Richmond Journal of Law and Technology

Volume 10 | Issue 4 Article 17

2004

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Recommended Citation

Rodney Smolla, *"Do-Not-Call-List" Testimony: Before the Senate Committee on Commerce, Science, and Transportation*, 10 Rich. J.L. & Tech 43 (2004).
Available at: http://scholarship.richmond.edu/jolt/vol10/iss4/17

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"Do-Not-Call List" Testimony

Before the Senate Committee on Commerce, Science, and Transportation*

Testimony by: Rodney Smolla**

September 30, 2003

I wish to thank the Committee for this opportunity to present testimony on the issues implicated by recent judicial rulings concerning the national telemarketing "Do Not Call" registry, developed by both the Federal Trade Commission and Federal Communications Commission.

The purpose of this testimony is to (1) briefly summarize the legislative and administrative history of the registry; (2) review the current legal status of the registry in light of recent litigation developments; (3) explain the First Amendment doctrines that place the constitutionality of the registry in doubt, (4) offer a prediction as to the likelihood that the registry will survive constitutional challenge in its current form; and (5) offer suggestions as to legislative "fixes" that could substantially improve the probability that the registry will survive judicial review.

II. Legislative and Administrative History of "Do Not Call"

Congress in 1991 passed the Telephone Consumer Protection Act ("TCPA").[1] The law was enacted "to protect residential telephone subscribers' privacy rights to avoid telephone solicitations to which they object."[2] The Federal Communications Commission was directed to promulgate regulations that restricted the use of automatic telephone dialing systems.[3]

In 1992, the FCC adopted rules pursuant to the TCPA, but declined to create a national "do not call" list. The FCC instead required telemarketers to adopt company specific do not call lists. Under this system a consumer who did not wish to receive telephone solicitations from a particular company could request that the telemarketer remove that consumer's telephone number from the telemarketer's list.

By 2002, however, the FCC appeared to realize that its company- specific approach had failed to provide adequate privacy protection to consumers, and the Commission issued a Notice of Proposed Rulemaking requesting comment on whether the Commission should revisit its decision regarding the establishment of a national do not call list.

Three years after the enactment of the TCPA, Congress in 1994 enacted a second important piece of legislation, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAP").[4] The law instructed the Commission to promulgate rules prohibiting deceptive and other abusive telemarketing acts or practices and to include in such rules a definition of deceptive telemarketing acts or practices.[5] The TCFAP, enforced by the FTC, did not apply to activities that were outside of the jurisdiction of the FTC, such as certain financial institutions, common carriers, air carriers and nonprofit organizations, or insurance companies. In 1995 the FTC

adopted rules implementing this legislation, rules that did not contain any national do-not-call registry.

In January 2002, the FTC issued a Notice of Proposed Rulemaking that recommended the creation of a national do not call registry, to be maintained by the FTC, as well as rules that addressed the problem of "abandoned calls" resulting from the use of predictive dialers by telemarketers. In January 2003, the FTC promulgated final rules establishing a nationwide do not call registry and specified requirements for the use of "predictive dialers." The FTC found that the previous company specific do not call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls. The FTC found that telemarketers interfered with consumers' attempts to be placed on company specific lists by hanging up on them or ignoring their request. The FTC noted that the prior practice placed too much burden on consumers who had to repeat their do not call request with every telemarketer who called, that the company specific list continually exposed consumers to unwanted initial calls which had significantly increased in numbers since adoption of the original FTC rules, and that consumers had no method to verify that their name had been removed from the company's list. In a move that has proven enormously significant in subsequent litigation, the FTC exempted charitable organizations from the do not call requirements. The FTC made this exception partly in deference to the heightened First Amendment protection afforded charitable speech. The FTC also found that abusive telemarketing practices of the sort the registry sought to combat were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. In an important concession, however, the FTC admitted that the interest of protecting privacy did not justify a distinction between commercial and charitable telemarketing calls, on the reasoning that consumer privacy was equally invaded by both types of calls. The FCC followed suit, ultimately adopting rules that paralleled those of the FTC.

Congress strongly endorsed this movement in 2003, enacting the Do Not Call Implementation Act ("Implementation Act").[6] The Implementation Act provided, among other things, that the FTC could promulgate regulations establishing fees sufficient to implement and enforce the provisions of its national do-not-call registry.

The first significant judicial setback to this momentum was a decision on September 23, 2003 by the United States District Court for the Western District of Oklahoma, *U.S. Security v. Federal Trade Commission*.[7] In *U.S. Security* the District Court held that the FTC lacked the statutory authority to create its national registry. Whereas Congress had clearly given the FCC the green light to adopt a national registry in acting the TCPA, the District Court reasoned, no similar explicit authority existed under the TCFAP granting parallel authority to the FTC. In reaching this judgment, the District Court was unmoved by the fact that the Implementation Act appeared to tacitly endorse the FTC's national registry, holding that Congress' appropriation and fee-authorizing legislation was not a "ratification" of the FTC's actions sufficient to constitute statutory authorization for the registry.

