

# John Oliver Robocalls the FCC: Is it Legal?

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"Yes FCC, we meet again old friends" was the message comedian John Oliver had for the FCC on his show Last Week Tonight, when he devoted nearly 20 minutes to an in-depth criticism of "robocalls" and the FCC's approach to regulating such calls. (Oliver had previously taken aim at the FCC in multiple segments about net neutrality – which included [comparing then-FCC Chairman Tom Wheeler to a dingo](#) – and he allegedly [crashed the FCC's comment system](#) after encouraging his viewers to submit pro-net neutrality comments in the proceeding that led to the decision to [revert back to light-touch regulation](#) of broadband Internet access service.) He ended the March 10th segment by announcing that he was going to "autodial" each FCC Commissioner every 90 minutes with a satirical pre-recorded message urging them to take action to stop robocalls.

The irony of John Oliver making robocalls in order to protest robocalls is rather funny. But, it raises the question – are these calls legal? The fact that the calls appear to be lawful – and would be legal regardless of the action Oliver called for in the program – highlights that there is an important distinction between illegal calls and unwanted calls. In the end, Oliver's segment demonstrates some of the problems with modern efforts to apply the Telephone Consumer Protection Act ("TCPA"), a statute that was adopted well before the proliferation of cell phones in America, and seems to deter many legitimate calls while not sufficiently stopping scam calls.

Under the TCPA, it is unlawful to place an autodialed or a pre-recorded message call to certain phones without consent from the called party. Each of these elements – whether the call is autodialed or contains a pre-recorded message, the phone to which the call is made and whether consent is obtained – are relevant to determining the legality of any specific call. This makes for a complex, fact-based analysis as to whether any calling campaign is lawful or not.

The definition of an "automated telephone dialing system" or "ATDS" is one of the primary issues before the FCC today. An ATDS is defined in the statute as a device with 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." The FCC over the years has taken an ever-expanding view of what falls within the scope of an ATDS, which has created significant uncertainty and inconsistency in federal courts that have jurisdiction over complaints alleging violations of the TCPA. The inconsistency and uncertainty has hampered legitimate efforts to provide information beneficial to consumers, and has led to a [steady stream of petitions](#) for clarification to the FCC itself.

Most recently, in 2015, the FCC adopted a new and even broader definition of ATDS that turned on a device's "capacity" to function as an autodialer. Specifically, the FCC defined equipment as an autodialer if it contained the potential "capacity" to dial random or sequential numbers, even if that capacity could be added only through specific modifications or software updates (so long as the modifications were not too theoretical or too attenuated). Under this revised interpretation, any equipment that could be modified to dial numbers randomly or sequentially would be an ATDS – and therefore subject the caller to potential liability under the statute.

The Court of Appeals for the D.C. Circuit, which was asked to review this definition, was troubled by the “eye-popping” reach of the FCC’s interpretation, finding that it could be applied to any smartphone, and found that such a reach could not be squared with Congress’ findings in enacting the TCPA. The Court observed that the FCC’s interpretation was “utterly unreasonable in the breadth of its regulatory [in]clusion.” It rejected the FCC’s justification that a broad reach was necessary to encompass “modern dialing equipment,” concluding that Congress need not be presumed to have intended the term ATDS to apply “in perpetuity” and citing paging services as an example of TCPA provisions that have ceased to have practical significance. The Court also found that the confusion over the term “capacity” as it relates to the ATDS definition was multiplied by the FCC’s insufficient explanation of the requisite features that the covered ATDS equipment must possess. The Court set aside the prior interpretation and handed the issue back to the FCC for further analysis and explanation. In the year since that decision, the FCC [sought comment](#) on how to respond to the D.C. Circuit’s ruling and appears to be close to issuing a decision on the remanded issues. (As we have explained previously, Chairman Pai’s dissent to the 2015 ATDS definition [may be indicative](#) of how the FCC will approach the issue under his leadership.)

Which brings us back to John Oliver. Apparently concerned that the FCC would narrow the definition of ATDS, Mr. Oliver decided to take to the phones to call the FCC. And he is. He announced during his show that he had set up a program that would automatically dial each of the five FCC commissioner’s offices every 90 minutes and play a satirical pre-recorded message urging them to take action to stop robocalls.

But are these calls legal? Actually, it is very likely that they are. Oliver is sending a call containing a pre-recorded message, which satisfies the first element of the TCPA’s applicability. (The calls likely were sent with an autodialer too.) Because Oliver is calling the FCC’s office numbers – which are non-residential landline phones – those calls actually are not affected by the TCPA or the current definitional issue for the FCC. As consumers receiving political robocalls know, calls to landlines [don’t require prior consent](#) because the TCPA’s restrictions on the use of an ATDS or pre-recorded message don’t apply for landlines unless a call “introduces an advertisement or constitutes telemarketing.”

Further, the issue of revocation of consent to receive autodialed calls also does not come into play. Oliver spent some time on this show criticizing the “fine print” that some parties use for revoking consent to receive calls. However, Oliver’s explanation that the FCC could “revoke” consent for his calls by sending a certified letter to an address “buried somewhere within the first chapter of Moby Dick” that was quick-scrolled across the screen at the end of the episode, while entertaining, had no legal significance. (And, in any event, the FCC’s 2015 conclusion that consumers may “revoke consent at any time and through any reasonable means” was upheld by the D.C. Circuit upon review.) Put simply, consent is not required for the calls that Oliver is making, and revocation of consent similarly is not relevant to the calls. Nor does the TCPA limit the number or frequency of calls, so the 90-minute intervals for his calls do not amount to a violation of the statute. Finally, Oliver rightly observed during his segment that the National Do Not Call Registry only applies to telemarketing calls, so even if the FCC commissioners registered their office phone numbers on the National Do Not Call Registry, Oliver’s calls to them would not be unlawful.

What does it all mean? In part, it means that John Oliver was taking a bit of comedic license in order to be funny (which he is of course entitled to do). But more deeply, the stunt demonstrates that the TCPA isn’t really about unwanted calls, even though some will talk about the Act as if it were. Too often, the frustration of consumers is directed to unwanted calls when the proper question under the TCPA is whether calls are illegal. Moreover, an autodialed call is not necessarily unwanted, and

consumers may be less concerned with how the call is placed than they are with its content. Nor are calls placed without the consent of the recipient necessarily illegal. This is true of Oliver's calls to the FCC, but also of emergency calls, free messages from your wireless carrier and certain health-related calls, areas where the FCC has carved out exceptions to the consent rules.

Further, one lesson here is that, unlike net neutrality and other issues that are highly contentious and divisive, everyone seems to be relatively on the same side when it comes to robocalls. John Oliver and Chairman Pai would almost certainly agree that additional steps to prevent scam calls – like someone impersonating the IRS or falsely stating that a consumer has won a free cruise – are needed. And to be fair, the FCC is taking actions aimed at reducing these calls, such as allowing voice service providers to [block calls](#) from invalid, unallocated, and unassigned numbers before they ever reach a consumer's phone, supporting development of the industry-led call authentication framework to combat deceptive spoofing, and voting to create a single, nationwide database for [reporting number reassignments](#) in order to reduce calls placed in good faith to the wrong party. But the public debate needs to be clearer – the key is figuring out whether what's being done is effective at stopping illegal calls. Inflaming the public over every unwanted call does not help advance a workable solution to the real problem.

