Kirk McDaniel: We Americans are a divided people. But one thing that bridges the partisan divide like nothing else is our collective loathing of spam calls. Welcome to Sidebar, a podcast by Courthouse News Service. I’m your host, Kirk McDaniel. Sidebar’s own Amanda Pampuro takes us on a tour of the battlefield between telemarketers and robocallers and the everyday citizens who have had enough.

Salty Sally: Yes, hi? Hello?

Sean Harris: Hi, this is Sean Harris and I’m calling you from American National Benefits. How are you doing today?

Amanda Pampuro: I’m Amanda Pampuro. If you live in America and have a phone, you might be feeling déjà vu because you’ve had a conversation just like this, with someone who sounds very similar to Sean Harris, and you know that’s not his real name. We get these calls so often Pew says 80% of people don’t even pick up their phone.

KM: The other 20% of people being journalists who are on a deadline.

AP: Or like FBI agents.

KM: You’d think there’d be a law against spam calls.

AP: There is! Kind of. Congress did pass the TCPA, the Telephone Consumer Protection Act in 1991 with bipartisan support.

KM: Then why exactly am I still getting robocalls? Is there anything else we can do?

AP: Stick around to find out. America is fighting back against illegal robocalls with that mad whack law, 49 attorneys general and spam-fighting robots.

KM: Spam-fighting robots?

AP: Yes! But first, you need to know about the 2021 Facebook case decided by a unanimous Supreme Court. I wanted to talk to the man who took Facebook to the Supreme Court, but I was nervous about just calling up someone who had sued a social media giant over unwanted texts, so I wrote him a letter. He emailed me right back. And I finally called him.

Noah Duguid: My name is Noah Duguid. I’m a self-employed sound engineer. I live in western Montana. I guess I never wanted to be Googlable. I was always a little uneasy, I guess, with the amount of exposure we get through social media. And it became apparent to me, you know, a few years ago that with sites like Facebook, we are less users or customers than we are actually their product. I got a new phone number when I moved to Montana in 2013, and so I just started getting random texts.

AP: A bunch were from Facebook, telling Noah someone had tried to access his account. Thing is, he never opened one.
ND: I'm sure they were intended for the former owner of the number, but I was getting several a day once I started using the phone, and it was just kind of annoying.

AP: And you texted stop sending me these messages?

ND: Exactly, which kind of did nothing. They just kept coming. Eventually, I, you know, went on to Facebook site and tried to find a form to unsubscribe or just to contact them. And reported it as a technical issue, which I think it probably was at that point. But there was just no way to address it directly.

AP: Facebook offered Duguid only one solution: he’d have to open an account and claim the phone number to stop getting these text alerts obviously meant for someone else. There was no way he was going to do that. Then he learned about the Telephone Consumer Protection Act, the TCPA.

AP: Noah’s case touched on an issue that had split the circuit courts: the definition of what constitutes an illegal autodialer. The autodialer of the 1980s made it cheap and easy to call random and sequentially dialed numbers, like 0001, 0002.

KM: 0003—I think I get it, actually. Bringing an onslaught of telemarketing calls, I assume.

AP: Which was a public safety issue. Telemarketers could tie up emergency landlines and block 911 calls. But Congress didn’t want to ban all autodialers, because a school might want to call parents and tell them about a snow day. So, when the TCPA passed in 1991, it focused on banning calls to people on the National Do Not Call registry. And it outlawed using random or sequentially dialed numbers from an ATDS.

KM: Autodialers?

AP: Yeah. The TCPA did one more thing nobody really talks about: the law banned sending faxes without consent.

KM: Faxes?

AP: Faxes. And look, I grew up with a landline and played snake on a Nokia candy bar, but I have never ever not once sent or received a fax in my life. I say this because the TCPA is very much a product of its time, even as the Federal Communications Commission makes rules to put it to use. It took the FCC six years after a Ninth Circuit ruling that found text messages fall under the TCPA to make a rule about it. That July 10, 2015, omnibus order is still controversial among people who litigate under the law.

