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Law and Technology

The TikTok Ban and Its Consequences

The U.S. Supreme Court suggests national security may sometimes trump free speech online.

IN APRIL 2024, the U.S. government enacted the “TikTok ban”—a law that gave the wildly popular short-form video service 270 days to divest from Chinese ownership or shut down in the U.S. TikTok and its Chinese parent company, ByteDance, sued to block the law, arguing it was a blatant violation of the First Amendment’s protections for freedom of speech. But in January 2025, the Supreme Court upheld the ban and rejected the First Amendment challenge.

In this column, I will discuss the history of the TikTok ban, the Supreme Court’s decision, and what they mean for the future of free speech and platform regulation. (This is the fourth in my *Communications Law and Technology* column series about recent developments in the law concerning free speech and content moderation online.)

The Pre-History of the Ban

Two trends came together when Congress passed the Protecting Americans from Foreign Adversary Controlled

Applications Act (PAFACAA). Both of them were tied to the fact that TikTok was owned and controlled by a Chinese company, and thus indirectly subject to pressure from the Chinese government. Many other Chinese apps are widely used in the U.S., including the messaging platform WeChat and shopping sites such as Shein and AliExpress, but TikTok drew particular concern.

First, proponents of the ban argued that control over TikTok’s famously effective recommendation algorithm would let the Chinese government manipulate U.S. public opinion. It could push pro-Chinese views and suppress criticism, or it could push extreme opinions on controversial topics to divide Americans against each other.

Second, the U.S. national security community argued that TikTok’s immense popularity was a privacy risk. They claimed TikTok could give the Chinese government access to Americans’ viewing habits, enabling either individual espionage or broader profiling.

The years from 2020 to 2024 involved legal and political skirmishing that stopped short of a total ban. Although

President Trump attempted to ban TikTok using an executive order and Montana enacted a statewide ban, both of these were struck down by courts. The Committee on Foreign Investment in the U.S. opened a review of TikTok, but took no action. The Biden administration negotiated with TikTok over locating its servers in the U.S. and limiting foreign access, an arrangement known as “Project Texas,” but no final agreement was ever reached. And several armed services and government agencies prohibited their members from using the TikTok app on government devices.

The TikTok Ban and Lawsuit

The uneasy truce broke in the spring of 2024. A bipartisan coalition voted for PAFACAA, and President Biden signed it on April 24, 2024. TikTok and other “foreign adversary controlled” social-media apps had 270 days to divest. (The definition included other ByteDance apps, like the video editor CapCut, but excluded product apps, so e-commerce apps such as Shein were exempt.)

PAFACAA does not actually prohibit TikTok from doing anything. Instead, it



prohibits U.S. companies from putting covered apps in their app stores or providing Internet hosting to them. Companies providing this assistance face fines up to \$5,000 per user who accesses the app as a result. Since TikTok has 170 million users in the U.S., the potential liability could be utterly ruinous.

The most important feature of PAFACAA is its divestment escape hatch. An app stops being covered if it goes through a “qualified divestiture,” that is, ceases to be owned by companies in one of the restricted countries. The President is also given a one-time ability to grant a 90-day extension if they certify that a company is making “significant progress” toward a divestiture under “binding legal agreements.”

TikTok and ByteDance flatly refused to divest. They argued that doing so was technically infeasible within PAFACAA’s 270-day timeline. Hanging unstated in the background was the reality that the Chinese government was likely unwilling to allow operational control of TikTok and its algorithms to pass into foreign hands.

Instead, they quickly filed suit to

prevent PAFACAA from going into effect. Their lawsuit argued that the law was unconstitutional on various grounds, but focused primarily on a claim that it violated the First Amendment’s protections for freedom of speech. A group of TikTok users also filed suit claiming that it violated their freedom to speak and listen by using TikTok, and the two cases were combined and heard on an expedited schedule.

The D.C. Circuit court, to which

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PAFACAA assigned the case, rejected the First Amendment claims on Dec. 6, 2024. The plaintiffs rapidly moved to ask the Supreme Court to hear the case, and it did so, setting a highly compressed briefing schedule over the winter holidays. Its decision came down on Jan. 17, 2025, just two days before the law took effect on Jan. 19 and three days before Donald Trump succeeded Joe Biden as President on Jan. 20, 2025.^a

The Supreme Court’s Reasoning

The Supreme Court’s unsigned opinion upholding the ban sidesteps almost all the major legal issues in the case. Most strikingly, the opinion does not actually decide whether the First Amendment applies *at all*.

