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## TikTok is on the Clock, Will Democracy Stop?

Jenna Koleson\*

### I. Introduction – What is TikTok?

Should this nation have to get ready to say goodbye to its favorite time-killer? TikTok was created and owned by Beijing’s ByteDance.<sup>1</sup> Sometimes referred to as a lip-syncing app, it is more commonly used to share videos created by users on wide ranging topics like dance, comedy, and business, which get endlessly reproduced and remixed among users.<sup>2</sup> TikTok is the leading short-form mobile video app with over 500 million monthly active users, surpassing other common social media apps such as Twitter, LinkedIn, Tumblr, and Snapchat.<sup>3</sup> According to its website, TikTok’s mission is to “inspire creativity and bring joy.”<sup>4</sup> Since its launch, the app’s popularity skyrocketed. In October 2018, it was the most-downloaded photo and video app in the Apple store, globally.<sup>5</sup> The app has reportedly amassed over 500 million monthly active users, and it has been downloaded over eighty million times in the United States.<sup>6</sup> Many users have downloaded the app to keep themselves occupied during the Covid-19 Pandemic.

### II. Trump’s Executive Order

On August 6, 2020, President Trump issued an executive order to deal with a supposed national emergency regarding the spread of mobile applications in the United States that are developed and owned by

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<sup>1</sup> Sarah Perez, *It’s time to pay serious attention to TikTok*, TECHCRUNCH (Jan. 29, 2019, 5:21 PM), <https://techcrunch.com/2019/01/29/its-time-to-pay-serious-attention-to-tiktok/>.

<sup>2</sup> *Id.*

<sup>3</sup> *What is TikTok? What you need to know about the new Musical.ly*, INFLUENCER MARKETING HUB (last updated Aug. 3<sup>rd</sup>, 2020), <https://influencermarketinghub.com/what-is-tiktok/>.

<sup>4</sup> TIKTOK, <https://www.tiktok.com> (last visited Aug. 26, 2020).

<sup>5</sup> INFLUENCER MARKETING HUB, *supra* note 3.

<sup>6</sup> *Id.*

companies in the People's Republic of China.<sup>7</sup> He proffers that certain apps continue to threaten the national security, foreign policy, and economy of the United States, and that action must be taken against one specifically, TikTok.<sup>8</sup>

So what is the threat that TikTok purportedly poses? The order states that because TikTok automatically captures vast swaths of information from its users, like Internet and network activity information such as location data and browsing histories, the Chinese Communist Party could access Americans' personal and proprietary information.<sup>9</sup> This could potentially allow "China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage."<sup>10</sup> Further, TikTok censors content that the Chinese Communist Party deems politically sensitive, like the protests in Hong Kong and China's abhorrent treatment of Muslim minority populations.<sup>11</sup> The President suggests that the TikTok videos that spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus exemplify that the app could be used to promote disinformation campaigns that benefit the Chinese Communist Party.<sup>12</sup>

The order asserts that TikTok's threats are real because certain government agencies have already banned the use of the app on Federal Government phones, American companies have begun banning the app on their devices, and the Government of India recently banned the use of TikTok and other Chinese mobile applications throughout the country.<sup>13</sup> In an attempt to take "aggressive action," Trump ordered that any transaction with ByteDance Ltd., TikTok, or any other ByteDance subsidiary, is prohibited beginning

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<sup>7</sup> 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, 48637 (Aug. 6, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 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. at 48637.

<sup>13</sup> *Id.*

September 20, 2020.<sup>14</sup> Consequently, American citizens will have to find an alternative method of entertainment while cooped up in their homes during the Covid-19 Pandemic unless TikTok finds a U.S. buyer within 45 days.

### III. What's next?

The ban could be reversed if it is sold to a U.S. company within forty-five days. Thus, Microsoft Corp. has confirmed its interest in purchasing a portion of TikTok's operations, emerging as the platform's main suitor.<sup>15</sup> If a deal is struck between Microsoft and ByteDance, Trump contends that the Treasury should get a substantial amount of money: "Whether it's Microsoft or somebody else, or if it's the Chinese—what the price is, the United States could—should get a very large percentage of that price. Because we're making it possible," he stated.<sup>16</sup>

### IV. Political Considerations

TikTok creator Leo Scheck said he believes the threatened ban is about controlling a group of people who have been actively detrimental to the president's re-election campaign.<sup>17</sup> For example, in June, TikTok users apparently organized and reserved tickets to Trump rally in Tulsa, Oklahoma, with the intent of not showing up, which resulted in a smaller than expected turnout. "Social media is in need of privacy reform, but the current administration really doesn't seem to be interested in that," said Scheck.<sup>18</sup> "This is about a fragile president who can't handle criticism, who is attempting to silence dissent on an app that happens to be foreign."<sup>19</sup> This

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<sup>14</sup> *Id.* at 48638.

<sup>15</sup> Bowdeya Tweh, *Is TikTok Getting Banned in the U.S.? It's Complicated. Here's Everything You Need to Know*, WALL ST. J. (updated Aug. 17, 2020), <https://www.wsj.com/articles/is-tiktok-getting-banned-in-the-us-its-complicated-heres-everything-you-need-to-know-11596495385>.

