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## Trump v. TikTok

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# Trump v. TikTok

Anupam Chander\*

## ABSTRACT

*How did a Chinese big tech company beat the president of the United States? When then-President Donald Trump sought to ban TikTok, ostensibly because of its Chinese roots, US courts came to TikTok's rescue. Rather than deferring to the president's claims of a national security emergency justifying the ban, courts held that the president lacked statutory authority to ban TikTok. This Article chronicles the Trump administration's attempt to either ban TikTok or to compel its sale to a "very American" company, preferably one led by a political ally. The TikTok affair thus demonstrates what Harold Koh calls the National Security Constitution at work—with courts and Congress checking and balancing the president even with respect to foreign relations and national security.*

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## I. INTRODUCTION

On July 31, 2020, with three months to go before the presidential election, then-President Donald Trump announced that the United

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States would ban TikTok.<sup>1</sup> TikTok is a social media app that relies on artificial intelligence to select videos that might be of interest to a user based on that user's prior actions on the app.<sup>2</sup> TikTok is the US-based version of the Chinese app Douyin, both owned by Beijing-based ByteDance.<sup>3</sup> Trump declared that the seemingly benign app's Chinese origins "threaten the national security, foreign policy, and economy of the United States."<sup>4</sup> Executive orders followed, invoking the president's powers to respond to international economic emergencies and to rebuff hostile foreign investors. While the company's founder, Zhang Yiming, portrayed TikTok's app as a "window to look into a bigger world," Republican Senator Josh Hawley decried it as a "Trojan horse."<sup>5</sup> The Trump administration would declare TikTok banned from US shores initially in forty-five days, then ninety days, then another few days, and so on.<sup>6</sup> After the November election, news services would wonder if the Trump administration had "forgotten" TikTok.<sup>7</sup> Despite Trump's efforts, TikTok survived, even becoming the world's most visited website in 2021 and the world's most downloaded app in the

1. Anticipating the odd process that would follow, the initial announcement came via a press pool report based on a report of President Trump's remarks aboard Air Force One. See Maggie Haberman (@maggieNYT), TWITTER (July 31, 2020, 9:29 PM), <https://twitter.com/maggieNYT/status/1289387767059775489?s=20&t=j8o6fzQHW6PdPmt8ISFmBw> [<https://perma.cc/C7MB-23M3>] (archived Sept. 11, 2022).

2. For an account of how TikTok's algorithm works, see Eugene Wei, *TikTok and the Sorting Hat*, REMAINS OF THE DAY (Aug. 4, 2020), <https://www.eugenewei.com/blog/2020/8/3/tiktok-and-the-sorting-hat> [<https://perma.cc/XV5B-LAHN>] (archived Aug. 17, 2022).

3. TikTok, Inc. is the successor to Musical.ly, Inc. and was incorporated in California in 2015. ByteDance purchased Musical.ly in 2017 for a reported \$800 million. See *TIKTOK INC.*, OPENCORPORATES (last updated Feb. 22, 2022), [https://opencorporates.com/companies/us\\_ca/C3780792](https://opencorporates.com/companies/us_ca/C3780792) [<https://perma.cc/P6ZF-JECX>] (archived Aug. 26, 2022) (stating the incorporation date of TikTok); Natalie Jarvey, *Musical.ly Owner Merges App with TikTok*, HOLLYWOOD REP. (Aug. 2, 2018), <https://www.hollywoodreporter.com/business/digital/musically-owner-bytedance-merges-app-tiktok-1131630/> [<https://perma.cc/77QL-GQQ9>] (archived Aug. 18, 2022) (stating the purchase details).

4. Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

5. Michael Schuman, *Why America Is Afraid of TikTok*, THE ATLANTIC (July 30, 2020), <https://www.theatlantic.com/international/archive/2020/07/tiktok-ban-china-america/614725/> [<https://perma.cc/L7VD-2HNSJ>] (archived Aug. 18, 2022).

6. See *infra* notes 33–36 for initial forty-five day ban until September 20, 2020; *infra* notes 38–39 for ninety-day ban until November 12, 2020; *infra* notes 62–65 for extension of ban for a few days; *infra* notes 70–73, 76–79, 81–88, 98–101 for ban postponements resulting from litigation. For detailed analysis of the litigation surrounding the Trump administration's attempt to ban TikTok, see generally *infra* Part III.

7. See Sam Byford, *TikTok Says the Trump Administration Has Forgotten About Trying to Ban It, Would Like to Know What's Up*, THE VERGE (Nov. 10, 2020), <https://www.theverge.com/2020/11/10/21559677/tiktok-cfius-court-petition-ban-deadline> [<https://perma.cc/YJ8J-A4NB>] (archived Aug. 18, 2022); Whitney Tesi, *Trump Seems to Have Forgotten About His TikTok Ban*, SLATE (Nov. 12, 2020), <https://slate.com/technology/2020/11/trump-admin-tiktok-ban-forgot.html> [<https://perma.cc/EG35-77XN>] (archived Aug. 18, 2022).

first three months of 2022.<sup>8</sup> TikTok reported that it a billion monthly active users in September 2021.<sup>9</sup> Ironically, instead of Trump successfully banning TikTok, it was TikTok that banned Trump's videos of his speeches to his supporters on January 6, 2021.<sup>10</sup>

How did a big tech company from China beat the president of the United States on his home turf?

The answer is that the US courts, interpreting both the Constitution and federal statutes, rebuffed the president of the United States even when he alleged a national security emergency threatening the United States. I argue here that the failed TikTok ban thus demonstrated what Harold Koh describes as the "National Security Constitution" at work—the checks and balances between the three branches of government in the context of what the president deems to be a national emergency.<sup>11</sup> In fact, the contemporary statutory framework for national emergencies evolved in response to congressional concerns of an executive with "dictatorial" powers.<sup>12</sup> I will argue that the TikTok ban reveals that such checks and balances

8. See Joseph Pisani, *TikTok Was the Internet's Most Visited Site in 2021, Even Beating Google*, WALL ST. J. (Dec. 22, 2021), <https://www.wsj.com/articles/tiktok-was-the-internets-most-visited-site-in-2021-even-beating-google-11640204147> [https://perma.cc/RRE5-AMM2] (archived Aug. 18, 2022); Zachary McAuliffe, *TikTok Is the Most Downloaded App Worldwide in 2022 So Far, Analyst Says*, CNET (Apr. 14, 2022), <https://www.cnet.com/news/social-media/tiktok-is-the-most-downloaded-app-worldwide-in-2022-so-far-analyst-says/> [https://perma.cc/3TRL-9HEW] (archived Aug. 18, 2022); Jonathan Briskman, *Q1 2022: Store Intelligence Data Digest*, SENSORTOWER (Apr. 2022), <https://sensortower.com/blog/q1-2022-data-digest> [https://perma.cc/S2TX-A92E] (archived Aug. 26, 2022) (showing a table for overall app downloads worldwide with TikTok at the top).

9. Echo Wang, *TikTok Hits 1 Billion Monthly Active Users Globally – Company*, REUTERS (Sept. 27, 2021), <https://www.reuters.com/technology/tiktok-hits-1-billion-monthly-active-users-globally-company-2021-09-27/> [https://perma.cc/J7S2-ZWRD] (archived Sept. 11, 2022).

10. See Sarah Perez, *TikTok Bans Videos of Trump Inciting Mob, Blocks #stormthecapital and Other Hashtags*, TECHCRUNCH (Jan. 7, 2021), <https://techcrunch.com/2021/01/07/tiktok-bans-videos-of-trump-inciting-mob-blocks-stormthecapital-and-other-hashtags/> [https://perma.cc/5QPU-RXB5] (archived Aug. 18, 2022).

11. See generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (Mark Jay Mirsky ed., 1990) (discussing the existence of a "National Security Constitution" in the United States where the three branches of federal government share powers over the administration of foreign affairs policy).

12. "In 1977, during the House markup of a bill revising [the Trading with the Enemy Act (TWEA)], Representative Jonathan Bingham, Chairperson of the House International Relations Committee's Subcommittee on Economic Policy, described TWEA as conferring 'on the President what could have been dictatorial powers that he could have used without any restraint by Congress.'" CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 5 (2020) (quoting H. COMM. ON INT'L RELS., *Revision of the Trading with the Enemy Act: Markup before the Committee on International Relations*, 95th Cong., 1st Sess., 5 (June 1977)).

are necessary. Trump had targeted a communications platform that had proven popular with his critics. Like the John Adams administration bringing Sedition Act claims against an unfriendly newspaper publisher,<sup>13</sup> Trump was targeting a social media platform that had proven a thorn in his side.<sup>14</sup> TikTok's survival in the face of Trump's attacks shows the vitality of legal checks on executive power.

This Article proceeds as follows. Part II sets out what happened as Trump sought to ban TikTok. This retelling contextualizes the struggle within the politics of the moment—demonstrating how Trump almost succeeded in replacing the app's Beijing-based owner with an American owner led by a political ally. Part III recounts how the struggle played out in the US federal courts. Part IV steps back to appraise the claims in the Trump TikTok ban and its implications for internet governance.

## II. THE TRUMP BAN

In May 2019, President Trump issued Executive Order 13873, "Securing the Information and Communications Technology and Services Supply Chain."<sup>15</sup> The order declared a national emergency relating to potential vulnerabilities in information and communications technology or services from "foreign adversaries." Trump would rely in part on this executive order to issue his executive orders related to TikTok and WeChat a year later.

On October 23, 2019, Republican Senator Tom Cotton and then-Democratic Senate Minority Leader Chuck Schumer wrote to Joseph Maguire, the acting Director of National Intelligence, to draw attention to "potential censorship and data security concerns" posed by TikTok.<sup>16</sup> The following month, the Committee on Foreign Investment into the United States (CFIUS) launched a review of ByteDance's 2017 acquisition of Musical.ly, a California corporation also with roots in China, which it had folded into TikTok.<sup>17</sup> In May 2020, TikTok hired

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13. See AKHIL REED AMAR, *THE WORDS THAT MADE US* 449 (2022).

14. Trump was hardly the first to target foreign ownership in certain industries in the U.S. See Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 *STAN. L. REV.* 1073, 1151 (2022) ("Since the First Congress, the United States government has frequently placed restrictions on foreign ownership, control, and influence in platform industries . . . Restrictions on the foreign ownership of broadcast and undersea cables emerged with the rise of radio communications in the early twentieth century, and these restrictions were strengthened in subsequent decades.")

15. Exec. Order 13873, 84 Fed. Reg. 22,689 (May 17, 2019).

16. Haley Samsel, *Senators Ask U.S. Intelligence to Investigate Potential Security Risks of TikTok and Chinese-Owned Companies*, *SEC. TODAY* (Oct. 28, 2019), <https://securitytoday.com/articles/2019/10/28/senators-tik-tok-security.aspx> [https://perma.cc/G72E-6U9C] (archived Aug. 18, 2022).