Eric Troutman: It was outrageous how broad the statute was back in 2015. And yet, the number of robocalls that American consumers received in 2015, 2016, 2017, was the highest in history. So, I’m Eric Troutman, I’m the czar of the TCPA, as I’m known.

AP: Besides defending businesses against TCPA claims, he runs the website TCPAworld.com.

ET: Not long ago, I received a text message from a local realtor that was trying to hawk their wares. And I responded very casually with a you know, this is a TCPA violation, please stop. And they literally cut and pasted something to me, it was quite lengthy, explaining why my text messages are not covered by the
TCPA. And I just thought, oh, dear, and then I did respond. I was like, my name is Eric Troutman. And you may want to look me up, just please, for your own sake, you might want to stop this or consult with counsel.

AP: So, I actually have some data that I pulled from the Courthouse News database. I went through and counted as many TCPA cases I could, and 2015, you're right, there were at least 2,533 cases. The next year 2016 was the most on record. And then it dropped off. That's counting federal, appellate and state cases collected by Courthouse News reporters. Since we don't cover county cases, there might have been even more. So, what happened in 2015 that drove these cases up?

ET: Yeah, so, in 2015, the FCC issued something called the TCPA omnibus ruling. And in that ruling, it decided a couple of things that were pretty important. First, it decided that the definition of autodialer, that's ATDS, the automatic telephone dialing system, under the TCPA was to be interpreted extremely broadly, so that any software-enabled dialing device was going to qualify as an autodialer. So, even your smartphone would constitute an autodialer as would popular predictive dialers, as would basically any piece of software that any big call center in the country was using. Instantly, they all became robocallers.

AP: One could argue that because your smartphone stores numbers and dials them for you, that made them illegal autodialers under the law as modernized by the FCC. The FCC expanded the rules, making it easier for plaintiffs to sue, driving up court cases. Having thousands of these cases, courts cut back on the rules, but different courts drew different lines, leading to a dramatic split on what constituted an illegal autodialer. Ultimately the Supreme Court had to step in.

ET: April 1 of 2021, a unanimous Supreme Court said that the autodialer definition in the TCPA is limited to systems that use a random or sequential number generator to either store or produce cellphones.

AP: So, autodialers are fine as long as you're not using it to call random numbers. And nobody does that anymore. More people probably use faxes today.

KM: Did that help Noah Duguid, who was getting the unwanted text messages from Facebook?

AP: Not really. Facebook had his phone number because someone provided it — either mistakenly or like when you have to fill out a form and you don't want to give your actual info so you make up a number? Yeah, don't do that. But since Facebook wasn't randomly texting people about account logins, the law didn't apply. The case was dismissed.

KM: Did he have to change his number or what?

AP: Luckily the filing of the lawsuit was enough for someone at Facebook to manually remove Noah’s number from its database. He told me he still gets random robocalls from other companies, but he was genuinely glad the case brought more clarity to the law. If you had known what the outcome would be, would you still have brought the suit? It broke the circuit split, but in favor of the telemarketers.

ND: I was glad to on principle. And I don't really agree that it was it ended in favor of them. I think it just ended saying that this law is not applicable against current technology or to protect people from current technology and its misuse. And if you're going to go after those kinds of abuses, you probably need a different law.
AP: In the aftermath, it became harder to sue under the TCPA using the autodialer prong, so fewer lawsuits are being filed.

AP: That doesn’t tell us anything about whether robocalls are getting better or worse. But defense attorneys were happy, at least the ones who think the TCPA is usually abused by serial litigants.

ET: You know, we look at it as quasi-extortion, though I’m sure plaintiff’s attorneys wouldn’t look at it quite as starkly.

AP: Eric Troutman, TCPA czar.

ET: Most of the folks that are making the really nuisance outbound calls, the scam calls, the IRS calls, are overseas and the folks overseas never get sued under the TCPA, because, obviously, the plaintiffs’ bar wants to get paid.

AP: One of the reasons the TCPA passed so easily during the Bush Sr. era.

George H. W. Bush: Read my lips, no new taxes.

