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Automated Political Telephone Calls ("Robo Calls") in Federal Campaigns: Overview and Policy Options

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Summary

Prerecorded telephone messages that provide information about political candidates or urge voters to go to the polls are a common campaign tactic. Anecdotal accounts suggest that the public often objects to the volume and frequency of these automated political calls (also called "auto calls" or "robo calls"). Despite often negative anecdotal information about automated political calls, they remain an inexpensive, effective way to reach hundreds or thousands of voters quickly. Campaigns and groups often rely on automated political calls to respond to last-minute campaign developments.

Four bills introduced in the 111th Congress contain provisions that are particularly relevant for automated political calls. H.R. 116 (Foxx) would add automated political calls to the federal do not call list. S. 1077 (Feinstein) would restrict the timing and volume of calls and would require certain information to be disclosed. H.R. 4641 (Lofgren) proposes similar restrictions. Finally, H.R. 4749 (Price, N.C.) would extend "stand by your ad" disclaimer requirements to various political messages, including prerecorded calls.

Automated political calls received attention in both chambers during the 110th Congress. Several bills (H.R. 248, H.R. 372, H.R. 479, H.R. 894, H.R. 1298, H.R. 1383, H.R. 1452, H.R. 4298, H.R. 5747, and S. 2624) would have added the calls to the federal do not call list, required additional reporting about the calls, or otherwise regulated the calls. The Committee on House Administration, Subcommittee on Elections, held an oversight hearing on automated political calls on December 6, 2007. The Senate Rules and Administration Committee considered S. 2624 at a February 27, 2008, hearing.

Empirical research and data about automated political calls are limited. Existing research suggests that the calls are an increasingly common campaign tactic and that various political committees spent millions of dollars on those efforts. Despite media reports of strong public disdain for automated political calls, the FEC has received few recent formal complaints on the issue. However, FEC enforcement data are not necessarily a reliable indicator of public sentiment toward automated political calls. The Federal Communications Commission (FCC) reportedly does not track data about complaints it receives on automated political calls.

This report provides an overview of how automated political calls are used in federal campaigns. This includes attention to recent spending estimates and polling data about automated political calls. The report also discusses legislation that would affect the calls. Policy options discussed in the report include maintaining the status quo, gathering additional data, revising federal disclosure or disclaimer requirements, adding the calls to the federal do not call list, or restricting the number and timing of calls. Some of those options would likely involve contentious questions about which organizations and messages should be regulated by campaign finance law. Constitutional issues could also affect some of those policy options. The "First Amendment Considerations" section provides a legal analysis.

This report will be updated as events warrant.

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Introduction[1]

Automated political calls generally include prerecorded messages that provide information about candidates or urge voters to go to the polls.[2] They are also used to announce events and solicit campaign volunteers. The calls are an inexpensive way to reach large numbers of voters quickly. The calls can therefore play an important role in get-out-the-vote (GOTV) and voter-education activities. Those who oppose the calls generally argue that they are intrusive, that too many calls are placed to individual voters, or that they are too often used to convey negative information. Identifying those responsible for calls is also a concern.

The Federal Election Campaign Act (FECA) does not require detailed reporting about automated political calls.[3] Political committees also have few incentives to make information about automated calls public. In addition to this lack of data from regulators and practitioners, campaign tactics and political consulting receive limited scholarly attention. Academic research that does exist tends to focus on campaign strategists, especially political consultants such as pollsters and media specialists.[4] By contrast, those providing automated political calls (so-called "vendors") often receive limited attention.

Automated calls remain a prominent campaign tactic and continue to appear on the congressional agenda. Thus far, however, legislative developments on the issue have been quieter in the 111th Congress than during the 110th Congress.[5] Several bills introduced in the 110th Congress would have imposed additional regulations on automated political calls, but would not necessarily apply to all circumstances in which the calls are used. Legislation on the topic has also been introduced in the 111th Congress. Many of the concerns surrounding automated political calls are not about the calls themselves, but about how those calls are used. Congress, therefore, has various options for addressing automated political calls, if it chooses to do so at all. Aside from maintaining the status quo, one relatively cautious option would be gathering additional data before choosing a policy approach. Federal agencies and the oversight process could provide such information. Another relatively limited approach would be to encourage voluntary changes by practitioners. By contrast, if Congress chose to require policy changes, it could add political calls to the do not call list or restrict the timing or number of calls. Finally, Congress could place additional disclosure or disclaimer requirements on political calls. Some of those options would likely involve difficult questions about which groups and messages are devoted to campaign activities versus policy advocacy.

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[1] R. Sam Garrett served as the primary author of this report. Kathleen Ann Ruane authored much of the "Federal Communications Commission Requirements" section and all of the "First Amendment Considerations" section.

[2] This report refers to American campaigns. Due to political culture and technical infrastructure, automated political calls are rare outside the U.S. See Michael Coleman, "Do Not Robocall? Depends on Your Country," *Campaigns & Elections*, September 2007, pp. 44-45.

[3] On FECA, see 2 U.S.C. § 431 et seq.

[4] See, for example, David A. Dulio, *For Better or Worse? How Political Consultants are Changing Elections in the United States* (Albany: State University of New York Press, 2004), chapt. 2. On the distinction between various kinds of political consultants, see Dennis W. Johnson, "The Business of Political Consulting," in James A. Thurber and Candice J. Nelson, eds., *Campaign Warriors: Political Consultants in Elections* (Washington: Brookings Institution Press, 2000), pp.37-52; and R. Sam Garrett, *Campaign Crises: Detours on the Road to Congress* (Boulder, CO: Lynne Rienner Publishers, 2010), chapt. 3. Prof. Johnson also provided a telephone consultation on these points (with R. Sam Garrett, November 16, 2007).

[5] On campaign finance issues generally during the 111th Congress, see CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by R. Sam Garrett.

Franked Calls Versus Campaign Calls

This report focuses on how automated calls are used during campaigns. From the outset, however, it is important to remember that not all automated calls containing political information are campaign-related. Although automated *campaign* calls can be controversial, many Members reportedly find *official* (franked) automated calls useful. According to one political consultant, official automated calls have been used to announce "town hall" meetings, solicit constituent input on votes, and provide information about federal programs (e.g., student loans).[6] House Commission on Congressional Mailing Standards staff reported similar uses for franked calls, which have become increasingly common.[7] Discussion at a December 2007 hearing held by the Committee on House Administration, Subcommittee on Elections, suggested a desire among some Members to curtail unwanted campaign calls while preserving official calls.

Federal Disclaimer and Disclosure Requirements

Automated political calls are subject to relatively little federal regulation, although approximately 20 states reportedly restrict or ban such calls, or are attempting to do so.[8] FCC and FEC regulations each place different restrictions on automated political calls. The FEC regulations apply only to political committees or individuals engaged in express advocacy, which proposes election or defeat of federal candidates. By contrast, the FCC regulations appear to apply to all prerecorded or automated calls, regardless of whether they are political or commercial. Regulations promulgated by both agencies require that automated political calls provide certain identifying information. Finally, the Federal Trade Commission's (FTC) National Do Not Call Registry exempts political calls. Therefore, even individuals whose telephone numbers appear on the registry may still receive automated political calls.

