the employee’s] ‘private interests rather than to raise issues of public concern, her speech is not protected, even if

the public would have an interest in the topic of her speech.”<sup>241</sup>

If an employee speaks as a private citizen on a matter of public concern, the speech is then subject to interest balancing. If the employee’s interest in speaking is outweighed by the government’s interest in efficaciously fulfilling its public-service role, the First Amendment will not shield the speech from adverse governmental action.<sup>242</sup> Speech may be understood to inhibit efficacious functioning of the government if it impedes proper performance of the employee’s duties or if it interferes with the government’s regular operations.<sup>243</sup> In balancing the government’s and the employee’s respective interests, courts generally consider some combination of the following factors: “(1) the need for harmony in the workplace; (2) whether the government’s responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech will impede the employee’s ability to perform his or her duties.”<sup>244</sup> The weight each factor receives is left to the discretion of the court.<sup>245</sup>

In summary, when determining whether speech is constitutionally protected, the Supreme Court asks two threshold questions: (1) whether the speech was made pursuant to official duties, and (2) whether the speech was on a matter of public concern. If the answers to those questions are no and yes, respectively, the Court then looks to balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in

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<sup>233</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal quotation marks omitted).

<sup>234</sup> See *Pickering*, 391 U.S. at 574.

<sup>235</sup> *Id.* at 564.

<sup>236</sup> *Id.* at 571–72.

<sup>237</sup> *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

<sup>238</sup> *Id.* at 149.

<sup>239</sup> *Id.*

<sup>240</sup> *McCullough v. Univ. of Ark. for Med. Servs.*, 559 F.3d 855, 866 (8th Cir. 2009) (quoting *Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir. 2007)).

<sup>241</sup> *Altonen*, 487 F.3d at 559 (quoting *Bailey v. Dep’t of Elementary and Secondary Educ.*, 451 F.3d 514, 518 (8th Cir. 2006)).

<sup>242</sup> *Connick*, 461 U.S. at 150–51.

<sup>243</sup> *Pickering*, 391 U.S. at 572–73.

<sup>244</sup> *Anzaldúa v. NE. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 835 (8th Cir. 2015).

<sup>245</sup> *Id.*

promoting the efficiency of the public services it performs through its employees.”<sup>246</sup>

## WHITE HOUSE NDAs AS APPLIED TO CURRENT GOVERNMENT EMPLOYEES

Analysis of a White House NDA enforced against a current employee would first turn upon the employee’s role within the administration. One important consideration would be the relationship of the speech at issue to the employee’s professional responsibilities. For example, if the Press Secretary, the Director of Public Liaison, or any member of the Office of the Chief of Staff were to speak to journalists on a matter of public concern, the employee might be seen as speaking pursuant to official duties. Liaising with the media is within the scope of the official duties of those positions. On the other hand, if the employee were the White House Chief Floral Designer or the Executive Chef—where relating information to the media is not clearly one of the employee’s duties—the employee would likely be understood as speaking as a private citizen, particularly if the speech conveyed information of public concern.

If the employee speaks as a private citizen on a matter of public concern, a court would weigh the government’s interest in restricting speech against the employee’s interest in speaking. Like private employers, “[g]overnment employers . . . need a significant degree of control over their employees’ words and actions.”<sup>247</sup> The government has identifiable interests in keeping confidential certain information that relates to executive endeavors, as well as controlling “official communications to the public.”<sup>248</sup> It also has an interest in maintaining a harmonious work environment. Speech creating workplace strife could inhibit effective government functioning by relations between employees. Relevant considerations will again include the nature of the employee’s role—collaborative or

solitary, for example—as well as the nexus between the employee speaker and any co-workers directly affected by the speech at issue.

For First Amendment purposes, what constitutes a disharmonious work environment is unclear. At first glance, one might think that this ambiguity would advantage the employee. But the history of deference afforded the executive in employment matters means that the government’s own determination will likely given credence. Deference, though, is not a *carte blanche*. Courts have voiced concerns that the government might hide behind operational efficiency to justify encroachments on employee rights. As the Ninth Circuit recently put it: “[E]fficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value.”<sup>249</sup> To guard against this, courts require the government to show that the harms are “real, not merely conjectural, and that the [restriction] will in fact alleviate these harms in a direct and material way.”<sup>250</sup>

Counterbalancing the interests of the government are those of the employee and of the public. Though the government can impose speech restrictions on public employees that would be unconstitutional if applied to the average citizen, the Court has made clear that “employees’ opinions about the proper way to administer government agencies” are protected. Moreover, speech about inefficient government management is speech on a matter “of inherent public concern.”<sup>251</sup>

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<sup>246</sup> *Pickering*, 391 U.S. at 568.