AP: Is that Congress didn’t put any money behind it. Instead, the law enabled citizens to take violators to court for $500 per violation.

KM: $500?

AP: Per call. That can add up to a billion-dollar class action today. The rational was that consumers suing violators would make it too expensive for businesses to keep making spam calls. In practice, it also incentivizes attorneys and plaintiffs to file more lawsuits.

ET: But largely, it’s just a play for money. So, they’ll sue a big brand for some phone calls that were made, maybe a phone number changed hands and maybe a wrong number called by accident, and they’ll file as a class action, and they’ll try to collect for billions of dollars in damages. Obviously, the case settles for much less than that, the plaintiff’s lawyer is happy, they get a little money, the defendant is usually fairly happy because they no longer have to worry about the potential exposure hanging over their head and everybody just moves on.

AP: It’s not really a secret. A majority of TCPA claims are filed by a handful of people. There’s even a guy who goes by Doc Compton hawking how-to classes on TikTok.

Doc Compton: My Turning Robocalls Into Cash Kit teaches you exactly how to take the calls and get the information out of them that allows you to track them down and send them any of the six pre-litigation demand letter templates that are in the kit.

AP: A few companies actually sell products to help callers avoid litigation by filtering serial suers out of their call lists. I like to think of it as being on a very elite do not call list. One regular plaintiff told me that is exactly what he wants — for companies to stop calling him. Could you introduce yourself?
Chris Laccinole: Sure. My name is Chris Laccinole, I'm just a regular consumer. I think I found out about the law in around 2011. And I was getting a lot of calls from debt collectors who, you know, I had become a victim of identity theft, and so one of the problems you find out is that there's no department of identity theft police that you can go to.

AP: Do you think the law successfully has curbed the amount of robocalls and spam calls you get?

CL: Oh, no, it has not at all, the numbers still keep going up. Most of the people that I've sued continue to keep calling. Many of my lawsuits have been just, quite frankly, repeats of previous lawsuits, because they keep calling. Most of the companies that do use robocalling systems made a business decision that it's far more profitable to just go ahead and violate the TCPA.

AP: Were you an attorney before you started researching TCPA?

CL: No, I have no legal background, and no legal training. Well, I sat down, and I started reading the laws. And, you know, I made a lot of mistakes along the way, but I learned to file my own lawsuit and I became a little more experienced.

AP: I've spoken to a defense attorney who describes it, not you personally, but generally people who use the TCPA regularly, he says that they are bankrupting businesses. Do you have a response to that?

CL: Well, I don't think any pro se litigant has bankrupted a business. It's sort of a cheap and underhanded argument to make those defense lawyers feel better about what they're doing, which is defending a practice that is universally loathed. Back in 1991, when Senator Fritz Hollings put the statute together, he precisely designed it for a consumer like me to go after companies that violate the law. That was innate, and the whole design of the statute. Companies are aware that this law is out there, and there's all these regulations, the onus is on them to follow the law. It's not on me to excuse a violation of law.

AP: Even if Chris' lawsuits worked, and suing these guys made them stop calling him, that doesn't necessarily help me, or my grandmother, who does not have the time and energy to take all those annoying callers to court.

KM: And we still wouldn't stop our friend Sean Harris at American National from calling.

AP: Exactly.

KM: That kind of thing would take every attorney general in the country.

AP: You might be on to something.

KM: Tell me about it, after this break.

[Music break]

AP: Since the start of the pandemic, I've been really interested in the tension between the government's ability to solve problems and the market's ability. It took 30 years of TCPA lawsuits and trillions of illegal robocalls, but the government is finally sponsoring an official Anti-Robocall Task Force. In one of the
biggest lawsuits to date, 48 state AGs and Washington, D.C., are calling out one VoIP provider that allegedly routed billions of robocalls. Courthouse News reporter Joe Duhownik is covering it.

Joe Duhownik: I got my first cellphone in eighth grade. I've had the same number since and ever since eighth grade, I've been getting phone calls and text messages for this woman named Tiffany Negrn, who there's no way is a real person. I am Joe Duhownik. I'm the Phoenix reporter at Courthouse News.