Federal Election Commission Requirements

FECA does not specifically address automated political calls. However, the FEC has determined that various requirements related to political advertising apply to automated calls.[9] In particular,

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[6] Telephone interview with Marty Stone, CEO, Stones' Phones, conducted by R. Sam Garrett, November 14, 2007. In addition to being a political consultant specializing in voter contact, Stone is a member of an American Association of Political Consultants (AAPC) working group monitoring automated-calls legislation. That group's recommendations are discussed later in this report.

[7] Telephone conversation between Jack Dail, Staff Director, House Commission on Congressional Mailing Standards, and Matthew E. Glassman, November 15, 2007. Although the frank is normally associated with official mail, Members are also permitted to use these funds for automated calls or e-mail. On franking regulations, see CRS Report RS22771, *Congressional Franking Privilege: Background and Current Legislation*, by Matthew Eric Glassman.

[8] See, for example, Donald G. Aplin, "States Take Aim at Political 'Robo-Calls' Despite Ongoing Legal, Regulatory Challenges," *Money & Politics Report*, February 14, 2008, at http://pubs.bna.com/ip/bna/mpr.nsf/eh/A0B6A8G4H3; Susan Saulny, "States Seek Limits on 'Robocalls' in Campaigns," *New York Times*, April 25, 2007, at http://www.nytimes.com/2007/04/25/us/politics/25calls.html?_r=1&hp&oref=slogin; Joseph Sanscrainte, "States Enforce Limits on Robocalls," *DMNews*, at http://www.dmnews.com/cms/dm-news/legal-privacy/38770.html, October 27, 2006; "Missouri AG Seeks to Expand No-Call Law to Cover Cell, Fax, Automated Political Calls," *Money & Politics Report*, November 20, 2006, at http://pubs.bna.com/NWSSTND/IP/BNA/mpr.nsf/SearchAllView/576C34E794B957738525722A0006AAB7?Open&highlight=MISSOURI,AG; and Testimony of William E. Raney, Appendix 1, in U.S. Congress, House Subcommittee on Elections, Committee on House Administration, *The Use of "Robocalls" in Federal Campaigns*, hearing, 110th Cong., 2nd sess., December 6, 2007, 41-185 (Washington: GPO, 2008), p. 98.

[9] See, for example, Federal Election Commission, First General Counsel's Report in Matters Under Review (MUR)

"telephone banks" are included in the definition of "public communications," a form of political advertising that must contain certain information.[10]

Messages from telephone banks (and other sources) paid for by authorized political committees (i.e., candidates' principal campaign committees), must contain what FEC regulations refer to as a "disclaimer" clearly stating that the committee paid for the communication.[11] Similarly, messages *not* authorized by candidate committees (e.g., by party committees) must clearly state that a candidate committee is not responsible for the call and must provide the "full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication."[12] The latter requirement also appears to apply to "general public political advertising" (including telephone banks) paid for by "any person" that expressly advocates the election or defeat of a clearly identified federal candidate or solicits funds.[13]

The requirements discussed above suggest that automated political calls paid for by political committees (i.e., candidate committees, political action committees (PACs), or party committees) must include disclaimers identifying the sponsor. The same is true for other "persons" engaging in express advocacy (advocating the election or defeat of particular candidates) or fundraising. However, it is possible that entities *other* than political committees could avoid disclaimer requirements as long as they did not engage in express advocacy or fundraising related to federal candidates. These entities or individuals also would not normally fall under FEC jurisdiction. To summarize, automated political calls that propose election or defeat of federal candidates, or solicit funds for those candidates, appear to require disclaimers identifying the sponsor. However, these requirements do not appear to apply to calls that are not sponsored by political committees or that do not engage in express advocacy or fundraising for federal candidates. Therefore, FEC disclaimer requirements do not necessarily apply to 527s, interest groups, or other entities that make automated political calls.[14]

FECA also requires political committees to report information about their spending—whether on political calls or any other good or service. Specifically, committees must itemize disbursements totaling more than $200 to a single source.[15] Reports submitted to the FEC must include the name and address of the payee, date of payment, and a brief description of the purpose of disbursement. However, political committees are generally not required to use particular terminology when itemizing expenditures, as long as their descriptions are specific enough to determine the purpose.[16] Policy guidance issued by the FEC in 2007 did not address how automated political calls should be described in expenditure reports.[17] (This topic is discussed in more detail later in this report.) Therefore, although payments for automated calls must be disclosed, committees are

5584 and 5585, January 26, 2006, p. 5, at http://eqs.nictusa.com/eqsdocs/00005777.pdf.

[10] On the definition of "public communications," see 2 U.S.C. § 431(22). Telephone banks include "more than 500 telephone calls of an identical or substantially similar nature within any 30-day period," which would be consistent with automated political calls. See 2 U.S.C. § 431(24).

[11] 11 C.F.R. § 110.11(b)

[12] Ibid.

[13] 2 U.S.C. § 441d(a)

[14] On 527s, see CRS Report RL33888, *Section 527 Political Organizations: Background and Issues for Federal Election and Tax Laws*, by R. Sam Garrett, Erika K. Lunder, and L. Paige Whitaker.

[15] 11 C.F.R. § 104.3(b)(3). Reporting time frames vary by committee type. See, for example, 11 C.F.R. § 104.3(b).

[16] For example, for authorized committees, itemized descriptions such as "phone banks" are acceptable, but "get-out-the-vote" is too vague. See 11 C.F.R. § 104.3(b)(3)(B).

[17] Federal Election Commission, "Statement of Policy: 'Purpose of Disbursement' Entries for Filings With the Commission," 72 *Federal Register* 887, January 9, 2007.

largely free to determine how they wish to characterize their expenditures on reports submitted to the FEC. Unless a committee chooses to be particularly specific—which is unlikely because these disclosures are available to opponents and the media—FEC reports do not necessarily indicate how much committees spend on automated calls or whether they purchase automated calls at all.

Federal Communications Commission Requirements

The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits calls made by automated telephone dialing systems to cell phones, emergency lines, certain hospital lines, and other similar establishments.[18] The TCPA also prohibits calls to residential telephone lines that use automated or prerecorded voices to deliver a message, except in an emergency or by order of the FCC exempting that call from the prohibition.[19] When promulgating rules under the TCPA, the FCC was required by Congress to consider exempting calls made for non-commercial purposes.[20] In its order implementing the TCPA, the FCC chose to exempt calls made for a non-commercial purpose from the prohibition on calls using prerecorded messages to residential telephone lines.[21] Calls made by campaigns or other political organizations generally are considered to be calls made for a non-commercial purpose.[22]

Though automated or prerecorded telephone calls and calls using automated telephone dialing systems, including calls made to deliver political messages, to residential telephone lines are not prohibited by FCC regulation or the TCPA, these types of calls are subject to some regulation. Specifically, prerecorded calls must clearly state the identity of the business, individual or other entity responsible for initiating the call at the beginning of the message.[23] Furthermore, prerecorded calls, including those placed with automatic dialers ("autodialers"), must also state the telephone number for the business, individual or entity responsible for initiating the call.[24] Calling the number provided may not result in a fee other than normal local or long-distance charges (i.e., 900-numbers are prohibited).[25] Although telephone solicitations such as product sales must occur during particular times of the day,[26] those requirements do not apply to calls made by, or on behalf of, tax exempt non-profit organizations,[27] including political committees.

