

Can Contract Law Trump First Amendment Law?

*Juliet Dee, University of Delaware**

This article examines the legal issues surrounding non-disclosure agreements (NDAs); specifically, anyone who signs a non-disclosure agreement waives his or her First Amendment rights because courts tend to rule that contract law takes precedence over one's freedom of speech if one willingly enters into the contract by signing it. After examining past and current cases in which former CIA agents challenged their non-disclosure agreements, the article turns its focus on recent cases in which those who worked on Donald Trump's campaign or White House staffers in the Trump administration have challenged their non-disclosure agreements. If courts consistently uphold non-disclosure agreements, the public will not have access to information from those who are potentially the most knowledgeable and credible sources of the operations of our government.

During the past four years, attorneys representing President Donald Trump have taken legal action against former employees and associates who had signed non-disclosure agreements (NDAs). Although Trump had made it a common practice to have his employees sign NDAs in his normal business dealings before becoming President, his attempts to silence former White House staffers with NDAs have raised profound legal questions about whether courts will uphold a signed contract or whether courts will find such contracts to be unenforceable because they prevent the free flow of information to the public, thus violating the First Amendment. In other words, Trump is using non-disclosure agreements to silence those around him and stop them from telling the truth. Trump has not succeeded in abolishing the First Amendment, but he is doing his best to weaken it through the use of non-disclosure agreements.

Following a look at the history of how previous administrations have used non-disclosure agreements since 1980, we will analyze the legal arguments in Trump's legal actions against his former mistresses Stephanie Clifford (Stormy Daniels) and Karen

*Juliet Dee is an Associate Professor in the Department of Communication at the University of Delaware. Correspondence regarding this manuscript may be directed to juliedee@udel.edu.

McDougal, against his former campaign workers Sam Nunberg and Jessica Denson, and against his former White House staffers Omarosa Manigault-Newman and Cliff Sims. It is the thesis of this paper that if non-disclosure agreements become as prevalent in the public sector as they have become in the private sector, it will infringe upon the free flow of information and the public's right to know about the workings of our government.

Non-disclosure Agreements for Ex-CIA Agents and Navy SEALs

Previous administrations have at times required government officials to promise they would not reveal certain information to the public, even after leaving the White House. But that ban has always been restricted to *classified* information.

When agents leave the Central Intelligence Association (CIA) they are required to sign a non-disclosure agreement that grants the CIA the right of "pre-publication review," meaning that they must submit every manuscript they write for publication to the CIA for approval for the rest of their life. In cases touching on national security, the government has had some success in enjoining disclosures by its former employees.

Nearly 50 years ago the government enjoined disclosure of certain CIA secrets in a book by a former agency official (*United States v. Marchetti*, 1972; *Alfred A. Knopf, Inc. v. Colby*, 1975). The *Marchetti* case began when former CIA agent Victor Marchetti submitted a manuscript to *Esquire* magazine in which he reported some of his experiences as a CIA agent. After 14 years with the CIA, Marchetti left because he had become disillusioned with the CIA's covert actions to destabilize governments considered unfriendly to the United States. The CIA charged that Marchetti's article contained classified information concerning intelligence sources, methods, and operations, and it won a broad injunction to prevent publication of the article. Marchetti appealed, but the U.S. Court of Appeals for the Fourth Circuit held that the secrecy agreement Marchetti had signed when the CIA first hired him in 1955 should be enforced, with the exception that the CIA could delete only classified information. Marchetti was the first writer in the United States to be subjected to such a censorship order. A few years later, Marchetti found himself back in court against the CIA.

Marchetti and his co-author John Marks, a former State Department employee who had also signed an agreement not to disclose classified information learned during

his employment, later wrote a book, *The CIA and the Cult of Intelligence*, which they submitted to the CIA for pre-publication review (Marchetti & Marks, 1974). The CIA demanded that they delete 339 passages, comprising 15 to 20 percent of the entire manuscript. For example, the CIA demanded numerous deletions in chapters concerning the Bay of Pigs operation against Fidel Castro, the Vietnam War, and the CIA's attempt to prevent Salvador Allende's election as president of Chile. With their publisher Alfred A. Knopf, Inc., the authors sued William Colby, Director of the CIA. Upon review, the CIA agreed that all but 26 of the 339 passages were acceptable. Ultimately the CIA permitted 25 of these 26 missing passages to be printed in whole or in part, leaving one to wonder why they had been deleted in the first place (*Alfred A. Knopf v. Colby*, 1975).

Two years after *Alfred A. Knopf v. Colby*, former CIA agent Frank Snepp published the book *Decent Interval: An Insider's Account of Saigon's Indecent End Told by the CIA's Chief Strategy Analyst in Vietnam* (Snepp, 1977). Snepp's thesis was that U.S. forces had forsaken the South Vietnamese informants who had helped American troops. Snepp argued that when the war was over the U.S. military abandoned hundreds of South Vietnamese translators and informants, leaving them to be executed by the North Vietnamese. Although he had signed a non-disclosure agreement, Snepp did not submit the book to the CIA for pre-publication review. Even though the CIA conceded that *Decent Interval* contained no classified information whatsoever, the government sued Snepp to enforce the non-disclosure agreement by garnishing all royalties that Snepp might receive from the book. When the case reached the U.S. Supreme Court, the Justices upheld the CIA's right to confiscate all profits from the publication—more than \$125,000. Thus, the financial burden placed on Snepp to pay off the government was substantial. Perhaps the most chilling aspect of *Snepp* was the subordination of First Amendment interests to “boilerplate” contract clauses in CIA non-disclosure agreements.

The High Court majority relegated First Amendment considerations to a footnote in rigorously enforcing the CIA's non-disclosure agreement contract against Snepp: “the CIA could have acted to protect substantial government interests by imposing reasonable

restrictions on employee activities that in other contexts might be protected by the First Amendment” (*Snepp v. United States*, 1980, 510). There was no mention of whether or not the public had a First Amendment right to know about how, as the Vietnam War ended, the United States had betrayed the trust of its Vietnamese allies, leaving thousands of them to the mercy of the North Vietnamese government. Thus, when Snepp tried to argue that enforcing the NDA he had signed comprised a prior restraint on speech, the U.S. Supreme Court responded that Snepp had voluntarily signed the NDA in exchange for employment; furthermore, obtaining such an NDA was within the CIA’s power. In other words, enforcing Snepp’s nondisclosure agreement did not violate the First Amendment. In effect the High Court implied that Snepp had waived his First Amendment rights when signing the NDA. But relegating all of this to a mere footnote provided little guidance to lower courts.

The High Court’s decision in *Snepp* also contained broad language that could be interpreted to permit the same pre-publication review procedure to be applied to the thousands of non-CIA employees who also have access to classified information. The Department of Justice had not sought that degree of power in *Snepp*, and it is not clear that the Court intended that result.