A more significant judicial blow to the national registry came two days later when the United States District Court for the District of Colorado held, in *Mainstream Marketing Services,*

Inc., v. Federal Trade Commission,[8] held that the national do-not-call registry violated the First Amendment. The District Court in *Mainstream Marketing* held, however, that the FTC did have statutory authority to promulgate its "abandoned calls" regulations. (The abandon calls regulations were not challenged on First Amendment grounds, but merely on statutory authority grounds.) The Colorado District Court in *Mainstream Marketing* did not specifically address the issue that had been decided by the Oklahoma District Court in *U.S. Security* – the question of whether the FTC had statutory authority to create the do-not-call registry. Generally, however, the reasoning of the Colorado District Court on the statutory authority question was in tension with the reasoning of the Oklahoma District Court, with the Colorado District Court taking a far more generous view of the authority of both the FCC and FTC to enact telemarketing rules in a coordinated inter-agency effort to deal with the privacy issues posed by telemarketing practices.

III. Statutory and Constitutional Issues Posed by Do-Not-Call

A. Statutory Authorization

In the long run the question of statutory authority is relatively trivial. It is plain that this Congress intends to grant to both the FTC and FCC the authority to establish a national registry, and to the extent that the alleged defect found by the Oklahoma District Court in the FTC's statutory authority is at all sound, that defect is easily cured by additional legislation flatly granting such authority to both agencies. It is my view that under the Implementation Act adequate statutory authority already exists, and there is no mistaking congressional intent on this point. The safest legislative course, however, could well be additional legislation that unequivocally authorizes the registry for both agencies.

B. Constitutional Issues

1. The Protection of Privacy

The do-not-call registry poses a conflict between two sacred American values, both of constitutional dimension, the right of privacy and freedom of speech. Privacy may be the most important emerging right of this new century. As technologies make it increasingly difficult for Americans to maintain their privacy, evolution in administrative, statutory, and constitutional law is necessary to keep pace, preserving privacy as an essential element of human dignity. Just as we make adjustments for inflation in cost-of-living indexes, we may need to think of "escalation clauses" in our legal protection for privacy. As the power of to impinge on privacy increases, legal principles must escalate to meet the challenge, preserving the power of the average person to fight back against unwelcome intrusions.[9]

The privacy of the home has always been at the core of English and American conceptions of privacy. The sacredness of the home as a "castle," a fortress of privacy surrounded with moats of constitutional and common law protection, is legendary and centuries old.[10] William Pitt, in a speech before Parliament, declared the home a sanctuary against the force of government, demarking the line at which the brute power of the state must yield to the principle of privacy: "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail;

its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement."[11]

This tradition was the backdrop of the Fourth Amendment, and its guarantee of the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures.[12]

This solicitude for the home, originally conceptualized as a bulwark against the force of the state, has evolved into a broader concept, in which the home is seen as an essential to one's autonomy and privacy, a place of respite from the cruel world. In the words of Judge Jerome Frank: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."[13] Virtually everyone engaged in the debate over the do-not-call registry will concede that powerful privacy interests are stake. Uninvited telephone solicitations are highly intrusive, particularly when they come during family time such as dinner and early evenings in the home.

Indeed, in a decision with many parallels to the do-not-call registry, decided in a simpler time in our history and dealing with old-fashioned land mail, the Supreme Court acknowledged the right of the consumer to reject unwanted mail. In *Rowan v. United States Post Office Department*,[14] the Court upheld a statute that allowed an addressee to refuse mail from any sender by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. Noting that the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials, allowing the addressee complete and unfettered discretion in electing what speech he or she desired to receive, the Court sustained the law. The First Amendment right to speak, the Court reasoned, was only circumscribed by the addressee's affirmative act in giving notice that he or she no longer wished to receive mail from the sender. Most importantly, the Court categorically rejected the argument that a vendor has the right to send unwanted material into the home of another.

2. Protection of Commercial Speech

The vital privacy interests that animate the do-not-call registry must be balanced against the competing First Amendment protection for freedom of speech, a protection that often is dependent upon the ability of the speaker to initiate the message, making a preliminary attempt to engage the listener or reader even though the message may not have been invited.

