

Court Protects First Amendment Right of Foreign National Christopher Steele to Distribute Trump Dossier

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While Special Counsel Robert Mueller, the U.S. Department of Justice, the Federal Election Commission, and Congress contemplate what to do about a host of allegations about foreign-funded political messages in 2016, one court has ruled that Christopher Steele, a British citizen, and his controversial “Steele Dossier” are protected by the First Amendment.

Several Russian-Israeli businessmen are suing Christopher Steele and his United Kingdom-based company Orbis Business Intelligence Ltd. in the Superior Court of the District of Columbia. The businessmen allege that Steele and Orbis defamed them by disseminating false statements about them in the Steele Dossier. Steele allegedly distributed the dossier to reporters in the United States in an effort to inform U.S. citizens about Donald Trump and Russian influence in the months leading up to the 2016 election.

Steele filed a special motion to dismiss the complaint under the District of Columbia’s Anti-SLAPP Act (“strategic lawsuits against public participation”). That statute affords special protections against lawsuits “arising from an act in furtherance of the right of advocacy on issues of public interest.” D.C. Code § 16-5502. The Anti-SLAPP Act protects the exercise of First Amendment rights against harassing or punitive litigation that has little merit.

Steele’s entitlement to the protection of the D.C. anti-SLAPP statute and First Amendment was challenged because he is a non-resident foreign citizen. But the D.C. Superior Court ruled that the dossier itself is entitled to First Amendment protection regardless of Steele’s

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foreign citizenship. “[A]dvocacy on issues of public interest has the capacity to inform public debate, and thereby furthers the purposes of the First Amendment, regardless of the citizenship or residency of the speaker,” the court ruled. “It is now well established that the Constitution protects the right to receive information and ideas.... As a result, the interest of U.S. citizens in receiving information that the First Amendment protects does not depend on whether the speaker is a U.S. citizen or resident.”

The court did not stop there. It went on to rule that Steele, a non-resident alien, also is entitled to First Amendment protection because he has “ample connections with the United States that are clearly substantial enough to merit First Amendment protection.”

Finally, the court ruled that Steele’s dissemination of information about the foreign businessmen is entitled to the First Amendment protection afforded by *New York Times v. Sullivan* because, the court ruled, the businessmen are public figures. Because they are public figures, Steele is protected by the heightened “actual malice” standard of the First Amendment.

Ironically, Congress, in the Federal Election Campaign Act (FECA) and the Foreign Agents Registration Act (FARA), has afforded political speech by foreign nationals less protection than the D.C. Superior Court’s ruling. The FECA prohibits foreign nationals from making expenditures to advocate the election or defeat of candidates. The foreign national prohibition has been ruled constitutional by a three-judge U.S. District Court in an opinion written by Judge Brett Kavanaugh and summarily affirmed by the Supreme Court. *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011). However, that opinion limited the prohibition to speech expressly advocating the election or defeat of candidates and reserved the right of foreign nationals to engage in issue speech. When foreign nationals or their agents disseminate issue speech in the United States to influence American public opinion, the FARA requires them to register with the Department of Justice and post disclaimers on all materials they distribute.

The Steele Dossier may have implicated both federal statutes, because it discussed a presidential candidate, was distributed for the purpose of influencing the election, and it also discussed policy issues. How Special Counsel Mueller and other government agencies and Congress will reconcile legal treatment of Russian-sponsored ads on Facebook and the Steele Dossier remains to be seen. One possible distinction is that Steele may have been working for the Democratic National Committee and Clinton Campaign when he disseminated the dossier, arguably rendering him an agent of Americans and the Steele Dossier speech by Americans, rather than speech by a foreign national.

The case is *German Khan, et al. v. Orbis Business Intelligence Limited and Christopher Steele*, Case No. 2018 CA 002667 B (Superior Court of the District of Columbia). The ruling granting Steele’s special motion to dismiss under the Anti-SLAPP Act was issued by Judge Anthony C. Epstein on August 20, 2018. Lawyers for the foreign businessmen have stated in press reports that they plan to appeal the ruling.