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[18] 47 U.S.C. § 227(b)(1)(A).

[19] 47 U.S.C. § 227(b)(1)(B).The TCPA does not expressly prohibit the use of automated dialing systems when making any call to residential telephone lines. Instead, it prohibits the use of automated or prerecorded messages in phone calls to residential lines. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 8752 (1992) at ¶ 27.

[20] 47 U.S.C. § 227(b)(2). The FCC was also directed to consider exempting calls that are made for a commercial purpose but do not affect the privacy rights the TCPA seeks to protect and do not contain unsolicited advertisements.

[21] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 8752 (1992) at ¶ 40.

[22] The commission found that the exemption for non-commercial calls extended to calls made by tax-exempt non-profit organizations (including some, though not necessarily all, political organizations) and to calls "which do not involve solicitation" as defined by the commission. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) at ¶ 41. Solicitation is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.... " 47 C.F.R. § 64.1200(f)(12).

[23] 47 U.S.C. § 227(d)(3); 47 C.F.R. § 64.1200(b)(2).

[24] The number provided may not be for the autodialer itself. 47 U.S.C. § 227(d)(3); 47 C.F.R. § 64.1200(b)(2).

[25] *Id.*

[26] 47 C.F.R. § 64.1200(c)(1).

[27] 47 C.F.R. § 64.1200(f)(9).

Other technical requirements also apply. However, some of those requirements do not apply to calls sponsored by nonprofit organizations.[28]

Automated Political Calls: Uses and Industry

Automated calls can be used offensively or defensively, as when criticizing an opponent or responding to criticism. The calls are often employed in the final days before elections to mobilize (or discourage) voters, when it is too late to purchase other services with last-minute campaign contributions. According to one political consultant, political committees are increasingly also turning to automated calls earlier during election cycles to solicit voter input (through automated responses) or to coincide with mailings and other messages.[29] Another consultant noted that automated calls can encourage event-attendance and other grassroots engagement.[30]

Automated calls are inexpensive (a few cents per call) and can be quickly produced and implemented. They also provide public officials or other activists with an ability to reach hundreds or thousands of voters in a matter of hours.[31] However, some campaigns reportedly are beginning to fear a "diminished impact" on voters because of a "flood of auto calls" just before elections.[32]

The Automated Political Calls Industry

Various campaign strategists might be involved in the decision to make automated political calls, but implementation typically rests with telemarketing firms. Some professional political consultants also specialize in automated calls. Data about the political consulting profession are frequently limited because consultants identify themselves by various titles, are often self-employed, and frequently do both political and non-political work. All these factors make tracking the profession difficult, particularly in terms of specialized groups such as those providing automated calls. A legislative working group of the American Association of Political Consultants (AAPC) recently identified 129 firms claiming to provide automated political calls.[33] The group's research suggested that no more than 10-20 of the 129 firms are professional political consulting firms, with the remainder primarily engaged in other business ventures.[34] The

[28] *See, e.g.*, 47 C.F.R. § 64.1200(a).

[29] Telephone interview with Marty Stone conducted by R. Sam Garrett, November 14, 2007.

[30] Telephone interview with John Giesser, CEO, Spoken Hub, conducted by R. Sam Garrett, November 19, 2007. In addition to being a political consultant specializing in voter contact, Giesser is a member of an American Association of Political Consultants (AAPC) working group monitoring automated-calls legislation. That group's recommendations are discussed later in this report.

[31] Donald P. Green and Alan S. Gerber cite a figure of approximately $0.05 per call in *Get Out the Vote! How to Increase Voter Turnout*, 2nd ed. (Washington: Brookings Institution Press, 2008), p. 77. According to CRS Internet research, some firms charge as little as $0.01-$0.02 per call.

[32] Telephone interview with Marty Stone, November 14, 2007. According to one scholarly review, live calls, particularly those placed by well-trained volunteers, are more effective than automated ones. See Donald P. Green and Alan S. Gerber, *Get Out the Vote!*, p. 95.

[33] The AAPC body was alternatively characterized as a "subcommittee" and "working group." In telephone interviews with CRS, group members Marty Stone and John Giesser described it as an informal entity. (Telephone interview with Marty Stone, November 14, 2007; telephone interview with John Giesser, November 19, 2007).

[34] Telephone interview with Marty Stone, November 14, 2007. The AAPC figures were based on Internet research and searches of industry trade publications, such as *Campaigns & Elections* magazine (now *Politics*). This estimate appears reasonable (but would be difficult to verify) given the limited publicly available information. Using trade publications

AAPC figure is roughly consistent with a 2006-2007 estimate compiled by Dennis Johnson, professor of political management at George Washington University and a former political consultant. Johnson identified 28 "telephone and direct voter contact" firms operating in 2006-2007, but did not differentiate between firms offering automated calls versus other services. Johnson found, however, that voter contact is a small subset of the political consulting industry, particularly compared with more common specializations such as direct mail (126 firms), media consulting (78 firms), and polling/research (76 firms).[35]

Although few firms specialize in automated political calls, computer technology is reportedly making it easier for those without specialized knowledge to pursue political telemarketing.[36] One consultant asserted that a "bifurcation" exists between professional political consultants and other firms or individuals offering automated calls. He also suggested that limited knowledge among the latter group could account for technical problems associated with some calls, such as late-night or truncated calls, and that an ability to place automated calls does not necessarily imply professional knowledge of how to use those calls effectively in campaigns.[37] (Of course, consultants have incentives to suggest that their services are unique compared with competitors. This report takes no position on that viewpoint.)

Spending Estimates

Comprehensive data about the total cost of, or spending on, automated political calls is publicly unavailable. However, some estimates, based on anecdotal information, are available. For example, a 2007 *Campaigns & Elections* (C&E, now *Politics*) magazine report estimated that the two major parties' congressional campaign committees "spent over $600,000 on robocalls in nearly 50 congressional districts" in the final week of the 2006 general election campaign.[38]

Lack of Clear Spending Data: A Brief Case Study

Even when working from FEC data, spending on automated political calls is often unclear. Because of their prominent roles in mobilizing voters, congressional campaign committee are possible sources for examining spending on automated political calls. None of the four committees—the Democratic Congressional Campaign Committee (DCCC), Democratic

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to infer information about the consulting industry is also a common practice in academic research. However, in the absence of law or regulations defining political consulting or requiring detailed disclosure about the types of services political committees purchase, and from whom, it is unclear precisely how many firms that provide automated political calls are operating in the United States. It is also unclear how much of their business volume reflects political calls.

[35] Dennis W. Johnson, *No Place for Amateurs: How Political Consultants are Reshaping American Democracy*, 2nd ed. (New York: Routledge, 2007), p. 241.

[36] See, for example, J. Todd Foster, "Are Phones Obsolete? The Evolution of Telephone Consulting," *Campaigns & Elections*, July 2006, pp. 32-36. Although the article focused on traditional telephone banks rather than automated political calls, Marty Stone told CRS that technology is also easing barriers to entry with respect to automated calls (telephone interview with R. Sam Garrett, November 14, 2007).

