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RWU First Amendment Blog: David Logan's Blog: Discovering Trump 06-22-2018

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June 22, 2018



Discovering Trump

June 22, 2018 Edward Fitzpatrick

David A. Logan, professor of law and former dean of the RWU School of Law, who has studied and written extensively about First Amendment issues:

Reporters, like litigators, spend much of their time talking with people and slogging through documents, trying to establish what happened. For lawyers, this tedious but essential work is called discovery. Right now, teams of lawyers across the country, representing both the government and private citizens, are doggedly “discovering” evidence to determine whether Donald Trump, as a businessman or president, has broken the law.

The most well-known of the discovery efforts involving President Trump is the investigation being handled by U.S. Department of Justice Special Counsel Robert Mueller, who is looking at a range of issues, including Russian ties to the Trump campaign (the “collusion investigation”) and the President’s

efforts to obstruct justice and derail an initial investigation under the direction of then-FBI Director James Comey.

Discovery is also underway into the conduct of the President's long-time personal lawyer and all-around "fixer," Michael Cohen. That task is being handled by another arm of the Department of Justice — the U.S. Attorney for the Southern District of New York. The discovery in this case came not in the typical form of a request for production via subpoena but rather in an unannounced FBI raid of Cohen's office — a highly unusual tactic typically used only when there is a fear that the target will destroy evidence.

On June 20, breaking news added another unusual discovery tactic, with First Amendment ramifications: Federal investigators are seeking documents from a media outlet — the National Enquirer — to determine whether it was involved in a "hush money" incident involving a former Playboy bunny and facilitated by Cohen.

All this activity on the criminal side would surely alarm anybody with even the slightest sense of risk-aversion.

But President Trump also must be concerned with the discovery in civil cases against him arising out of allegations of his sexual misconduct, the best-known involving \$130,000 of "hush money" paid to stop pre-election revelation of an affair with adult movie star Stormy Daniels, pending in California state court.

Lawyers for the President have succeeded in halting discovery, for the time being at least, but a defamation action in New York state court is also rummaging into the President's life. Summer Zervos alleges that Trump kissed, groped and rubbed his genitals against her after she appeared on Trump's reality show, "The Apprentice" — a charge that he has publicly denied. If her statements are true, then calling her a liar is the basis for a successful libel claim. Her lawyers are pushing for an early trial date, and they have subpoenaed the records of Trump stays at the Beverly Hills Hotel (AKA the "Pink Palace"), a place well-known for protecting the privacy of the high-rollers who make up its clientele.

If this discovery request confirms Zervos' allegations, and Zervos' lawyers are successful in forcing President Trump into a deposition (which is not certain, because there is debate about whether a sitting President can be forced to do so), it could be used to trap Trump into making (more) false denials — but now under oath in a deposition.

The danger is clear: President Bill Clinton's under oath denials of pre-presidential sexual misconduct created shock waves that led to impeachment charges. So discovery on all these many fronts create a highly perilous situation for President Trump.