Citing *Snepp*, President Ronald Reagan introduced nondisclosure agreements for classified information in the 1980s in a way that many people initially considered to be overly broad. In 1983 President Reagan issued his National Security Decision Directive 84 (Safeguarding National Security Information, 1983). This became part of Reagan’s Executive Order 12356, which would have required thousands of federal employees with access to classified information to submit for pre-publication review any manuscripts containing intelligence information. The Executive Order would have covered about 128,000 employees who would be bound by the contract for the rest of their lives.

Reagan’s Executive Order required executive branch officials to sign a form called Standard Form 189 (SF 189), or the “Classified Information Nondisclosure Agreement,” which demanded that officials keep secret any information that is “classified or is classifiable.” In response to Reagan’s executive order, Congress attached a rider to a State Department appropriations bill ordering the administration to delay enforcement of the

directive until 1984. Reagan signed the bill and agreed not to enforce the directive. Despite this promise, however, the General Accounting Office (GAO) reported in 1984 that aspects of the directive had been in effect since 1982. The GAO found that 156,000 employees of the Defense Department had signed non-disclosure agreements and that there had been a sharp increase in the number of articles and books that the Reagan administration was reviewing (*Freedom of Information Digest*, 1984, 1). Furthermore, the Reagan administration required thousands of government officials to acknowledge in writing that they would face criminal and civil penalties for unauthorized disclosures for the rest of their lives.

Senator Chuck Grassley (R-Iowa) asked the Congressional Research Service to review SF 189 after Information Security Oversight Office (ISOO) Director Steven Garfinkel had acknowledged that the term “classifiable” could mean “anything” (MacKenzie, 1997, 225). In 1988 the ISOO replaced SF 189 with SF 312. The Congressional Research Service also advised Senator Grassley that SF 189 was “arguably in conflict with the language and intent of” whistleblower statutes then on the books” (225). When George H.W. Bush became President, his administration reached a compromise with Congress in which they agreed that any whistleblower laws would supersede SF 189. From George H.W. Bush’s administration to the present, members of the White House staff sign SF 312 if they had access to information related to national security. For example, President Barack Obama’s White House Staff Secretary Lisa Brown and White House Counsel Andy Wright both signed SF 312 for security clearance purposes.

Following the U.S. Supreme Court’s decision in *Snepp*, former government employees submitted their manuscripts to the CIA for prepublication review. In a few cases, however, they filed lawsuits against the CIA or the Department of Energy (DOE) when they disagreed with the CIA or DOE’s designation of parts of their manuscripts as “classified.” Former CIA agent Ralph McGehee sued CIA Director William Casey after the CIA redacted numerous passages in McGehee’s manuscript about how the CIA had played a role in ousting Prime Minister Mohammad Mosaddegh in order to install the Shah in Iran in 1953, and how the United States was propping up oligarchs who hired

“death squads” to murder peasants who were protesting in El Salvador in 1980 (*McGehee v. Casey*, 1983, 1140). The U.S. Court of Appeals for the District of Columbia Circuit sided with the CIA, finding that the CIA had properly classified the redacted passages. McGehee ultimately published his article in *The Nation* magazine with the censored passages deleted.

Just as Ralph McGehee signed an NDA for the CIA, Danny Stillman signed NDAs as a condition of his employment as a nuclear scientist at Los Alamos National Laboratory. Stillman signed several Sensitive Compartmented Information (SCI) Nondisclosure Agreements in which he agreed to pre-publication review and also acknowledged that “all information to which [Stillman] may gain access ... is now and will remain the property of the United States Government.” When he retired, Stillman wrote a manuscript titled “Inside China’s Nuclear Weapons Program,” which he submitted to the Department of Energy (DOE) and the CIA for pre-publication review. The DOE and the CIA informed Stillman that they did not want his manuscript published at all. Stillman filed suit, and following negotiations the CIA released his manuscript for publication with the condition that Stillman delete 23 passages that contained classified information. A federal district court ruled in favor of the CIA’s argument that the 23 passages had to remain classified (*Stillman v. CIA*, 2007). Following two more years of litigation, the CIA finally cleared the way for Stillman and his co-author Thomas Reed to publish their book with the title *The Nuclear Express* (Reed & Stillman, 2009).

Like Stillman, former CIA operations officer Gary Berntsen submitted his manuscript “Jawbreaker,” about the search for Osama bin Laden in Tora Bora, to the CIA for pre-publication review. After waiting for months for a decision, Berntsen filed a lawsuit against the CIA, arguing that the prolonged wait comprised an unlawful prior restraint. At that point the CIA identified 18 passages that contained classified information. After four years of litigation, a federal district court held that the CIA had properly classified these 18 passages; thus, Berntsen and his co-author Ralph Pezzullo had to publish *Jawbreaker* (Berntsen & Pezzullo, 2005) with the 18 passages deleted (*Berntsen v. CIA*, 2009).

Like Gary Berntsen, Lieutenant Colonel Anthony Shaffer, who received the Bronze Star Medal after two tours of duty in Afghanistan, submitted the manuscript for his book *Operation Dark Heart* to his Army Reserve Command in 2009. The U.S. Army Reserve Center reviewers approved the manuscript for publication by St. Martin's Press in June 2010. In July 2010, however, the Defense Intelligence Agency (DIA) contacted Shaffer to tell him that the DIA and the CIA had rescinded the Army Reserve's permission for St. Martin's Press to publish the book because it contained classified information. The DIA and CIA demanded redactions on 250 of the book's 320 pages (433 passages). Although Shaffer cooperated fully with the DIA and the CIA and redacted everything they asked for, without Shaffer's knowledge, someone at the Department of Defense sent an unclassified copy of the manuscript to St. Martin's Press, which then printed it in September 2010, assuming that it was the version that the Pentagon had approved. The Department of Defense immediately paid St. Martin's Press nearly \$50,000 to destroy all 9,500 copies from the first printing on the grounds that distribution of Shaffer's book would threaten national security. Because St. Martin's Press had sent advance copies of the book to reviewers, however, copies of the first edition soon appeared on eBay and other web sites (*Shaffer v. Defense Intelligence Agency*, 2010, Complaint, 11).

Although St. Martin's Press later printed the book with the 433 passages redacted, Shaffer filed suit against the Defense Intelligence Agency, arguing that the 433 passages contained declassified information. After five years of litigation, a federal district court judge held that 198 of the 433 originally redacted passages contained unclassified information and could be published. For example, Shaffer had testified before the U.S. House of Representatives Armed Services Committee, and the court held that Shaffer could include this testimony in all subsequent printings of *Operation Dark Heart* (Shaffer, 2010) because it was in the public record. The court held that the information from Shaffer's Bronze Star Narrative was classified, however; thus, material based on the Narrative would still have to be redacted in subsequent printings (*Shaffer v. Defense Intelligence Agency*, 2015, Opinion, 20).