[37] Telephone interview with Marty Stone, November 14, 2007. Stone's distinction between vendors and professional political consultants is consistent with academic literature cited elsewhere in this report.

[38] Tom Jennemann, "Ready to Play Phone Tag?" *Campaigns & Elections*, September 2007, pp. 42-43. According to Jennemann, the C&E estimate was based on identifying payments to known automated-calls vendors, as itemized in FEC reports. A reporter then confirmed with Democratic Congressional Campaign Committee (DCCC) and National Republican Congressional Committee (NRCC) "sources" which payments were actually for automated calls. E-mail correspondence between Tom Jennemann, correspondent, *Campaigns & Elections*, and R. Sam Garrett, November 15, 2007. That methodology would not account for payments to subcontractors or firms not known for making automated calls. It also would not account for non-DCCC or NRCC spending.

Senatorial Campaign Committee (DSCC), National Republican Congressional Committee (NRCC), and National Republican Senatorial Committee (NRSC)—appear to publicize information about their spending on automated political calls. Required information provided on their FEC reports also provides little detail about how much the committees spent on automated political calls.[39]

In fact, of 467 "purpose of disbursement" descriptions listed by the four party committees in 2005-2006, none used the terms "automated calls," "robo calls," "prerecorded calls," or other language clearly indicating automated political calls.[40] The committees spent approximately $8.6 million on activities itemized with some variation of the term "telemarketing," but it is unclear what proportion of those expenses, if any, were for automated calls. In addition, a large proportion of the "telemarketing" expenses were from one committee (the DCCC), suggesting that others simply chose not to use the term frequently in their reports. The $8.6 million figure also does not include other large disbursements that *could* represent automated calls, including expenditures itemized as "generic phone banks" or using variations of the word "telephone." Without additional information, however, the exact purpose of those disbursements is unclear.

Some caveats are important to consider when interpreting the party-spending information. First, as noted above, the party committees are not required to provide detailed information about automated political calls, or any other expense, in their FEC reports. Indeed, examples of acceptable itemized disbursements provided by the FEC do not include references to automated political calls.[41] Second, analyzing data from four party committees is simpler than doing so for hundreds or thousands of candidate committees, PACs, etc. Therefore, the party committees provide a snapshot of possible automated calls spending. Importantly, however, various other political committees also contract for automated political calls. Despite these limitations, this brief case study reinforces the point that data on automated-calls spending are elusive—even when examining FEC reports.

Frequency of Calls and Voter Reaction

Despite the lack of firm data on the number of calls placed or the amount of money spent, it is clear that many voters receive automated political calls. Use of automated calls also appears to be on the rise as a campaign tactic.

Comprehensive data from the 2008 cycle appear to be publicly unavailable, but the limited data that are available show that automated calls played a substantial role during the primary election. According to March 2008 survey data, "[i]n states that have already held a primary or caucus, fully 44% of voters have received robo-calls."[42] As **Table 1** shows, use of the calls also increased notably as the primary election cycle unfolded between November 2007 and March 2008. Nonetheless, some voters remain wary of automated calls. Data from Iowa and New Hampshire,

[39] In response to a CRS request, the FEC provided totals for itemized expenditures, by type of expense, reported by the four committees during 2005 and 2006. FEC press officer Robert Biersack provided the data via e-mail, November 8, 2007.

[40] R. Sam Garrett conducted this analysis. Although the FEC data listed 467 different "purpose of disbursement" itemizations, that figure overstates the total number of *unique* expenditures. For example, many itemized terms were duplicates or differed only slightly (i.e., "food and beverages" versus "food/beverage").

[41] Federal Election Commission, "Statement of Policy: 'Purpose of Disbursement' Entries for Filings With the Commission," p. 887.

[42] Pew Research Center for the People and the Press, "Robo-Calls Now Top Type Of Campaign Outreach," April 3, 2008, at http://pewresearch.org/pubs/785/robo-calls-election-2008.

for example, show that more than 40% of those who reported receiving automated calls during the 2008 primary (or caucus) usually hung up.[43]

Table 1. Self-Reported Campaign Phone Calls and Mail Received, 2008 Primary Elections

Reportedly Received ...	November 2007	March 2008
Recorded phone call	25%	39%
Personal phone call	9%	16%
Mail	29%	36%

Source: Pew Internet & American Life Project, April 2008 Election Survey.

Sixty-four percent of registered voters received automated political calls during the "final stages" of the 2006 campaign.[44] As **Table 2** below shows, automated calls were the second-most-commonly reported form of voter contact late in the 2006 elections. (However, the poll did not include television or radio advertising.) Only a slightly higher proportion of respondents reported receiving direct mail than automated calls, but more than twice as many respondents reported receiving automated calls compared with live calls, home visits, or e-mail. According to the Pew data, Republicans were slightly more likely than Democrats to report receiving automated calls. Half of the surveyed Independents reported receiving calls.

Table 2. Self-Reported Voter Contacts During the Final Weeks of the 2006 Election Cycle

	All Respondents	Registered Voters	Rep.	Dem.	Ind.
Received mail urging vote for particular candidate	61%	71%	67%	62%	58%
Received recorded phone call	**56%**	**64%**	**63%**	**58%**	**50%**
Received phone call from live person	20%	24%	24%	20%	16%
Visited at home	16%	18%	18%	17%	14%
Received e-mail	12%	14%	16%	12%	11%

Source: Pew Internet & American Life Project, November 2006 Election Survey.

[43] Ibid.

[44] Lee Rainie, Director, Pew Internet Project, "Robo-calls during the 2006 election," Pew Internet & American Life Project, December 2006, available at http://www.pewinternet.org/pdfs/PIP_Robocalls06.pdf. "Final stages" refers to Pew questions about contacts voters received "in the past two months." The Pew surveys were conducted in November and December 2006, so the results would reflect calls received between September and December 2006.

Although the data discussed above indicate what proportion of voters received automated political calls, it is important to note that they provide little additional detail. For example, the data do not indicate what portion of the automated calls were aimed at increasing or decreasing turnout, reinforcing loyalty among decided voters versus swaying undecided ones, etc. Therefore, it is unclear how many calls were used for allegedly positive, negative, offensive, or defensive purposes.

As with other data about automated political calls, little or no systematic information about voter reaction to automated calls is available. However, anecdotal accounts typically suggest strong public disdain for such calls, particularly in states featuring several competitive elections. In some districts during the 2006 elections, some voters reportedly received 20 calls in a single day.[45] Some sources cited far lower numbers (e.g., 5-10, or fewer, calls per day), but reports indicated that these calls were nonetheless frustrating to recipients.[46] In Missouri, the state Attorney General received more than 600 consumer complaints regarding automated political calls in the weeks leading up to the 2006 elections.[47] In response to public aggravation over automated political calls, Citizens for Civil Discourse, which describes itself as "a non-partisan and non-profit group of ordinary citizens," recently established a free National Political Do Not Contact Registry.[48] Such services depend on voluntary compliance by those making automated political calls.