17. See Taylor Walshe & Shining Tan, *TikTok on the Clock: A Summary of CFIUS's Investigation into ByteDance*, *CTR. FOR STRATEGIC & INT'L STUD.* (May 13, 2020), <https://www.csis.org/blogs/trustee-china-hand/tiktok-clock-summary-cfiuss-investigation-bytedance> [https://perma.cc/EHX9-ZFUS] (archived Aug. 18, 2022).

as its CEO an American, Kevin Mayer, after he was passed over by Disney's board of directors for Disney's top job.<sup>18</sup>

Meanwhile, in the spring and summer of 2020, TikTok users repeatedly humiliated President Trump. In April, upcoming comedienne (and former Google employee) Sarah Cooper began uploading TikTok clips lip-syncing to Trump's remarks on various topics.<sup>19</sup> Through her facial expressions and gestures, she used Trump's own words to ridicule him to devastating effect, drawing millions of views. In June, K-pop fans and others used TikTok to encourage users to claim tickets for a Trump rally in Tulsa and then not show up. After Trump himself boasted of a million requests for tickets, "fewer than 6,500 supporters came to cheer him on," leaving a mostly empty auditorium.<sup>20</sup> Where Trump relied on Twitter, YouTube, and Facebook to reach his millions of followers, TikTok was the one massively popular media platform that Trump and his supporters did not rely on.

On July 31, 2020, Trump announced the TikTok ban to reporters on Air Force One, stating, "[a]s far as TikTok is concerned, we're banning them from the United States."<sup>21</sup> Undeterred, Sarah Cooper posted yet another TikTok video mocking him with his own words.<sup>22</sup>

Just two days later, on Sunday, August 2, 2020, Microsoft issued a statement that it was negotiating with ByteDance about possibly

18. See Brooks Barnes & Jack Nicas, *Disney's Head of Streaming Is New TikTok C.E.O.*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/business/media/tiktok-ceo-kevin-mayer.html> [<https://perma.cc/HET9-EKF6>] (archived Aug. 22, 2022).

19. See Sarah Cooper (@whatchugotforme), TIKTOK, <https://www.tiktok.com/@whatchugotforme?lang=en> (last visited Aug. 26, 2022) [<https://perma.cc/48D6-BVUS>] (archived Sept. 11, 2020) (the TikTok page in question); James Poniewozik, *Trump Said, 'I Have the Best Words.' Now They're Hers.*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/arts/television/trump-sarah-cooper.html> [<https://perma.cc/5CRN-QFEM>] (archived Aug. 23, 2022) (reporting on the background and effects of Sarah Cooper and her TikTok videos).

20. Travis M. Andrews, *Did TikTokers and K-Pop Fans Foil Trump's Tulsa Rally? It's Complicated.*, WASH. POST (June 21, 2020), <https://www.washingtonpost.com/technology/2020/06/21/tiktok-kpop-trump-tulsa-rally/> [<https://perma.cc/DW73-JJN7>] (archived Aug. 23, 2022); see also Taylor Lorenz, Kellen Browning & Sheera Frenkel, *TikTok Teens and K-Pop Stans Say They Sank Trump Rally*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/style/tiktok-trump-rally-tulsa.html> [<https://perma.cc/C37C-NZCT>] (archived Aug. 23, 2022).

21. Ellen Nakashima, Rachel Lerman & Jeanne Whalen, *Trump Says He Plans to Bar TikTok from Operating in the U.S.*, WASH. POST (July 31, 2020), <https://www.washingtonpost.com/technology/2020/07/31/tiktok-trump-divestiture/> [<https://perma.cc/6HK4-6FYD>] (archived Aug. 23, 2022).

22. Sarah Cooper (@whatchugotforme), *How to TikTok*, TIKTOK (July 31, 2020), [https://www.tiktok.com/@whatchugotforme/video/6855773292595367173?is\\_from\\_webapp=1&sender\\_device=pc&web\\_id=7094314856959280686](https://www.tiktok.com/@whatchugotforme/video/6855773292595367173?is_from_webapp=1&sender_device=pc&web_id=7094314856959280686) [<https://perma.cc/4A7S-8UWH>] (archived Sept. 11, 2022).

purchasing TikTok.<sup>23</sup> Microsoft had already been contemplating a minority investment in TikTok since earlier that summer, aiming to bring TikTok over to using its Azure cloud services, “making the app one of Microsoft’s biggest cloud clients.”<sup>24</sup> A small Microsoft investment would have benefited TikTok, in turn, by providing “the endorsement of a blue-chip American company to mollify the Trump administration.”<sup>25</sup> But the Trump ban declaration had transformed those talks about a minority investment into negotiations towards an outright acquisition. Many also noted the possible fire sale price that an acquiror might obtain. Noting that “the United States’ forcing such a huge company to sell itself was ‘really unprecedented,’” Steven Davidoff Solomon, a law professor at the University of California in Berkeley, observed, “[t]his is a forced sale, and ByteDance is trying to keep it from being as much of a fire sale as possible.”<sup>26</sup> Oddly, the Microsoft announcement of acquisition negotiations began by noting a conversation between the head of the company and the US president: “Following a conversation between Microsoft CEO Satya Nadella and President Donald J. Trump, Microsoft is prepared to continue discussions to explore a purchase of TikTok in the United States.”<sup>27</sup> This made it clear that potential acquirors, at least, believed that the imprimatur of the US president was a precondition for any acquisition. Indeed, it was Trump who placed the weekend call to Satya Nadella.<sup>28</sup>

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23. See *Microsoft to Continue Discussions on Potential TikTok Purchase in the United States*, MICROSOFT: MICROSOFT CORP. BLOGS (Aug. 2, 2020), <https://blogs.microsoft.com/blog/2020/08/02/microsoft-to-continue-discussions-on-potential-tiktok-purchase-in-the-united-states/> [<https://perma.cc/5V3P-QSE9>] (archived Aug. 23, 2022).

24. Mike Isaac & Andrew Ross Sorkin, *How TikTok’s Talks with Microsoft Turned into a Soap Opera*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/technology/tiktoks-microsoft-deal-soap-opera-trump.html> [<https://perma.cc/N4ZV-5WE9>] (archived Aug. 24, 2022).

25. *Id.*

26. *Id.*; see also Mark Sweney, *Microsoft’s TikTok Deal: Bargain of the Decade or a \$50bn Blunder?*, GUARDIAN (Aug. 10, 2020), <https://www.theguardian.com/technology/2020/aug/10/microsoft-tiktok-bargain-blunder-video-sharing-social-media> [<https://perma.cc/S9S7-VDF5>] (archived Aug. 24, 2022) (“We believe Microsoft buying TikTok would be like Christmas morning coming early for investors,” said Dan Ives, an analyst at Wedbush, in a note to investors. “This is a unique deal of a decade opportunity. In a few years if navigated the right way [TikTok] could reach a valuation in the \$200bn area code.”).

27. *Microsoft to Continue Discussions on Potential TikTok Purchase in the United States*, *supra* note 23; see also Clare Duffy, *Microsoft Says It Is Still Talking with Trump About Buying TikTok from Its Chinese Owner*, CNN BUS. (Aug. 3, 2020), <https://www.cnn.com/2020/08/02/tech/microsoft-tiktok/index.html> [<https://perma.cc/YW6R-XFK4>] (archived Aug. 25, 2022) (discussing the continued negotiations between Microsoft and TikTok and President Trump’s input).

28. See Isaac & Sorkin, *supra* note 24.



On Monday, August 3, 2020, Trump stipulated that “a very large percentage” of the sale price should be “coming to the Treasury.”<sup>29</sup> Avery Gardiner, general counsel for the Center for Democracy and Technology, called that unprecedented government demand for a finder’s fee for the deal, “protection money.”<sup>30</sup> This Trump demand explained why Microsoft had singled out benefits for the US Treasury in its initial announcement of the TikTok negotiations, noting that Microsoft was committed to ensuring that the acquisition would “provid[e] proper economic benefits to the United States, including the United States Treasury.”<sup>31</sup> The unusual use of the word “proper” to qualify the “economic benefits” signaled some concern over the arrangements. In his remarks on August 3, Trump said that unless Microsoft or some other “very American” company purchased TikTok, it would be shuttered by September 15.<sup>32</sup>

On August 6, 2020, President Trump issued an executive order targeting TikTok, relying on his powers under the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act.<sup>33</sup> The order banned any transactions by any person subject to US jurisdiction with TikTok’s owner, ByteDance, and any ByteDance subsidiary.<sup>34</sup> This meant that no company operating in the United States could provide hosting services or purchase advertising. Apple and Google would have to remove ByteDance apps from their app stores and refuse to provide any services to the company. While the order did not technically ban TikTok from operating in the United States, the fact that no other company could provide hosting, advertising, or distribution services, even for routine security updates, effectively meant that the app would become unusable in the United

29. Tali Arbel, *Trump’s Demand for US Cut of a TikTok Deal Is Unprecedented*, ASSOCIATED PRESS (Aug. 4, 2020), <https://apnews.com/article/technology-business-asia-pacific-donald-trump-ap-top-news-84d93560dbdf072cf76ae7fe88dd8854> [<https://perma.cc/M86V-S5S3>] (archived Aug. 25, 2022).

30. Michael D. Shear, Alan Rappoport & Ana Swanson, *Trump Wants U.S. to Get Cut of Any TikTok Deal. No One Knows How That’d Work*, N.Y. TIMES (Aug. 8, 2020), <https://www.nytimes.com/2020/08/08/us/politics/trump-tiktok-deal-treasury.html> [<https://perma.cc/PC7J-6ZHD>] (archived Aug. 25, 2022).

31. *Microsoft to Continue Discussions on Potential TikTok Purchase in the United States*, *supra* note 23.

32. See Ana Swanson & Michael D. Shear, *TikTok, Trump and an Impulse to Act as C.E.O. to Corporate America*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/business/economy/trump-tiktok-china-business.html> [<https://perma.cc/R4MQ-4K3L>] (archived Aug. 25, 2022).

33. See Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

34. *Id.* § 1(a) (banning “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. . . . or its subsidiaries”).

States.<sup>35</sup> The order was scheduled to go into effect in forty-five days—that is, September 20, 2020.<sup>36</sup>

Also, on August 6, 2020, President Trump issued a parallel executive order taking aim at WeChat, a China-based app popular in the Chinese-American community.<sup>37</sup> Unlike ByteDance, which has bifurcated its Chinese and foreign apps, WeChat appears to operate as a unified app with its global operations managed from Shenzhen, China. And unlike the TikTok ban, there was no prior CFIUS investigation because there was no WeChat acquisition of a US company to trigger CFIUS jurisdiction.

On August 14, 2020, President Trump followed up with a second order against TikTok based on a review by CFIUS of ByteDance's acquisition of Musical.ly in 2017 and its eventual merger with TikTok in 2018.<sup>38</sup> The CFIUS review was a result, in part, of the Foreign Investment Risk Review Modernization Act of 2018, which expanded CFIUS's mandate to cover certain investments involving "sensitive personal data of U.S. citizens."<sup>39</sup> This order required ByteDance to sell or transfer TikTok within ninety days, that is—on November 12, 2020.