<sup>247</sup> *Garcetti*, 547 U.S. at 418.

<sup>248</sup> *Moonin v. Tice*, 868 F.3d 853, 865 (9th Cir. 2017).

<sup>249</sup> *Id.* at 866.

<sup>250</sup> *NTEU*, 513 U.S. at 475 (quoting *Turner Broad. Sys., Inc. v. Fed. Comm. Comm’n et al.*, 512 U.S. 622, 664 (1994)).

<sup>251</sup> *Moran v. Washington*, 147 F.3d 839, 849 (9th Cir. 1998) (quoting *Johnson v. Multnomah Cty.*, 48 F.3d 420, 425 (9th Cir. 1995)).

In balancing the competing interests at stake, courts consider the social value of government employees “engaging in civic discussions,”<sup>252</sup> as well as “the public’s right to read and hear what the employees would [say]” if not inhibited by fear of reprisal.<sup>253</sup>

It is again helpful to consider some hypothetical situations in order to develop a sense of how the interests of the government and of public employees might be weighed in practice. Suppose that a high-level official in the White House Office of Public Liaison hopes to secure a position at Fox News after President Trump’s presidency. She joins “Fox & Friends” one morning as a guest commentator and, in the course of conversation, discloses the president’s tentative negotiation strategies with Afghanistan. She learned of these strategies in a private brainstorming meeting with Trump and other top White House officials, and it was made clear that the strategies are classified information. Here, the employee would be speaking pursuant to her official duties because interacting with the press falls within the ambit of her position in the Office of Public Liaison. Moreover, the disclosure would jeopardize foreign affairs—the government would likely have no problem proving potential harm from such a disclosure. Lastly, the employee was aware of the information’s status as classified. Even though the content of the disclosure is a matter of public concern, the other factors all weigh against First Amendment protection in this scenario.

For a counter example, suppose that a low-level White House official delivered coffee to President Trump on July 25, 2019 and, while doing so, overheard a critical part of the president’s infamous phone call with Ukrainian President Volodymyr Zelensky that

ultimately led to Trump’s impeachment.<sup>254</sup> The official, who signed a White House NDA, was then subpoenaed by the House to testify before Congress as part of the impeachment inquiry. Assume that Congress passes a statute authorizing it to sue to enforce the subpoena.<sup>255</sup> How would the subpoena square with the official’s nondisclosure obligation? Could he be held liable for breaching an NDA if his speech were compelled by Congress?

The Wolkoff NDA includes an exception for statutorily-authorized communications to Congress.<sup>256</sup> It is unclear, however, whether all White House NDAs contain such a clause. Assume for the purposes of this hypothetical that some do not. It can be deduced from Supreme Court precedent that, regardless of the NDAs’ terms, the First Amendment would grant protection to subpoenaed testimony. The Court faced a similar question in *Lane v. Franks*.<sup>257</sup> It unanimously held that the First Amendment “protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.”<sup>258</sup>

Applying the *Garcetti/Pickering* analysis to this scenario, the first question is whether the official’s testimony was made pursuant to professional duties.<sup>259</sup> The Court in *Lane* found sworn testimony to exemplify citizen speech—rather than professional speech—because “[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”<sup>260</sup> The next question is whether the speech was on a matter of public concern.<sup>261</sup> Here, the official’s case for public concern would be strong, given that the

<sup>252</sup> *Garcetti*, 547 U.S. at 419.

<sup>253</sup> *NTEU*, 513 U.S. at 470.

<sup>254</sup> See Nicky Robertson, *Vindman Tweets on Anniversary of Trump’s Call with Zelensky that Led to Impeachment*, CNN (July 25, 2020, 2:06 PM), <https://www.cnn.com/2020/07/25/politics/alexander-vindman-trump-call-ukraine-zelensky/index.html>.

<sup>255</sup> See Comm. on Judiciary of United States House of Representatives v. McGahn, 973 F.3d 121, 123 (D.C. Cir.

2020), *reh’g en banc granted, judgment vacated* (Oct. 15, 2020).

<sup>256</sup> Wolkoff NDA at 3.

<sup>257</sup> 573 U.S. at 231.

<sup>258</sup> *Id.*

<sup>259</sup> *Garcetti*, 547 U.S. at 411.

<sup>260</sup> *Lane*, 573 U.S. at 238–39.

<sup>261</sup> *Pickering*, 391 U.S. at 571–72.



speech in question is subpoenaed testimony that was part of an impeachment investigation.

