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The Embattled Future of the Do-Not-Call Implementation Act

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NEWS

The Embattled Future of the Do-Not-Call Implementation Act

By Jacquelyn Trussell*

I. Introduction

Factions have been forming and taking sides in the latest dispute that, surprisingly, has nothing to do with nuclear arms, terrorism, or even the militaristic actions of another nation. This recent dispute is about the future of the federal do-not-call registry—the Federal Trade Commission's ("FTC") answer to the number one consumer complaint in the United States, telemarketing.[1]

The future of the do-not-call registry has been the focus of several legal battles that have put a consumer's privacy rights in conflict with the First Amendment's protection of free speech.[2] Intended to go into effect on October 1, 2003, the implementation of the do-not-call registry was stymied by the judiciary,[3] until a recent decision by the Tenth Circuit Court of Appeals gave the registry a temporary reprieve.[4]

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[1] 149 CONG. REC. S11903-03 (daily ed. Sept. 24, 2003), *available at* 2003 WL 22208232.

[2] *Burns Ready to Prepare Bill on Telecom Service Access*, Congress Daily/A.M., Sept. 30, 2003, *available at* 2003 WL 60130490.

[3] 149 CONG. REC. S11903-03; *see* United States Security v. FTC, No. CIV-03-122-W, 2003 WL 22203719 (W.D. Okla. Sept. 23, 2003); Mainstream Mktg. Servs., Inc. v. FTC, No. Civ. A. 03 N 0184, 2003 WL 22213517 (D. Colo. Sept. 25, 2003).

[4] Caroline E. Mayer, *FTC Set to Process Protests of Sales Calls; Agency to Accept Consumer Complaints Beginning Saturday*, WASH. POST, Oct. 9, 2003, at E1, *available at* 2003 WL 62221569.

The do-not-call registry has struck a chord with the public, which has motivated the FTC, the Federal Communications Commission ("FCC"), and Congress to relentlessly pursue the validation of the registry. However, two federal courts have recognized serious deficiencies in the do-not-call registry that cannot be ignored simply because the public embraces the registry.

II. The Federal Court Decisions

A. United States Security v. Federal Trade Commission

The future of the do-not-call registry was first put in jeopardy when the United States District Court for the Middle District of Oklahoma found that the FTC lacked authority to promulgate a registry on September 23, 2003, only eight days before the do-not-call registry was to go into effect.[5] The FTC based its authority to create the registry on the Telemarketing Consumer Fraud and Abuse Prevention Act ("TCFAPA"), which directed the FTC to "prescribe rules prohibiting deceptive . . . and other abusive telemarketing acts or practices."[6] However, as the Oklahoma court pointed out and the FTC conceded, the TCFAPA is silent as to the FTC's authority to promulgate a do-not-call registry.[7] Because the FTC is an administrative agency, its power to regulate must be based on a valid grant of authority from Congress.[8] The court found that the TCFAPA's silence demonstrated the FTC's lack of valid authority to implement a do-not-call registry.[9] Consequently, Judge Lee West ruled that the do-not-call registry was invalid.[10]

Congress almost uniformly denounced Judge West and his decision as myopic and erroneous and immediately sought to overrule the decision.[11] Less than 24 hours after Judge West's

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[5] *United States Security*, 2003 WL 22203719, at *9.

[6] Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102(a)(1) (2003).

[7] *United States Security*, 2003 WL 22203719, at *5.

[8] *Id.* at *7.