TikTok and its users argued that it obviously does. The “ban” half of “divest or ban” prevents TikTok users from sharing their ideas and views on the app, and it prevents TikTok from exercising its editorial discretion over what

^a *TikTok v. Garland*, Nos. 24-656 and 24-657 (U.S. Jan. 17, 2025).

content to recommend.^b The government, however, defended PAFACAA by arguing that the “divest” half of “divest or ban” was a purely economic regulation about corporate ownership.

The Supreme Court ducked the issue. It accepted that the kinds of effects on speech that TikTok pointed to involved real First Amendment interests. But it “assume[d] without deciding” that the First Amendment applied, leaving its options open when dealing with future platform regulations. If the case had involved a straight-up ban, rather than including a divestment option, this escape hatch probably would not have been available.

The Court similarly avoided the issue of whether PAFACAA could be justified based on the rationale of limiting Chinese control over the speech that Americans see. On the one hand, foreign governments (such as the Chinese government) do not have First Amendment rights. But on the other hand, Americans (like TikTok’s users) do. First Amendment caselaw protects their right to create and share views that align with foreign governments’, and to receive “communist political propaganda” if they want to.^c

TikTok and its users also argued that PAFACAA was enacted with transparently ideological motivations, which is normally a First Amendment red flag. Some members of Congress, for example, objected to pro-Palestinian videos shared on TikTok. But the government responded that PAFACAA was pro-speech, because it prevented the Chinese government from using its own power to censor the range of views being shared on TikTok.

This is a genuinely difficult question, so perhaps it is no surprise that the Supreme Court, on its rushed timeline, stayed away from it. Instead, the court held that PAFACAA could be upheld solely on the basis of its data-protection rationale. Because the privacy concerns for an app with

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170 million users were so serious, the court did not inquire whether they were a pretext for Congress to alter the ideological balance of Americans’ media diets.

In a sense, the Supreme Court’s opinion is the best news privacy advocates have received from the Supreme Court in years. In previous cases, the court has used the First Amendment to strike down privacy laws, holding, for example, that drug companies’ rights to market their medicines outweighed a state prescription-privacy law intended to limit such marketing.^d But the *TikTok* opinion treats privacy of bulk data as a compelling rationale that can outweigh speech interests.

TikTok and its users argued that Congress had better and less speech-restrictive options open to protect Americans’ privacy. It could, for example, pass a comprehensive privacy law that applies to all social-media platforms. Or it could require TikTok to keep all data on U.S. users on servers in the U.S. and prohibit their export.

The Supreme Court, however, deferred to Congress’s judgment that only a flat-out divest-or-ban rule would suffice. The opinion is striking for its reliance on the government’s national-security concerns. The court repeatedly emphasized that it was hesitant to disagree with Congress and the President’s judgment that foreign access to TikTok’s data was a matter not just of individual privacy but of the security of the entire nation.

In the past, the Supreme Court has been willing to push back against national security claims. In 1971, it allowed the *New York Times* and *Washington Post* to publish the “Pentagon Papers”: an internal, classified government study

about how the U.S. had entered the Vietnam War. There, it expressed real skepticism about the government’s assertions that publishing this history would harm the U.S. and reveal the internals of its decision-making process.^e

But in the TikTok case, the court took the government largely at its word. It did not just defer to the claim that TikTok was a serious danger. It also accepted the political branches’ judgment that less restrictive measures would suffice.

Aftermath

Instead of producing certainty, the Supreme Court’s opinion sparked chaos. Almost as soon as it had been issued, both the outgoing Biden administration and incoming President Trump let it be known that they did not actually want TikTok to shut down on the 19th. The app went dark for about half a day, coming back online after Trump claimed that he wanted to strike a deal for 50% U.S. ownership of TikTok.

In his first day in office, Trump issued an executive order purporting to give TikTok another 75 days to negotiate a divestment. The order did not rest on any legal authority that Trump actually has—instead of using the 90-day extension written into PAFACAA, the order instead said that enforcing it would interfere with the President’s ability to negotiate a resolution. Despite its shaky foundations, the order was eventually accepted by app stores and service providers, including Oracle, Akamai, Apple, and Google. For now, TikTok remains available in the U.S.

As I write this column, TikTok’s future is uncertain. But even though TikTok may yet live, the Supreme Court’s opinion in *TikTok v. Garland* is cause for concern. It opens the door for the U.S. government to deprive Americans of essential channels of communications for nakedly partisan reasons, as long as the reasons for doing so can be dressed up in terms of “national security.” ■

^b In *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), discussed in Pamela Samuelson’s November 2024 *Communications Legally Speaking* column, the Supreme Court effectively held that social-media platforms have a First Amendment right to curate the content they show to users.

^c *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

^d *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

^e *New York Times Co. v. United States*, 403 U.S. 713 (1971).

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