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Do Not Call: Abdicating and Ignoring Responsibility*

*Tim Searcy***

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[1] I am not a lawyer, but for nearly a decade and a half, I have dealt with the issues that gave rise to the Federal Do Not Call Registry. Regardless of what you have read or seen, this issue did not just appear on the scene with the updating of the FTC’s Telemarketing Sales Rule or the subsequent corollary changes made by the FCC in its rules implementing the Telephone Consumer Protection Act (“TCPA”). As a matter of fact, the original regulatory rulemaking by the FCC to implement the TCPA are over a decade old.

[2] Congress adopted the TCPA in 1991 to charge the FCC with adopting rules regulating autodialers and unsolicited telephone calls and facsimile transmissions. Under this legislation, the FCC adopted rules regulating autodialed and prerecorded calls to particularly sensitive phone numbers, such as those to assigned to emergency services, hospitals and elderly homes, and services for which the called party pays for incoming calls. The rules also adopted permissible hours during which unsolicited commercial telephone calls may be placed and required companies to begin keeping track of – and honoring – requests by consumers that the company not call again. The rules also restricted unsolicited or “junk” faxes sent to unwilling recipients. These rules, as Congress intended, balanced the harm caused in some instances by unwanted commercial

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telephone calls and the consumer's right to avoid them, against the need to honor the requirements free speech and to preserve legitimate telemarketing practices.

[3] In 1995, Congress passed the Telemarketing and Consumer Fraud and Abuse Protection Act, *i.e.*, the "Telemarketing Act." As indicated by the full, formal title, the concept was to protect consumers from fraud perpetrated by individuals and companies over the phone. This was a noble goal, and to be honest, not a bad law. It cleaned up a few things and codified some best practices in an intelligent way. Legitimate verification of credit information became legally necessary, and the telemarketing industry addressed honesty in our dialog with prospects and customers. In implementing the law, the FTC also adopted rules similar to the FCC's TCPA rules under which calling hours were restricted to reasonable times, and it incorporated rules mirroring those adopted by the FCC to create the obligation of companies to develop and manage a list of individuals that requested to receive no more calls from them.

[4] Though these new obligations and prohibitions, in many cases, required a change in approach and capital outlays to develop and acquire new equipment and methods, in-house teleservices operations and outsourced teleservices companies learned to be compliant with the regulations. Life existed fairly peaceably. This was possible because the rules dovetailed with the best interests of the marketers and the consumers. The rules provided a legitimate means by which to level the playing field, and remove through market and legal requirements the "bad actors" operating within the legitimate business framework. As a matter of fact, in its rule review, the FTC reported that violations it encountered enforcing the Telemarketing Act and the Telemarketing Sales Rule almost exclusively involved complaints of fraud or other transactional malfeasance. Importantly, both the FCC's and the FTC's rules involving the development of entity-specific do-not-call lists were on the books for more than a decade without a major violation being pursued. Meanwhile, the industry was left to work in state legislatures to counteract a rising tide of more specific and onerous initiatives.

[5] In thirty-seven states over approximately the past ten years, legislators have crafted a wide variety of laws creating statewide do-not-call registries to restrict legitimate telemarketing. Some laws have had many exemptions for "pet industries" like newspapers or insurance, or political calls. Some laws have had virtually no exemptions at all, even going so

far as to ban calls to individuals on a state list from companies that have an existing business relationship, or even charities. In each case, the state has assessed its individual constituents' needs and developed a law to attempt to serve those needs.

[6] Yet the FCC and FTC have moved to strengthen federal telemarketing laws (though with wanting results, as discussed below), in part, they claim, to do away with the patchwork of divergent and sometimes inconsistent state rules, there is no statutory or regulatory preemption that makes the federal law, "the prevailing law" in all cases. So teleservices firms find themselves in the position of having to comply with redundant, confusing, and sometimes contradictory laws simultaneously. Once the federal government decided to enter the do-not-call registry business, it made sense to drive home a point about the real 'power' of politicians. How did this get accomplished? Simple . . . politicians exempted themselves, and therefore you can choose to not receive calls from anyone you don't have a relationship with except for fundraisers and politicians (who are often one and the same).

[7] Political pundits have been speculating since the PATRIOT Act about the erosion of individual liberties in this country. Social theorists have been working on redefining individual responsibility. In one stroke, the FTC, FCC, Congress, and the White House eliminated both elements of personal choice. By giving consumers the opportunity to partially take themselves out of the stream of commercial messaging, policymakers made it clear that people are not to be trusted with their own decision making process. No longer should you receive messages and accept and reject them on their individual merits. But the telephone is an odd and particularly inapt starting place for this kind of thinking. Based on social measurements, the average consumer is exposed to three to four thousand commercial messages every day. According to materials placed on the record before the FCC and FTC (and in turn proffered by the agencies defending their rules in court), the average consumer only receives, on average, two unwanted solicitation calls by phone per day.

[8] Policy is a funny thing. Most of the disenchanting electorate fall into two categories of thinkers: those who think the system is probably flawed, and those that know it is flawed. There is a certain belief that balance should be part of any decision. Along those lines, consideration should be given to the interests that are both "special," and those that are general. In this particular case, Congress had imposed on the FCC a statutory

obligation to weigh consumer interests, business interests, and the U.S. Constitution. To satisfy these kinds of requirements, there is typically a comment period, which allows interested parties to express their thoughts on current and pending regulations before agencies like the FCC and FTC. During this period, business interests pay lawyers a lot of money to craft articulate responses to the request for comments that highlight both the wrongs and rights of possible changes. A review of the record demonstrates that the FCC, in a rush to judgment, left ideas like statutory responsibility, balance, and economics at the side of the road. Only cursory assertions and unsubstantiated claims of anecdotal data have been employed in what is meant to be a much more rigorous process.

[9] This leads to the ultimate issue – ignoring the U.S. Constitution. Rather than re-state what appears elsewhere in this issue of the *Richmond Journal of Law & Technology* in the telemarketing industry’s briefs seeking judicial review of the new FTC and FCC rules by the United States Court of Appeals for the Tenth Circuit, let’s consider the downstream implications of letting the matter stand as currently regulated. Allowing the government to define favored and disfavored classes of speech through exemptions to prohibitions that affect everyone except the likes of politics and charities, without attempting other means of relief, is counter to both the Framers’ intent, as well as the judicial record. Our concern is one of more than mere hypothetical extension. If the government gets into the business of regularly determining what types of unsolicited speech may be presented for consideration by recipients, without regard to the Constitution, we all wind up on the slippery slope.

[10] It is not sufficient to simply say that political speech deserves a special set of considerations. The residents of a home called to ringing phone do not know before answering who is calling. If the harm is the inconvenience of having to respond to an unwanted call, or the intrusion on notions of “residential privacy” by the ringing phone, the problem is not affected by the content of the call. Indeed, the record before the FCC and FTC reflected that many people were just as opposed to unsolicited political or charitable calls as they are commercial calls, while others would put a stop to those calls but allow certain commercial calls – notably, those in which they were or might be interested or where there is an existing relationship – to continue unabated. When the government crafts a content-specific solution that gives some speakers special rights others are barred from exercising, that is where constitutional

considerations must take precedence over facile regulatory responses to more nuanced real-world concerns.