[9] *Id.*

[10] *Id.*

[11] Representative Tauzin stated that Judge West was "dead wrong" and was the only one who "seems to want to stand in the way of" the Registry, and would undoubtedly be "overturned." 149 Cong. Rec. H8916-02 (daily ed. Sept. 25, 2003),

decision, Congress responded by introducing a bill that unequivocally authorized the FTC to implement and enforce a national do-not-call registry.[12] The House voted 412-8 and the Senate 95-0 for the bill on September 25, 2003.[13] Four days later, on September 29, 2003, President George W. Bush was pleased to sign the bill noting that "American people should be free to restrict. . . [their] calls."[14]

It is rare that Congress moves so quickly in a bipartisan manner in both the House and the Senate,[15] but the timely implementation of the do-not-call registry depended on the quick actions of Congress. Its unprecedented speed reflects the registry's popularity with consumers.[16] However, this year is also an election year, and Congress wants to keep the voters happy.[17] Regardless of the reasons, Congress trumped Judge West's decision and made his ruling moot.[18] Notwithstanding the quick actions of Congress, the future of the do-not-call registry was not solidified by the legislation and in fact took another blow.

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available at 2003 WL 22217227. Representative Dingell said the decision was "erroneous" and would be "overruled" by Congress. *Id.* Representative Schakowsky and Frelinghuysen both believed that the decision was "incorrect." *Id.* Representative Frelinghuysen further stated that it "was the most incorrect and outrageous ruling [he had] seen in a long time." *Id.* Representative Markey said it was "a terrible Oklahoma court decision." *Id.* Representative Kirk found that "[n]ever in history has so much been screwed up by such a small number of people: one judge." *Id.* Senator McCain stated that "[c]learly the court's decision was misguided." *See More Call Waiting; Congress approves Do Not Call legislation, but 2nd judge blocks list*, CHI. TRIB., Sept. 26, 2003, at C3, *available at* 2003 WL 64664058.

[12] *See More Call Waiting*, *supra* note 11; *see* 15 U.S.C. § 6102(a)(3)(A) (2003).

[13] *George W. Bush Delivers Remarks at Signing of Do Not Call Registry Bill*, FDCH, Sept. 29, 2003, *available at* 2003 WL 22229332.

[14] *Id.*

[15] 149 Cong. Rec. H8916-02 (daily ed. Sept. 25, 2003) (statement of Rep. Stupak), *available at* 2003 WL 22217227.

[16] *See More Call Waiting*, *supra* note 11.

[17] *Id.*

[18] Cindy Brovsky, *Federal Do-not-call List Cleared*, THE CAP. TIMES & WISC. ST. J., Oct. 8, 2003, at 8B, *available at* 2003 WL 59183625.

B. Mainstream Marketing Services v. Federal Trade Commission

Only hours after the new legislation was passed, a second decision by the United States District Court of the District of Colorado invalidated the do-not-call registry.[19] The district court ruled that the do-not-call registry violated the First Amendment[20] because the registry exempts charitable and political fund-raising telemarketers.[21] The exemption distinguishes between commercial and noncommercial speech, which arbitrarily prevents consumers from choosing for themselves whether or not to ban charitable or political fund-raising telemarketers.[22] According to Judge Edward Nottingham's opinion, "the FTC has chosen to entangle itself too much in the consumer's decision by manipulating consumer choice and favoring speech by charitable over commercial speech."[23]

If this content-based discrimination had resulted in the material advancement of the FTC's interests in implementing the registry, it would have been valid despite the discrimination.[24] An "interest in privacy does not justify the distinction between commercial and noncommercial speech,"[25] because, as the FTC itself has recognized, unwanted telemarketing calls seeking charitable contributions are just as invasive and detrimental to privacy interests as commercial telemarketing phone calls.[26] Similarly, because the FTC presented no evidence that commercial telemarketers have a greater tendency to commit fraud than charitable telemarketers, the FTC did not show how preventing fraud[27] was at all related to its

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[19] *See* Mainstream Mktg. Serv., Inc. v. FTC, No. Civ. A. 03 N 0184, 2003 WL 22213517 (D. Colo. Sept. 25, 2003).

[20] *Id.* at *14.

[21] See 16 C.F.R. §§ 310.2(f), 310.6(a) (2003).

[22] *Mainstream Mktg.*, 2003 WL 22213517, at *10.

[23] *Id.* at *14.

[24] *Contra* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 190 (1999) (Court found content-based discrimination that did not materially advance legitimate interests was invalid).