Trump wasted little time in making his acceptable choice for an acquirer known, calling Oracle a "great company" and declaring, "I think that Oracle would be certainly somebody that could handle it."<sup>40</sup> Asked whether he preferred Oracle to Microsoft as a suitor, Trump refused to answer.<sup>41</sup> Calling the company a "prominent ally of Mr. Trump," the *New York Times* observed that Oracle's "close ties with the White House . . . are what really make it stand out in Silicon Valley."<sup>42</sup> Oracle's CEO, Safra Catz, "was the only major tech executive to join the executive committee of the Trump administration's transition team."<sup>43</sup> Its founder and chairman, Larry Ellison, had hosted a fundraiser for Trump at his home. After the November 2020 election,

35. These prohibitions would be clearly spelled out with Commerce Department implementing orders on September 18, 2020. *See infra* notes 61–65.

36. *See* Exec. Order No. 13942, 85 Fed. Reg. 48,637 §1(a) (Aug. 6, 2020).

37. *See* Exec. Order No. 13943, 85 Fed. Reg. 48,641 (Aug. 6, 2020).

38. *See* Presidential Order Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (Aug. 14, 2020); Nicole Sperling, *Trump Officially Orders TikTok's Chinese Owner to Divest*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html> [<https://perma.cc/EQ9E-YUX4>] (archived Aug. 25, 2020).

39. Foreign Investment Risk Review Modernization Act of 2018, 50 U.S.C. § 4565(a)(4)(B)(iii)(III).

40. David McCabe, *Trump Says Oracle Could 'Handle' Owning TikTok*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/technology/trump-oracle-tiktok.html> [<https://perma.cc/3ZX7-MVLX>] (archived Aug. 25, 2022).

41. *See id.*

42. David McCabe, *TikTok Bid Highlights Oracle's Public Embrace of Trump*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/technology/oracle-tiktok-trump.html> [<https://perma.cc/S7VK-NENX>] (archived Aug. 25, 2022).

43. *Id.*

Ellison participated in a call focusing “on strategies for contesting the legitimacy of the vote.”<sup>44</sup>

The Japanese company Softbank had organized an alternative acquiror group in which Walmart would receive a majority stake and Softbank and Google parent company Alphabet would obtain minority stakes.<sup>45</sup> Softbank believed that “Walmart’s all-American image and Google’s cloud computing infrastructure backbone could be a way in for the Japanese technology company.”<sup>46</sup> But Trump administration officials rebuffed the plan, preferring that “the lead buyer of TikTok . . . be a technology company because that would better fit with its national-security rationale for forcing Chinese owner ByteDance to divest TikTok’s U.S. operations.”<sup>47</sup>

On August 27, 2020, Walmart stated that it would seek to acquire TikTok alongside Oracle. TikTok would be a marquee client for Oracle’s cloud services, which had less market share than Amazon, Microsoft, and Alphabet. Meanwhile, Walmart would benefit from direct e-commerce possibilities created on the app.

The Chinese government called Trump’s actions against TikTok a “smash and grab,” characterizing them as “an officially sanctioned ‘steal’ of Chinese technology.”<sup>48</sup> China called on the United States to “earnestly maintain fair and transparent international rules and order.”<sup>49</sup> On August 28, 2020, the Chinese ministries in charge of commerce, science, and technology expanded restrictions on technology exports to “cover such computing and data-processing technologies as text analysis, content recommendation, speech modeling and voice-

44. Isaac Stanley-Becker & Shawn Boburg, *Oracle’s Larry Ellison Joined Nov. 2020 Call About Contesting Trump’s Loss*, WASH. POST (May 20, 2020), <https://www.washingtonpost.com/politics/2022/05/20/larry-ellison-oracle-trump-election-challenges/> [https://perma.cc/9T3F-TL9M] (archived Aug. 25, 2022).

45. See Tyler Sonnemaker, *Walmart Reportedly Tried to Become TikTok’s Majority Owner by Teaming Up with Alphabet and SoftBank Before the Trump Administration Nixed the Idea*, BUS. INSIDER (Aug. 27, 2020), <https://www.businessinsider.com/walmart-alphabet-softbank-tiktok-deal-talks-before-microsoft-government-rejected-2020-8> [https://perma.cc/95DF-FZLB] (archived Aug. 25, 2022).

46. Alex Sherman, *Walmart Wanted to Be Majority Owner of TikTok, and Was Teamed Up with Alphabet and SoftBank Before Microsoft*, CNBC (Aug. 27, 2020), <https://www.cnn.com/2020/08/27/walmart-wanted-majority-tiktok-stake-teamed-with-alphabet-softbank.html> [https://perma.cc/XGF8-U5L7] (archived Aug. 25, 2022).

47. *Id.*

48. *US Administration’s Smash and Grab of TikTok Will Not Be Taken Lying Down: China Daily Editorial*, CHINA DAILY (Aug. 3, 2020), <https://www.chinadaily.com.cn/a/202008/03/WS5f2810e3a31083481725de72.html> [https://perma.cc/EZV8-WT4G] (archived Aug. 25, 2022).

49. *China Attacks US ‘Bullying’ over Ban on Tiktok and WeChat*, GUARDIAN (Sept. 19, 2020), <https://www.theguardian.com/technology/2020/sep/19/stay-calm-us-tiktok-users-prepare-for-world-without-newly-banned-app> [https://perma.cc/6LA3-9WEY] (archived Aug. 25, 2022).

recognition.”<sup>50</sup> This meant that if ByteDance sought to transfer the artificial intelligence to Oracle or any other foreign company, it would need a license from the Chinese government.

On September 14, 2020, Oracle confirmed Treasury Secretary Mnuchin’s announcement that it was a party to the proposed deal that ByteDance had submitted for CFIUS review in order to comply with the Divestment Order. On September 19, Trump declared himself satisfied: “I have given the deal my blessing,” he said.<sup>51</sup> “If they get it done, that’s great. If they don’t, that’s OK too.”<sup>52</sup> He also sought to make good in some way on his promise of a windfall for the US treasury, saying that the new company would hire at least twenty-five thousand people and make a \$5 billion contribution to a fund dedicated to education for Americans.<sup>53</sup> “That’s their contribution that I’ve been asking for,” Trump declared.<sup>54</sup> He also stated that the deal would result in a new company likely “to be based in Texas.”<sup>55</sup>

Differences over the deal term quickly arose, with ByteDance stating that it would own 80 percent of TikTok Global (the new company that would hold the US-based TikTok app) while Oracle’s executive vice president declared that “ByteDance will have no ownership in TikTok Global.”<sup>56</sup> ByteDance argued that TikTok Global would still be majority owned by Americans after the deal because ByteDance itself is about 40 percent–owned by US investors.<sup>57</sup> Sequoia Capital and General Atlantic, two US-based private funds with significant investments in ByteDance, had both advocated for an acquisition led by Oracle.<sup>58</sup>

50. Eva Xia & Liza Lin, *TikTok Talks Could Face Hurdle as China Tightens Tech Export Rules*, WALL ST. J. (Aug. 30, 2020), <https://www.wsj.com/articles/china-tightens-ai-export-restrictions-11598703527> [https://perma.cc/X6G5-PZ6A] (archived Aug. 25, 2022).

51. Stan Choe, *Trump Backs Proposed Deal to Keep TikTok Operating in US*, WASH. POST (Sept. 19, 2020), [https://www.washingtonpost.com/business/technology/trump-backs-proposed-deal-to-keep-tiktok-operating-in-us/2020/09/19/08cc901a-fadf-11ea-85f7-5941188a98cd\\_story.html](https://www.washingtonpost.com/business/technology/trump-backs-proposed-deal-to-keep-tiktok-operating-in-us/2020/09/19/08cc901a-fadf-11ea-85f7-5941188a98cd_story.html) [https://perma.cc/4ZVA-W4HU] (archived Aug. 25, 2022).

52. *Id.*

53. *See id.*

54. *Id.*

55. *See id.*

56. Georgia Wells & Alex Leary, *TikTok and Oracle Spar Over Ownership, Threatening Deal*, WALL ST. J. (Sept. 21, 2020), <https://www.wsj.com/articles/tiktok-and-oracle-spar-over-ownership-threatening-deal-11600702185> [https://perma.cc/G74C-LB MZ] (archived Aug. 25, 2022).

57. *Id.*

58. *See* Rolfe Winkler, Miriam Gottfried & Cara Lombardo, *General Atlantic, Sequoia Capital Are Key Drivers in Oracle Bid for TikTok*, WALL ST. J. (Aug. 24, 2020), [https://www.wsj.com/articles/general-atlantic-sequoia-capital-are-key-drivers-in-oracle-bid-for-tiktok-11598310734?st=4d2u0cu3263wqet&reflink=desktopwebshare\\_permalink](https://www.wsj.com/articles/general-atlantic-sequoia-capital-are-key-drivers-in-oracle-bid-for-tiktok-11598310734?st=4d2u0cu3263wqet&reflink=desktopwebshare_permalink) [https://perma.cc/V8TG-FFPD] (archived Aug. 25, 2022).

On September 14, 2022, Senator Josh Hawley criticized the proposed deal with Oracle, calling on CFIUS to reject the arrangement because “an ongoing ‘partnership’ that allows for anything other than the full emancipation of the TikTok software from potential Chinese Communist Party control is completely unacceptable, and flatly inconsistent with the President’s Executive Order of August 6.”<sup>59</sup>

On September 17, 2020, the Commerce Department prepared a “threat analysis” that declared sufficient evidence to establish “the national security risk that ByteDance and TikTok present[ed] to the United States,” noting that “[a]ssessments by the U.S. Intelligence Community (‘USIC’) and the Department of Homeland Security have reached concurrent and similar conclusions.”<sup>60</sup> TikTok’s national security threat stemmed from two central claims—one about the collection of information and the other about the dissemination of information. First, the United States claimed that the Chinese government would use TikTok to gather compromising data about Americans, which it could then use for “blackmail.” The Trump administration seemed to be relying on a broad provision of the Chinese National Intelligence Law, Article 7, which states that “any organization or citizen shall support, assist, and cooperate with state intelligence work according to law.”<sup>61</sup> Thus, the reasoning seems to go, if you deal with a company owned by a company that is subject to Chinese jurisdiction, then your data might be seized by the Chinese government.

On September 18, 2020, the US Department of Commerce issued an order implementing the first TikTok executive order, which barred any person subject to the jurisdiction of the United States from providing any hosting, peering, or mobile app store to TikTok.<sup>62</sup> The order, titled “Identification of Prohibited Transactions to Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain,” was

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59. *Senator Hawley Calls for CFIUS to Reject TikTok Partnership, Violates President’s Executive Order*, JOSH HAWLEY (Sept. 14, 2020), <https://www.hawley.senate.gov/senator-hawley-calls-cfius-reject-tiktok-partnership-violates-presidents-executive-order> [<https://perma.cc/5DV5-25B9>] (archived Aug. 25, 2022) (quoting Letter from Josh Hawley, U.S. Senator for Mo., to Steven T. Mnuchin, U.S. Sec’y of the Treasury (Sept. 14, 2020)).

