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The Supreme Court Answers a Call for Clarity Under the TCPA

Authors: Gary C. Shockley, Matthew S. Mulqueen, Caldwell G. Collins
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The 1991 Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, seems straightforward enough. Prerecorded calls to residences are prohibited, as are calls made using an "automatic telephone dialing system" to cell phones, emergency lines, hospital rooms, and the like. Behind that surface simplicity, however, lies a tangled mass of legal, grammatical, and technological quandaries. Given that the statute provides for damages of up to \$1,500 for each improper call (or text), the answers to those questions carry enormous consequences for American consumers and businesses. In July, the U.S. Supreme Court severed an exception in the statute allowing calls regarding government debt after finding that the provision violated the First Amendment. On December 8, 2020, the Supreme Court waded further into the TCPA swamp when it heard oral arguments in *Facebook, Inc. v. Duguid*, No. 19-511.

Facebook v. Duguid squarely presents the question that has vexed litigants and courts in recent years: whether the definition of an "automatic telephone dialing system" (ATDS) encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator". The statute itself defines an ATDS as:

Equipment which has the capacity (A) to **store** or **produce** telephone numbers to be called, **using a random or sequential number generator**; and (B) to dial such numbers.

Id. (emphasis added). U.S. Courts of Appeal facing this question have reached a variety of results. Some have found the trailing modifier, "using a random or sequential number generator," applies to **both** preceding verbs: "to store or produce." Others reached a contrary conclusion by reading the modifier to apply only to the closest antecedent verb: "produce." Under the latter or disjunctive approach, any system with the capacity to dial from a stored list of numbers would be a prohibited ATDS, regardless of how those numbers were compiled. This extraordinarily broad reading would arguably include most modern cell phones capable of dialing from a stored list of contacts and would open many businesses – and perhaps individuals – to TCPA liability. Like the federal courts, the Federal Communications Commission's position on the scope of the ATDS definition has evolved in various rulemakings.

The Supreme Court granted review in *Facebook* to resolve the Circuit Court split. Invited to offer its views, the United States argued for a narrow, conjunctive view of "random or sequential number generator;" that is, that the TCPA prohibited use of a system to call randomly or sequentially generated numbers, but not those from a stored list compiled by other means. A number of interested individuals and groups filed amicus briefs addressing the legal arguments and highlighting the technological, business, and privacy concerns at stake.

Arguing for Facebook, former Solicitor General Paul Clement faced generally friendly questioning from the Justices. Justice Thomas asked if text messages were covered as a "call" in the first place – an issue generally resolved in favor of TCPA coverage. Justice Breyer confirmed Facebook's position that a disjunctive reading would outlaw virtually all calls from modern cell phones. Justice Alito, however – usually a hardliner on textual statutory interpretation – questioned how a number could be "stored" using "a random or sequential number generator" and stated that issue posed a "problem" for Facebook's argument.

The Assistant Solicitor General, supporting Facebook's position, argued that the case begins and ends with the statutory text. He contended that the conjunctive reading was the more natural one, and that the FCC had little discretion to interpret the statute differently. Justice Thomas asked, "At what point do we simply say that the statute is outdated and doesn't apply to new technology?" Justice Alito once again returned to his question about how one could possibly "store" a number using a generator.

Next up was Bryan Garner, the noted legal grammarian and lexicographer, for Respondent Duguid. Duguid's primary counsel had just recently recruited Garner on his team after Facebook's lawyers cited Garner's book *Reading Law: The Interpretation of Legal Texts* (which Garner co-authored with Justice Antonin Scalia) in their principal brief. Garner argued that the grammatical rules relied upon by Facebook and the SG were, in fact, narrow exceptions that could not overcome the plain language of the statute itself. He faced tough questioning from the Justices, all of whom seemed to question Congress's intent to outlaw in 1991 the use of features commonly found on cell phones in 2020 and generally unrelated to privacy concerns. Justice Sotomayor pointed out that she regularly used group texts, which her phone automatically dialed from her stored list of contacts. She also warned that suits against individuals for the "severe" civil penalties under the TCPA would certainly follow a ruling upholding the broad interpretation favored by Duguid. Garner attempted to distinguish those cases by arguing that human intervention in placing a call or text took it outside the scope of "automatic" dialing and thus of the TCPA. Justice Alito expressed skepticism on that point, noting that some human intervention was always required upstream of the actual transmission itself. Justice Gorsuch added to that skepticism by noting that the word "automatic" is not in the statute's definition of an ATDS. In a testy exchange, new Justice Amy Coney Barrett pressed counsel on whether programming the auto-reply function on her iPhone was "human intervention" sufficient to avoid liability under the TCPA.

Overall, the Justices appeared reluctant to adopt an interpretation that would risk sweeping common cell phone communications into the TCPA-prohibited category of ATDS calls. For various reasons, however, they also seemed to struggle to reconcile the language used by Congress with the approach favored by the Solicitor General and Facebook. Given the hundreds of millions of dollars at stake in ongoing TCPA litigation around the country, both businesses and consumers will await a final decision anxiously over the next weeks and months.

If you have any questions about this topic, contact [Gary Shockley](#), [Matthew Mulqueen](#), or [Caldwell Collins](#).