[25] *Mainstream Mktg.*, 2003 WL 22213517, at *13.

[26] FTC Telemarketing Sales Rule, 16 C.F.R. § 310 (2003).

[27] Content-based discrimination may be proper when it prevents commercial harms like fraud. *See* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

distinction between commercial and noncommercial telemarketing.[28] Furthermore, the FTC could not justify the distinction because of the heightened First Amendment protections for charitable speech.[29] The court ruled that simply because the distinction was made on constitutional grounds does not mean it advanced the interests of the FTC.[30] Moreover, the court noted, the FTC attaches too much importance to the distinction between commercial and non-commercial speech, thereby undervaluing the importance of commercial speech.[31]

The Colorado court's decision presents a problem for Congress, because Congress cannot pass legislation that will overrule the court's decision like it did with the decision in *United States Security*.[32] "Congress cannot trump the Constitution . . . [i]f rules and laws are unconstitutional, they cannot be enforced."[33] Thus, the decision in *Mainstream Marketing* can only be overturned by a higher court.[34]

As a result, the FTC is appealing the Colorado decision to the Tenth Circuit. But, the appeals process could take up to two years.[35] Therefore, the FTC, while appealing the decision, moved to stay the effect of the decision in order to implement the do-not-call registry. The district court did not budge, however, and denied the motion as it found that the FTC was unable to present sufficient evidence that its appeal to the Tenth Circuit would be successful.[36]

Nevertheless, the relentlessness of the FTC has resulted in a victory, albeit a temporary one, for the future implementation of the

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[28] *Mainstream Mktg.*, 2003 WL 22213517, at *14.

[29] *See* FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580-01, at 4586 (Jan. 29, 2003).

[30] *Mainstream Mktg.*, 2003 WL 22213517, at *14.

[31] *Id.*

[32] *Do Not Call Registry is Blocked by Ruling*, N.Y. TIMES, Sept. 25, 2003, at C1.

[33] Sheryl Gay Stolberg & Matt Richtel, *Do-not-call Listing Remains Up in Air After Day of Twists*, N.Y. TIMES, Sept. 25, 2003, at A1.

[34] *Id.*

[35] William Glanz, *FTC seeks Plan B on junk calls; Aims to skirt rulings on telemarketers*, WASH. TIMES, Sept. 27, 2003, at A01, *available at* 2003 WL 7719921.

[36] Mainstream Mktg. Serv., Inc. v. FTC, No. Civ. A. 03-N-184, 2003 WL 22232209, at *10 (D. Colo. Sept. 29, 2003).

do-not-call registry. After the Colorado court denied its motion, the FTC requested that the Tenth Circuit issue an emergency stay.[37] In granting this motion,[38] the Tenth Circuit found that "the public does have strong privacy and expectation interests that weigh in favor of granting this stay."[39] More importantly, the court concluded that Judge Nottingham's decision finding the do-not-call registry unconstitutional was too broad.[40] The court found that "[t]here is a substantial likelihood that the FTC will be able to show. . .that the list directly advances the government's substantial interests and is narrowly tailored," and is therefore, constitutional.[41]

Although the Tenth Circuit's decision allows the FTC to begin enforcing the do-not-call registry, however, the registry's future is still unclear. The Tenth Circuit has not yet addressed the constitutionality issues that are the real danger to the future of the do-not-call registry. The court heard oral arguments on the constitutionality of the registry on November 10, 2003.[42] The court has yet to issue a ruling.

III. The Do-Not-Call List v. The First Amendment

The constitutional questions regarding the do-not-call registry are quite serious and potentially fatal to its implementation. Despite the huge popularity of the registry, "the right to have dinner without being interrupted is not in the Constitution."[43] The Supreme Court has traditionally respected a consumer's right to bar solicitors from his property, embracing the concept that "a man's home is his

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[37] Marilyn Geewax, *FCC Details No-call Plans Cooperation is Key Element*, ATL. J. CONST., Oct. 2, 2003, at E1, *available at* 2003 WL 64042858.