60. Memorandum from John K. Costello, Deputy Assistant Sec’y for Intel. and Sec., on Proposed Prohibited Transactions Related to TikTok Pursuant to Executive Order 13942 2 (Sept. 17, 2020).

61. Guójiā Qíngbào Fǎ (国家情报法) [National Intelligence Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., June 27, 2017, effective June 28, 2017), art. 7.

62. See generally *Identification of Prohibited Transactions to Implement Executive Order 13942*, 85 Fed. Reg. 60061 (Sept. 24, 2020) (to be codified at 15 C.F.R. ch. VII).

published in the *Federal Register* on September 24, 2020.<sup>63</sup> The original transaction ban date was postponed from September 20, 2020. Providing services to keep TikTok running in the United States would now be illegal, but in two steps. The first step in the ban would be the barring of app store activities to support or distribute the app and would take place on September 27, 2020.<sup>64</sup> The second step would be to bar all other transactions essential to keep TikTok running, including hosting the app or its data, and would go into effect on November 12, 2020.<sup>65</sup>

### III. JUDICIAL CHECKS

As fall arrived in 2020, TikTok faced findings from the US government that declared it a national security threat and orders directing companies not to provide services to TikTok and directing ByteDance to sell the company. TikTok's days as a Chinese-owned app operating in the United States appeared numbered. On August 24, 2020, TikTok and ByteDance filed a complaint seeking to enjoin the Trump administration's ban in the United States District Court for the Central District of California, where TikTok is based.<sup>66</sup> But by September 20, 2020, TikTok and ByteDance sought to voluntarily dismiss the case without prejudice.<sup>67</sup>

Then a case brought by WeChat users successfully challenged the ban of that app, offering renewed hope for TikTok itself. The WeChat users sought to contextualize the WeChat ban within Trump's hostile remarks about China, including referring to COVID-19 as the "China flu," and "saying that China would own the United States if he was not re-elected."<sup>68</sup> The WeChat users argued that the president had another ulterior motive: to present China as a threat to the United States that he was protecting Americans against. Trump's anti-China actions were, they said, "aimed at bolstering his re-election campaign."<sup>69</sup>

63. See *id.*

64. See *id.*

65. See Satish M. Kini, Carl Micarelli, Zila Reyes Acosta-Grimes & Robert T. Dura, *U.S. Commerce Department Announces 'Prohibited Transactions' Related to TikTok, WeChat Mobile Apps*, DEBEVOISE & PLIMPTON (Sept. 24, 2020), <https://www.debevoise.com/insights/publications/2020/09/us-commerce-department-announces> [https://perma.cc/6ELE-KNZY] (archived Aug. 26, 2022). No similar delay was announced for the WeChat app. See *id.*

66. Complaint, *TikTok, Inc. v. U.S. Dep't of Com.*, No. 2:2020-cv-07672 (C.D. Cal. Aug. 24, 2020).

67. Notice of Voluntary Dismissal, *TikTok, Inc. v. U.S. Dep't of Com.*, No. 2:2020-cv-07672 (C.D. Cal. Sept. 20, 2020).

68. Ana Swanson & David McCabe, *U.S. Judge Temporarily Halts Trump's WeChat Ban*, N.Y. TIMES (Sept. 20, 2020), <https://www.nytimes.com/2020/09/20/business/economy/court-wechat-ban.html> [https://perma.cc/ZM63-D3SH] (archived Aug. 26, 2022).

69. *Id.*

On Saturday, September 19, 2020, WeChat users successfully challenged the Trump administration ban on WeChat, blocking it from taking effect the following day.<sup>70</sup> In *U.S. WeChat Users Alliance v. Trump*, Magistrate Judge Laurel Beeler ruled that the WeChat ban might well violate the US plaintiffs' First Amendment rights, and enjoined the executive order targeting that app.<sup>71</sup> With respect to the government's argument that WeChat endangered national security, Judge Beeler offered two responses: first, that the government had offered "scant little evidence" that the WeChat ban would alleviate concerns about Chinese actions threatening national security, and second, that alternative means might be available to address those concerns. She wrote,

on this record — while the government has established that China's activities raise significant national-security concerns — it has put in scant little evidence that its effective ban of WeChat for all U.S. users addresses those concerns. And, as the plaintiffs point out, there are obvious alternatives to a complete ban, such as barring WeChat from government devices, as Australia has done, or taking other steps to address data security.<sup>72</sup>

Judge Beeler also pointedly noted the possibility of anti-Chinese animus underlying the executive order:

The plaintiffs point to the President's anti-Chinese statements around the time he issued the WeChat Order, including his remarks about China's responsibility for the COVID-19 pandemic (including calling it the "China virus," the "China flu," and similar names), his reference to China's owning the United States if he is not reelected, and other mocking conduct that the plaintiffs characterize as showing racial animus and aimed at bolstering the President's reelection campaign.<sup>73</sup>

Trump's statements seemed to call into question the motivations of the executive order, at least in Judge Beeler's eyes. Indeed, on a radio talk show in August 2020, Trump had remarkably suggested that he alone would protect the United States from a Chinese takeover: "China will own the United States if this election is lost by Donald Trump."<sup>74</sup> He went on, "[i]f I don't win the election, China will own the

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70. See generally *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912 (N.D. Cal. 2020).

71. See *id.* at 926 (holding that the plaintiffs showed "serious questions going to the merits of their First Amendment claim that the Secretary's prohibited transactions effectively eliminate the plaintiffs' key platform for communication, slow or eliminate discourse, and are the equivalent of censorship of speech or a prior restraint on it").

72. *Id.* at 927.

73. *Id.* at 921–22.

74. Kevin Liptak, *Trump Says Americans Will Have to Learn Chinese if Biden Wins but Offers Little Condemnation of Beijing*, CNN POLITICS (Aug. 11, 2020), <https://www.cnn.com/2020/08/11/politics/trump-china-biden-learn-chinese/index.html> [<https://perma.cc/BEA3-48G8>] (archived Aug. 26, 2022).

United States. You're going to have to learn to speak Chinese, you want to know the truth.”<sup>75</sup>

Almost immediately after the WeChat users' victory, TikTok filed suit on September 23, 2020, in the US District Court for the District of Columbia to enjoin the US government from enforcing its order barring US companies from supplying services to TikTok, then scheduled to occur on Sunday, September 27, 2022. TikTok argued, “[t]here is simply no genuine emergency here that would justify the government’s precipitous actions.”<sup>76</sup> On September 27, 2022, hours before the Sunday night deadline for the TikTok prohibitions, Judge Carl Nichols enjoined the Department of Commerce’s order implementing Trump’s executive order, but only with respect to the transactions that were to take effect that evening as the clock struck midnight. Judge Nichols has impeccable conservative credentials, having clerked for Judge Laurence Silberman of the United States Court of Appeals for the District of Columbia Circuit and then Justice Clarence Thomas, and having been nominated to the federal bench by Trump himself.<sup>77</sup> He had been a long-time member of the Federalist Society, a well-established conservative pipeline to the judiciary.<sup>78</sup> TikTok argued that the executive order was *ultra vires* because it exceeded the president’s authority under IEEPA. While IEEPA gives the president broad powers to regulate economic transactions after a declaration of an international emergency, the statute expressly bars the president from “regulat[ing] or prohibit[ing], directly or indirectly” the importation or exportation of “information or informational materials,” “whether commercial or otherwise” and “regardless of format or medium of transmission.”<sup>79</sup> Judge Nichols held that the TikTok ban fell squarely within the informational materials exception, and thus fell outside the actions authorized by the statute.

75. *Id.*

76. Mike Isaac, *TikTok Files for Injunction to Stop Ban of App*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/technology/tiktok-injunction-ban-app.html?searchResultPosition=8> [<https://perma.cc/Y3EF-PL79>] (archived Aug. 26, 2022).

77. See Carl Nichols, '96: Nominated to Serve as a District Judge on the US District Court for the District of Columbia, UNIV. OF CHI. L. SCH. (June 7, 2018), <https://www.law.uchicago.edu/news/carl-nichols-96-nominated-serve-district-judge-us-district-court-district-columbia> [<https://perma.cc/NF3Y-FZ8V>] (archived Sept. 18, 2022); *The Federalist Society Presents: A Conversation with Judge Nichols*, UNIV. CHI. L. SCH., <https://www.law.uchicago.edu/events/conversation-judge-nichols> (last visited Aug. 26, 2022) [<https://perma.cc/TTC9-W7KZ>] (archived Aug. 26, 2022).

78. See S. COMM. ON THE JUDICIARY, CARL NICHOLS' REPONSES TO QUESTIONS FROM SENATOR FEINSTEIN 6–7 (Aug. 29, 2018), <https://www.judiciary.senate.gov/imo/media/doc/Nichols%20Responses%20to%20QFRs1.pdf> (last visited Aug. 26, 2022) [<https://perma.cc/HY5E-G8C9>] (archived Aug. 26, 2022); Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/9NP5-JFNM>] (archived Oct. 11, 2022).

79. 50 U.S.C. § 1702(b)(3).



Trump's next challengers were, as they described themselves, "a comedian, fashion creator, and musician."<sup>80</sup> Three TikTok creators, each with millions of followers on the app, brought a lawsuit in the US District Court for the Eastern District of Pennsylvania, arguing that a TikTok ban would hamper their speech and, in the process, undermine their livelihood as internet influencers. They argued that alternative media platforms would prove inadequate: "Although Plaintiffs have accounts on other social media platforms, those platforms do not have the same capabilities as TikTok and Plaintiffs have not achieved nearly the same success using those platforms."<sup>81</sup> On September 26, 2022, Judge Wendy Beetlestone denied their request for a temporary restraining order. Judge Beetlestone understood the Department of Commerce order as creating a "phased elimination of TikTok in the United States, such that on September 27, 2020, "distribution of TikTok within the United States will be prohibited and current TikTok users will no longer be able to update the application," and on November 12, 2020, "TikTok will be effectively banned in the United States."<sup>82</sup> Judge Beetlestone concluded that the plaintiffs' First Amendment claims were unlikely to succeed with respect to a bar on new users downloading the app.<sup>83</sup> With respect to the claim that the executive order exceeded the power granted under IEEPA, she also concluded that the plaintiffs failed to demonstrate irreparable harm from the failure to grow their audience from new downloads of TikTok.<sup>84</sup>

But returning to these issues a month later with respect to a request for a preliminary injunction, Judge Beetlestone sided definitively with the TikTok influencers. She recognized that the executive order went far beyond barring new downloads of TikTok, and would cause the plaintiff influencers to "lose the ability to engage with their millions of followers on TikTok, and the related brand sponsorships."<sup>85</sup> The US government argued that the TikTok prohibitions were designed to affect TikTok's commercial transactions, and that any impact on expressive activity was merely "incidental."<sup>86</sup> On October 30, 2020, observing that the informational materials

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80. Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. at 1, *Marland v. Trump*, 498 F. Supp. 3d 624 (E.D. Pa. 2020) (No. 2:20-cv-04597) 2020 WL 8613435.

81. Compl. for Injunctive and Declaratory Relief at 18, ¶ 61, *Marland v. Trump*, 498 F. Supp. 3d 624 (E.D. Pa. 2020) (No. 2:20-cv-04597) 2020 WL 8613435.

