

## Is This the End of the TCPA? High Court Hears Oral Arguments in 'Barr'

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By Kristie Rearick | May 07, 2020



**From left: Michael Pest and Kevin P. Allen of Eckert Seamans Cherin & Mellott.**

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First enacted in 1991, the TCPA generally prohibits calls to mobile phones when the caller uses an artificial or prerecorded voice or an automatic telephone dialing system (ATDS). In 2015, Congress amended the TCPA by adding an exemption for calls “made solely to collect a debt owed to or guaranteed by the United States.” See 47 U.S.C. Section 227(b)(1)(A)(iii).

In *Barr*, the American Association of Political Consultants (AAPC) challenged the constitutionality of the TCPA, arguing that it violates the First Amendment by imposing content-based restrictions on speech. For instance, the TCPA could impose sanctions on AAPC for a call to a mobile phone to deliver a political message, but a party seeking to collect a U.S. government debt who called the same number, using the same technology, would not suffer any TCPA repercussions.

After the district court held that the statute was constitutional, the U.S. Court of Appeals for the Fourth Circuit reversed, holding that the government-debt exception created a content-based limitation on speech and therefore was subject to strict scrutiny. The Fourth Circuit held that the exception could not survive such strict constitutional scrutiny and was invalid. However, the Fourth Circuit refused to nullify the TCPA in its entirety. Instead, the Fourth Circuit held that the unconstitutional government-debt exception could be severed from the TCPA, leaving the rest of the statute intact.

On further appeal to the Supreme Court, both sides argued that the Fourth Circuit was wrong. The U.S. government argued that the government-debt exception is not unconstitutional, while AAPC argued that the Fourth Circuit erred by leaving the balance of the TCPA intact after severing the government-debt exception.

The May 6 oral argument was conducted telephonically in light of virus-driven social distancing concerns. The ultimate outcome of the case is unknown and unpredictable. However, based on the questioning and tone of the oral argument, it appeared that multiple Justices were seemingly open to the possibility of striking down as unconstitutional not just the narrow government-debt exception but the broader TCPA restriction on calls to mobile phones using an ATDS or an artificial or prerecorded voice.

There appeared to be unanimity or at least near-unanimity among the justices that the government-debt exception created a content-based limitation on speech and therefore was subject to strict scrutiny; and there appeared to be little to no enthusiasm among the justices to conclude that the exception itself could survive that scrutiny. Therefore, the real debate appeared to be on the issue of “severance”—whether the proper remedy was to excise the government-debt exception from the statute, essentially leaving the pre-2015 amendment version of the TCPA intact; or conclude that severance of the exception was improper and that, as a result, the broader restrictions on ATDS/prerecorded voice calls had to fall along with the government-debt exception.

Multiple questions from multiple justices seemed to signal skepticism or at least some doubt about the propriety or wisdom of severance. Chief Justice John Roberts observed that severance typically happens when the provision to be excised is itself illegal. Here, by contrast, there is nothing inherently impermissible about allowing the collection of a government debt using an ATDS or an artificial/prerecorded voice. Justice Clarence Thomas relatedly observed that, in this case, the use of severance as a remedy for a First Amendment violation paradoxically would result in *more* punishment of speech, not less, because the invalidation of the exception but the retention of the underlying TCPA restrictions would only add government debt collectors to the camp of those whose speech the TCPA limits. Justice Neil Gorsuch asked, nearly rhetorically, why the court, in considering the severance option, could or should presume that Congress would want more speech suppressed.

This is not to suggest that the questioning was one-sided. AAPC’s counsel did not get kid-glove treatment by any measure. Thomas observed that the addition of the government-debt exception in 2015 is what created the constitutional issue and observed that a broader invalidation of the TCPA therefore would seemingly be asymmetrical. Justice Samuel Alito worried aloud about frustrating Congressional intent by going further than a severance, while Gorsuch held the view that there was an “intuitive appeal” to severance because it would restore the status quo ante prior to the 2015 amendment that created the problem in the first place. Justice Brett Kavanaugh and Roberts both expressed a belief that the TCPA is a law that generally enjoys broad popular appeal because of the limits that it imposes on unwanted telemarketing calls.

One exchange with AAPC's counsel seemed to grab Gorsuch's particular interest. AAPC's counsel argued that the original passage of the TCPA in 1991 occurred at a very different technological time. Cellphones then were not ubiquitous, and Congress in the early 1990s was worried about unwanted calls imposing incremental charges on consumers or the depletion of minutes on the cellular phone plans then prevalent. Times had radically changed by 2015 when another Congress adopted the government-debt exception. AAPC's counsel argued that the court should not presume that *that* Congress in 2015 necessarily would want the by-then outdated and nearly obsolete general TCPA restrictions to survive in their current form. That "two Congresses" argument appeared to resonate to some degree with Gorsuch.

The implications for the TCPA from the ultimate decision in *Barr* are enormous. If the court concludes that the TCPA violates the First Amendment by punishing the content of speech, and the court refuses to cure the violation by severing the government-debt exception, then the burgeoning cottage industry for claims under the TCPA could essentially disappear overnight. The oral argument suggests that such a seismic event is a real possibility.

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