

Unpacking The Supreme Court's Praise For The TCPA

By Ezra Church and Terese Schireson (July 13, 2020, 6:08 PM EDT)

The U.S. Supreme Court issued its decision in *Barr v. American Association of Political Consultants Inc.* on July 6, invalidating the government-debt exception to the Telephone Consumer Protection Act, but leaving the rest of the ban on autodialed calls intact.

The decision was closely watched given the possibility, according to some legal scholars, that the court might actually strike down the entire TCPA as unconstitutional. In the end, the decision likely only strengthens the TCPA and its role as one of the most vexing and frequently deployed privacy and consumer protection statutes in the U.S.

In four separate opinions, six justices concluded that through the government-debt exception, Congress has impermissibly favored debt collection speech over political and other speech in violation of the First Amendment. Seven justices concluded that the proper remedy was to sever the debt-collection provision from the TCPA, rather than to invalidate the entire autodialer ban.

In the plurality opinion, Justice Brett Kavanaugh considered whether the TCPA, through the government-debt exception, "single[d] out a specific subject matter for differential treatment." In determining that it did, the court rejected the plaintiffs' arguments that the law's distinction was based on speakers rather than speech, that the legality of a robocall turned on the type of economic activity the caller is engaged in rather than the content of its speech, and that striking down the government-debt exception would require invalidating other statutes that regulate debt collection.

The court further held that because the exception is content-based, the exception is subject to strict scrutiny review. The government had conceded that it could not demonstrate that compelling governmental interest that would satisfy that review; accordingly, the court held that the government-debt exception is unconstitutional.

Turning to the second question — whether the proper remedy is to strike down the entire autodialer ban or only the government-debt exception to the ban — the court concluded that the provision could properly be severed. The court relied heavily on language in the TCPA instructing that if any portion was determined to be unconstitutional, it would be severed. The court also relied on a strong presumption in



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favor of severability where the remainder of the statute is capable of functioning independently.

In the end, only Justice Neil Gorsuch argued for invalidating the entire TCPA. He agreed the government-debt exception violates the First Amendment but said that the proper remedy is to invalidate the entire autodialer ban. Justice Gorsuch disagreed that the exception should be severed, as doing so "leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned."

Justice Gorsuch also cited the evolution of the technological landscape since the TCPA was enacted, noting that consumers nowadays rarely pay per call and are armed with new weapons, such as tools to screen and block unwanted calls.

Here are five takeaways from the decision.

First, the TCPA remains the law of the land and is only strengthened by the decision. Had a majority of the Supreme Court agreed with Justice Gorsuch that the entire autodialer ban should be stricken, the landscape of TCPA litigation would have changed overnight. Instead, the court settled on striking down and severing only the government-debt exception.

Ironically, the court's decision gives neither party its requested relief; the plaintiffs sought to strike down the entire autodialer ban, thereby permitting them to use autodialer technology to contact consumers, and the government sought to maintain its ability to use autodialers to collect debts. Rather than do away with many TCPA claims, since there would be no longer be any TCPA prohibition against the use of autodialers, as the plaintiffs had hoped, the holding in Barr reaffirms the viability of the autodialer ban and the TCPA more generally.

Second, the court appears to have been influenced in part by the perceived popularity of the TCPA, a point quite evident during oral argument and reflected in the decision, with Justice Kavanaugh noting that although Americans disagree about many things, they are "largely united in their disdain for robocalls."

First Amendment purists might suggest that such considerations should not influence a decision about speech, but favorable views of the law appear to have nonetheless weighed on the determination. The glowing language the court used to describe the TCPA is particularly interesting when contrasted with the view of the TCPA frequently expressed by trial court judges, many of whom are open in their distaste for the statute and the frequency with which TCPA cases clog their dockets.

As other TCPA issues percolate to the court, and in particular the TCPA's definition of an "autodialer," the court's praise for the statute cannot be ignored.

Third, the court's decision repeatedly referred to the TCPA as a privacy statute, intended above all to protect consumers from an invasion of privacy. This characterization of the TCPA will likely have long-term impact: as privacy laws continue to develop in the U.S., the TCPA's inclusion of a private right of action with heavy statutory penalties up to \$1,500 per violation will likely be influential and an important model, with legislators and advocates using it as both a positive and negative example going forward. This characterization also may have some impact on standing challenges in the lower courts to actions brought under the TCPA.

Fourth, the Barr decision may also be used to challenge other aspects of the TCPA. If the decision

requires that speech cannot be subject to different rules based on content, there are various other aspects of the TCPA that might be attacked, such as exceptions for package delivery and certain types of healthcare messages. Given the court's conclusion that the exception for government debt collection was unconstitutional because it "single[d] out specific subject matter for deferential treatment," some may argue that the other exceptions are also problematic.

Finally, Justice Gorsuch's dissent — specifically his discussion about the reductions in cost and new protections for consumers that have come with technological advances — is likely to provide support for future arguments against broad application of the TCPA.

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