[38] Caroline E. Mayer, *FTC Set to Process Protests of Sales Calls; Agency to Accept Consumer Complaints Beginning Saturday*, THE WASH. POST, Oct. 9, 2003, at E1, *available at* 2003 WL 62221569.

[39] Caroline E. Mayer, *FTC Unveils Plan for Do-not-call Complaints*, NEWSBYTES NEWS NETWORK, Oct. 8, 2003, *available at* 2003 WL 61569691.

[40] *Id.*

[41] Mayer, *supra* note 4.

[42] *Id.*

[43] Jay Evensen, *Do-not-call on the Law to Cut Off Solicitors*, DESERET MORNING NEWS, Oct. 5, 2003, at AA01, *available at* 2003 WL 64083754 (statement of Sen. Bishop, who voted no when Congress put through the recent legislation giving the FTC the authority to implement the Do-not-call registry).

castle."[44] Nevertheless, the First Amendment protects commercial speech because such speech furthers consumer interests by granting them access to the fullest possible dissemination of information, and telemarketing solicitation is commercial speech.[45] Furthermore, content-based discrimination, even that which is minor, violates the First Amendment if it does not materially advance a governmental interest.[46] Judge Nottingham's opinion showed that the reasons the FTC cited for implementing the do-not-call registry are defeated by the content-based discrimination of the registry.[47]

One potential solution to the constitutional difficulties faced by the do-not-call registry is to eliminate the exemptions for charitable or political fund-raising organizations and create a method whereby consumers would be given a choice to ban all telemarketing calls or only commercial calls. The elimination of this exemption would avoid any content-based discrimination by making it a function of individual choice, which the Supreme Court has permitted in the past.[48]

However, this solution is unlikely to be enacted for a number of reasons. First and foremost, banning political fund-raising calls would significantly hamper the solicitation of votes[49] as well as political party funding.[50] Moreover, "a quarter of all charitable contributions raised in 2001 came from telephone solicitation, and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers," a fact which also has a significant effect on the interests of Congress in eliminating the exemption.[51] The FTC also expressed concerns about cost and the complicated nature of

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[44] Rowan v. United States Post Office Dept., 397 U.S. 728, 737 (1970).

[45] Mainstream Mktg. Servs., Inc. v. FTC, No. Civ. A. 03 N 0184, 2003 WL 22213517, at *7 (D. Colo. Sept. 25, 2003).

[46] Rappa v. New Castle County, 18 F.3d 1043, 1068 (3d Cir. 1994).

[47] *See Mainstream Mktg.*, 2003 WL 22213517, at *13-14.

[48] *See Rowan*, 397 U.S. at 738 (Court upheld a statute that permitted an addressee to refuse mail from any sender by notifying the post office, which then required the sender to remove the addressee's name and address from its mailing list under penalty of law).

[49] *The Do-not-call Dilemma*, THE WALL ST. J., Sept. 29, 2003, at A18, *available at* 2003 WL-WSJ 3980983.

[50] *American telemarketing The chairman of the FCC gets a chance to redeem himself*, ECONOMIST, Oct. 4, 2003, *available at* 2003 WL 58584315.

[51] FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4364.

such a solution as a reason to not employ a bifurcated approach.[52] Further, the FTC might face legal difficulty in removing the exemption because a complete ban of all telemarketing calls would likely violate the heightened First Amendment rights of politicians and charities, a fact which the FTC has recognized from the start.[53]

IV. Moving Forward

At this point, the FTC is just rejoicing over its ability to enforce the Do-not-call registry, even if it might be temporary. Starting at 8 a.m., on October 9, 2003, consumers were once again able to join the registry, and on October 10, 2003, at 6 p.m., the FTC officially began enforcing it.[54] The FCC will work with the FTC in implementing the do-not-call registry, although the FCC won't have immediate access to the registry.[55] In fact, prior to the Tenth Circuit's ruling that allowed the FTC to enforce the registry, FCC Chairman Michael Powell had ordered the telemarketing industry to honor the do-not-call list, essentially taking over the implementation of the Registry while the FTC was enjoined from doing so.[56] Chairman Powell's directive was validated when both the Tenth Circuit and Supreme Court Justice Stephen Breyer denied requests by the telemarketing industry to block his directive.[57]