Commercial telemarketing is a form of "commercial speech." Contemporary commercial speech doctrine is governed by the four- part test first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*:[15]

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[16]

The arc of modern commercial speech jurisprudence is unmistakable: in decision after decision the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations.[17]

3. Content-Based Distinctions and the Charitable Speech Exception

The District Court in *Mainstream Marketing* did not hold that any form of do-not-call registry would be unconstitutional. Indeed the District Court explicitly acknowledged that the protection of privacy was a substantial government interest sufficient to satisfy the second prong of *Central Hudson*, and also acknowledged that the registry directly and materially advanced that interest, satisfying the third prong of the test. Rather, the District Court rested its decision on a non-discrimination principle that cuts across many First Amendment areas, a principle that generally looks with great skepticism at content-based distinctions.[18]

This antipathy toward content-based discrimination applies to commercial speech regulation. In a key precedent, *Cincinnati v. Discovery Network, Inc.*,[19] the Supreme Court struck down an ordinance that engaged in content-based distinctions similar to those in the do-not-call registry. In *Discovery Network* the city of Cincinnati enacted an ordinance prohibiting the distribution of commercial handbills on public property. The ordinance effectively granted distributors of traditional "newspapers," such as the *Cincinnati Post*, *USA Today*, or *The Wall Street Journal*, access to public sidewalks through newsracks, while denying equivalent newsrack access to the distributors of commercial magazines and handbills, such as publications for apartment or house rentals or sales. The ordinance was designed to reduce the visual and spacial clutter of newsracks. The constitutional difficulty, however, was that no principled distinction could be drawn between the clutter caused by a *USA Today* newsrack and one caused by a real estate magazine. Clutter was clutter, and a newsrack was a newsrack, and the content of the speech inside the rack bore no relation to the city's environmental or aesthetic interests. The Supreme Court pointedly rejected the notion that government could simply "pick on" commercial speech, making such speech bear a disproportionate burden, merely because the *Central Hudson* test contemplates somewhat reduced constitutional protection for commercial speech. The harm the government sought to address simply had nothing to do with the commercial or non-commercial character of the speech that was regulated.

The District Court in *Mainstream Marketing* applied similar logic. An unwanted telephone call during dinner is an unwanted telephone call during dinner. An abusive or overbearing or fraudulent call is an abusive or overbearing or fraudulent call. Whether the caller is a commercial vendor, a solicitor for a charity, or a political fundraiser, the essential hit on privacy interests remains the same. Similarly, the District Court could find nothing in the record before it

to support the supposition that commercial telemarketers are as a class are more prone to abuse or fraudulent practices than non-commercial telemarketers. Following the straightforward logic of *Discovery Network*, the District Court thus struck down the do-not-call registry.

The District Court distinguished *Rowan* largely on the ground that in *Rowan* Congress made no distinctions relating to the content of the mail being rejected. The addressee could block mail from any sender – a cleric or a Member of Congress, a butcher, a baker, or a candlestick maker. As the District Court was careful to note: "Were the do not call registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in Rowan, it might be a different matter. As the amended Rules are currently formulated, however, 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. The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the do not call registry distinguishes between the indistinct, it is unconstitutional under the First Amendment."

IV. The Future of Do-Not-Call in its Present Form

The do-not-call registry is enormously popular with the American people and with Members of Congress, and it is firmly grounded in the enormously important and ongoing American battle to preserve human privacy and dignity. It is a concept worth saving.

Nevertheless, the analysis of the District Court in *Mainstream Marketing* is, if one will indulge the pun, within the mainstream. *Mainstream Marketing* is not a radical extension of existing law, not a "stretch" in which existing doctrines are applied in some exotic or implausible manner, not an aggressive exercise in inappropriate judicial activism. The First Amendment principles forbidding content-discrimination, and the specific commercial speech principles that forbid discriminating against commercial speech on grounds that are unrelated to the commercial content of the speech, are well-entrenched and laudable components of our current constitutional jurisprudence. There are sound reasons why courts look with great skepticism at content-based distinctions, and sound reasons why these principles apply to advertising and commercial speech. There is probably no principle more central to our First Amendment tradition than the notion that the government ought not "pick and choose" among messages, particularly when the values it seeks to vindicate bear no demonstrable relationship to the content of those messages.

In short, modern First Amendment doctrine tends to favor an "all or nothing" form of regulation. There is, admittedly, an irony here, and a heavy social cost. To eliminate the distinction between non-commercial and commercial telemarketing would actually burden more speech. One might plausibly argue that the current form of the do-not-call registry is thus actually preferable to a complete ban. Reinforcing this argument, one might argue that given the especially high place that charitable and political speech enjoy in our constitutional constellation, there is positive constitutional value in carving out an exception for those categories. Seen this way, the current do-not-call registry regime does not discriminate against commercial speech so much as it discriminates in favor of political or charitable solicitations. While these arguments do have

some appeal, in the end they appear to be in tension with current First Amendment doctrines, especially decisions such as *Discovery Network*.