Effect on Voter Turnout

Scholarly research on the effectiveness of telephone voter contact, particularly through automated calls, is limited.[49] Available data, however, suggest that automated calls have a minimal effect on turnout. Political scientists Donald P. Green and Alan S. Gerber concluded have that, despite anecdotal examples of small effects on turnout:

> Thus far, none of the experiments using robo calls has been able to distinguish their effects from zero. Our best guess, based on experiments involving more than 1 million voters [in a variety of settings], places the vote production rate somewhere in the neighborhood of one vote per 1,000 contacts, but given the shaky state of the evidence, robo calls may have no effect at all.[50]

In the absence of additional research on automated calls, much remains unknown—including what effect, if any, calls containing negative information have on depressing turnout, and what impact the calls might have on encouraging other forms of campaign engagement, such as volunteering.

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[45] See, for example, Susan Saulny, "States Seek Limits on 'Robocalls' in Campaigns;" and Charles Babington and Alec MacGillis, "It's a Candidate Calling. Again." *Washington Post*, November 7, 2006, p. A8.

[46] Ibid.; Jennifer Duck, "Dems Claim GOP Launched 'Dirty' Phone Campaign," ABCnews.com, November 6, 2006, at http://abcnews.go.com/Politics/story?id=2633458; and State of Missouri, Office of the Attorney General, "Automated political calls need to be covered by Missouri's No Call law," press release, November 15, 2006, at http://ago.mo.gov/newsreleases/2006/111506.htm.

[47] Office of the Attorney General, "Automated political calls need to be covered by Missouri's No Call law."

[48] See "Stop Political Calls Now," at http://www.stoppoliticalcalls.org/index.php.

[49] For an overview of the literature on telephone outreach, see Alan S. Gerber and Donald P. Green, "Do Phone Calls Increase Voter Turnout? A Field Experiment." *The Public Opinion Quarterly*, vol. 65, no. 1 (Spring 2001), pp. 75-85. CRS research using various databases of published and unpublished scholarship confirmed Gerber and Green's characterization of the literature as sparse.

[50] Donald P. Green and Alan S. Gerber, *Get Out the Vote!*, p. 92.

Campaign Enforcement Issues

FEC Activity

The FEC is responsible for enforcing the FECA requirements discussed at the beginning of this report. Even so, campaigns often respond to perceived misconduct by opponents through political advertising or by encouraging media scrutiny rather than by pursuing formal enforcement of FEC regulations. In addition, although the commission in the past has received telephone or mail complaints from the public regarding automated calls, these individuals rarely followed-up by filing formal complaints.[51] Therefore, although FEC enforcement activity provides one measure of automated political calls, it is not a comprehensive indicator of all potentially objectionable behavior associated with those calls.[52]

Overall, the FEC appears to receive few complaints about automated political calls. For example, in response to a CRS request, the FEC identified eight enforcement cases concerning automated political calls that were closed between October 2003 and February 2008.[53] During the same period, the FEC closed a total of 476 enforcement actions known as Matters Under Review (MURs).[54] Therefore, just 1.7% (8 of 476) of MURs closed between October 2003 and February 2008 concerned automated political calls.[55] CRS research using the commission's Enforcement Query System (EQS) suggests that MURs potentially related to automated calls did not notably increase during the 2008 election cycle.[56]

Professional Enforcement

In addition to federal enforcement, a professional trade association could take enforcement action related to automated political calls. When they join or renew their membership, American Association of Political Consultants (AAPC) members agree to follow the organization's code of ethics.[57] The code does not explicitly address automated political calls but condemns "false or misleading attacks" on opponents or family members and encourages campaigns to document criticisms of opponents. A separate AAPC policy statement, adopted by the organization's board

[51] Duane Pugh, Deputy Director, Congressional Affairs, FEC, provided consultations regarding this point and other FEC enforcement issues (e-mail and telephone consultations with R. Sam Garrett, November 2007; February 2008).

[52] On a related note, in the absence of a legislative mandate, the *FCC* does not compile data about complaints it receives on automated political calls (Kevin Washington, FCC legislative affairs, telephone consultation with R. Sam Garrett, November 30, 2007).

[53] These cases are Matters Under Review (MURs) 5401, 5455, 5584, 5585, 5588, 5601, 5649, and 5819. A ninth case, initially designated as MUR 5882, was opened but dismissed after the individual filing the complaint reportedly failed to respond to requests for additional information (telephone consultation with Duane Pugh, February 6, 2008). This report assumes that the FEC's number (eight cases) represents all closed enforcement cases related to automated political calls during the time period under consideration. Commission staff reportedly identified these cases through keyword searches that could indicate complaints about automated political calls. CRS research using EQS suggests that the number of relevant MURs is indeed small. CRS keyword searches for variations of the term "robo call" revealed only five closed cases in the entire database, some of which were already included in the listing provided by the FEC. (Searches using other terms returned overly broad results that appeared to be unrelated to automated political calls.)

[54] R. Sam Garrett, telephone consultation with Duane Pugh, November 16, 2007.

[55] To emphasize recent information, some of this discussion has been condensed compared with previous versions of the report. R. Sam Garrett can provide additional information about these cases and the data.

[56] This refers only to closed MURs, which are publicly available.

[57] Applicants must sign the Code of Ethics. See the organization's online application at http://www.theaapc.org/content/membership/AAPC_Online_application.pdf.

of directors in 1995, condemns push polling.[58] Although AAPC members are subject to limited sanctions (if the organization chooses to pursue internal enforcement) the code does not apply to non-members. Former AAPC ethics committee member James A. Thurber, an American University political scientist, reported that ethics-enforcement cases are rare and minimally effective.[59] However, details about AAPC enforcement cases are publicly unavailable.

Recent Legislation

Four bills introduced in the 111th Congress would affect automated political calls, as would have 10 bills introduced in the 110th Congress. None of the legislation introduced in the 110th Congress received a floor vote. See **Table 3** and **Table 4** for additional details.

Bills on the topic generally fall into three categories. Specifically, the bills would: (1) add political calls to the FTC do not call list; (2) revise disclosure or disclaimer requirements or otherwise restrict automated political calls; or (3) regulate political calls generally, which could include automated calls. The "Policy Options" section below discusses potential ramifications associated with these and other approaches.

The Committee on House Administration, Subcommittee on Elections, held an oversight hearing on automated political calls on December 6, 2007. In addition to providing background information about campaign practices, Members and witnesses considered whether, or if, automated calls could be constitutionally restricted. Some Members also emphasized the value of official (franked) automated calls to arrange telephone-based town hall meetings. The Senate Rules and Administration Committee also held a hearing on the calls, and S. 2624, on February 27, 2008. Discussion at that hearing emphasized voter and candidate frustration with the calls, and whether the calls could be constitutionally restricted.

As of this writing, no hearings have substantially addressed automated calls during the 111th Congress.

Table 3. 111th Congress: Legislation Relevant for Automated Political Calls

Bill	Sponsor	Committee Referral (Most Recent Major Action)	Major Provisions on Automated Political Calls
H.R. 116	Foxx	Energy and Commerce (no additional action)	Would add automated political calls to the FTC Do Not Call Registry
H.R. 4641	Lofgren	Judiciary (no additional action)	Would prohibit making automated political calls during certain hours and pre-election periods, unless the calls contained disclosure and identification information

[58] American Association of Political Consultants, "Statement on Push Polling," at http://www.theaapc.org/content/resources/statement.asp.

