

# Trump's Threat to Sue Ex-Aide Rings Hollow to Legal Experts

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*By Andrew M Harris, Patricia Hurtado and Bob Van Voris*

Donald Trump's unusual bid to muzzle his one-time top strategist is a flimsy legal gambit that could bring deeper complications for the president if he chooses to pursue it, according to legal experts.

Charles Harder, a Trump attorney, sent cease-and-desist letters to Steve Bannon and the publisher of a new expose about the Trump White House. The publisher, Henry Holt, responded by moving up the publication date of "Fire and Fury: Inside the Trump White House," by journalist Michael Wolff, to Friday.

Should Trump follow through on his attorney's legal threats, he'd have little chance of success in courts, according to legal experts, while opening himself to accusations of authoritarianism and disregard for the First Amendment. Any effort to push the matter to trial could backfire, they say -- by potentially forcing Trump to produce documents or subject people in his circle to sworn depositions, and compromising an earlier argument that he's too busy being president to do battle in court.

And if the president and his lawyers don't follow up on their attempt to hold Bannon accountable for a non-disparagement deal, they run another risk: Others who made similar pacts, and have tales to tell, may feel emboldened to go public.

Trump's lawyers are attempting to hold Bannon to a non-disclosure agreement they say he signed with Trump and his presidential campaign that was, like those apparently entered into by other advisers, unusually broad. Harder wrote to Bannon late Wednesday reminding him he'd agreed not to

disclose confidential or disparaging information "during the term of your service and at all times thereafter."

Experts say there are any number of reasons Trump would have a hard time prevailing in court. For starters, any agreement Trump had with Bannon would have effectively ended once both men became public officials, said Peter Henning, a law professor at Wayne State University in Detroit.

"There aren't any confidentiality agreements in the government and certainly not with an individual," he said. "Once someone becomes a government official he can't be bound by the agreement because Trump wasn't paying him. He's an employee of the U.S. government and is subject to the rules. The confidentiality agreement is only with Donald J. Trump the individual, but Bannon worked for the office of the president."

As hard as it might be to contain Bannon, stopping publication of a book by a journalist who talked to Bannon may be even more difficult.

"A non-disclosure or non-disparagement contract only binds the parties to the agreement, not others who obtain the information," said Jonathan Adler, a professor of law at Case Western Reserve University in Cleveland. "It's much harder to stop or punish third-party publication than it is to stop or punish a party to the agreement, and this obstacle is heightened given the clear public interest in matters relating to the conduct of a major political figure."

The Constitution would stand in the way as well, said Kathleen Clark, who teaches ethics in government at Washington University law school in St. Louis.

"Our First Amendment doctrine is quite clear that the courts will be of no help to try to attempt to prevent speech by a former government official," she said.

Nor is it likely Trump would prevail in a defamation case, said Samuel Estreicher, a New York University law school professor and director of its Center for Labor and Employment Law. Because Trump and his family members are considered public figures, under the law, he'd have to prove the publisher put out the book in "knowing or reckless disregard of the truth" -- a exceedingly high hurdle for the president, Estreicher said.

## **Campaign Staffers**

Bannon's non-disclosure agreement with a candidate and his campaign, as outlined in Harder's letter, appears to be an outlier. NDAs are common in business. It's not unusual for staffers working on presidential transitions to enter into such deals because they're privy to sensitive government information, according to Bob Bauer, a former White House counsel and campaign lawyer for President Barack Obama. Some narrow NDAs in campaigns, pertaining to people working on IT or research teams, might be enforceable, Bauer said.

"But broad non-disparagement clauses? I think that's unenforceable," Bauer said. "There's a broad First Amendment concern."

Politically, the idea of a sitting president chasing former campaign officials in court is a "nonstarter," Bauer said. It conveys "the idea he's trying to shut people up" and is "quasi-authoritarian" in nature, he said. Moving ahead with a lawsuit could be a distraction at best, but also expose the president to document requests by his opponents.

"If Trump sues, he better be prepared to make lots of other things public that he may not want public," said Jamie Dokovna, a business litigation partner with Becker & Poliakoff in West Palm Beach, Florida.

Pursuing a suit against Bannon would also complicate Trump's defense against another, separate defamation lawsuit, a case brought by Summer Zervos, a former contender on "The Apprentice." In that matter, Trump is arguing that the judge has no authority over him while he's president. Should Trump bring a claim against Wolff, experts said, he may have to explain why he can sue the author but can't be sued by Zervos.