The analysis would then move to interest balancing, where the government would likely falter.<sup>262</sup> The Court in *Lane* found the governmental interest lacking, noting an absence of evidence that the testimony was false or that “[it] unnecessarily disclosed any sensitive, confidential, or privileged information.”<sup>263</sup> While the government would argue that this situation involves disclosure of confidential information, its interest would nonetheless be minimal because the disclosure would be necessary to serve an important value: political accountability. The impeachment inquiry hinged on whether President Trump abused his executive power by urging a foreign power to investigate his personal political rival.<sup>264</sup> Weighed against the significant public interest in holding the president accountable for serious misdoings, the governmental interest pales. The disclosure related to President Trump as a politician, not as the president. The disclosure may implicate foreign affairs, but it is unlikely that it would jeopardize national security. Assuming that the official’s testimony included only unclassified information, the government would have no valid interest in prohibiting him from speaking. It is therefore likely that the official’s speech in this case would be protected.

It is important to note that the speech currently at issue in the Wolkoff suit and in the Campaign NDA litigation likewise centers not on national security, but on President Trump’s poor administration of the executive branch.<sup>265</sup> Administrative criticism was recently the focus of a case heard by the Court of Appeals for the Sixth Circuit. In *Hudson v. City of Highland Park, MI, et al.*, the court evaluated criticism by an employee of his employer’s administrative practices.<sup>266</sup> The court held that such criticism is “surely protected speech,” seeing the matter as so self-evident as not to require

application of the *Pickering* analysis.<sup>267</sup> Whether that same perspective would apply in cases involving criticisms of the Trump administration is yet to be seen, but it is promising that a federal appellate court recognized the importance of such critical speech.

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<sup>262</sup> *Id.* at 568.

<sup>263</sup> *Lane*, 573 U.S. at 242.

<sup>264</sup> Robertson, *supra* note 2456.

<sup>265</sup> See Schmidt, *supra* note 2; see generally Omarosa Manigault Newman, *Unhinged: An Insider’s Account of the*

Trump White House (2018); Cliff Sims, *Team of Vipers: My 500 Extraordinary Days in the Trump White House* (2019).

<sup>266</sup> *Hudson v. City of Highland Park*, 943 F.3d 792, 798 (6th Cir. 2019).

<sup>267</sup> *Id.* at 798.



## Conclusion

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In an interview with Bob Woodward and Robert Costa during his 2016 campaign, then-candidate Trump bluntly defended his intention to use NDAs to suppress protected speech by White House employees. “[W]hen 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. I mean, I’ll be honest. And people would say, oh, that’s terrible, you’re taking away his right to free speech. Well, he’s going in. . . . I would say . . . I do have nondisclosure deals.”<sup>268</sup>

The president has followed through on this promise. His White House’s use of private sector-style secrecy agreements to circumscribe public discourse is a grave affront to our system of free expression. The First Amendment enshrines a collective commitment to vibrant public debate on issues of governance. Allowing the White House to stymie damaging revelations for political purposes would subvert the standard of transparency to which we hold our democratically elected officials.

As applied beyond classified information (which is already protected from disclosure by other secrecy agreements), the White House NDAs likely violate the First Amendment.

Enforcement against former employees likely unconstitutionally abridges private citizens’ speech rights. While claims by current officials have a higher doctrinal hurdle to clear—given the historical deference afforded the executive in regulation of employee speech—the NDAs nonetheless likely violate current government officials’ First Amendment rights for the same reason they likely violate the rights of former employees.

They are too broad to pass constitutional muster. And it is doubtful that their enforcement would further a substantial governmental interest.

In such cases, the NDAs could likewise violate the rights of the press by limiting its right to receive speech from a potentially willing speaker whose own right to speech has been abridged.

The DOJ enforcement action against Wolkoff is a line in the sand. Should the government prevail, the speech rights of wide swaths of future executive branch employees would be jeopardized. And the free flow of unclassified information that drives our democracy would be severely inhibited. The First Amendment demands that news relevant to democratic decision-making be made available to the public in all but the most exceptional circumstances. The White House NDAs reach much farther than that. They should be rejected accordingly, be it by the courts or by an incoming Biden administration.

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<sup>268</sup> Bob Woodward and Robert Costa, *Transcript: Donald Trump Interview with Bob Woodward and Robert Costa*, THE WASHINGTON POST (April 2, 2016),

<https://www.washingtonpost.com/news/post-politics/wp/2016/04/02/transcript-donald-trump-interview-with-bob-woodward-and-robert-costa/>.



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