[59] James A. Thurber, Director, Center for Congressional and Presidential Studies, American University, telephone consultation with R. Sam Garrett, November 28, 2007.

Bill	Sponsor	Committee Referral (Most Recent Major Action)	Major Provisions on Automated Political Calls
H.R. 4749	Price (N.C.)	House Administration (no additional action)	In addition to e-mail and Internet provisions, would have extended disclaimer and "stand-by-your-ad" requirements to prerecorded messages [a]
S. 1077	Feinstein	Rules and Administration (no additional action)	Would restrict the hours of day during which automated calls could be made and limit the number of calls that a single entity could make to the same telephone number in one day; would also permit complaints to, and civil enforcement by, the FEC or in civil suits through a private right of action

Source: CRS analysis of bill texts.

a. For additional discussion of the "stand by your ad" provision, which requires candidates to state their approval of their advertisements, see CRS Report R41054, *Campaign Finance Policy After Citizens United v. Federal Election Commission: Issues and Options for Congress*, by R. Sam Garrett.

Table 4. 110th Congresses: Legislation Relevant for Automated Political Calls

Bill	Sponsor	Committee Referral (Most Recent Major Action)	Major Provisions on Automated Political Calls
H.R. 248 (110th)	Foxx	Energy and Commerce (no additional action)	Would have added automated political calls to the FTC Do Not Call Registry
H.R. 372 (110th)	Altmire	Energy and Commerce (no additional action)	Would have added automated political calls to the FTC Do Not Call Registry
H.R. 479 (110th)	Doolittle	Energy and Commerce (no additional action)	Would have added "any politically-oriented telephone calls" to the FTC Do Not Call Registry
H.R. 894 (110th)	Price (NC)	House Administration (no additional action)	In addition to e-mail and Internet provisions, would have extended disclaimer and "stand-by-your-ad" requirements to prerecorded messages
H.R. 1298 (110th)	Petri	House Administration (no additional action)	Would have required disclosure of the identity of the person funding telephone/electronic polls to respondents; would require disclosure of total costs and funding sources for the poll, number of households contacted, and questions asked (if results were not to be made public) to the FEC
H.R. 1383 (110th)	Lofgren	Judiciary (no additional action)	In addition to other provisions, would have established penalties for using "automatic telephone dialing system[s]" or prerecorded messages to transmit deceptive information about federal campaigns and elections

Bill	Sponsor	Committee Referral (Most Recent Major Action)	Major Provisions on Automated Political Calls
H.R. 1452 (110th)	Maloney	House Administration (no additional action)	Would have required disclosure to the FEC of specified phone-bank costs, funding sources, households contacted, and questions asked/information provided
H.R. 4298 (110th)	Stupak	Energy and Commerce (no additional action)	Would have added "politically-oriented recorded message[s]" to the FTC Do Not Call Registry
H.R. 5747 (110th)	Lofgren	House Administration (no additional action)	Would have restricted the hours of day during which automated calls could be made and limit the number of calls that a single entity could make to the same telephone number in one day; would also permit civil enforcement by the FEC
S. 2624 (110th)	Feinstein	Rules and Administration (hearing held 2/27/2008)	Would have restricted the hours of day during which automated calls could be made and limit the number of calls that a single entity could make to the same telephone number in one day; would also permit complaints to, and civil enforcement by, the FEC or in civil suits through a private right of action [similar to H.R. 5747, but contained private right of action]

Source: CRS analysis of bill texts.

Policy Options

Congress could choose several approaches to regulating automated political calls—or not to do so at all. This section provides comments on various options. It also discusses broader issues that are likely to affect whatever policy options Congress chooses.

Maintain the Status Quo

Congress could choose not to pursue additional regulation of automated political calls. This option would likely be appealing to those who believe that the benefits of automated calls outweigh their negative consequences. As noted previously, those who favor automated political calls believe that they provide important information to voters. Automated calls can also be valuable for responding quickly to last-minute attacks. Some Members also rely on automated calls for official (franked) communications. If Congress chose to maintain the status quo, existing federal requirements would remain in place. The states would be free to consider additional regulation as they choose. Campaign committees and others would likely continue their current campaign practices.

Gather Additional Data

Congress might also choose to gather additional information before deciding on a policy solution. Although automated political calls are believed to be unpopular, little is known about how many calls are made, how much money is spent on the calls, how the calls affect voters, and whether the calls are used illegally or unethically. Substantial information about the use of automated calls during the 2008 election cycle also remains illusive. Without such information, it could be difficult to define the full extent of policy problems, if any, and to develop appropriate solutions.

Federal agencies and the oversight process could provide useful additional data. For example, as noted elsewhere in this report, because the FCC has not been directed to do so, the agency reportedly does not maintain statistics on consumer complaints about automated political calls. Similarly, although the FEC can compile data about relevant complaints upon request, it does not routinely release information about automated political calls. Congress could request or direct both agencies to maintain and release data about automated-calls complaints. Through the oversight process or by making requests to academics or other researchers, Congress could also encourage more polling attention to automated political calls. Empirical data on public reaction to automated political calls, and the effect of those calls on voter turnout, is especially lacking.

Gathering additional information through federal agencies or researchers could clarify whether automated political calls are merely annoying or whether they represent a substantial public policy concern. Such research might also find that the issue is not as prominent as media accounts often suggest. Regardless of the findings, defining the scope of the problem by gathering more information could make the policy response more precise. On the other hand, because of their personal involvement in campaigns and automated political calls, lawmakers might feel that additional research is unnecessary. Gathering additional information could also be a lengthy process, particularly if Congress requests data over a long time period.

Encourage Voluntary Changes by Practitioners

If Congress determines that concerns surrounding automated calls are primarily about how the calls are used rather than the calls per se, it could choose to encourage different behavior. Voluntary change would not necessarily require any legislative or regulatory action. For example,

Congress could use the oversight process, or decisions by individual Members regarding their own campaigns, to encourage practitioners to release more information about how and when they make automated political calls, to limit the number or timing of the calls, or to curtail automated calls that criticize opponents.

A voluntary approach could be attractive to those who believe that governmental intervention in campaigns is unnecessary. Perhaps more importantly, despite anecdotal impressions, there is no clear standard for what constitutes objectionable content, how many calls are too many, etc. It could be difficult to translate these subjective concerns into precise legislative proposals. Therefore, Congress might avoid legislation altogether by encouraging, but not requiring, practitioners to change their behavior. However, without legislative or regulatory action, or strong public pressure, those who make automated political calls would have few incentives to change their practices. As the preceding discussion of the AAPC code of ethics suggests, existing norms among political consultants do not necessarily address automated political calls. Professional enforcement cases are reportedly rare. There is also no guarantee that political consultants are responsible for allegedly negative consequences stemming from automated calls. Therefore, if Congress chose to encourage voluntary changes, it would need to carefully consider which behaviors, and by whom, it wanted to address.

Revise Disclosure Requirements

Congress could require political committees or others to report to the FEC (or another agency) more information about how automated political calls are used in campaigns. As explained previously, FECA requires political committees to report spending exceeding $200, including on political calls. However, although expenses must be itemized, FEC regulations do not require substantial detail about those expenses. As the brief case study highlighting the party committees' spending shows, automated calls (or any other expense) are not always clearly identifiable in FEC reports—even when those reports are filed consistent with FECA and FEC regulations.