Many telemarketers have aided the fledging efforts of the FCC and the FTC by voluntarily complying with the registry even when it wasn't clear that they had to. In response to a request by the Direct Marketing Association ("DMA") President H. Robert Wientzen,[58] who represents 70 percent of the telemarketing

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[52] Charles Lane, *Do-not-call Case Spotlights Vagueness of Commercial Speech Law*, WASH. POST, Sept. 27, 2003, at E1, *available at* 2003 WL 62218444.

[53] *See Do-not-call Dilemma, supra* note 49; *see also* Michael Bazeley, *Speech, Privacy Rights at Odds; Do-not-call List, Spam Law at Issue*, SAN JOSE MERCURY NEWS, Sept. 27, 2003, at 1, *available at* 2003 WL 63264736.

[54] Mayer, *supra* note 4.

[55] FTC, FCC Energized By 'Do Not Call' List Appellate Ruling, Congress Daily/A.M., Oct. 8, 2003, *available at* 2003 WL 58357845.

[56] Ryan J. Foley, *FCC to Enforce Do-not-call List*, WALL ST. J., Sept. 30, 2003, at A14, *available at* 2003 WL-WSJ 3981069.

[57] *Id.*

[58] Glanz, *supra* note 35.

industry,[59] nearly 200 of the largest telemarketing corporations agreed to abide by the list.[60] The industry recognizes the fact that, because consumers must come first, it must be willing to listen to consumers.[61]

Despite the legal battle surrounding the validity of the do-not-call registry, the enforcement of the registry has begun. Most consumers have received fewer telephone calls from telemarketers since its implementation.[62] The number of households not receiving any telemarketing calls has risen from 13 percent to 43 percent since October 1, 2003.[63] In fact, in the first 8 hours of implementation, consumers submitted 250 complaints to the FCC.[64] Notwithstanding the receipt, FCC Chairman Powell has acknowledged that consumers simply don't understand what is going on with the do-not-call registry.[65] Most are unaware that, because telemarketing companies legally do not have to update their lists more than once every three months, people who signed up for the registry after September 1, 2003, will have to wait three more months before the calls stop.[66]

Complicating the informational deficit is the public's confusion over the ramifications of the federal court decisions in Oklahoma and Colorado.[67] Thirty-seven states have their own do-not-call lists, which will be affected by the decision that the Tenth Circuit will render. If the FTC is not successful in appealing the decision in *Mainstream Marketing*, it is likely that the telemarketing industry will bring similar lawsuits against state do-not-call registries, and the

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[59] David Ho, *Bush puts do-not-call list in FTC's hands; Signing ignores court disputes; FCC may step in*, DETROIT FREE PRESS, Sept. 30, 2003.

[60] *Id.*

[61] Tamara Lytle, *Do-not-call Flap Has Wider Repercussions The Supreme Court Has Increased Protections for Commercial Speech in Recent Years*, ORLANDO SENTINEL, Sept. 27, 2003, at C1, *available at* 2003 WL 64969394.

[62] Ryan J. Foley, *Regulators Begin Enforcing Do-not-call List*, WALL ST. J., Oct. 2, 2003, at D2, *available at* 2003 WL-WSJ 3981406.

[63] Mayer, *FTC Unveils Plan for Do-not-call Complaints*, NEWSBYTES NEWS NETWORK, Oct. 8, 2003, *available at* 2003 WL 61569691.

[64] Caroline E. Mayer, *FCC Begins to Receive Complaints About Calls*, WASH. POST, Oct. 2, 2003, at E1, *available at* 2003 WL 62219831.

[65] Mayer, *supra* note 63.

[66] Mayer, *supra* note 4.