Like Anthony Shaffer, former FBI Special Agent Ali Soufan submitted his manuscript about September 11 and al-Qaeda, *The Black Banners*, to the FBI for pre-publication review. One of Soufan's arguments was that the CIA could have thwarted the September 11 terrorist attacks if the CIA had shared information with the FBI. The FBI approved Soufan's manuscript without asking for any redactions, but the FBI then sent the manuscript to the CIA for pre-publication review. Soufan also argued against torture, which the CIA called "enhanced interrogation techniques" (EIT). Indeed, then-FBI Director Robert Mueller had ordered FBI agents to stop using torture as a means of getting suspected terrorists to talk, but the CIA was still employing torture. After several months, the CIA faxed 181 pages of redactions that it required (Shane, 2011, A1). Soufan appealed to the CIA's Publications Review Board (PRB), but the PRB demanded that Soufan make every single redaction originally demanded. In September 2011, Soufan and his publisher decided to go ahead with a first printing with all of the CIA's required redactions because they did not want any further delay (Soufan & Freedman, 2011).

Several years later, investigative journalist Raymond Bonner and documentary filmmaker Alex Gibney asked Soufan if he would grant them an interview about his interrogation of Abu Zubaydah, who had trained the September 11 terrorists. Soufan explained that because he had signed a non-disclosure agreement and the CIA had redacted a great deal of what Soufan had written about his interrogation of Zubaydah, he could not discuss anything that the CIA had designated as "classified" for Bonner and Gibney's documentary film. Not to be deterred, Bonner and Gibney filed a lawsuit against the CIA, charging that the CIA had "effectively gagged Soufan's speech in violation of the First Amendment." They added that "the CIA has silenced Mr. Soufan because his speech would further refute the CIA's false narrative about the efficacy of torture." Bonner and Gibney also noted that the CIA had approved the publication of three books whose authors had argued in favor of torture. They cited former CIA Director George Tenet's *At the Center of the Storm* (Tenet & Harlow, 2007), Jose Rodriguez' *Hard Measures* (Rodriguez & Harlow, 2012) and James Mitchell's *Enhanced Interrogation* (Mitchell & Harlow, 2016), all of which described how CIA agents had used water boarding, freezing temperatures, extreme noise and sleep deprivation to get

Zubaydah to talk (but Tenet, Rodriguez and Mitchell believed that it was effective to use these “enhanced interrogation techniques”). Arguing that the CIA’s restrictions on Ali Soufan comprise an unconstitutional prior restraint on speech, Bonner and Gibney filed a complaint seeking a declaratory judgment lifting the gag order so that Soufan would not fear criminal prosecution from the CIA if he were to discuss his interrogation of Zubaydah (*Bonner v. CIA*, 2018, Complaint at 17). The federal district court for the Southern District of New York has not yet ruled on Bonner and Gibney’s request for a declaratory judgment; thus, the case is pending.

A year after Ali Soufan and Daniel Freedman published *The Black Banners*, Navy SEAL Matt Bissonnette, using the pseudonym Mark Owen, published the book *No Easy Day: The First-Hand Account of the Mission that Killed Osama bin Laden* (Owen, 2012). Because Bissonnette had violated a non-disclosure agreement and did not submit the manuscript for pre-publication review, prosecutors considered filing criminal charges against Bissonnette under the Espionage Act. Instead of taking that route, the Department of Defense filed a civil suit charging that Bissonnette had violated his NDA (*United States v. Bissonnette*, 2016). In 2016 Bissonnette and the Pentagon reached an out-of-court settlement requiring Bissonnette to pay back nearly \$6.8 million (all royalties from the book) to the government (Drew, 2016, A9). Upon losing in court, Bissonnette immediately sued his attorney Kevin Podlaski for legal malpractice because Podlaski had originally advised Bissonnette that he did not have to submit his manuscript to the Department of Defense for pre-publication review. In June 2018, federal district court Judge Susan Collins held that a jury should decide whether Podlaski had been the “proximate cause” of Bissonnette’s forfeiture of \$6.8 million in royalties. The case is pending (*Bissonnette v. Podlaski*, 2018).

Former Naval Criminal Investigative Service (NCIS) Special Agent Mark Fallon was no doubt aware of the controversies surrounding the books that Ali Soufan and Matt Bissonnette had written when he submitted the manuscript for his book *Unjustifiable Means* to the Pentagon’s prepublication review board in 2017; like Ali Soufan, Fallon was writing about the torture of prisoners under President George W. Bush’s administration. After eight months, the Pentagon demanded 113 separate redactions,

despite the fact that the requested excisions were based on unclassified Congressional reports and newspaper articles as his sources. Because President Donald Trump had spoken favorably about reinstating torture as a policy, Fallon accepted the Pentagon's required redactions because he felt that it that his book could contribute to the public debate on torture if it were published without any further delay (Fallon, 2017).

Just as Fallon had submitted his manuscript for prepublication review, former Office of the Director of National Intelligence (ODNI) employee Richard Immerman submitted the manuscript for his book *The Hidden Hand* to the ODNI in 2013. ODNI's prepublication review office referred Immerman's manuscript to the CIA for further review. The CIA demanded extensive redactions, despite the fact that all of the mandated redactions were for material from publicly available sources. For example, the CIA demanded redactions of material based on its own CIA publications on the use of drones, publications of other government agencies, and even from published newspaper articles. Immerman filed an appeal and met in person with two CIA reviewers, who ultimately permitted Immerman to publish about 80% of the previous redactions following 10 months of negotiations (Immerman, 2014).

Like Immerman, in 2016 former ODNI employee Timothy Edgar submitted the manuscript for his book *Beyond Snowden* to the ODNI's prepublication review office, which referred his manuscript to both the CIA and the National Security Agency (NSA) for further review. Although Edgar had relied only on declassified documents, after several months the ODNI advised him that he could not publish the manuscript unless he made certain redactions. Edgar ultimately decided to accept the redactions in order to meet his publishing deadline (Edgar, 2017).

Whereas Immerman and Edgar had worked for ODNI, Mel Goodman had been a division chief with the CIA. In 2017 Goodman submitted the manuscript for his book *Whistleblower at the CIA* for prepublication review, but the CIA demanded certain redactions, despite the fact that everything Goodman had written about the CIA's use of armed drones was based on newspaper accounts. Although Goodman met with the CIA censors in person, they still demanded numerous redactions, which Goodman agreed to after nearly a year of negotiations (Goodman, 2017).

Whereas all of the authors mentioned above had signed non-disclosure agreements, former U.S. Marine Anuradha Bhagwati neither signed a non-disclosure agreement nor had any awareness of the Pentagon's Directive 5230.09 or Instruction 5230.29, both of which required her to submit all manuscripts she wrote to the Department of Defense before publication. She published her book *Unbecoming*, which deals with misogyny and sexual violence in the military, without submitting it for prepublication review (Bhagwati, 2019).

