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National Do-Not-Call Registry to Stay: Opt-in Feature May Be Its Saving Grace

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refused to allow most print journalists into the meetings, and granted only select television interviews. Finally, critics charge that the speaking tour violates the restriction placed on government officials to participate in political activities.¹⁸

Ashcroft's speaking tour, however, seems to have had little effect on the opposition efforts against the Patriot Act. During the speaking tour, resolutions opposing the Act were passed in fifteen cities and communities and a statewide resolution passed in Oregon's state Senate.¹⁹ These city and statewide resolutions represent a population of approximately of 2.7 million Americans. These efforts, along with Chicago's own resolution, indicate the desire, at least among public officials, to reexamine the Patriot Act in an open format. In the words of Chicago Alderman Manuel Flores: "If the Patriot Act has merit, why not argue the merits to the open public?"²⁰

1. The USA Patriot Act of 2001, Pub. L. No. 107-56.

2. Bill of Rights Defense Committee, Local Efforts, <http://www.bordc.org/OtherLocalEfforts.htm> (last updated Oct. 16, 2003).

3. Chicago City Council Resolution Opposing the USA Patriot Act and Related Executive Orders, Chicagoland Coalition for Civil Liberties and Rights, at <http://www.chicagorights.org/resources/handouts/resolution.pdf> (Oct. 1, 2003).

4. Patrick J. Fitzgerald, *Eye on America's Safety*, Chicago Tribune, Sep. 30, 2003, at 19.

5. *Id.*

6. Chicago City Council Resolution Opposing the USA Patriot Act and Related Executive Orders, Chicagoland Coalition for Civil Liberties and Rights, at <http://www.chicagorights.org/resources/handouts/resolution.pdf> (Oct. 1, 2003).

7. Interview with Brian Doherty, Alderman, 41st Ward, City of Chicago (Oct. 3, 2003).

8. Patrick J. Fitzgerald, *Eye on America's Safety*, Chicago Tribune, Sep. 30, 2003, at 19.

9. Interview with Manuel Flores, Alderman, 1st Ward, City of Chicago (Oct. 3, 2003).

10. Peter Brownfeld, "Patriot Act Opponents Say Law Endangers Rights," FOXNews.com, Sep. 11, 2003, <http://www.foxnews.com/story/0,2933,97003,00.html>.

11. Bob Barr, "Whistle Stopping with the Attorney General," Creative Loafing, available at <http://atlanta.creative loafing.com/2003-08-28/news/flankingaction.html> (Aug. 28, 2003).

12. John Ashcroft, "Attorney General Ashcroft Speaks About the Patriot Act," Speech in Boise, ID, (Aug. 25, 2003), transcript available at http://www.lifeandliberty.gov/subs/speeches/patriotactroadspeech_boise_082503.htm.

13. Fox News/Opinion Dynamic Poll (Jul. 31, 2003), available at http://www.lifeandliberty.gov/subs/s_people.htm.

14. USA Today/CNN/Gallup Poll (Aug. 29, 2003), available at http://www.lifeandliberty.gov/subs/s_people.htm.

15. *Id.*

16. Sarah Ferguson, "Bashcroft!" Village Voice, Sep. 10, 2003, available at <http://www.villagevoice.com/issues/0338/ferguson.php>.

17. Eric Lichtblau, "Ashcroft's Tour Rallies Supporters and Detractors," New York Times, Sep. 8, 2003, A14.

18. Eric Lichtblau, "Ashcroft Criticized for Talks on Terror," New York Times, Aug. 22, 2003, A17.

19. Bill of Rights Defense Committee, On the Road, <http://www.bordc.org/Ontheroad.htm> (last updated Oct. 16, 2003).

20. Interview with Manuel Flores, Alderman, 1st Ward, City of Chicago (Oct. 3, 2003).

National Do-Not-Call Registry to Stay: Opt-in Feature May Be Its Saving Grace

Amanda Strainis-Walker

The national Do-Not-Call Registry got off to a tenuous start. In the week before the widely anticipated Registry was to take effect, a round of judicial decisions impeded the implementation of the most popular consumer-protection initiative in some time. Despite the legal hurdles, the Registry is currently in effect, and its permanence is looking hopeful. "The FTC is very pleased with the 10th Circuit's decision, which effectively allows the Registry to operate as it was intended until a final decision is handed down in the case," says Asheesh Agarwal, Assistant Director of the Office of Policy Planning, Federal Trade Commission. "We look forward to the court's final decision on the constitutionality of the Registry."