82. *Marland v. Trump*, 498 F. Supp. 3d 624, 629 (E.D. Pa. 2020).

83. *See id.* at 635.

84. *Marland v. Trump*, No. CV 20-4597, 2020 WL 5749928, at \*9 (E.D. Pa. Sept. 26, 2020) ("There is no need to address Plaintiffs' likelihood of success on the merits of either IEEPA claim because Plaintiffs fail to make a clear showing that the September 27 prohibitions will likely subject them to irreparable harm.").

85. *Marland v. Trump*, 498 F. Supp. 3d 624, 641 (E.D. Pa. 2020).

86. *Marland v. Trump*, 498 F. Supp. 3d 624, 637 (E.D. Pa. 2020), *appeal dismissed*, No. 20-3322, 2021 WL 5346749 (3d Cir. 2021).

exception excluded the authority to regulate informational materials “either directly or indirectly,”<sup>87</sup> Judge Beetlestone concluded that the president’s TikTok ban exceeded the authority Congress had granted the president under IEEPA.<sup>88</sup>

Because plaintiffs were entitled to a preliminary injunction based on their *ultra vires* claim, Judge Beetlestone did not reach the plaintiffs’ First Amendment claims.<sup>89</sup> However, a footnote took aim at a crucial First Amendment defense offered by the government—that the government’s actions against TikTok were “content neutral.”<sup>90</sup> Judge Beetlestone observed that the Department of Commerce’s actions were “clearly not a ‘generally applicable’ regulation” but rather “expressly appl[ied] only to certain specified transactions involving the TikTok mobile app.”<sup>91</sup>

On November 10, 2020, TikTok and ByteDance opened a new front, challenging the CFIUS order directly in court. They filed their challenge directly at the US Court of Appeals for the D.C. Circuit.<sup>92</sup> They argued that the CFIUS order was *ultra vires* because CFIUS’s jurisdiction was limited to a review of ByteDance’s acquisition of Musical.ly, which had already been phased out of the TikTok software for more than two years, and Musical.ly’s user base constituted a small fraction of TikTok’s user base.<sup>93</sup> The CFIUS order, TikTok and ByteDance argued, went far beyond attempting to unwind that transaction.<sup>94</sup> TikTok and ByteDance also argued that the CFIUS order violated its due process rights by failing to provide a reasoned basis for its decision or an opportunity to respond to CFIUS’s concerns.<sup>95</sup> TikTok and ByteDance went on to challenge the CFIUS order under the Administrative Procedure Act, as arbitrary, capricious, and unlawful, because, among other things, CFIUS failed to consider ByteDance’s efforts to mitigate the committee’s concerns.<sup>96</sup> Finally, TikTok and ByteDance argued that the compelled divestiture to “a government-approved entity” constituted a taking without just compensation under the Fifth Amendment.<sup>97</sup>

TikTok’s and ByteDance’s challenge to the CFIUS order has not yet been addressed by a court. Neither Judge Nichols’s nor Judge Beetlestone’s orders enjoined the CFIUS executive order. Instead, the

87. 50 U.S.C. § 1702(b).

88. *Marland*, 498 F. Supp. 3d at 641 (“Commerce Identification is *ultra vires* under IEEPA’s informational materials exception.” (emphasis in original)).

89. *Id.* at 642 n.8.

90. *Id.* at 638 n.6.

91. *Id.*

92. *TikTok Inc., et al v. Comm. on Foreign Inv., et al*, Docket No. 20-01444 (D.C. Cir. Nov 10, 2020).

93. *Id.* at 19–22.

94. *Id.* at 23.

95. *Id.* at 27–29.

96. *Id.* at 29–31.

97. *Id.* at 31–33.

government has repeatedly delayed the implementation of the order. On November 12, 2020, CFIUS granted an extension of the ninety-day period for an additional fifteen days, from November 12, 2020, to November 27, 2020.<sup>98</sup> Then on November 25, 2020, CFIUS granted an additional one-week extension of that period, from November 27, 2020, to December 4, 2020.<sup>99</sup> And when the latest deadline arrived, the Treasury Department declined to extend it further but also indicated that it “won’t yet compel a sale.”<sup>100</sup> On February 19, 2021, the CFIUS case was held in abeyance on a joint motion of the parties.<sup>101</sup>

On December 7, 2020, in the case of *TikTok v. Trump*, Judge Nichols granted a preliminary injunction with respect to the remaining transactions prohibited by the Department of Commerce order. The US government sought to argue that the Department of Commerce’s prohibitions were only business-to-business regulations, rather than regulation of communications or prohibitions on informational materials, saying that the Department of Commerce prohibitions “directly prohibit only commercial transactions but do not indirectly regulate anything, not even data.”<sup>102</sup> But Judge Nichols answered that the government had itself argued that it sought to prevent the dissemination of propaganda—clearly a regulation of communications. Judge Nichols wrote, “the two goals of those prohibitions are to halt US user data from flowing to China and to stop CCP propaganda from spreading in the United States.”<sup>103</sup>

#### IV. APPRAISAL

What lessons should we learn from *Trump v. TikTok*? This Part reviews the national security claims and the broader implications of both the Trump ban and the judicial response. It begins by analyzing the national security claims of Chinese surveillance and propaganda, and then turns to the implications of the executive actions and the judicial reception.

98. See Pls.’ Notice of Extension in CFIUS Matter at 1, *TikTok, Inc. v. Trump*, No. 20-cv-02658 (D.D.C. Nov. 25, 2020).

99. See *id.*; see also *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 101 (D.D.C. 2020); Miles Kruppa, *ByteDance Gets Seven More Days to Resolve TikTok U.S. Ownership*, FIN. TIMES (Nov. 25, 2020), <https://www.ft.com/content/35e11a7a-2bd8-4d1b-9f5c-e0cc3c0851a8> [<https://perma.cc/6M8U-Q5NP>] (archived Sept. 5, 2022).

100. Jay Greene, *TikTok Sale Deadline Will Pass, Though Regulators Will Hold Off on Enforcing Divestiture*, WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/technology/2020/12/04/tiktok-sale-deadline/> [<https://perma.cc/T7R5-BSB5>] (archived Aug. 24, 2022).

101. *TikTok Inc. v. Comm. on Foreign Inv.*, Docket No. 20-01444 (D.C. Cir.) (Feb. 19, 2021).

102. *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 106 (D.D.C. 2020), *appeal dismissed sub nom. TikTok Inc. v. Biden*, No. 20-5381, 2021 WL 3082803 (D.C. Cir. 2021).

103. *Id.*

The public response to the TikTok ban was equivocal. Op-eds were divided. One *Washington Post* op-ed in 2020 even worried that the app's AI might be used to train China's military AI.<sup>104</sup> Given the direct attack on a wildly popular means of communication in the months before a national election, the response was surprisingly muted.

#### A. *A Threat to National Security?*

Trump's first TikTok executive order spelled out the twin threats allegedly posed by TikTok: its collection of personal data and its shaping of discourse. I consider the surveillance threat in this section and the propaganda threat in the next section.

The Trump administration argued that through TikTok, the Chinese government would be able to grab sensitive personal information from Americans, which might be used for blackmail or espionage. According to the executive order, "[t]his data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage."<sup>105</sup> To substantiate this claim, the August 6th executive order reported, "TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories."<sup>106</sup>

But TikTok was hardly unique in this regard—this kind of information collection is commonplace among apps of its kind. Location data, when permitted to be shared by the user, might be used to better target both content and ads. Browsing and search history on the TikTok app is how the TikTok app learns what might be appealing to a user, again both for content and ads. There is no indication that TikTok has access to browsing or search history outside the app itself. Indeed, many may have misread the government's reference to browsing and search histories to mean that the government had found that TikTok was able to access users' Google or Bing searches or their web browsing outside the app. As *Wired* reporter Louise Matsakis concluded, "TikTok's data collection practices aren't

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104. See Sarah Bauerle Danzman, *The U.S. Government Thinks TikTok Is a National Security Threat. So Why Can't They Decide What to Do?*, WASH. POST (Sept. 23, 2020), <https://www.washingtonpost.com/politics/2020/09/23/us-government-thinks-tiktok-is-national-security-threat-so-why-cant-government-decide-what-do/> [https://perma.

cc/AGG3-LMA7] (archived Aug. 24, 2022) ("If the algorithm has military applications (such as providing more powerful AI to use in weapon systems), the Chinese policy of 'military-civil fusion' could potentially transfer this technology to its military.").

105. Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

106. *Id.*

particularly unique for an advertising-based business.”<sup>107</sup> A Central Intelligence Agency analysis found no evidence that the Chinese government had used TikTok to spy on Americans.<sup>108</sup>

Moreover, TikTok is a largely public app, where individuals post material typically for public view. The type of data available to it is typically less sensitive than data held by many communications or health apps.

One claim about TikTok’s information gathering received significant attention in 2020, suggesting that it was gathering data from outside the app. Many news services reported on TikTok constantly reading the clipboard on iOS devices.<sup>109</sup> The story was based on a report by security researchers Talal Haj Bakry and Tommy Mysk.<sup>110</sup> What often got lost in the reporting is that TikTok was hardly alone in clipboard snooping; the apps from *Reuters*, the *New York Times*, and even National Public Radio engaged in the same behavior, as did many other popular apps like Reddit and LinkedIn.<sup>111</sup> TikTok explained that this was an anti-spam measure, and promised to discontinue it.<sup>112</sup> But for TikTok this report has been used to suggest

107. Louise Matsakis, *Does TikTok Really Pose a Risk to US National Security?*, WIRED (July 17, 2020), <https://www.wired.com/story/tiktok-ban-us-national-security-risk/> [<https://perma.cc/G7FK-RFE4>] (archived Aug. 24, 2022).

108. See David E. Sanger & Julian E. Barnes, *Is TikTok More of a Parenting Problem Than a Security Threat?*, N.Y. TIMES (Aug. 27, 2020) <https://www.nytimes.com/2020/08/07/us/politics/tiktok-security-threat.html> [<https://perma.cc/A7EY-VGDR>] (archived Sept. 5, 2022).

109. See, e.g., Dan Goodin, *TikTok and 32 Other iOS Apps Still Snoop Your Sensitive Clipboard Data*, ARS TECHNICA (June 27, 2020), <https://arstechnica.com/gadgets/2020/06/tiktok-and-53-other-ios-apps-still-snoop-your-sensitive-clipboard-data/> [<https://perma.cc/LZN9-RYL9>] (archived Aug. 23, 2022); Zoe Kleinman, *TikTok ‘Didn’t Store’ iPhone Clipboard Data*, BBC (June 29, 2020), <https://www.bbc.com/news/uk-53223463> [<https://perma.cc/9T7E-X476>] (archived Aug. 24, 2022); Io Dodds, *TikTok to Stop Snooping on Users’ Clipboards After iPhone Update Shows App Constantly Reads Copied Text*, TELEGRAPH (June 25, 2020) <https://www.telegraph.co.uk/technology/2020/06/25/tiktok-stop-snooping-users-clipboards-iphone-update-shows-app/> [<https://perma.cc/2X79-LPYV>] (archived Aug. 24, 2022).