Although Mark Fallon, Richard Immerman, Timothy Edgar, Mel Goodman and Anuradha Bhagwati did not individually sue the CIA, ODNI or the Department of Defense, all five of them have become plaintiffs in a lawsuit against former ODNI Director Dan Coats and CIA Director Gina Haspel. The American Civil Liberties Union (ACLU) and the Knight First Amendment Institute of Columbia University are representing Fallon, Immerman, Edgar, Goodman and Bhagwati in a lawsuit filed in April 2019. The ACLU and the Knight Institute argue that the prepublication review system is dysfunctional and discriminatory because it permits those on the prepublication review boards to delay publication of any books whose authors criticize government actions. For example, the CIA's Publications Review Board (PRB) neither has to disclose its standards for review, nor has to give any reasons for its decisions. The five plaintiffs have asked a federal district court to make a declaratory judgment that federal agencies such as the CIA, ODNI or Department of Defense cannot enforce the non-disclosure agreements; thus, the plaintiffs would no longer have to submit their manuscripts to prepublication review boards because "the prepublication review regimes are void for vagueness under the First Amendment" (*Edgar v. Coats*, Complaint, 2019, 41).

In response, Assistant Attorney General Joseph Hunt of the Department of Justice filed a motion to dismiss in August 2019; Hunt relies heavily on *Snepp v. United States* (1980) as the controlling case, and stresses the fact that Frank Snepp *voluntarily* agreed to be bound by the non-disclosure agreement. Furthermore, Hunt argues that the plaintiffs lack standing and the federal district court lacks jurisdiction. Hunt emphasizes the point that the plaintiffs' "prepublication review obligations are not imposed by a statute, but rather arise as a matter of private law between the government and the

plaintiffs” (*Edgar v. Coats*, Defendants’ Reply Brief in Support of Motion to Dismiss, 2019, 19). The federal district court in Maryland has not yet issued a ruling; thus, the case is pending.

Governmental employees who signed NDAs—including Victor Marchetti, John Marks, Frank Snepp, Danny Stillman, Gary Berntsen, and Matt Bissonnette—have all found themselves in court seeking the right to publish their knowledge. The cases all center on pre-publication review and adherence to their NDAs. There is less certainty regarding non-disclosure agreements made between two members of the public sphere, however.

Attempts to Silence Former Mistresses

Non-disclosure agreements between two parties in the public sphere, such as those that pornographic film star Stephanie Clifford (known as Stormy Daniels) and former Playboy Playmate Karen McDougal have signed, are not as clear-cut. In March 2018, President Donald Trump’s former personal attorney Michael Cohen secretly obtained a temporary restraining order (TRO) to prevent Clifford from speaking about her liaison with Trump. Both Clifford and McDougal had affairs with Trump in 2006, shortly after Melania Trump had given birth to their son Barron. In March 2018, both Clifford and McDougal granted interviews to journalist Anderson Cooper about their

affairs with Trump. Both women signed an NDA before Trump became President. Because the cases of Clifford and McDougal have numerous parallels but also differ slightly, I will consider Clifford's case first.

Stephanie Clifford

Michael Cohen had paid Stephanie Clifford \$130,000 to sign the non-disclosure agreement just before the 2016 election related to her relationship with Donald Trump. Cohen set up a "shell company" in Delaware called Essential Consultants from which he drew the funds, and later (falsely) told the press that he had paid the \$130,000 out of his own pocket. After a January 2018 *Wall Street Journal* story about Cohen's payment to Clifford, Clifford argued that Cohen had broken the nondisclosure agreement by talking with the press (Rothfield & Palazzolo, 2018). Then in March 2018 Clifford's attorney, Michael Avenatti, filed a motion for a declaratory judgment from a federal district court in Los Angeles, asking the court to invalidate the NDA because Trump had never actually countersigned it (*Clifford v. Trump*, 2018a). The same month journalist Anderson Cooper interviewed Clifford about her affair with Trump on *60 Minutes*. During the interview Clifford said that in 2011 a man had approached her in Las Vegas when she was with her young daughter. The man said, "That's a beautiful little girl; it would be a shame if something happened to her Mom." Cohen immediately threatened to sue Clifford for \$20 million for breaching the NDA. The agreement had contained a clause requiring that any dispute must be resolved through confidential and private arbitration, but Clifford sidestepped this requirement with her motion for declaratory judgment.

In May 2018 the federal district court judge in California ordered a three-month stay (delay) on Clifford's motion to invalidate the NDA after prosecutors in New York began a criminal investigation into Cohen's business affairs (*Clifford v. Trump*, 2018b). After Trump and Cohen agreed not to insist that Clifford should pay monetary damages for breaching the NDA, Los Angeles federal district court Judge James Otero dismissed Clifford's case requesting a declaratory judgment in March 2019. Thus, Judge Otero never answered the question of whether or not the NDA Clifford had signed was valid (Melley, 2019). This case provides insight into a similar NDA case.

Karen McDougal

In August 2016 before the November election, Karen McDougal told *The National Enquirer* about her relationship with Donald Trump in exchange for \$150,000. American Media Incorporated (AMI) is the parent company of The National Enquirer, and AMI's Chief Executive Officer David Pecker is a close friend of Donald Trump. Thus, McDougal was unaware that Pecker's actual motive was to buy exclusive rights to her story of an affair with Trump and then bury it, a practice known as "catch and kill" (Rutenberg & Ruiz, 2018, A14). In March 2018 McDougal sued AMI, asking to be released from the 2016 non-disclosure agreement (*McDougal v. American Media Incorporated*, 2018a).

McDougal's attorney Peter Stris argued that Trump's attorney and McDougal's former attorney Keith Davidson (also Stephanie Clifford's former attorney) had tricked McDougal into signing the NDA. Stris further argued that because the contract had been executed under fraudulent circumstances, McDougal had the right to sue in court rather than go through confidential arbitration. In April 2018 McDougal reached an out-of-court settlement with AMI; this permitted her to speak freely about her affair with Trump (*McDougal v. American Media Incorporated*, 2018b). On July 24, 2018 CNN aired a secret recording that Cohen had made while he and Trump were discussing the \$150,000 payment to McDougal, showing that Trump had lied when he had denied knowing about the payment (Apuzzo & Haberman, 2018, A16).

These cases raise the question of whether or not our First Amendment "right to know" about NDAs might outweigh Trump's interest in enforcing the contracts. The Restatement (Second) of the Law of Contracts (Section 178) provides that a "promise ... is unenforceable ... if the interest in its enforcement is clearly outweighed in the circumstances by a public policy." Law professor Wilson Huhn argued:

The American people acquired a vital interest in knowing about [Donald Trump's] character. Is he honest or dishonest? Is he candid or secretive? Is he trustworthy or untrustworthy? It is at least debatable that Trump's interest in enforcing the non-disclosure agreement against [Stephanie] Clifford is clearly outweighed by the interest of the public in *not* enforcing that agreement—and that as President, Trump is no longer entitled to enlist the aid of the courts to suppress public access to information about his honesty, candor, and trustworthiness.

