

National Security Update: Court Upholds Divest-or-Ban Law Impacting TikTok's U.S. Operations

December 9, 2024

On December 6, 2024, the U.S. Court of Appeals for the D.C. Circuit released its opinion in *TikTok, Inc. et al. v. Garland*, upholding a law requiring ByteDance, Ltd. to divest its ownership of TikTok or face a ban in the United States.

The Protecting Americans from Foreign Adversary Controlled Applications Act ("PAFACA"), enacted in April 2024 with bipartisan support, seeks to prevent foreign adversaries from manipulating content or accessing sensitive data. The Act identifies the People's Republic of China (the "PRC"), the Democratic People's Republic of North Korea, the Russian Federation and the Islamic Republic of Iran as foreign adversaries of the United States.

The law specifically prohibits the distribution or operation of "foreign adversary controlled applications" and explicitly bans TikTok, its subsidiaries or successors from operating under such control. It also extends to any company deemed by the President to pose a significant threat to U.S. national security.

PAFACA provides a qualified exemption allowing divestiture to lift the prohibition. This exemption requires (1) a presidential determination that divestiture removes foreign adversary control over the application and (2) assurance that divestiture eliminates operational ties between U.S. operations and foreign-affiliated entities. This includes restrictions on content-recommendation algorithms and data-sharing agreements.

TikTok's Legal Challenge and the Government's Justifications. TikTok, Inc., and ByteDance, Ltd., challenged the law, claiming it violates the First Amendment, the Fifth Amendment's Equal Protection Clause, the Bill of Attainder Clause and the Takings Clause. They argued the law infringes on free speech, imposes disproportionate burdens, unfairly targets the companies and constitutes an unconstitutional taking of property.

The government defended PAFACA, citing two primary national security concerns:

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- **Countering the PRC's Data Collection Efforts:** The PRC has sought to collect extensive data on millions of Americans for potential use in espionage, blackmail or other harmful activities.
 - **Preventing Content Manipulation:** The PRC could use TikTok to covertly manipulate content, influence political discourse and advance its agendas in the United States.

The Court's Ruling. The court upheld PAFACA, emphasizing its focus on safeguarding national security. It deferred to the government's judgment, citing bipartisan efforts in Congress and the Executive Branch to mitigate TikTok's national security risks. The court emphasized key government concerns, including:

- The PRC's history of large-scale cyberattacks, such as breaches of the U.S. Office of Personnel Management and financial institutions;
- The PRC's use of tactics like leveraging Chinese companies, making strategic foreign investments and purchasing large datasets;
- Chinese laws requiring companies and citizens to cooperate with the government, giving the PRC access to corporate data even from private entities; and
- The PRC's reported history of censoring content on social media platforms outside the United States.

The court also rejected TikTok's argument that the government's data-related concerns are speculative, stating, "the [g]overnment need not wait for a risk to materialize before acting; its national security decisions often must be based on informed judgment."

National Security Agreement Rejection. National Security Agreements ("NSAs") are legally binding arrangements with the Executive Branch designed to mitigate national security risks posed by foreign ownership of companies operating in the United States. TikTok proposed an NSA to mitigate concerns over ByteDance's control. The proposal included creating an independent U.S. data entity, implementing enhanced data-protection measures, partnering with Oracle to oversee data storage and security and introducing a temporary shutdown mechanism. TikTok argued that this NSA was a less restrictive alternative to divestiture.

The court deferred to the U.S. government's rejection of the NSA, citing insufficient operational independence, continued data flows to China, inadequate monitoring capabilities and weak data-protection measures. The U.S. government also found the

shutdown mechanism too limited since it did not grant the government full discretion to act on potential concerns.

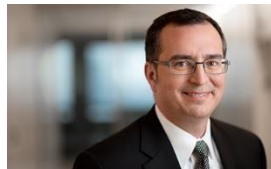
No Regulatory Taking. The court also ruled that PAFACA did not constitute a regulatory taking because TikTok has the option to divest and continue operating in the U.S. It also determined that the PRC's own export restrictions on TikTok's recommendation algorithm do not render the Act unconstitutional.

Lastly, the court acknowledged TikTok's significant role for 170 million American users as a platform for free expression, community and income. However, it supported Congress's judgment that removing the platform from PRC control is essential to address grave national security threats. The court recognized that while divestiture could potentially disrupt access to the platform if ByteDance or the PRC resists, Congress deemed this risk necessary to safeguard U.S. security. The court found Congress's decision well considered, consistent with regulatory norms and not aimed at suppressing specific viewpoints, affirming its constitutionality.

This decision reinforces the longstanding deference that courts have shown the Executive Branch when it comes to matters of national security and promises to serve as a backstop to the U.S. government's increasingly assertive national security regulatory agenda. The Debevoise national security team continues to monitor developments in this rapidly evolving regulatory landscape.

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Please do not hesitate to contact us with any questions.



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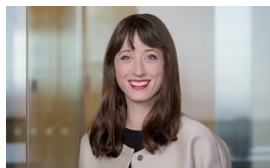
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