The U.S. Court of Appeals for the 10th Circuit's decision is the most recent opinion in telemarketers' legal attempt to thwart the implementation of the Registry.¹ Their attempts were initially met with success in several district courts the week before the Registry was to take effect, with rulings finding that the FTC exceeded its delegated authority with the promulgation of the Registry and the unconstitutionality of the restrictions on commercial speech.² Congress passed a bill that explicitly stated that the FTC had the authority to promulgate the Registry, thus remedying the

first issue. The second issue of constitutionality, however, was not so easily remedied, and depended on the 10th Circuit's interpretation of legal precedent, which initially appeared to favor the FTC.

The Registry was established to offer consumers relief from telemarketers, notorious for phoning households when the calls are least welcome, including dinner time and late evening. The Registry follows in a line of government actions seeking to limit commercial solicitor calls to residences, and developed into its current form in 2003, through a joint effort of the Federal Trade Commission and the Federal Communications Commission. The rules establishing the Registry prohibit telemarketers from calling consumers who have placed their names in the government-maintained database, and impose fines up to \$11,000 for each registered phone number telemarketers dial.

The 10th Circuit's decision overturned the district court denial to stay its order enjoining the FTC from enforcing the telemarketing sales rules.³ The telemarketers were able to persuade the district judge that the Registry was unconstitutional because it infringed upon their First Amendment protections, resulting in an order enjoining the FTC from enforcing the rules. The district court

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focused on the differences between commercial speech and noncommercial speech as it determined whether the rules directly advanced the government's asserted purpose of maintaining privacy in the home, and found no persuasive evidence to support the difference between the two types of calls, thereby rendering the Registry unconstitutional.

The district court's decision followed the Supreme Court's vigorous application of First Amendment protections to commercial speech.⁴ The Court has repeatedly struck down legislation regulating commercial speech because the means used by the enacting body did not directly advance the asserted government interest in restricting such speech. The Court's recent opinions on commercial speech, however, have not dealt with telemarketers or privacy issues, as are included in the issue at hand. Even though the Court has not specifically ruled on First Amendment issues related to telemarketers, the Court has established a four-part test to balance the nature of the expression and the interest asserted by the government in regulating it that applies to all restrictions on commercial speech.⁵

Applying the same test as the district court, the 10th Circuit found that the FTC was entitled to a stay since it was likely to establish that the Registry was constitutional. The court found the evidence asserted by the FTC distinguishing the difference between commercial and non-commercial speech persuasive. The FTC asserted evidence from congressional testimony indicating that consumers found commercial telemarketing a bigger problem than non-commercial calls. Additionally, the FTC complaint includes statistics that show how the inherent nature of the two types of telemarketing calls differ in their impact on consumers.

In finding that Registry directly advances a government interest and is narrowly tailored to that end, the 10th Circuit gave special cre-

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dence to the opt-in feature. The court found that the opt-in feature of the Registry, which requires individuals to sign-up and confirm their telephone number, assisted in establishing a "reasonable fit" between the rules and the government interest in restricting commercial telemarketers. The opt-in feature, and similar mechanisms of private choice in solicitation restrictions, weighed in favor of finding a "reasonable fit." In the Supreme Court's recent vigorous application of First Amendment protections to commercial speech, none of the cases had an opt-in feature, which could go a long way in establishing the constitutionality of the Registry.

CITE NOTES

1. See *FTC v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10th Cir. 2003).
2. See *U.S. Security v. FTC*, 2003 WL 22203719 (W.D.Okla.); *Mainstream Marketing Services, Inc. v. FTC*, 2003 WL 22213517 (D.Colo.).
3. See *Mainstream Marketing Services, Inc. v. FTC*, 2003 WL 22232209 (D.Colo.).
4. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *City of Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410 (1993).
5. See *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).