Some political observers asked whether or not the payments to Clifford and McDougal comprised “an illegal coordinated campaign expenditure” (Apuzzo & Haberman, 2018, A16). Indeed, Common Cause filed a complaint with the Federal Election Commission (FEC) claiming that the \$150,000 payment to McDougal and the \$130,000 payment to Clifford were in fact illegal campaign contributions (Rutenberg, Steel & McIntire, 2018, A19). Federal prosecutors agreed with Common Cause; in August 2018 Trump’s former attorney Michael Cohen pled guilty to violating campaign finance laws by paying “hush money” at Trump’s direction to Clifford and McDougal (McCoy, 2018, 1B).

In addition to governmental NDAs and NDAs between private citizens, there have also been attempts to silence presidential campaign workers. Trump is known for his requirement that all persons employed by him sign an NDA. This measure inhibits people from speaking for fear of litigation against them.

Attempts to Silence Campaign Workers

In addition to silencing Stephanie Clifford and Karen McDougal, Donald Trump also required those who worked on his presidential campaign to sign nondisclosure agreements. *Washington Post* columnist Ruth Marcus observed that long before Trump became President, one of his favorite tactics, “whether you were a Trump Organization employee ... or Trump wife, involved the non-disclosure agreement, with the accompanying threat of litigation for daring to spill his secrets” (Marcus, 2018a). For example, when Trump was pondering running for President in 1999, his second ex-wife Marla Maples threatened “to tell the people what he is really like” (Marcus, 2018a). Trump “countered by withholding a \$1.5 million alimony payment, although he eventually backed down” (Marcus, 2018a). In this section I discuss the NDA situations in which Sam Nunberg and Jessica Denson found themselves.

Two former campaign workers, Sam Nunberg and Jessica Denson, filed suits against Trump after they had signed NDAs. Nunberg had been a political advisor to Trump, but the Trump campaign fired Nunberg in 2015 after some of Nunberg’s racially charged posts surfaced on Facebook. Trump accused Nunberg for leaking information about an affair between Trump campaign staffers Corey Lewandowski and Hope Hicks;

Nunberg flatly denied that he had been the source of the leak. Trump sued Nunberg for \$10 million, alleging that Nunberg had violated his NDA. Furthermore, Trump's attorneys insisted that the case must go to arbitration (rather than being tried in open court) and the arbitration must be sealed. Trump and Nunberg reached an out-of-court settlement in August 2016; the terms of the settlement were confidential (Cullins, 2016).

Like Nunberg, Denson worked on the Trump Campaign and signed a nondisclosure agreement. She worked as a national phone bank administrator, but later sued the Trump Campaign, claiming that her supervisor Camilo Jaime Sandoval subjected her to gender discrimination, harassment, a hostile work environment, and cyberbullying. Trump immediately sued Denson for \$1.5 million, charging that she had breached her NDA's non-disparagement clause by including private information in her complaint against Sandoval and the Campaign. In 2018 a federal district court judge agreed with Trump that the dispute had to be resolved in arbitration, rather than in open court (*Denson v. Donald J. Trump for President*, 2018). The arbitrator ruled in Trump's favor, holding that the NDA was "valid and enforceable." Although the arbitrator did not award Trump the \$1.5 million he had asked for, he held that Denson had to pay Trump more than \$50,000. Denson challenged the ruling; her attorney argued that:

[T]he public policy implications of this issue are immense.... Because arbitration is confidential, it is impossible to know how many [Trump] Campaign workers might have been similarly discriminated against, and who might be afraid to bring a lawsuit due to the *in terrorem* effect of the Campaign's NDAs. Indeed, it is impossible to know how many Campaign workers have already been retaliated against by the Campaign (*Denson v. Donald J. Trump for President*, 2019).

Despite Denson's objections to arbitration, a federal district court again ruled in Trump's favor in July 2019, holding that Denson would indeed have to pay Trump the \$52,230 that he had won in arbitration (*Denson v. Donald J. Trump for President*, 2019).

Private arbitration of violations of NDAs is a way Trump protect his personal privacy and his assets. He does this through NDAs with private citizens, as well as requiring employees to sign NDAs. Trump has also used NDAs to attempt to silence former White House staff members.

Attempts to Silence Former White House Staff Members

Washington Post journalist Ruth Marcus reported that during Donald Trump's first winter in office, he demanded that senior White House staff members sign NDAs promising not to reveal confidential information. An early draft of the NDA imposed a penalty of \$10 million upon anyone who leaked information to the press, although Marcus (2018b) suspects that this draconian sum was reduced in the final version of the contract that staff members actually signed. The NDA would cover Trump's aides not only during their White House service but also "at all times thereafter" (Marcus, 2018b). Furthermore, the NDA provides for an injunction to prevent a White House aide from disclosing information:

I understand that the United States government or ... an authorized representative of Mr. Trump may seek any remedy available to enforce this agreement including ... application for a court order prohibiting disclosure of information in breach of this agreement (Marcus, 2018b).

Marcus explained that some White House staff members "balked at first but, pressed by then-Chief of Staff Reince Priebus, they ultimately complied, concluding that the agreements would likely not be enforceable in any event" (Marcus, 2018b).

Whereas Victor Marchetti, Frank Snepp, Ralph McGehee, Dan Stillman, Gary Berntsen and Matt Bissonnette would have signed Standard Form (SF) 312 which deals with national security, the NDAs that Donald Trump has asked his campaign workers and White House staffers to sign are quite different from SF 312. President Obama's Senior Advisor David Axelrod said it would be "unthinkable" for Obama to have asked White House employees to the type of NDA that Trump asked for; indeed, "there is wide agreement that [Trump's NDAs] would violate whistleblower statutes as well as the First Amendment" (Stahl, 2018).

Before Michael Wolff published *Fire and Fury: Inside the Trump White House* in January 2018, Trump's lawyer Charles Harder sent a cease-and-desist letter to Steve Bannon. Harder asserted that Bannon had violated the terms of his NDA in gossiping to Wolff. In Bannon's NDA he promised "not to demean or disparage publicly" the Trump Organization, Donald Trump, or "any family member" (Marcus, 2018a). Trump's lawyer also fired off a cease-and-desist letter to Macmillan Publishers just before they published Wolff's *Fire and Fury*, at which point Macmillan pushed up its production schedule and

got the book in print the next day, rather than four days later as it had originally planned. Macmillan's chief executive officer John Sargent explained to his staff that for President Trump to halt publication of *Fire and Fury* would be a prior restraint on the press, and would be "flagrantly unconstitutional" (Begley, 2018). In addition to Bannon, Trump sought to silence Omarosa Manigault-Newman.