No one, of course, can predict with complete confidence what the United Stated Court of Appeals for the Tenth Circuit, or possibly the Supreme Court, will do when the *Mainstream Marketing* decision is reviewed on the merits. Congress would be prudent not to proceed, however, on the supposition that *Mainstream Marketing* is some kind of "outlying" decision that is obviously wrong and heading for certain reversal. To the contrary, the decision appears largely consistent with existing constitutional principles, and the probability, in my judgment, is that it will ultimately be sustained.

V. Legislative Solutions

Admittedly, it may well be painful to extend the reach of the do-not-call registry to non-commercial solicitations. It is my view, however, that the simplest and cleanest way to maximize the probability that the do-not-call registry will withstand constitutional attack is to pattern the registry after the postal rules upheld in *Rowan*, permitting consumers to block all unsolicited calls, from whatever source.

There are other somewhat more creative (and perhaps less certain) possibilities. Congress might authorize the promulgation of agency rules that would allow consumers to block all solicitations, or choose between blocking only commercial or non- commercial solicitations. This would be a "hybrid" model, somewhere between the current FTC and FCC approach and the approach in *Rowan*. Because it would empower consumers to make the choice, it would largely mitigate the content-based discrimination found unconstitutional by the District Court in *Mainstream Marketing*. At the same time, it would operate, somewhat like television "V-Chips" or computer filtering software, to allow some consumers to selectively permit some messages in while keeping others out. For those consumers to who do not mind receiving non-commercial telemarketing calls but object to commercial solicitations (or the reverse, those who do not mind receiving commercial calls but dislike charitable or political calls), the option would be available to block one category but not the other.

VI. Conclusion

I appreciate the opportunity to address the Committee on this important issue. In the short time and space available I have not attempted to canvass every nuance of the issues posed, or every aspect of the decisional law, but I do hope my testimony will assist the Committee in looking at this dispute with additional perspective as it considers possible action responsive to the ongoing judicial developments.

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[*] The *Richmond Journal of Law & Technology* has not verified the accuracy of these remarks. The *Journal* has verified the accuracy of the author's endnotes.

[**] Mr. Rodney Smolla is the Dean of the University of Richmond School of Law at the University of

Richmond.

[1] 47 U.S.C. § 227 (2003).

[2] *Id.* § 227(c)(1).

[3] *Id.* § 227(b)(1).

[4] 15 U.S.C. §§ 6101, 6108 (2003).

[5] *Id.* § 6102(a) (1) & (2).

[6] Do Not Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 577 (2003).

[7] 282 F. Supp. 2d 1285 (W.D. Okla. 2003).

[8] 283 F. Supp. 2d 1151 (D. Colo. 2003).

[9] *See, e.g.,* Katz v. United States, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment's guarantee against unreasonable searches extended to cover electronic eavesdropping, even though the framers of the Constitution could not have contemplated such an electronic search, because the Fourth Amendment was intended to protect "people, not places").

[10] *See* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604) ("[T]he house of every one is to him as his castle and fortress. . . "); William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371, 400 (1980) (noting that the belief that "a man's house is his castle" found expression at least as early as the sixteenth century in English jurisprudence).

[11] Cuddihy & Hardy, *supra* note 10, at 386 (quoting Thomas M. Cooley, Constitutional Limitations 299 n.3 (1868)); *see also* 4 William Blackstone, Commentaries 223 (photo. reprint 1967) (1769) ("And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private.").

[12] U.S. Const. amend. IV; *see also* Silverman v. United States, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (citing Boyd v. United States, 116 U.S. 616, 626 30 (1886); Entick v. Carrington, 19 Howell's State Trials 1029, 1065 (C.P. 1765)).

[13] United States v. On Lee, 193 F.2d 306, 315 16 (2d Cir. 1951) (Frank, J., dissenting).

[14] 397 U.S. 728, (1970).

[15] 447 U.S. 557 (1980).

[16] *Id.* at 563-64.

[17] *See, e.g.,* Thompson v. Western States Medical Center, 535 U.S. 357, 369-71 (2002) (striking down restrictions on pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554- 555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); Greater New Orleans Inc., v. United States, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996) (striking down liquor advertizement restrictions); Rubin v. Coors Brewing Company, 514 U.S. 476 (1995) (striking down beer advertising regulations); Ibanez v. Florida Dep't of Business and Professional Regulation, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91(1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); In re R.M.J., 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); In re Primus, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); Bigelow v. Virginia, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

[18] *See, e.g,* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[19] 507 U.S. 410 (1993).