AP: Have you, like, made any efforts with your phone company to get the calls stopped?

JD: Actually, last night just because I was reading more and more about this case, I did put my phone on the National Do Not Call Registry. So, hopefully that will actually abate things. But I guess we'll see.

AP: Well, it's such a universal topic that everybody gets these, everybody hates them and it's incessant. So, 48 states and Washington, D.C., came together under the Anti-Robocall Litigation Task Force.

JD: Yes. So that task force it is aided and kind of facilitated through the FCC, and it's assisted by the inspector general. Avid Telecom, which is a telecommunications company based in Tucson, they sell phone numbers, data dialing software. But it also serves as an intermediate network to route telemarketing calls across the 48 states that are suing. I mean, which is where Avid Telecom got into a little bit of trouble because at least 7.5 billion of those calls that were made between December 2018 and January 2023, were made to people on the National Do Not Call Registry.

AP: The TCPA bans anyone from calling numbers listed there without consent.

JD: The investigation into those calls found that more than 90% of them lasted less than 15 seconds, which the attorneys general say that's proof that these are automated or spam calls because people are hanging up right away once they realize it's not a real person.

AP: Besides looking for really short calls, the government also used spoofing and snowshoeing to identify scammers. Spoof calls can mimic numbers associated with government agencies like the IRS or the Social Security Administration. And snowshoeing is when the same caller uses a bunch of different numbers.

JD: In response to an investigation by the FCC working with that task force, they said, “Oh, no, we got all these numbers legitimately.” The owner, Michael Lansky, who is the main defendant in the suit, pointed to these opt-in websites that people put their numbers into. But the FCC kind of came back and said, “Well, these websites didn’t provide proper disclosures for what people were signing up for,” so in their eyes the company didn’t really legitimately obtain consent for these people to be called multiple times a day. Either they didn’t know what they were signing up for or their phone number got input automatically because they were signing up for some other deal.

AP: Yeah. You put your number in to shareyourfreebies.com, and suddenly, you're getting calls from Social Security scammers?

JD: Right, right, exactly.

AP: Have you tried to reach out to Avid or Michael Lansky?
JD: Both Lansky and the Vice President Stacy Reeves, their phone numbers listed on their websites are no longer in service, so you can't call either of them. But I did hear from their attorney who dismissed all claims, said “No, everything we're doing is lawful.”

AP: No one knows when or if the case will settle or go to trial. But every attorney in this area of practice is watching to see what happens.

Jay Edelson: It’s definitely a game of cat and mouse with the TCPA. So, the bad guys are pretty creative. I’m Jay Edelson, I’m the founder and CEO of Edelson PC. For me, it’s kind of more personal than that, I despise getting robocalls and spam text messages, I think more than anybody in the world. And it’s especially the type where they’re trying to trick you. I would not want to be the defendant in that case, I think they’re in a lot of trouble. And if you read the complaint, it’s really damning in terms of what the defendant’s business model was, again, it kind of goes back to what we were saying. It’s not just the violation of the TCPA, it went to a larger fraud, that people were using these robocalls in order to trick people and to give them the money.

AP: The TCPA is just part of this puzzle. In December 2019, Congress passed the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, the TRACED Act, to give the FCC new tools to fight illegal robocalls, like the STIR/SHAKEN framework. I’m not going to spell out those acronyms, but suffice it to say, someone at the FCC loves James Bond and STIR/SHAKEN directs phone companies to verify that calls coming through are from who they say they are. One more key player, the ITG, the Industry Traceback Group, is a private consortium led by USTelecom and the Broadband Association. They collect information about where the calls are coming from.

KM: That sounds great.

AP: There is one problem.

KM: Can't we just have one nice thing?

AP: No, Kirk, we can’t. As robocalls are dropping, TCPA czar Eric Troutman says it comes with a price.