Omarosa Manigault-Newman

Several months after Macmillan released *Fire and Fury*, former White House Director of Communication Omarosa Manigault-Newman began work on her manuscript titled *Unhinged: An Insider's Account of the Trump White House*. In that work she described Trump as a racist and misogynist whose mental health was declining. Before the book was published, Trump's attorney Charles Harder wrote to Carolyn Reidy, Chief Executive Officer of Simon & Schuster, advising her that Manigault-Newman's manuscript included excerpts that violated the non-disparagement clause of the NDA that Manigault-Newman had signed when she had worked for the Trump Campaign. Attorney Harder's letter quoted Paragraph 2 of the NDA: "No Disparagement. During the term of your service and at all times thereafter you hereby promise and agree not to demean or disparage publicly the [Trump] Company, Mr. Trump, any family member, any Trump company or any family member company" (Harder, 2018). Harder then threatened to sue Simon & Schuster for "tortious interference" for its role in inducing Manigault-Newman to breach her nondisclosure agreement.

Attorney Elizabeth McNamara represented Reidy and Simon & Schuster. McNamara wrote back to Harder, noting that Harder had not identified *specific* "disparaging statements" that might embarrass Trump. Furthermore, McNamara suggested that no court would uphold the NDA because it would violate public policy:

Put simply, the book's purpose is to inform the public. Private contracts like the NDA may not be used to censor former or current government officials from speaking about non-classified information learned during the course of their public employment. Nor could the NDA support censorship of a publisher like Simon & Schuster that legitimately reports on information that is plainly newsworthy and highly relevant to matters of public concern. The government has no legitimate interest in censoring such materials and no court would

support the Presidential campaign of a sitting U.S. President in silencing a former government official like Ms. Manigault-Newman or her publisher. To do so would be a perversion of contract law, a prior restraint, and a plain violation of the First Amendment.

McNamara added that Simon & Schuster would not be intimidated by “hollow legal threats” and Simon & Schuster would publish Manigault-Newman’s book as scheduled.

The Trump Campaign filed suit against Manigault-Newman in August 2018, charging that she had violated the NDA she had signed in 2016 before Trump was elected. The Trump Campaign’s case against Manigault-Newman is currently in private arbitration; thus, it is pending. Bannon and Manigault-Newman were joined by Cliff Sims in Trump’s web of NDAs.

Cliff Sims

Like Manigault-Newman, former White House special assistant Cliff Sims had signed an NDA. Sims published the book *Team of Vipers: My 500 Extraordinary Days in the Trump White House* in January 2019. The Trump Campaign immediately filed suit against Sims, seeking monetary damages for violating the non-disparagement clause of the NDA that Sims signed when he worked for the Trump Campaign. The NDA that Sims signed required that any dispute had to be settled in arbitration rather than in open court.

In response, Sims sued Donald Trump, seeking a declaratory judgment that Trump may not enforce an NDA that infringes on Sims’ First Amendment rights. Trump’s attorney argued that Sims had signed the NDA with a *private* employer, the Trump Campaign, adding that “Private employers do not violate the First Amendment when they bring claims in arbitration to enforce a nondisclosure agreement.” In response, Sims’ attorney argued that “the U.S. government is engaging in a subterfuge effort to use a private entity, Donald J. Trump for President, Inc. to silence Mr. Sims” (*Sims v. Trump*, Complaint at 1-2, 2019). Sims further argued that the NDA he had signed while working on the campaign should *not* apply to the work he did in the White House while working for Trump in the capacity of a public (not a private) employee. His attorney

argued that the Trump administration, through the use of a private surrogate, the Trump Campaign, was:

seeking to censor a former federal employee for disclosing unclassified information outlining what Sims saw during his time in the White House. To permit this circumvention of decades of judicial precedent regarding the First Amendment rights of former federal employees would chill free speech.... The [Trump administration] has infringed upon Mr. Sims' First Amendment rights and acted contrary to the interests of public policy. (*Sims v. Trump*, Complaint at 9-10, 2019)

His attorney declared that Sims' First Amendment rights were being violated and the NDA did not transfer to his work in the White House.

In response, Trump's attorney argued that a private employer, the Trump Campaign, does not violate the First Amendment when it enforces an NDA in arbitration, even if the employee, Sims, later serves in the government. Trump's attorney insisted that Sims must submit to binding arbitration as stipulated in the NDA. Trump's attorney further argued that Sims could not ask the court to make a declaratory judgment that would preempt the arbitration proceeding that Sims accepted when he had signed the NDA (*Sims v. Trump*, Memorandum at 21, 2019).

In response, Sims' attorney noted that:

the importance of the legal issue of *first impression* is significant. This lawsuit was necessitated by [the Trump administration's] unprecedented attempt to circumvent well-established First Amendment case law regarding prior restraint against former federal employees by using the Trump Campaign to punish Mr. Sims for publishing unclassified information that Mr. Sims learned during his federal service... (*Sims v. Trump*, Plaintiff's Memorandum at 26-27, 2019).

Of note, Sims' attorneys are emphasizing in their brief that this is a case of first impression. Previous presidents did not threaten to enforce nondisclosure agreements against West Wing staff members, who work for the U.S. government. Russell Riley, co-chair of the Presidential Oral History Program at the University of Virginia, commented that "As far as I know, [enforcing an NDA] has never been tried in the White House. I've never heard of it. I've done oral histories back to the Jimmy Carter presidency" (Bennett, 2019). The federal district court has not yet ruled on Sims' request for a declaratory judgment and the case is pending.

Does Contract Law Outweigh the Public's Right to Know?

In 1931 cryptologist Herbert Yardley published *The American Black Chamber* (1931) before the government required those who worked in the area of intelligence to sign nondisclosure agreements. His book revealed so much information about code-breaking that it caused great damage; since there were no NDAs, Congress passed a law prohibiting future disclosure of methods of deciphering codes. The NDAs that CIA agents sign there is no explicit statutory authority for pre-publication review. However, the authority to review manuscripts has been inferred from Section 3024 of the National Security Act of 1947 (Casey, 2015, 425). Legal scholars generally acknowledge that the CIA and other government agencies need to balance the need to safeguard national security against the First Amendment and the public's right to know.

Of course, cases that touch on national security such as *Snepp* or Bissonnette's account of killing Osama bin Laden are of far greater public importance than a candidate's infidelities (although since the Federal Election Commission held that the payoffs to Stephanie Clifford and Karen McDougal comprised unreported campaign contributions, this is also a matter of public importance). It should give us pause, however, to remember that in *Snepp*, any notion of the public's First Amendment "right to know" was mentioned in passing in a footnote. Thus, *Snepp* suggests that contract law (protecting property rights) "trumps" First Amendment law (protecting speakers or the public's right to know).

The CIA now has NDAs and pre-publication review in place; however, a major problem is that the government's standards of review are not only vague, but vary from one agency to another. For example, after he retired, former CIA Director Leon Panetta submitted a manuscript to the CIA's Publication Review Board (PRB). He became so frustrated with the PRB process that he sent the manuscript to his editor before the PRB had completed reviewing the manuscript (Bailey, 2017, 209). Law professor Christopher Bailey argues that various federal agencies need to standardize their pre-publication review and appeals processes. He also cautions that it is also important to protect whistleblowers: "An aggrieved employee who wants to 'whistleblow' should have a protected means to do so without facing recriminations from his or her supervisory

chain” (Bailey, 2017, 237-238). In this sense, NDAs need to protect whistleblowers, which is not always the case.

