

An “IEEPA-Free Zone” for TikTok and other Chinese Mobile Applications?

In October 2020, U.S. District Judge Wendy Beetlestone enjoined the Trump administration’s attempt effectively to ban the Chinese mobile app TikTok within the United States, finding that the administration’s proposed restrictions on TikTok would intrude on the “IEEPA-free zone” that shields “personal communication” and trade in “informational materials” from U.S. sanctions and other trade restrictions.¹ TikTok, which is used primarily for sharing short videos, is one of the most popular mobile applications in the world. The court, in issuing this extraordinary injunction blocking the President’s use of his national security emergency powers, was not convinced by the government’s view that “[t]he President should not be disabled from mitigating a national-security threat simply because a foreign adversary exploits a vulnerability by way of a media company.”²

The TikTok litigation (and similar ongoing cases involving another Chinese mobile app, WeChat³) is arguably the most important legal development in many years of U.S. efforts to regulate global technology in the name of national security. This article addresses why two U.S. district courts have so far barred the government from banning TikTok, and how the competing interests at stake—free speech and free trade in ideas, on the one hand, and national security on the other hand—may fare under U.S. law moving forward. Does (or should) the U.S. government have the authority to restrict or prohibit the use or support of social media, news, chat, digital payment, or other types of technologies developed in “foreign adversary” countries if they present significant national security risks?

The International Emergency Economic Powers Act (IEEPA) is among the most powerful tools available to the U.S. President for addressing national security threats, and has been invoked in a variety of contexts, most notably as the authority for many U.S.

economic sanctions programs and to maintain the Commerce Department's export control regulations while the authorizing statute had lapsed. President Trump also infamously invoked IEEPA to shift funding to build a border wall,⁴ and to threaten tariffs on imports from Mexico due to immigration concerns.⁵

IEEPA broadly authorizes the President to regulate transactions involving foreign countries or foreign nationals within U.S. jurisdiction.⁶ To invoke this authority, the President must first declare a national emergency with respect to the target of the regulation, asserting that it presents an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."⁷

Background on the TikTok Cases

The TikTok saga began with President Trump's issuance of Executive Order 13873 in May 2019, which declared a national emergency under IEEPA and directed the Commerce Department to develop a regulatory structure to address vulnerabilities in the U.S. "information and communications technology and services supply chain."⁸ A little over a year later, while Commerce was still working on developing its regulations under Executive Order 13873, the President issued a second executive order under the same national emergency, to address "mobile applications developed and owned by companies in [China]," and "one mobile application in particular, TikTok."⁹ This second order—Executive Order 13942—prohibits "any transaction" involving TikTok's owner, ByteDance Ltd., to the extent "identified by" the Commerce Department as necessary to address the national security threats said to be posed by TikTok.¹⁰

In September 2020, the Commerce Department identified certain types of prohibited transactions "by any person, or with respect to any property, subject to the jurisdiction of the United States" involving TikTok's parent company or its subsidiaries.¹¹ These prohibitions applied only to "business-to-business transactions" that would support TikTok's operations in the United States, and expressly carved out the "exchange between or among TikTok mobile application users of personal or business information using" TikTok.¹²

Plaintiffs filed litigation in several U.S. district courts to enjoin Commerce from implementing these prohibitions, asserting violations of IEEPA, the First Amendment to the U.S. Constitution, the Administrative Procedure Act (APA), and other claims. Judge Beetlestone's injunction, issued on October 30, 2020 found that one group of plaintiffs was likely to prevail on the merits of the argument that Commerce's prohibitions violated

IEEPA. As a result of Judge Beetlestone’s injunction, on November 17, the Commerce Department confirmed that the TikTok prohibitions it had identified would “not go into effect, pending further legal developments.”¹³

Key Issues in the TikTok Cases

In enjoining the Commerce Department’s TikTok prohibitions, Judge Beetlestone found that this attempted regulatory scheme would likely be shown to be *ultra vires*, or beyond the government’s authority, because it “constitutes, at minimum, an indirect regulation” of trade in informational materials in contravention of IEEPA.¹⁴

IEEPA explicitly does not provide the President with the authority to “regulate or prohibit, directly or indirectly,” any “personal communication, which does not involve a transfer of anything of value,” or “the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials,” excluding certain activities regulated under U.S. export controls or the Espionage Act.¹⁵ These exemptions are intended in part to help ensure that “no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment.”¹⁶

In finding that Commerce did not have the authority under IEEPA to prohibit the identified transactions in support of TikTok, Judge Beetlestone looked beyond the government’s insistence that the prohibitions “nominally govern[] only ‘business-to-business transactions,’” and issued the injunction because “the effect of the [prohibitions] will be to undermine the app’s functionality such that U.S. users will be prevented from exchanging data on the app,” and as a result it would “no longer properly function for U.S. users as a forum for exchanging informational materials.”¹⁷ The court found that “[t]he Government’s suggested reading ignores Congress’s deliberate insertion of the word ‘indirectly’ into IEEPA.”¹⁸

In December 2020, U.S. District Judge Carl Nichols in Washington D.C. also enjoined Commerce’s TikTok restrictions, but for different reasons. Judge Nichols found that the government’s “intended objects include stopping the exportation of data (which the government itself defines as ‘text, images, video, and audio’) to China and stopping the importation of propaganda into the United States,” which fall within IEEPA’s informational materials exemption.¹⁹ The government has argued in its appeal brief that the court “fundamentally misinterpreted” the object of the prohibitions, which, according to the government, focus not on substantive communications or materials, but on metadata, such as users’ “internet and other network activity information,” including users’ “location

data and browsing and search histories.”²⁰ The government asserts that “[t]he prohibitions at issue here do not foreclose any informational material from entering or leaving the country. Even if the prohibitions inhibit U.S. users’ ability to view and share content on the TikTok app, those users could post the same content on other platforms, including on TikTok’s website, which do not present the same national security risks.”²¹