ET: On the one hand, it's a miraculous and positive development if you really want to stop robocalls. I think the government's on the right path. On the other hand, you know, there's a lot of sacrifice from a civil liberties perspective and from an open communication networks perspective, that we're making in order to facilitate. Frankly, it cuts against the grain of telecom law as it existed for 80 years because it does make the carriers responsible for traffic that they carry, whereas for the large majority of the telecom infrastructure in this nation, they weren't responsible if some mob boss was using their phone line to call in a hit or something, that was never on the carriers.

AP: Something that came up in my conversation with the czar. Do you think that legitimate callers, legitimate businesses are at risk of being blocked by carriers or having action taken against them by the FCC today?

Isaac Shloss: Being blocked by carriers? Are they at risk? It's already happening. My name is Isaac Shloss, I’m the chief compliance officer for Contact Center Compliance by day. By night, I am the chair of government affairs for the PACE Association and I’m also vice chair of the association itself.
AP: PACE, the Professional Association of Customer Engagement, originated as the American Teleservice Association in 1983.

IS: Carriers are already doing this, they are already blocking calls from going through and there's really little incentive for them to stop that because one, the federal government's put pressure on them to do it, but two, the companies that they've employed to help them with this have found that they cannot only manufacture the disease, but they can sell the cure. So, you can call that same company and say, “Hey, I keep getting labeled as a spammer and I’m telling you I’m not a spammer,” and they say, “Oh, well, for $5 a month, we'll make sure that that phone number of yours doesn't get on the naughty list. It sure would be a shame for that to happen now, wouldn’t it.”

AP: I also asked Isaac about the things the government is using to identify scammers.

IS: You're looking at this from the view of a consumer and saying, “Aren't these things really obvious and clear ways where we can shut someone down?” And the answer to that is, unfortunately, no.

KM: What is it called when you use a bunch of different numbers?

AP: Snowshoeing. Legitimate callers might use a bunch of different numbers to try to get around spam blockers.

KM: What about spoofing?

AP: If you’re like my trash company and have people working from home all over the country, you have them spoof their numbers so the same one shows up on every caller ID, like the main 1-800 number.

KM: And making really short calls?

AP: That’s inevitable, because we’re wary of scam calls and quick to hang up.

KM: So, the government expanded the law, and now businesses want to trim it back?

AP: Sound familiar? Even if the Anti-Robocall Task Force and your phone company fine tune their programs, enforcement only comes after you’ve gotten a bunch of calls. And scammers, they hustle. They are constantly looking for ways to get better at stealing from people.

KM: Is there anything you can do in the moment?

AP: I mean, you can hire a spam fighting robot.

KM: What?

AP: Yeah, one guy I talk to got tired of waiting for the government to fix phones, so he programmed his own bot to answer his calls. You actually heard from Salty Sally, the spam fighting robot, at the beginning of the episode.

SS: You won't believe what just happened. I won a local talent show and I am just over the moon. Have you ever participated in a talent show?
Sean Harris: Well, that’s great ma’am, I used to participate when I was in Dubai from 2016 to 2019... I participated in the dancing, I did not win it exactly, but from the audition I got selected. Congratulations to you, ma’am, it’s a good day for you, and another congratulations that you received my call, and we are just providing to you some free invitation that can save you some good money.

Sally: You know I just won a local talent show and I’ve been thinking of a way to celebrate, maybe this insurance program could be a part of my celebration plan. Can you tell me more about it, like what kind of benefits does it offer, and do you think it would cover the cost of a big party?

Roger Anderson: My name is Roger Anderson. I founded the Jolly Roger Telephone Company several years ago. It was sort of an accidental service. I created a robot that would intercept and talk to my telemarketers and when I posted some audio recordings online, it turns out everyone hates telemarketing, so everyone wanted to use it. So, that’s what the Jolly Roger Telephone Company is.

AP: Roger loved computers growing up in the 80s. When he got his first job at Sears, he found out they used a computerized branch exchange, a kind of computer, to generate phone extensions and run the dial tone.

RA: That was in 1992. I fell in love with that ROLM phone system and said for the rest of my life I just want to work on phones.