In 2017 Congress directed the Office of the Director of National Intelligence (ODNI) to prepare a new policy that would apply to all government agencies and that would yield “timely, reasoned and impartial decisions that are subject to appeal.” Although Congress gave ODNI six months to create a new, more consistent policy, ODNI has not done so, although they have been working on it in 2019 (Savage, 2019, A-13).

Legal scholar Brittany Scott observes that those who sign a nondisclosure agreement are in effect waiving their First Amendment rights. They may not realize that the person demanding the signature is enforcing a:

contract of silence prohibits speech that is considered ‘noxious’ as determined by the writer of the contract... The courts are making value judgments when they balance enforcement of contracts against waiving one’s First Amendment rights. In choosing to enforce these waivers, the courts signal a preference for enforcing contracts over protecting First Amendment rights (Scott, 2019, 474-475).

Lawyers who write nondisclosure agreements have learned to build in arbitration, rather than open court, as the required venue for resolving disputes; this puts an employee (or former mistress) at a disadvantage. In contrast with open court, the press and public do not have access to observing an arbitration hearing because it occurs behind closed doors. In other words, those who waive their First Amendment rights are also waiving their Sixth Amendment right to a fair trial before their peers.

Law professor Orly Lobel argued that Donald Trump’s NDAs should not be enforceable under contract law:

When it comes to the President of the United States, the public interest in access to the information surely outweighs any interest in contract enforcement. But if Trump believes that he can weaponized NDAs to conceal misconduct, he is right. It’s the effect of a contract that counts, not its legality. The prolific use of NDAs risks setting a terrible new standard of silence and fear (Lobel, 2019).

Lobel is right. Although a few brave former campaign workers such as Sam Nunberg and Jessica Denson have attempted to speak out, and a few brave former White House staffers such as Omarosa Manigault-Newman and Cliff Sims have attempted to inform

their readers about the White House environment, they all have undoubtedly faced daunting legal fees. The fear of litigation alone is enough to silence most people. As a result, the general public loses the opportunity to learn the truth about what is happening in the White House.

If Donald Trump succeeds in enforcing the non-disclosure agreements that members of his White House staff (or former intimate partners) have signed, he will hinder the free flow of information to the American public, and the public's right to know will be diminished. Trump has not destroyed the First Amendment, but he has seriously weakened it.

References

- Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.1975).
- Apuzzo, M. & Haberman, M. (2018, July 26). Secret audio clip and Trump's on-the-record statements aren't in sync. *New York Times*, A16.
- Bailey, C. E. (2017, Fall/Winter). Reform of the intelligence community prepublication review process: Balancing First Amendment rights and national security interests. *5 National Security Law Journal* 203.
- Begley, S. (2018, January 8). "Flagrantly unconstitutional:" *Fire and Fury's* publisher attacks Trump's attempt to block book. *Time*. Retrieved from <http://time.com/5092923/fire-fury-michael-wolff-publisher-trump-unconstitutional/>
- Bennett, B. (2019, February 1). President Trump's threats to former staffer reveal a problem at the White House. *Time*. Retrieved from <https://time.com/5518135/donald-trump-non-disclosure-agreements/>
- Bernsten, G. & Pezzullo, R. (2005). *Jawbreaker: The Attack on Bin Laden and al-Qaeda: A Personal Account by the CIA's Key Field Commander*. New York: Crown Publishers.
- Berntsen v. Central Intelligence Agency*, 618 F. Supp. 2d 27 (D.D.C. 2009)
- Bhagwati, A. (2019). *Unbecoming: A Memoir of Disobedience*. New York: Atria Books.

- Bissonnette v. Podlaski*, 2018 U.S. Dist. LEXIS 94198 (U.S. District Court for the Northern District of Indiana, Fort Wayne Division, filed June 5, 2018).
- Bonner v. CIA*, No. 1:18-CV-11256, Complaint at 17 (U.S. District Court, Southern District of New York, filed December 3, 2018).
- Casey, K. (2015, March). Till death do us part: Prepublication review in the intelligence community. 115 *Columbia Law Review* 417).
- Clifford (aka Stormy Daniels aka Peggy Peterson) v. Trump (aka David Dennison), Essential Consultants, and Michael Cohen*. (2018a). Case No. 2:18-CV-02217-SJO-FFM, First Amended Complaint for Declaratory Relief and Defamation: Demand for Jury Trial (U.S. District Court for the Central District of California, filed March 26, 2018).
- Clifford (aka Stormy Daniels aka Peggy Peterson) v. Trump (aka David Dennison), Essential Consultants, and Michael Cohen*. (2018b). Case No. 2:18-CV-02217-SJO-FFM, Plaintiff Stephanie Clifford's Memorandum of Points and Authorities in Support of Motion for Reconsideration in Part of Order Imposing Stay (U.S. District Court for the Central District of California, filed May 23, 2018).
- Cullins, A. (2016, August 11). Trump resolves \$10 million lawsuit with former staffer. *Hollywood Reporter*. Retrieved from <https://www.hollywoodreporter.com/thr-esq/trump-resolves-10m-lawsuit-staffer-919014>
- Denson v. Donald J. Trump for President, Inc.*, No. 18-CV-2690 (JMF), 2018 U.S. Dist. LEXIS 148395, 2018 WL 4568430 (S.D.N.Y. Aug. 30, 2018).
- Denson v. Donald J. Trump for President, Inc.*, 2019 U.S. Dist. LEXIS 122618 (S.D.N.Y. July 23, 2019).
- Drew, C. (2016, August 20). Ex-SEAL member who wrote book on Bin Laden raid forfeits \$6.8 million. *New York Times*, A9.
- Freedom of Information Digest*. (1984, May-June), 1.
- Edgar, T. H. (2017). *Beyond Snowden: Privacy, Mass Surveillance and the Struggle to Reform the NSA*. Washington, DC: Brookings Institution Press.
- Edgar v. Coats*, No. 8:19-CV-00985-GJH, Complaint for Declaratory and Injunctive Relief at 41 (U.S. District Court, Maryland, filed April 2, 2019).