110. See Talal Haj Bakry & Tommy Mysk, *Popular iPhone and iPhone Apps Snooping on the Pasteboard*, MYSK INC. (Mar. 10, 2020), <https://mysk.blog/2020/03/10/popular-iphone-and-ipad-apps-snooping-on-the-pasteboard/> [<https://perma.cc/QC6Y-XD7X>] (archived Aug. 24, 2022).

111. See Jacob Kastrenakes, *LinkedIn Says It Will Stop Repeatedly Copying iOS Clipboard*, THE VERGE (July 3, 2020), <https://www.theverge.com/2020/7/3/21312821/linkedin-app-ios-14-clipboard-copying-fix> [<https://perma.cc/U6EX-TZQK>] (archived Aug. 26, 2022); *Reddit and LinkedIn to Stop Copying iPhone Clipboards*, BBC (July 6, 2020), <https://www.bbc.com/news/technology-53305388> [<https://perma.cc/6SED-437Y>] (archived Aug. 26, 2022).

112. See Kleinman, *supra* note 109 (stating that the “anti-spam feature” was “designed to identify repetitive, spammy behaviour”); Kim Lyons, *TikTok Says It Will Stop Accessing Clipboard Content on iOS Devices*, THE VERGE (June 26, 2020), <https://www.theverge.com/2020/6/26/21304228/tiktok-security-ios-clipboard-access-ios-14-beta-feature> [<https://perma.cc/NXT6-4S2A>] (archived Aug. 26, 2022).

that the Chinese government may be able to access the passwords on their users' clipboards.

The Trump administration repeatedly pressed the national security argument before the courts, arguing that national security weighed strongly in favor of the ban. Reviewing the government's secret evidence, Judge Wendy Beetlestone concluded that it was largely "hypothetical."<sup>113</sup> Judge Carl Nichols came to a similar conclusion, writing, "[h]ere, the government has provided ample evidence that China presents a significant national security threat, although the specific evidence of the threat posed by Plaintiffs, as well as whether the prohibitions are the only effective way to address that threat, remains less substantial."<sup>114</sup>

TikTok had long insisted that it was innocent of the charges of surveilling Americans on behalf of the Chinese government. A TikTok spokesperson said, "[w]e have never provided user data to the Chinese government, nor would we do so if asked."<sup>115</sup> Roland Cloutier, Global Chief Security Officer of TikTok Inc., testified that TikTok maintained a completely independent software stack from the Douyin app available in China: "[B]oth the source code and user data for TikTok are maintained separately from the source code and user data for Douyin."<sup>116</sup> He reported that TikTok stores data using Alibaba Cloud in Singapore and owns and operates its own servers in the United States, and also leases server space from Google, Microsoft, and Amazon.<sup>117</sup> He stated that "many categories of TikTok user data are encrypted in storage," and that "user data in these datacenters is sharded, which means that a user's data is broken down into many pieces across many different servers."<sup>118</sup> He admitted that earlier versions of the app did have IP addresses that could connect with China, but averred that the current version of the app did not.

Only one other country, India, banned TikTok as a national security threat. Despite the US declaration of TikTok's national security threat, European nations never banned the app.<sup>119</sup> A German

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113. *Marland v. Trump*, 498 F. Supp. 3d 624, 642 (E.D. Pa. 2020), *appeal dismissed*, No. 20-3322, 2021 WL 5346749 (3d Cir. July 14, 2021) ("[T]he Government's own descriptions of the national security threat posed by the TikTok app are phrased in the hypothetical.").

114. *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 85 (D.D.C. 2020).

115. Zack Whittaker, *TikTok Saw Rise in Government Demands for User Data*, TECHCRUNCH (July 9, 2020), <https://techcrunch.com/2020/07/09/tiktok-transparency-data-demands/> [<https://perma.cc/226E-KZGX>] (archived Aug. 26, 2022).

116. Decl. of Raymond Cloutier at 2–3, *TikTok v. Trump*, No. 20-cv-2658.

117. *See id.* at 3.

118. *Id.*

119. *See Vincent Manancourt & Laura Kayali, TikTok Finds Safe Haven in Europe*, POLITICO (Aug. 6, 2020), <https://www.politico.eu/article/tiktok-europe-safe-haven-us-china-tech-standoff/> [<https://perma.cc/37PM-CNW7>] (archived Aug. 26, 2022).

government official told *Bloomberg* that the country has seen no signs that the app poses a national security risk.<sup>120</sup>

Trump's TikTok executive order had cited the Indian precedent for its actions:

The Government of India recently banned the use of TikTok and other Chinese mobile applications throughout the country; in a statement, India's Ministry of Electronics and Information Technology asserted that they were "stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India."<sup>121</sup>

What the Trump administration did not mention is that the Indian action came in the wake of deaths of its soldiers following skirmishes with Chinese soldiers along the Line of Control in the Himalayas. Announcing the ban on July 2, 2021, Indian Minister for Electronics and Information Technology Ravi Shankar Prasad called the action against TikTok and certain other apps from China a "digital strike."<sup>122</sup> The ministerial order explained that the Chinese apps were "engaged in activities prejudicial to sovereignty and integrity of India, defence of India, security of state and public order," but did not provide any specific evidence justifying those claims.<sup>123</sup> India's claims of a national security threat cannot be readily disentangled from its need to respond to perceived Chinese aggression without risking escalation with a violent response. In July 2020, before Trump announced the US ban, the *Washington Post* had editorialized against the Indian TikTok ban, arguing, "[t]his action will hurt China, in other words, but also more than 120 million Indians."<sup>124</sup> And it had gone on to worry about internet fragmentation: "For those who live in countries inclined to ban Web services from abroad, this fracturing of the Internet isn't only a fracturing. It's a shrinking, too."<sup>125</sup>

120. See Thomas Seal, Birgit Jennen & Katharine Gemmill, *Europe Resists TikTok Ban as U.S. Advances China Tech Crackdown*, BLOOMBERG L. (Aug. 3, 2020), <https://news.bloomberglaw.com/tech-and-telecom-law/europe-resists-tiktok-ban-as-u-s-advances-china-tech-crackdown> [<https://perma.cc/ALL8-WAV5>] (archived Aug. 26, 2022).

121. Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

122. 'Banning Chinese apps a digital strike': Union Minister Ravi Shankar Prasad, HINDUSTAN TIMES (July 2, 2020), <https://www.hindustantimes.com/india-news/banning-chinese-apps-a-digital-strike-union-minister-ravi-shankar-prasad/story-XQQbTV>

t4bauqeBHXC75iM.html [<https://perma.cc/S6HE-HST8>] (archived Aug. 26, 2022).

123. *Id.*

124. Editorial Board, Opinion, *India isn't just fracturing the Internet with its ban on Chinese app. It's shrinking it.*, WASH. POST (July 4, 2020), [https://www.washingtonpost.com/opinions/global-opinions/india-isnt-just-fracturing-the-internet-with-its-ban-on-chinese-apps-its-shrinking-it/2020/07/03/e5d0cad8-bbcb-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/india-isnt-just-fracturing-the-internet-with-its-ban-on-chinese-apps-its-shrinking-it/2020/07/03/e5d0cad8-bbcb-11ea-8cf5-9c1b8d7f84c6_story.html) [<https://perma.cc/CN5D-6BPW>] (archived Sept. 18, 2022).

125. *Id.*

## B. *An Organ of Foreign Propaganda*

Trump's second claim to justify the ban was that TikTok would give the Chinese government influence over speech in the United States. The executive order stated,

TikTok also reportedly censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities. This mobile application may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus.<sup>126</sup>

There was indeed evidence that TikTok had sought to avoid running afoul of the political sensitivities of the Beijing government. In 2019, former TikTok employees reported that they had been pressured to censor content that might offend the Chinese government.<sup>127</sup> Also in 2019, TikTok was criticized for suspending an American teenager who cleverly used an eyelash tutorial to criticize the Chinese government's horrific treatment of Uyghur Muslims.<sup>128</sup> When this act drew public attention, TikTok claimed that the suspension was for other activity and restored her account.

A spokesperson for TikTok insisted that it has not censored its app at the Chinese government's request, stating, "[w]e do not and have not removed any content at the request of the Chinese government, and would not do so if asked."<sup>129</sup> Of course, Chinese censorship is often done by private parties who seek to avoid topics that the Chinese government would find problematic.<sup>130</sup>

To some extent at least, it is possible to uncover broad TikTok censorship. Individuals can use other platforms to complain about unwarranted deletion of posts. Searches on the app can reveal whether a topic is permitted. For example, a search on TikTok now shows that posts with the hashtag #uyghur have garnered 194.5 million views on

126. Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

127. See Paige Leskin, *Employees of TikTok in the US Were Reportedly Pressured to Censor 'Culturally Problematic' Content that Might Offend the Chinese Government*, BUS. INSIDER (Nov. 5, 2019), <https://www.businessinsider.com/tiktok-china-censorship-employees-restrict-content-dancing-vaping-2019-11> [https://perma.cc/3QAN-X675] (archived Aug. 26, 2022).

128. See Alexandra Ma, *TikTok Suspended a Teen Who Posted a Viral Takedown of China Disguised as a Makeup Tutorial, but It Claims It's Because She Posted a Video of Osama bin Laden*, BUS. INSIDER (Nov. 26, 2019), <https://www.businessinsider.com/china-uyghur-protest-tiktok-suspend-feroza-aziz-2019-11> [https://perma.cc/Y6PG-Q4RZ] (archived Aug. 26, 2022).

129. See Whittaker, *supra* note 115.

130. See Rebecca MacKinnon, *China's Censorship 2.0: How Companies Censor Bloggers*, FIRST MONDAY (Feb. 2, 2009), <https://firstmonday.org/article/view/2378/2089> [https://perma.cc/EW3Q-4NDN] (archived Aug. 19, 2022).



the app.<sup>131</sup> Of course, it is possible that the number should be double, were it not for some hidden suppression, but it is not the usual practice of Chinese censors to tolerate critical posts with views in the millions.

A July 2022 report suggested that a Chinese government public relations entity had asked TikTok for an account that would not be transparent about its origins, but that TikTok had declined.<sup>132</sup> The disclosure of this conversation raises concerns about possible future interventions along similar lines, but it also suggests an additional avenue for public scrutiny of a company's actions: employees and contractors who leak information to the press.

### C. *The Great Firewall of America?*

The TikTok ban borrowed from the Chinese playbook. Indeed, the TikTok ban was a remarkable reversal of longstanding US policy towards the internet. The United States itself engaged in multiple actions that it had long complained about; these include the following:

- (1) Possible compelled intellectual property transfer
- (2) Compelled disclosure of source code
- (3) Foreign investment only via joint venture with domestic partner
- (4) Data localization
- (5) A Great Firewall against foreign apps

Consider the turnabout for each in turn.