Legislative action or an FEC rulemaking would be necessary to require political committees to provide more information about how they use automated political calls. Such efforts might include requiring use of more specific terms or categories on FEC reports than are currently required. In 2006, the FEC reconsidered its requirements regarding filing terminology.[60] After receiving only two public comments on the issue, the agency largely declined to require additional detail. At that time, the commission noted that the term "phone banks" provided sufficient detail to itemize "a disbursement to a vendor providing phone bank services."[61] The FEC did not address other telephone expenses, including automated political calls. If Congress wanted to require more specificity regarding reporting about automated political calls, it could encourage the FEC to reconsider its regulations on itemized disbursements.[62] Congress could also amend FECA. In particular, additional requirements about expenses could be added to the section of the law detailing itemized reports.[63]

Additional information about spending on automated calls, or other details, such as when the calls were made and why, would provide greater transparency about what role automated calls play in campaigns. On the other hand, requiring detailed information about automated political calls

[60] Federal Election Commission, "Statement of Policy: 'Purpose of Disbursement' Entries for Filings With the Commission," p. 887.

[61] Ibid., p. 888.

[62] The FEC could not act in the short term due to vacancies at the commission. See CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

[63] 2 U.S.C. § 434(b)

would be largely at odds with current regulations. Campaign finance reporting emphasizes providing information about the source and amount of campaign money, not how that money is used to execute campaign strategy. Perhaps most importantly, unless Congress chose to extend disclosure requirements to non-political committees (e.g., 527 organizations that are not registered as political committees), new disclosure requirements would not necessarily apply to all organizations responsible for the calls.

Revise Disclaimer Requirements

Congress could also require those making calls to provide more information to recipients. As noted previously, some disclaimer requirements already apply to automated political calls, which raises the question of whether additional enforcement measures, or increased oversight surrounding enforcement, is necessary. Even attempted enforcement can be difficult. For example, as the FEC has noted in some enforcement cases, field investigations do not necessarily reveal the identities of those responsible for launching "anonymous" automated calls. Therefore, just as regulations do not necessarily address moral issues related to campaign ethics, additional disclaimer requirements will not necessarily ensure that those intent on breaking the law provide truthful information when making automated calls.[64]

There is, however, room for requiring additional disclaimers if Congress chose to do so. In particular, existing disclaimer requirements do not necessarily apply to "outside groups" or individuals sponsoring calls that do not explicitly call for election or defeat of federal candidates or engage in fundraising. If Congress wanted disclaimer requirements to apply more broadly, it could amend the definition of "political committee" in FECA—a topic that is frequently controversial—or place additional requirements on all entities using automated calls, regardless of whether or not they are political committees. Doing so, however, potentially raises contentious issues that extend well beyond automated political calls. These include questions about which groups and individuals should be regulated by campaign finance law and which political messages constitute campaign speech versus policy-oriented speech.

Revise the Do Not Call Framework

As noted previously, several bills introduced in the 111th and 110th Congresses propose (or proposed) to add automated political calls to the national do not call list. The do not call bills would provide consumers with a way of opting out of political calls. This approach would not necessarily affect the content of automated political calls.

Adding political calls to the do not calls registry could occur relatively quickly while avoiding some of the complications of other policy options. For example, if "political calls" were defined broadly, questions about which organizations were making the calls (e.g., political committees versus outside groups) would presumably be inconsequential. By contrast, questions about political-committee status would likely affect some other policy options. Nonetheless, any effort to restrict political calls, including adding them to the do not call list, could raise constitutional questions (discussed below). This option would also not address concerns about the content of automated political calls.

[64] See, for example, Candice J. Nelson, David A. Dulio, and Stephen K. Medvic, eds. *Shades of Gray: Perspectives on Campaign Ethics* (Washington: Brookings Institution Press, 2002).

Restrict the Timing or Number of Calls

Congress could also limit automated political calls to certain hours of the day or restrict the number of calls made to a single recipient. Several states have reportedly placed time or other restrictions on automated calls.[65] The AAPC recommendations also include limiting the number of calls political committees could make in one day to the same number.

This policy option could reduce the number of calls voters receive, which appears to be a significant concern in the debate over automated political calls. However, one challenge associated with this approach would be determining how many calls are "too many" and what hours are acceptable. In addition, although this policy option could decrease the *volume* of calls voters receive (e.g., if a single entity could place only a certain number of calls to the same person per day), it would not necessarily reduce the *frequency* of calls for those voters who live in states that produce competitive campaigns. In fact, if groups were limited to a certain number of calls, it is possible that other organizations could emerge solely for the purpose of placing multiple calls to the same voters. Constitutional considerations (speech issues) that could affect this policy option are discussed below.[66]

First Amendment Considerations

Political calls to potential voters are political speech and entitled to the highest degree of protection under the First Amendment.[67] Laws or regulations that would burden or prohibit such calls if they use automated dialers or prerecorded messages, therefore, must withstand so-called strict scrutiny in order to be considered constitutional.[68] Under a strict scrutiny analysis, if a governmental restriction is challenged in court, the government must demonstrate that the restriction on automated political calls serves a compelling government interest and is the least restrictive alternative to serve that interest.[69]

A regulation that would ban the use of automated telephone dialing systems or prerecorded messages in political calls may place too high a burden on core political speech to withstand such exacting scrutiny. The First Amendment "protects [a speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[70] The Supreme Court announced this principle in the context of invalidating a state law that prohibited

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[65] Testimony of William E. Raney, in U.S. Congress, House Subcommittee on Elections, Committee on House Administration, p. 98.

[66] For additional information on constitutional regulation of campaign speech, see, for example, CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[67] *See* Eu v. San Francisco Democratic Cen. Com, 489 U.S. 214, 223 (1989) (holding that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office")(internal quotation omitted).

[68] Buckley v. Valeo 424 U.S. 1, 45 (1976) (holding that limitations on political expression are subject to the most exacting scrutiny). Current laws restricting the use of these technologies to call residential telephone lines prohibit only commercial calls, as noted earlier in this report. Calls for commercial purposes receive a lesser degree of First Amendment protection, and, accordingly, are subject to less exacting review by the courts. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[69] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

[70] Meyer v. Grant, 486 U.S. 414, 424 (1988).

the use of paid workers to obtain signatures on voter-initiative petitions as an impermissible burden on political speech.[71] The Court found that the law restricted "access to the most effective, fundamental, and perhaps economical avenue of political discourse."[72] The Supreme Court also has noted that "[i]t is of no moment that [a statute] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."[73] Accordingly, though a ban on the use of prerecorded messages or automated dialing systems would not prohibit all political calls, if a court finds that prohibiting the use of such technology would limit such calls to a lesser degree, such a restriction could be considered an impermissible burden on the First Amendment free speech rights of those placing political calls.