- Edgar v. Coats*, No. 8:19-CV-00985-GJH, Defendants' Reply Brief in Support of Motion to Dismiss at 19 (U.S. District Court, Maryland, filed August 2, 2019).
- Fallon, M. (2017). *Unjustifiable Means: The Inside Story of How the CIA, Pentagon and U.S. Government Conspired to Torture*. New York: Regan Arts.
- Goodman, M. A. (2017). *Whistleblower at the CIA: An Insider's Account of the Politics of Intelligence*. San Francisco: City Lights Books.
- Harder, C. (2018, August 13). Letter to Carolyn Reidy, Chief Executive Officer of Simon & Schuster.
- Huhn, W. R. (2018, May 13). The Trump/Clifford non-disclosure agreement: Violation of public policy and the First Amendment. *Juris Magazine*. Retrieved July 26, 2018 from <http://sites.law.duq.edu/juris/2018/05/13/the-trump-clifford-non-disclosure-agreement-violation-of-public-policy-and-the-first-amendment/>
- Immerman, R. H. (2014). *The Hidden Hand: A Brief History of the CIA*. Hoboken, New Jersey: Wiley-Blackwell.
- Kessler, G., Rizzo, S. & Kelly, M. (2018, June 1). President Trump has made 3,250 false or misleading claims in 497 days. *Washington Post*. Retrieved July 31, 2018 from https://www.washingtonpost.com/news/fact-checker/wp/2018/06/01/presidenttrump-has-made-3251-false-or-misleading-claims-in-497-days/?utm_term=.b488d3922289
- Lawyer says 3 more women were paid for silence about Trump. (2018, July 28). *USA Today*, 1B.
- Lobel, O. (2019, March 4). Trump's extreme NDAs: His nondisclosure agreements are draconian. *The Atlantic*. Retrieved from <https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/>
- MacKenzie, A. (1997). *Secrets: The CIA's War at Home*. Berkeley: University of California Press.
- Marchetti, V. & Marks, J. (1974). *The CIA and the Cult of Intelligence*. New York: Alfred A. Knopf.

- Marcus, R. (2018a, March 15). Trump won't be able to buy his way out of trouble this time. *Washington Post*. Retrieved from https://www.washingtonpost.com/opinions/trump-wont-be-able-to-buy-his-way-out-of-trouble-this-time/2018/03/15/ddc1959e-2883-11e8-bc72-077aa4dab9ef_story.html?utm_term=.4d33eca666a7
- Marcus, R. (2018b, March 18). Trump had senior staff sign nondisclosure agreements. They're supposed to last beyond his presidency. *Washington Post*. Retrieved from 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?utm_term=.565bd75da063
- McCoy, K. (2018, December 8). Prosecutors ask for "substantial" term for Cohen. *USA Today*, 1B-2B.
- McDougal v. American Media, Incorporated*. (2018a). Case No. BC698956 (Los Angeles Superior Court, March 20, 2018).
- McDougal v. American Media, Incorporated*. (2018b). Settlement Agreement and General Release, Case No. BC698956 (Los Angeles Superior Court, April 18, 2018).
- McGehee v. Casey*, 718 F. 2d 1137 (D.C. Circuit, 1983).
- McNamara, E. (2018, August 15). Letter to Charles Harder, attorney for Donald Trump.
- Melley, B. (2019, March 7). Judge dismisses porn star Stormy Daniels' hush money lawsuit against President Trump. *USA Today*. Retrieved from <https://www.usatoday.com/story/news/politics/2019/03/07/stormy-daniels-hush-money-lawsuit-against-president-trump-dismissed/3100482002/>
- Mitchell, J. E. & Harlow, B. (2016). *Enhanced Interrogation: Inside the Minds and Motives of Islamic Terrorists Trying to Destroy America*. New York: Crown Forum Publishing.
- Owen, M. (2012). *No Easy Day: The Firsthand Account of the Mission that Killed Osama bin Laden*. New York: Dutton-Penguin Books.
- Reed, T. C. & Stillman, D. B. (2009). *The Nuclear Express: A Political History of the Bomb and its Proliferation*. Minneapolis, Minnesota: Zenith Press.

- Rodriguez, J. A. & Harlow, B. (2012). *Hard Measures: How Aggressive CIA Actions after 9/11 Saved American Lives*. New York: Threshold Editions.
- Rothfield, M. & Palazzolo, J. (2018, January 12). Trump lawyer arranged for \$130,000 payment for adult-film star's silence. *Wall Street Journal*. Retrieved from <https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678>
- Rutenberg, J. & Ruiz, R. R. (2018, March 21). Ex-model sues to void muzzle by Trump ally. *New York Times*, A1, A14.
- Rutenberg, J., Steel, E. & McIntire, M. (2018, April 12). Headline a tabloid didn't run catches the investigators' eyes. *New York Times*, A1, A19.
- Safeguarding National Security Information: National Security Decision Directive 84. (1983). 9 *Media Law Reporter* 1759 (July 5, 1983).
- Savage, C. (2019, April 3). Ex-national security officers sue to limit censorship of their books. *New York Times*.
- Scott, B. (2019, Winter). Waiving goodbye to First Amendment protections: First Amendment waiver by contract. 46 *Hastings Constitutional Law Quarterly* 451.
- Shaffer, A. (2010). *Spycraft and Special Ops on the Front Lines of Afghanistan—and the Path to Victory*. New York: Thomas Dunne Books, St. Martin's Press.
- Shaffer v. Defense Intelligence Agency*, No. 1:10-cv-02119-RMC, Complaint (D.D.C. filed December 14, 2010).
- Shaffer v. Defense Intelligence Agency*, No. 1:10-cv-02119-RMC, Opinion (D.D.C. filed April 21, 2015).
- Shane, S. (2011, August 26). CIA fighting memoir of 9/11 by FBI agent. *New York Times* A-1.
- Sims v. Trump*, Complaint at 1-2, No. 1:19-CV-00345-CKK (U.S. District Court, District of Columbia, filed February 11, 2019).
- Sims v. Trump*, Memorandum in Support of Defendant's Motion to Dismiss, No. 1:19-CV-00345-CKK (U.S. District Court, District of Columbia, filed April 25, 2019).

Sims v. Trump, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, No. 1:19-CV-00345-CKK (U.S. District Court, District of Columbia, filed May 31, 2019).

Snepp v. United States, 444 U.S. 507 (1980).

Snepp, F. W. (1977). *Decent Interval: An Insider's Account of Saigon's Indecent End Told by the CIA's Chief Strategy Analyst in Vietnam*. Lawrence, Kansas: University Press of Kansas.

Soufan, A. & Freedman, D. (2011). *The Black Banners: The Inside Story of 9/11 and the War against al-Qaeda*. New York: W. W. Norton & Company.

Stahl, J. (2018, August 14). Is it normal for White House officials to sign nondisclosure agreements? *Slate*. Retrieved from <https://slate.com/news-and-politics/2018/08/trump-white-house-ndas-are-these-nondisclosure-agreements-normal.html>

Stillman v. CIA, 517 F. Supp. 2d 32 (D.D.C. 2007).

Tenet, G. & Harlow, B. (2007). *At the Center of the Storm: My Years at the CIA*. New York: Harper Collins.

United States v. Bissonette, No 1:16-CV-01070 (Eastern District of Virginia, filed August 19, 2016).

United States v. Marchetti, 466 F.2d 1309 (4th Cir.1972).