<sup>16</sup> Luke McGee, *Analysis of Trump TikTok and a dangerous precedent for democracy*, CNN (updated Aug. 8, 2020), <https://www.cnn.com/2020/08/08/business/trump-tiktok-democracy-intl/index.html>.

<sup>17</sup> Nicole Girten and Henry Ren, *Trump wants to force a ban or sale of TikTok. Here is what political activists on the platform are saving.*, USA TODAY (Aug. 14, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/08/14/tiktok-users-speak-out-trumps-plan-ban-platform/3372350001/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

begs the question: can a president ban companies when their feelings are hurt?

#### V. The Legal Implications of Trump's Executive Order

Critics worry that Trump's latest attempt to put pressure on China could set a dangerous, anti-democratic example on how governments try to control the way citizens use the internet, which will be celebrated by leaders of countries where democracy is dwindling.<sup>20</sup> "Restricting internet and interfering with people's capacity to criticize power is not unprecedented on a global scale. It has happened in India, Iran and in different parts of Africa. What people are struggling with is the fact that it's happening in the US. When a country like the US begins to erode the ideas of democracy it naturally opens the door for other countries to do the same," said political analyst, Nanjala Nyabola, to CNN.<sup>21</sup> TikTok can easily be removed from Americans' phones since the app store market is a duopoly (Apple and Google), but the legal implications are much more complex.<sup>22</sup> While the administration doesn't need congressional approval to ban an entity, it sets a dangerous precedent to do so without clear and extensive justification of wrongdoing.<sup>23</sup>

TikTok posted a statement on its website claiming that for nearly a year, it has sought to engage with the United States government in good faith to provide a constructive solution addressing the concerns in the order.<sup>24</sup> The company asserts that it will pursue all remedies available in order to ensure that the rule of law is not discarded, and that the company and its users are treated fairly—if not by the Administration, then by the courts.<sup>25</sup> Consequently, TikTok filed a complaint in federal court on August 24, 2020,

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<sup>20</sup> McGee, *supra* note 16.

<sup>21</sup> *Id.*

<sup>22</sup> Scott Galloway, *Why TikTok is unlikely to be banned in the US, despite plenty of US apps being banned in China*, BUS. INSIDER (Aug. 14, 2020), <https://www.businessinsider.com/why-tiktok-is-unlikely-to-be-banned-in-us-2020-8>.

<sup>23</sup> *Id.*

<sup>24</sup> *Statement on the Administration's Executive Order*, TIKTOK (Aug. 7, 2020), <https://newsroom.tiktok.com/en-us/tiktok-responds>.

<sup>25</sup> *Id.*

challenging the ban.<sup>26</sup> TikTok contends that the company prefers constructive dialogue over litigation, but it is left with no other choice as the Executive Order threatens to eliminate “the creation of 10,000 American jobs and irreparably [harm] the millions of Americans who turn to this app for entertainment, connection, and legitimate livelihoods that are vital especially during the pandemic.”<sup>27</sup>

In the complaint, TikTok emphasizes that the Administration ignored its extensive good-faith efforts to address the concerns in the order, despite that the company disagreed with those concerns:

[A]s the U.S. government is well aware, Plaintiffs have taken extraordinary measures to protect the privacy and security of TikTok’s U.S. user data, including by having TikTok store such data outside of China (in the United States and Singapore) and by erecting software barriers that help ensure that TikTok stores its U.S. user data separately from the user data of other ByteDance products.... As part of that review, Plaintiffs provided voluminous documentation to the U.S. government documenting TikTok’s security practices and made commitments that were more than sufficient to address any conceivable U.S. government privacy or national security concerns.... The key personnel responsible for TikTok, including its CEO, Global Chief Security Officer, and General Counsel, are all Americans based in the United States—and therefore are not subject to Chinese law.<sup>28</sup>

Additionally, the complaint alleges that Trump ignored due process and violated the Fifth Amendment by banning TikTok with no notice or opportunity to be heard.<sup>29</sup> Further, TikTok asserts that its conduct is not an unusual and extraordinary threat, which is a requirement for the International Emergency Economic Powers Act (IEEPA) that the Administration is acting under, because no evidence was provided to show

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<sup>26</sup> *Why we are suing the Administration*, TIKTOK (Aug. 24, 2020), <https://newsroom.tiktok.com/en-us/tiktok-files-lawsuit>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

that TikTok is an actual threat.<sup>30</sup> Finally, as many others maintain, TikTok asserts that the order is not rooted in bona fide national security concerns, but rather a political scheme, and this is further proven by Trump's demands for payments that have no relationship to any conceivable national security threats.<sup>31</sup>

## VI. Conclusion

A complete halt of all transactions with ByteDance is a severe response to abstract national security concerns, especially when the White House has presented no evidence of actual improper data collection or compromise. It seems a bit ironic that the United States, the democratic posterchild, is restricting its citizens' internet use in fear of China, a Communist superpower. When the President of the United States does anything, the rest of the world is watching. Thus, while blocking a social media platform may seem trivial, we must ask ourselves what type of precedent this will set. The next time we criticize a communist regime's internet censorship, will our glass house be protected from the stones we've thrown?

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<sup>30</sup> *Id.*

<sup>31</sup> See *Why we are suing the Administration*, *supra* note 26.