[67] 149 CONG. REC. S12101-03 (daily ed. Sept. 26, 2003), *available at* 2003 WL 22222797.

outcome of those suits will likely mirror that of the federal do-not-call registry.[68] Recognizing this possibility, forty-five states, as well as Puerto Rico and the District of Columbia, have filed briefs with the Tenth Circuit in support of the FTC.[69]

For the six million people who are employed by the telemarketing industry, the future of the do-not-call registry is particularly important. It is expected that the implementation of the do-not-call registry will result in a loss of $50 billion in sales[70] and 1 to 2 million jobs.[71] This is a grim portent in a bad economy. Those who suffer will be those least able to deal with the losses, as about 30 percent of those employed by the telemarketing industry are welfare-to-work participants.[72] Telemarketing also employs a significant number of minority, disabled and elderly workers, who will all suffer as a result of the implementation of the registry, temporary or not.[73]

Although there are many obstacles facing its implementation, the do-not-call registry has strong allies. Both Congress and the 51 million consumers who have joined the registry[74] strongly support its implementation despite the economic damage that will result to the telemarketing industry and to those whom it employs.[75] However, the judiciary and the telemarketing industry who are the apparent enemies of the do-not-call registry have in their favor, the United States Constitution, which is a strong base of power. Nevertheless, there are cracks in this alliance. The Tenth Circuit has denied telemarketers' requests to stay the FCC's implementation of the do-not-call registry and has allowed the FTC to enforce the registry while it appeals Judge Nottingham's decision. This is integral

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[68] *See* Alan Goldstein, *Do-not-call List Supporters Rally Around Registry*, DALLAS MORNING NEWS, Sept. 27, 2003, *available at* 2003 WL 56752272.

[69] Caroline E. Mayer, *FCC Promises to Try to Enforce Phone List*, NEWSBYTES NEWS NETWORK, Oct. 1, 2003, *available at* 2003 WL 61569575.

[70] MSNBC NEWS, *Do Not Call Registry not dead yet*, Sept. 24, 2003, *at* http://www.msnbc.com/news/971221.asp?cp1=1 (last visited Oct. 18, 2003).

[71] Lisa Bertagnoli, *No Calls, No Work; Court Challenges Aside; the Do-not-call Registry Will Likely Mean the Loss of Jobs*, CHI. TRIB., Oct. 5, 2003, at C5, *available at* 2003 WL 64667525.

[72] Jeffrey Milberg, *Do-not-call Will Cause Millions to Lose Job*, PATRIOT-NEWS, Oct. 8, 2003, at A12, *available at* 2003 WL 3220507.

[73] *Id.*

[74] Mark Wigfield, *Telemarketers Won't Hand Over No-Call List: Prosecution Fears*, NAT'L POST, Oct. 4, 2003, at FP07, *available at* 2003 WL 55646080.

[75] *See* Bertagnoli, *supra* note 71.

because it is the Tenth Circuit that will rule on the FTC's appeal. Moreover, the fact that eleven of the top executives of the DMA are on the federal do-not-call registry creates doubt as to the degree of the telemarketing industry's interest in invalidating the registry.[76]

V. Conclusion

If public opinion were to determine the outcome of the appeal, the do-not-call registry would be found constitutional. The question then is whether or not the Tenth Circuit will be swayed by this opinion. With not only the future of the federal do-not-call registry at risk, but also the future of the state do-not-call registries, the FTC will be zealous in its pursuit of its Tenth Circuit appeal, which will likely reach the Supreme Court. Unless the Constitution triumphs again, it is unlikely that the telemarketing industry can successfully oppose this seemingly insurmountable force. But, in the end, anything could happen in this battle, as evidenced by the amazing turn of events that have already transpired in the very short existence of the do-not-call registry.

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[76] Jack Dolan, *Marketers: Don't Call Us; We'll Call You; Home Phone Numbers of 11 Top Executives at Telemarketing Group Appear on No-Call List*, CHI. TRIB., Oct. 1, 2003, at C1, *available at* 2003 WL 64665957.

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