The United States has long complained about compelled intellectual property transfer required by China. In 2018, for example, a major study of Chinese practices by the US Trade Representative concluded,

the Chinese government uses foreign ownership restrictions, such as formal and informal JV requirements, and other foreign investment restrictions to require or pressure technology transfer from U.S. companies to Chinese entities. These requirements prohibit foreign investors from operating in certain industries unless they partner with a Chinese company, and in some cases, unless the Chinese partner is the controlling shareholder.<sup>133</sup>

The transfer of TikTok's management to US owners, as demanded by the Trump administration as a condition of continuing operations in the United States, would seem to fall into the kinds of practices that

131. Search on TikTok app on Aug. 4, 2022.

132. See Olivia Solon, *Chinese Government Asked TikTok for Stealth Propaganda Account*, BLOOMBERG (July 29, 2022), <https://www.bloomberg.com/news/articles/2022-07-29/chinese-government-asked-tiktok-for-stealth-propaganda-account?leadSource=verify%20wall> [<https://perma.cc/9W47-XJUF>] (archived Oct. 11, 2022).

133. OFF. OF U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 19 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [<https://perma.cc/6D6Y-E35G>] (archived Oct. 11, 2022).

the United States had itself complained about. The Oracle-Walmart consortium that was negotiating to take over TikTok promised the Trump administration that US partners would own a majority stake in the enterprise.<sup>134</sup>

The US government has also complained about Chinese practices, which it believes compel the disclosure of source code and algorithms. The US Trade Representative report on Chinese practices cited US corporate complaints over the disclosure of source code to Chinese entities.<sup>135</sup> The United States now includes protections against compelled disclosure of source code disclosure in its new trade agreements.<sup>136</sup>

The United States has also complained about joint venture requirements in China for foreign investment in certain industries. The US State Department's 2022 review of the investment climate in China cites obstacles to US investment, including "ownership caps and requirements to form joint venture (JV) partnerships with local firms."<sup>137</sup> As described above, ByteDance sought to placate the Trump administration by finding US partners that would take over the majority stake in TikTok.

Criticism of data localization measures across the world has long been a cornerstone of its digital trade policies. The United States Mexico Canada Agreement has three different provisions designed to ensure the ability of service providers to move data freely across borders.<sup>138</sup>

Among other things, the Great Firewall of China includes the selective ban of certain foreign services, such as Twitter and Wikipedia, that are deemed a national threat. The TikTok and WeChat bans were far more restrained in comparison. But the logic behind the TikTok ban would require the ban be broadened to include any future Chinese information services that became popular in the United States, as they would presumably be national security threats as well.

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134. See Wendy Lee, *Trump Blesses Tik Tok Deal with Oracle and Walmart. How Will China Respond?*, L.A. TIMES (Sept. 19, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-09-19/trump-tiktok-deal-oracle-walmart> [https://perma.cc/7DLL-QFJZ] (archived Aug. 19, 2022) ("Oracle and Walmart said TikTok Global would be majority-owned by American investors, with four of five board seats held by Americans.").

135. See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 133, at 173 (finding that fifty-four companies reported theft of software or source code as an impact faced from malicious cyber activity).

136. See United States–Mexico–Canada Agreement, Can.-Mex.-U.S., art. 19.16, Nov. 30, 2018, Pub. L. No. 116-113 [hereinafter USMCA].

137. 2022 *Investment Climate Statements: China*, U.S. DEP'T OF STATE, BUREAU OF ECON. AND BUS. AFFS. (2022), <https://www.state.gov/reports/2022-investment-climate-statements/china/> (last visited Aug. 21, 2022) [https://perma.cc/86V8-NKPS] (archived Aug. 21, 2022).

138. See USMCA, *supra* note 136, arts. 19.10–19.12.

In the *New York Times*, Tim Wu argued that reversal of America's long-standing approach to the internet was long overdue. He did not argue that the ban was justified as a national security measure, but that it was an appropriate response to the Great Firewall of China. He observed that "China keeps a closed and censorial internet economy at home while its products enjoy full access to open markets abroad."<sup>139</sup> Wu argued that the ban was an overdue "tit for tat."<sup>140</sup> He commended Trump's action because it responded in kind to the Great Firewall of China, no longer allowing China to play the United States for a "sucker."<sup>141</sup> Interestingly, Wu argued, "if we want decency and openness to survive on the internet — surely a more attainable goal — the nations that hold such values need to begin fighting to protect them."<sup>142</sup> Wu's argument was striking because it meant that the United States should wall off its internet from Chinese companies as a way to protect the open internet, but it was not clear how closing off the United States' internet would cause China to open theirs. Furthermore, TikTok was the first major Chinese internet firm to become highly successful in the United States; there had been no significant Chinese players in the United States that the country could have excluded previously. Finally, a TikTok ban lays in tension with net neutrality principles by treating different speakers very differently with respect to their access to US networks.

A reversal makes it difficult to complain when others, including China, apply any of these policies against US companies. The United States will appear hypocritical if China boots a US app alleging, without evidence, that it is a Central Intelligence Agency front.

The TikTok ban might also violate the United States' commitments under a trade agreement with China that went into effect in February 2020. The Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China had in fact banned either country from compelling technology transfer as a condition for operating in that country. In a provision designed to ensure market access, the agreement provided, "[n]either Party shall require or pressure, formally or informally, persons of the other Party to transfer technology to its persons as a condition for . . . operating in the jurisdiction of the Party or otherwise having access to the Party's market."<sup>143</sup> It would be hard for the United States to enforce an

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139. Tim Wu, Opinion, *A Tik Tok Ban Is Overdue*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/opinion/tiktok-wechat-ban-trump.html> [<https://perma.cc/CR99-LLAC>] (archived Aug. 21, 2022).

140. *Id.*

141. *See id.*

142. *Id.*

143. OFF. OF THE U.S. TRADE REPRESENTATIVE, ECONOMIC AND TRADE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE

agreement with China prohibiting compelled technology transfer while the United States was engaging in similar behavior.

In an op-ed in the *New York Times*, Kevin Roose reported that he did not “buy the argument that TikTok is an urgent threat to America’s national security.”<sup>144</sup> He went on, “[i]f TikTok is a threat, so are WeChat, Alibaba and League of Legends, the popular video game, whose maker, Riot Games, is owned by China’s Tencent.”<sup>145</sup> He continued,

[a]nd since banning every Chinese-owned tech company from operating in America wouldn’t be possible without erecting our own version of China’s Great Firewall a drastic step that would raise concerns about censorship and authoritarian control — we need to figure out a way for Chinese apps and American democracy to coexist.<sup>146</sup>

#### D. *The National Security Constitution*

As Part I above shows, in 2020 before Trump announced his ban, TikTok had been the source of nearly daily humiliation for Trump, as comedienne Sarah Cooper lampooned him by simply lip-syncing to his own words. K-pop teens shared a plan to wreck Trump’s rally in Tulsa by reserving seats that would lead to an empty stadium. There was, at least then, little evidence of broad support for Trump on TikTok, and thus banning TikTok was like banning a wildly popular opposition newspaper or television station. Berkeley Law Dean Ervin Chemerinsky had made a similar argument in a declaration in the *WeChat Users* case:

The Executive Order’s prohibition on the use of WeChat is the equivalent of a complete ban of a newspaper, a TV channel, or a website used by the tens of millions of U.S. citizens who regularly use the WeChat platform to communicate ideas and to conduct business every day in the United States.<sup>147</sup>

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GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA arts. 2.3(2), 2-2, Jan. 15. 2020, [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf) [<https://perma.cc/8YEU-ETJM>] (archived Aug. 24, 2022).

144. Kevin Roose, *Don’t Ban TikTok. Make an Example of It.*, N.Y. TIMES (July 26, 2020), <https://www.nytimes.com/2020/07/26/technology/tiktok-china-ban-model.html> [<https://perma.cc/4NHH-4S4B>] (archived Aug. 21, 2022).

145. *Id.*

146. *Id.* But see Sitaraman, *supra* note 14, at 1151 (“[D]emocracy, national sovereignty and global economic integration are mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full.” (quoting Dani Rodrik, *The inescapable trilemma of the world economy*, DANI RODRIK’S WEBLOG (June 27, 2007), [https://rodrick.typepad.com/dani\\_rodriks\\_weblog/2007/06/the-inescapable.html](https://rodrick.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html) [<https://perma.cc/9LMG-UJL3>] (archived Oct. 11, 2022))).

147. Decl. of Ervin Chemerinsky in Supp. of Pls.’ Mot. for Prelim. Inj. at 2, *WeChat Users Alliance v. Trump*, 488 F. Supp. 3d 912 (N.D. Cal. 2020) (No. 20-cv-05910-

Chemerinsky noted how the *WeChat Users* order was “unprecedented in the modern history of this country”: “Historically, the government has repeatedly attempted to censor or suppress certain ‘offensive’ content on newspapers or other media. But never has the government tried to shut down entirely a public forum used by millions of Americans.”<sup>148</sup>

Chemerinsky also offered a tantalizing possibility that the Trump order might violate the equal protection of the law because it discriminated on the basis of WeChat’s origin in China. He wrote, “[t]he public evidence gathered in the Complaint also strongly suggests that the Executive Order is motivated by anti-Chinese animus, which suggests that the Executive Order violates the Equal Protection Clause of the Fifth Amendment.”<sup>149</sup>

The speed with which the ban was to be implemented was unusual and suggested political motivations. When CFIUS had ordered a Chinese company to divest from Grindr, a popular dating app, in March 2019, the company was given more than a year to complete the divestment.<sup>150</sup> Here, CFIUS imposed a deadline of ninety days—which was at least double the forty-five days imposed by the IEEPA executive order—but in either case, coming in the months before the 2020 presidential election. When the IEEPA executive order was stayed by courts, the urgency of the national emergency posed by TikTok seems to have dissipated.

TikTok was the one wildly popular social media service that Trump and his allies did not depend on. It is hard to imagine Trump banning Twitter or YouTube, which he used to talk with his supporters, or Facebook, which he used to raise money, even if they had Chinese owners. The targeting of TikTok seems not to have been based on legitimate concerns, but rather based on the desire of a

LB), <https://rbgg.com/wp-content/uploads/USWUA-v-Trump-Declaration-of-Erwin-Chemerinsky-ISO-Motion-for-Preliminary-Injunction-08-28-2020-1.pdf> [https://perma.cc/Z3KV-655K] (archived Aug. 22, 2022).

148. *Id.*

149. *Id.*; see also Albert Fox Cahn & Naz Akyol, *The TikTok Backlash Is Hypocritical*, BOS. GLOBE (July 23, 2020), <https://www.bostonglobe.com/2020/07/23/opinion/tiktok-backlash-is-hypocritical/> [https://perma.cc/R5YH-FXBC] (archived Aug. 22, 2022) (“Racialized fear-mongering about TikTok from those who undermine Americans’ privacy at home isn’t a cyber security agenda. It’s privacy nativism, and we should dismiss it as such.”).