AP: Jolly Roger launched in 2016, but over the last year, Roger’s been experimenting with the artificial intelligence program ChatGPT-4.

RA: We have a lot of information sort of cached, so when we determine that the call is about solar energy or something that way, then we have a library in Whitey Whitebeard’s voice, he’s our old man robot, by far our favorite, but there also is a loop in the background. Imagine a marble traversing along a Rube Goldberg machine. The evil genius of the service itself, telemarketers have no idea, you know they may figure it out at some point, but they really have no idea that they’re speaking with something artificial, which then ties them up, prevents them from calling thousands and thousands of channels. And you know, in my view, blocking telemarketers only does them a favor, because if you’re the type of person to block telemarketers, they don’t want to talk to you anyway. So, all that traffic moves downstream, their machines move it downstream, to the less sophisticated, so now the more vulnerable people are getting all the telemarketer calls.

AP: To date, Jolly Roger has intercepted 10 million calls. Do you think scammers, either legal or illegal marketers, are going to develop their own AI-driven calling monster?

RA: Absolutely. Yeah, there’s no question of that. The technology is very mature to determine the best time of day to reach you, or the best day of the week to reach you, or how many phone calls it’ll take before you pick up the phone. So, there’s a lot of analytics out there that legitimate call centers and legitimate fundraisers or political affiliations use for this type of analysis. But, there’s also a situation where you’ll hear a professional voice and a professional recording say that I’m with your local police and fire retirements fund or something that way.

Robocall: Hello, this is the National Police and Trooper Association. We’re calling everyone to let them know the new drive is under way...
RA: And that's actually a soundboard driven by someone maybe in a noisy call center who doesn't speak English very well and so they'll click on the different sound files that should be played. And so they'll say, “Can you do the $15?” And it'll be a gruff policeman sounding voice that's speaking with you, right, because they've managed to get somebody that has the gravely gruff sheriff’s authority voice, right, but it's being driven by a bunch of 19-year-old people in a basement somewhere overseas. So, there's that situation, well that will most certainly be plugged into AI. AI will now start driving soundboards in much the same way that the early Jolly Roger services worked, where, you know, some AI will now try to screen you to determine whether you're a good candidate for scamming and then send you off to Mr. Big.

AP: What have you learned, because I know you’ve screened a couple of calls, on your YouTube channel, you break down what's happening in the conversation, what have you learned about spammers from reviewing Jolly Roger tapes?

RA: There really is no concept of a do not call list. The nice thing also about Jolly Roger services, it's in the telemarketer’s best interest to stop calling you. Right? Now, it's not painful for you anymore, it’s painful for them. So, we transferred the pain to the telemarketer. And now they want to take your number off their list because it's a waste of time and money if they call you, which is lovely.

AP: I love this idea of bots being designed to converse with bots. You zoom out and algorithms are filtering through billions of calls, on one side they’re trying to connect us, on the other, they’re trying to block us. There’s this amazingly intricate system of telecoms, tech companies and government agencies trying to win ground in the robocall battle royale. If you think about it, every time you pick up the phone, it’s a victory for one of them or the other. I want to give a quick shout out to attorney Sergei Lemberg and WebRecon founder Jack Gordon, thank you for your insight and conversation.

KM: Well then, here’s to the war effort and hopes that one day we may live in a world where when the phone rings, there isn’t a telemarketer or a robot to be heard on the other end of the line. Thank you, Amanda, for your reporting on this episode and thank you for going on this journey with us through the frontline of this war against the robocallers. Remember to subscribe to Sidebar on Spotify and Apple Podcasts and if you feel so inclined, drop us a review. We would really like to hear your thoughts. Make sure to follow us at SidebarCNS on Instagram, Threads and X, the social media site formerly known as Twitter. In our next episode, Sidebar’s Hillel Aron takes us behind the scenes of the brutal divorce drama between Hollywood A-listers Angelina Jolie and Brad Pitt. Divorce is never easy, especially when there is a whole wine label at stake. You won’t want to miss out on these sour grapes. See ya.

[Outro music]