Judge Nichols also justified his injunction based on IEEPA’s personal communication exemption, which only applies to communications that do “not involve a transfer of anything of value.” The court rejected the government’s argument “that, even if the communications were of no value to the creators, they benefit TikTok as a platform,” finding that “such an expansive reading of the phrase ‘anything of value’ would write the personal-communications limitation out of the statute. All communication service providers—from television stations and publishers to cellular phone carriers—get some value from a user’s ‘presence on’ their platform.”²² The court set out the principle that “this provision is best read as referring to the transfer of money (or other value) as a part of the personal communication itself, rather than the transfer of value to those who facilitate communications.”²³ The government pointed out in response that “TikTok predicates its business model on the substantial economic value it obtains from the *content* of every user communication on the app. This business model differs in kind from traditional communications service providers such as telephone networks and postal services, which derive value from transmitting communications, not from licensing or otherwise monetizing the content of those communications.”²⁴

Conclusion

The TikTok litigation represents one of the most significant setbacks the U.S. government has faced in using IEEPA to impose economic restrictions in the name of U.S. national security. Nonetheless, in the waning days of his administration, President Trump issued another order, very similar to the orders at issue in the TikTok (and WeChat) cases, requiring Commerce Department restrictions on several additional popular apps developed by Chinese companies. As of the date of this publication, this new order has yet to be implemented or challenged in court.

The Biden administration will need to decide whether to amend or revoke the TikTok (and WeChat) orders, or continue with a full-throated defense of Commerce’s prohibitions through litigation. Adverse outcomes at the appellate court level could hamstring the U.S. government’s future use of IEEPA to restrict access to mobile technologies. In any case, if the Biden administration continues forward on this path, U.S. courts and (if the litigation losses under IEEPA continue, the U.S. Congress) will need to define the appropriate

scope of executive authority to restrict foreign mobile applications and other types of communications technologies.

About the Authors: Peter Jeydel is of counsel and Brian Egan is a partner, both in the Washington, D.C. office of Steptoe & Johnson LLP, specializing in export controls, economic sanctions and other international regulatory matters. Mr. Egan was formerly Legal Adviser at the U.S. State Department and also worked at the White House and the U.S. Department of the Treasury.

¹ *Marland v. Trump*, No. CV 20-4597, 2020 WL 6381397 at *12 (E.D. Pa. Oct. 30, 2020).

² *Defendants' Memorandum in Opposition to Plaintiffs' Second Motion for a Preliminary Injunction* at 19, *Marland v. Trump*, No. CV 20-4597 (E.D. Pa. Oct. 20, 2020).

³ This Insight does not discuss the WeChat cases, which have so far focused primarily on First Amendment issues. See, e.g., *U.S. WeChat Users All. v. Trump*, No. 20-CV-05910-LB, 2020 WL 6891820 (N.D. Cal. Nov. 24, 2020).

⁴ For background, see Nomaan Merchant, *Appeals court rules for Trump taking military money for wall*, ASSOCIATED PRESS (Dec. 4, 2020), <https://apnews.com/article/donald-trump-courts-de3448091bd56541acad9789d3e2ad96>.

⁵ See generally, Trump Administration Tariff Actions: Frequently Asked Questions, Congressional Research Service (Dec. 15, 2020), <https://crsreports.congress.gov/product/pdf/R/R45529>.

⁶ 50 U.S.C. § 1702(a).

⁷ *Id.* § 1701.

⁸ Exec. Order No. 13873 (May 15, 2019), *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 22689 (May 17, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-05-17/pdf/2019-10538.pdf>.

⁹ Exec. Order No. 13942 (Aug. 6, 2020), *Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain*, 85 Fed. Reg. 48637 (Aug. 11, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-11/pdf/2020-17699.pdf>.

¹⁰ *Id.* At the time, ByteDance was also subject to an unrelated order issued by President Trump to divest its ownership in certain TikTok assets/operations/data, under the supervision of the Committee on Foreign Investment in the United States (CFIUS). See Order of August 14, 2020, *Regarding the Acquisition of Musical.ly by ByteDance Ltd.*, 85 Fed. Reg. 51297 (Aug. 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-19/pdf/2020-18360.pdf>.

¹¹ *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*, 85 Fed. Reg. 60061 (Sept. 24, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-24/pdf/2020-21193.pdf>.

¹² *Id.*

¹³ *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; Preliminary Injunction Order by a Federal District Court*, 85 Fed. Reg. 73191 (Nov. 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-11-17/pdf/2020-25360.pdf> (emphasis in original).

¹⁴ *Marland v. Trump*, *supra* note 1 at *12.

¹⁵ 50 U.S.C. § 1702(b).

¹⁶ See H.R. REP. NO. 103-482, at 239 (1994).

¹⁷ *Marland v. Trump*, *supra* note 1 at *8.

¹⁸ *Id.* at *9.

¹⁹ *TikTok Inc. v. Trump*, No. 1:20-CV-02658, 2020 WL 7233557, at *12 (D.D.C. Dec. 7, 2020).

²⁰ *Brief for Appellants* at 36, *TikTok Inc. v. Trump*, No. 20-5381 (D.C. Cir. Jan. 15, 2021).

²¹ *Id.* at 48.

²² *TikTok Inc. v. Trump*, No. 1:20-CV-02658, 2020 WL 5763634, at *7 (D.D.C. Sept. 27, 2020).

²³ *TikTok Inc. v. Trump*, *supra* note 19 at *11.

²⁴ *Brief for Appellants*, *supra* note 20 at 39 (emphasis in original).