150. See Carl O’Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. Security at Risk, Chinese Firm Seeks to Sell Grindr Dating App*, REUTERS (Mar. 27, 2019), <https://www.reuters.com/article/us-grindr-m-a-exclusive/exclusive-told-u-s-security-at-risk-chinese-firm-seeks-to-sell-grindr-dating-app-idUSKCN1R809L>

[https://perma.cc/3CXY-877X] (archived Aug. 22, 2022) (reporting that CFIUS informed the Chinese gaming company that its ownership constitutes a national security risk); Zack Whittaker, *Grindr Sold by Chinese Owner After US Raised National Security Concerns*, TECHCRUNCH (Mar. 6, 2020) <https://techcrunch.com/2020/03/06/grindr-sold-china-national-security/> [https://perma.cc/Y8V8-CAW8] (archived Aug. 22, 2022) (noting the Chinese company’s agreement to sell by June 2020).

political leader to eliminate channels of communication that had proven unfriendly to him. Russian apps were not banned, despite Russia's well-documented efforts to meddle in the US election via social media.<sup>151</sup>

The Committee on the Foreign Investment into the United States, consisting of the heads of the Department of the Treasury, Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, and the Office of the US Trade Representative, concluded that TikTok was a national security threat. However, CFIUS is composed of political appointees in service of the president of the United States. Even with such an alarming conclusion from senior members of the Trump administration, it turns out, the conclusion can be hard to distance from the political considerations at stake.

The possible political motivations underlying an ostensibly national security-based action made judicial review critical. Writing after the Iran-Contra crisis, Harold Koh advises, “[w]herever possible, the legality of proposed foreign-policy initiatives should be tested by processes of adversarial review both within and without the executive branch.”<sup>152</sup>

Over decades, Congress had expressly excluded control over information flows into the United States from the president's international emergency economic powers. In 1994, the House Conference Report, with another amendment to IEEPA, made clear that the information materials exception was designed to exclude “the import or export of information that is protected under the First Amendment.”<sup>153</sup> Thus, when courts reviewed the president's executive orders, they were interpreting the limits of the Congressional authorization.

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151. See Devlin Barrett, *FBI Director Affirms Russia's Aim to 'Denigrate' Biden Ahead of Election*, WASH. POST (Sept. 17, 2020), [https://www.washingtonpost.com/national-security/wray-fbi-election-security-threats-hearing/2020/09/16/4461526e-f869-11ea-a275-1a2c2d36e1f1\\_story.html](https://www.washingtonpost.com/national-security/wray-fbi-election-security-threats-hearing/2020/09/16/4461526e-f869-11ea-a275-1a2c2d36e1f1_story.html) [https://perma.cc/S7AB-42HK] (archived Aug. 23, 2022) (reporting that FBI Director Christopher A. Wray confirmed Russia's attempts to interfere with U.S. elections); NAT'L INTEL. COUNCIL, OFF. OF DIR. OF NAT'L INTEL., FOREIGN THREATS TO THE 2020 ELECTION i, 7 (Mar. 10, 2021), <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf> [https://perma.cc/VL3F-Q6E8] (archived Aug. 23, 2022) (concluding that “Russian President Putin authorized, and a range of Russian organizations conducted, influence operations aimed at denigrating President Biden's candidacy and the Democratic Party, supporting former President Trump, undermining public confidence in the electoral process and exacerbating sociopolitical divisions in the U.S.” but “China did not deploy interference efforts.”).

152. KOH, *supra* note 11, at 161.

153. H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 398, 483.

### E. A Better Way Forward

The Biden administration reversed course on the IEEPA executive orders targeting TikTok and WeChat. On June 9, 2021, it withdrew those orders. It accordingly also withdrew the appeal and sought to dismiss the TikTok case involving the rescinded executive order. On July 14, 2021, the US Court of Appeals for the D.C. Circuit granted the Biden administration's motion to dismiss the appeal, and on July 20, 2021, it dismissed the case.<sup>154</sup>

In place of the IEEPA executive orders directed against the two apps, the Biden administration instituted a broad review of applications subject to the jurisdiction of a foreign adversary. It said such a review would be based on "rigorous, evidence-based analysis and should address any unacceptable or undue risks consistent with overall national security, foreign policy, and economic objectives, including the preservation and demonstration of America's core values and fundamental freedoms."<sup>155</sup> As I have noted elsewhere, "[c]oupling the rescission of the prior order with this statement suggests the earlier executive orders failed to meet those standards."<sup>156</sup> A broad review was consistent with the *Washington Post's* editorial position when Trump announced the ban: "The United States needs a lawful process, based on objective criteria, to evaluate them — or else it only accepts China's techno-nationalism as its own."<sup>157</sup>

Tellingly, however, the Biden administration did not reverse the CFIUS executive order. Some two years later and under a different administration, the Chinese owner of TikTok remains under an order to divest itself of the app, but without a public timetable to do so. This suggests that the administration shares some national security concerns about the app but does not see them as extremely urgent. In fact, Secretary of Transportation Pete Buttigieg appeared on TikTok in April 2021. TikTok has been negotiating with the Biden administration to satisfy its national security concerns. In a letter to certain members of Congress who had expressed concern about possible connections to the Chinese government, TikTok explains that it plans to move

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154. See *TikTok Inc. v. Biden*, No. 20-5381, 2021 WL 3082803, at \*1 (D.C. Cir. July 14, 2021); *TikTok Inc. v. Biden*, No. 20-5302, 2021 WL 3713550, at \*1 (D.C. Cir. July 20, 2021).

155. Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 9, 2021).

156. Anupam Chander, *Protecting the Global Internet from Technology Cold Wars*, 64(9) COMM'NS OF THE ACM 22, 24 (Sept. 2021), <https://cacm.acm.org/magazines/2021/9/255030-protecting-the-global-internet-from-technology-cold-wars/fulltext> [<https://perma.cc/EN4J-BSHN>] (archived Aug. 23, 2022).

157. Editorial Board, Opinion, *Trump is Treating TikTok as a Cudgel Against China. It's the Wrong Approach.*, WASH. POST (July 17, 2020), [https://www.washingtonpost.com/opinions/trump-is-treating-tiktok-as-a-cudgel-against-china-its-the-wrong-approach/2020/07/16/e48e45f8-c6c8-11ea-a99f-3bbdff1af38\\_story.html](https://www.washingtonpost.com/opinions/trump-is-treating-tiktok-as-a-cudgel-against-china-its-the-wrong-approach/2020/07/16/e48e45f8-c6c8-11ea-a99f-3bbdff1af38_story.html) [<https://perma.cc/9K3Q-5GFL>] (archived Aug. 23, 2022).

“protected user data” to Oracle’s cloud with protocols for access approved by the US government: “This protected user data will be stored in Oracle Cloud Infrastructure with access limited only to authorized personnel, pursuant to protocols being developed with the U.S. Government.”<sup>158</sup> The Biden administration’s approach importantly depoliticized the treatment of TikTok.

American users should not have to trust TikTok to be good on its word to protect US user data and not spread Chinese propaganda; after all, a company might be compelled to do so even if it resisted (this observation applies to foreign companies as well as Chinese ones). Rather, users should ask if there are better ways to systematically consider the issues rather than targeting a particular new media enterprise that happens to be a politically convenient target.<sup>159</sup> Broad, generally applicable laws, subject to robust judicial review, are necessary for actions that implicate speech platforms. Generally applicable privacy laws that limit the sharing of information, even with governments, are preferable. In fact, the Stored Communications Act title of the Electronic Communications Act already bars companies from sharing with foreign governments outside the USA CLOUD Act procedures.<sup>160</sup>

158. Letter from TikTok Inc. to U.S. Senators (June 30, 2022), <https://int.nyt.com/data/documenttools/tik-tok-s-response-to-republican-senators/e5f56d3ef4886b33/full.pdf> [<https://perma.cc/6HTC-BK78>] (archived Aug. 23, 2022).

159. See Alicia Faison, Note, *TikTok Might Stop: Why the IEEPA Cannot Regulate Personal Data Privacy & the Need for A Comprehensive Solution*, 16 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 115, 116 (2021) (“If there is no regulatory mechanism preventing personal data sales to Ideal Financial, there is certainly nothing stopping the Chinese government, or any other foreign government for that matter, from buying Americans’ data through data brokers. In that sense, there is no material difference between sharing data under foreign national security law and buying it on the open market.”)

160. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R45173, CROSS-BORDER DATA SHARING UNDER THE CLOUD ACT 10–11 (2018) (“ECPA prohibits service providers from disclosing the content of electronic communications directly to foreign governments absent a statutory exception or a warrant from a federal court.”); Albert Gidari, *The Cross-Border Data Fix: It’s Not So Simple*, STAN. L. SCH.: THE CTR. FOR INTERNET SOC’Y (June 16, 2017), <http://cyberlaw.stanford.edu/blog/2017/06/cross-border-data-fix-it%E2%80%99s-not-so-simple> [<https://perma.cc/XM54-RXCP>] (archived Aug. 25, 2022) (“[L]aw enforcement outside the U.S. can’t get data for their legitimate investigations from U.S. providers because the Electronic Communications Privacy Act (ECPA) prohibits such disclosures; that is, ECPA is a classic blocking statute.”); *Data Stored Abroad: Ensuring Lawful Access and Privacy Protection in the Digital Era: Hearing Before the H. Comm on the Judiciary*, 115th Cong. 48 (2017) (statement of Richard Salgado, Director of Law Enforcement and Information Security, Google Inc.) (“ECPA includes a broad, so-called ‘blocking’ provision that restricts the circumstances under which U.S. service providers may disclose the content of users’ communications to foreign governments.”); *CLOUD Act Resources*, U.S. DEPT OF JUST., <https://www.justice.gov/dag/cloudact> (last visited Aug. 25, 2022) [<https://perma.cc/MP7K-2CMY>] (archived Aug. 25, 2022) (showing that, thus far, the U.S. has signed executive agreements pursuant to the USA CLOUD Act with only two countries, the United Kingdom and Australia, but has also entered formal negotiations with Canada).



In 2022, the Biden administration gathered thirty TikTok influencers to provide information about the Russian invasion of Ukraine. Rather than TikTok influencers suing the US government, the US government was now relying on TikTok influencers to spread its message. Rather than seeing TikTok as a propaganda arm of the Chinese government, the US government sought to use it to promote its own message.

## V. CONCLUSION

The Trump v. TikTok battle begun with a bang and has now declined to a whimper. The alleged immediate threat to national security is now a part of life for millions of ordinary Americans. This was a result of federal judges that refused to accept the executive's claims of national security emergencies justifying extraordinary actions. The judges could only do so because Congress had expressly carved out of the president's emergency economic powers the ability to regulate the exchange of information across borders. The judiciary and Congress thus together rebuffed an effort by the US president to control the information that was available to the US public.

The checks and balances demonstrated in the TikTok affair are the jewel in the US structure of government.<sup>161</sup> Judicial review, even of national security decisions, is a hallmark of liberal democracies. Apps that allow us to speak with each other, even across political borders, are essential.

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161. For an account finding the checks and balances in IEEPA insufficient, see Jonathan W. Ellison, Note, *Trust the Process? Rethinking Procedural Due Process & the President's Emergency Powers over the Digital Economy*, 71 DUKE L.J. 499, 504 (2021).

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