Governments, however, are permitted to place reasonable restrictions on the time, place, and manner of speech so long as they are content-neutral, narrowly tailored (though not necessarily the least restrictive means), and serve a significant government interest (though not necessarily a compelling interest), and leave open ample alternative channels for communication of the information.[74] Laws that "do not foreclose an entire medium of expression, but merely shift the time, place or manner of its use" likely will be upheld so long as "ample alternative channels for communication" are left open.[75] In order to qualify for the less exacting "reasonable time, place, and manner" restriction analysis, the law must be content-neutral. It is important to note that a restriction on the use of automated telephone dialers or prerecorded messages that applied only to political calls would likely be characterized as a content-based restriction on speech, which would require strict scrutiny, as described above.[76] Content-based discrimination could be avoided if the restriction encompassed all speech that utilized these technologies.[77]

There is little case law on this question; however, at least one federal court has addressed the issue in a decision that was subsequently reversed on unrelated grounds. The United States District Court for the Southern District of Indiana upheld the constitutionality of an Indiana statute that bans the use of automated dialing systems, unless the called party has given prior consent or the message is immediately preceded by a live operator who requests consent to play the message.[78] The court found that the statute did not violate the First Amendment, because it was content-neutral and a reasonable time, place, and manner restriction that left open ample alternative modes of communication.[79] The court distinguished the provisions at issue from other Supreme Court decisions that applied strict scrutiny to restrictions on the modes of delivery for

[71] *Id.*

[72] *Id.*

[73] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812 (2000).

[74] Burson v. Freeman, 504 U.S. 191, 197 (1991) (citing United States v. Grace, 461 U.S. 171, 177 (1983). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989). This case makes clear that, although both "strict scrutiny" and the test for reasonable time, place, and manner restrictions on speech require "narrow tailoring," "the same degree of tailoring is not required" under the two; under the reasonable time, place, and manner restrictions test, "least-restrictive-alternative analysis is wholly out of place." *Id.* at 798-799 n.6.

[75] City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (internal citation omitted).

[76] *See Burson*, 504 U.S. at 198 (holding that a ban on electioneering within a one-hundred yard radius of polling stations was a content-based regulation subject to strict scrutiny, as the regulation did not prohibit other types of speech).

[77] *See*, Ward v. Rock Against Racism, 491 U.S. 781, 793 (1989) (holding that city sound amplification guidelines at bandshell events were justified by the city's interest in regulating noise-levels without regard to content and, therefore, were content-neutral).

[78] Freeeats.com, Inc. v. Indiana, 2006 U.S. Dist. LEXIS 77534 (S.D.Ind. 2006).

[79] *Id.* at *34.

speech because the statute applied to all speech regardless of content and did not single out political speech.[80]

The decision of the district court was reversed by the U.S. Court of Appeals for the Seventh Circuit.[81] The Seventh Circuit held that the district court should have abstained from deciding the case, because the related state court action had been filed first, important state interests were implicated, and state courts were able to afford ample opportunity to address the federal questions raised by the case.[82] The case now awaits decision in Brown County Circuit Court, an Indiana state trial court.[83]

A related case was argued before the Indiana Supreme Court.[84] The case concerned whether Indiana's Auto-Dialer Law[85] applies to all calls (including political calls) or only to commercial calls.[86] On December 23, 2008, the court issued its decision holding that the statute applies to all calls placed using autodialers.[87] The court did not, however, analyze whether the statute is valid under the First Amendment.

Conclusion

Much remains unknown about automated political calls. Although empirical data are limited, estimates suggest that the calls reach at least a majority of American voters, occur frequently during federal campaigns, and could represent millions of dollars in spending by various political committees. Despite media accounts of strong public disdain for automated political calls, the FEC has received few formal complaints on the issue since 2003. Several bills introduced in the 111th and 110th Congresses would (or would have) impose additional regulations on automated political calls, but would not necessarily apply to all circumstances in which the calls are used.

Congress has several policy options for restricting automated political calls, if it chooses to do so. Aside from maintaining the status quo, a relatively cautious option might be gathering additional data before choosing a policy approach. Federal agencies and the oversight process could provide additional information. Another relatively limited approach would be to encourage voluntary changes by practitioners. By contrast, if Congress chooses to require policy changes, it could add political calls to the do not call framework or restrict the timing or number of calls. Finally, Congress could place additional disclosure or disclaimer requirements on political calls. Some of those options would likely involve sensitive questions about which groups and messages should be covered by campaign finance law. Constitutional considerations could also be a factor.

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[80] *Id.* at *39.

[81] Freeeats.com, Inc. v. Indiana, 502 F.3d 590 (7th Cir. 2007).

[82] *Id*. at 600-601.

[83] Indiana v. Economic Freedom Fund, No. 07C01-0609-MI-0425 (Brown County Cir. Ct. Filed September 18, 2006).

[84] Indiana v. American Family Voices, Inc. et al., No. 31S00-0803-CV-139 (Indiana Supreme Court, 2008).

[85] Ind. Code § 24-5-14-5(b) (2008).

[86] *See* Brief of Appellees at 9, State of Indiana v. American Family Voices, Inc. et al., No. 31S00-0803-CV-139 (Ind. May 27, 2008) (arguing that the auto-dialer statute seeks only to regulate commercial messages promoting goods or services); Brief of Appellant at 7, State of Indiana v. American Family Voices, Inc. et al., No. 31S00-0803-CV-139 (Ind. May 1, 2008) (arguing that the auto-dialer law applies to *all* calls, not just commercial calls).

[87] Indiana v. American Family Voices, Inc. et al., 2008 Ind. LEXIS 1188, No. 31S00-0803-CV-139 (Indiana Supreme Court, December 23, 2008).

Appendix. Research Methodology

As this report discusses, publicly available data about automated political calls are virtually nonexistent. FECA does not require detailed reporting about automated political calls. Political committees also have few incentives to make information about automated calls public because doing so potentially alerts opposing candidates, groups, and the media to campaign strategy. In addition to this lack of data from regulators and practitioners, scholarly literature is limited. Academic research that does exist tends to focus on campaign strategists, such as media consultants and pollsters, but not on vendors who provide technical services such as automated calls. Automated calls as a campaign tactic have also received limited scholarly attention.

Given the limited publicly available information about automated political calls, CRS employed a broad research strategy designed to gather as much information as possible. This included consultations with staff at the FCC, FEC, prominent political scientists, staff from the four national congressional campaign committees,[88] the American Association of Political Consultants (AAPC), individual political consultants, and a political journalist. CRS also conducted keyword searches in databases that provide archives of news sources, scholarly journals, dissertations, and polling data (e.g., LexisNexis, Proquest, JSTOR, Polling the Nations, etc.).[89] The primary author also conducted telephone interviews with three political consultants and analyzed disclosure and enforcement data provided by the FEC. Use of individual data sources is documented in the text of this report.

Finally, Internet research revealed many political web log ("blog") references to automated political calls in recent elections. Many of these entries contained claims about allegedly unethical or illegal campaign practices. Because CRS cannot verify the information contained in these blogs, it is not included in this analysis.

Author Information

R. Sam Garrett
Analyst in American National Government

Kathleen Ann Ruane
Legislative Attorney

[88] These include the Democratic Congressional Campaign Committee (DCCC), Democratic Senatorial Campaign Committee (DSCC), National Republican Congressional Committee (NRCC), and National Republican Senatorial Committee (NRSC).

[89] CRS analyst Kevin Coleman, information research professional Heather Negley, legislative attorney L. Paige Whitaker, and R. Sam Garrett, conducted database searches.

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