

2023

TikTok's Fall From Grace: How Growing Security Concerns in Chinese Technology Affect U.S. Courts and Presidential Successors

Madeline Cartwright
Southern Methodist University, Dedman School of Law

Recommended Citation

Madeline Cartwright, *TikTok's Fall From Grace: How Growing Security Concerns in Chinese Technology Affect U.S. Courts and Presidential Successors*, 26 SMU SCI. & TECH. L. REV. 87 (2023)

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

TikTok's Fall From Grace: How Growing Security Concerns in Chinese Technology Affect U.S. Courts and Presidential Successors

*Madeline Cartwright**

ABSTRACT

In recent years, the United States government has warned that China may use Chinese companies as a vehicle for infiltrating American data security. The U.S. first acted on this warning in 2017 when it effectively banned Huawei—one of the world's largest telecom companies—from the U.S. market. Then-president Donald Trump subsequently turned the controversy to the popular social media app, TikTok, in an attempted ban over alleged privacy issues. Personal data collection and the legal implications behind trying to ban China-linked apps is an increasingly controversial topic in American politics. This article assesses the lawsuits following these groundbreaking governmental movements, including how the case of *Huawei v. United States* compares to the lawsuits and court decisions following Trump's executive order prohibiting transactions between U.S. citizens and TikTok's parent company, ByteDance. This includes an analysis of the holdings various courts reached and why they differ among jurisdictions, parties, and claims. Finally, this article will discuss future implications for TikTok and what the U.S. government may need to prove to place the app in the same sphere as its Huawei counterpart.

I. INTRODUCTION

Over the last few years, United States officials have sought a “technological decoupling” from China.¹ The government has warned that China is a “threat to American security” and can leverage technological linkages to steal secrets, spread disinformation, survey nonconformists, and hold U.S. infrastructure hostage.² To better protect Americans' data security, the U.S. has attempted to restrict Chinese technology and its problematic dive into personal user data.³

This Case Note addresses the following: (1) a brief run-through of the ongoing battle between the U.S. and China, up to the present day, over user

DOI: <https://doi.org/10.25172/smustr.26.1.5>.

* Madeline Cartwright is a 2024 JD candidate at Southern Methodist University Dedman School of Law. She graduated from the University of Oklahoma in 2018 with a Bachelor of Arts in Journalism and a minor in Political Science.

1. Jon Bateman, U.S.-CHINA TECHNOLOGICAL “DECOUPLING”: A STRATEGY AND POLICY FRAMEWORK 1 (2022).
2. *Id.* at 9.
3. *See id.* at 15.

personal data access in technology; (2) the similarities and differences between two Chinese tech companies in controversy; (3) an overview of how various lawsuits regarding technology bans of these tech companies have played out in the courts; (4) an analysis of why courts' holdings differ; and (5) a conclusion discussing future implications and TikTok's status in the marketplace.

II. THE CHINA VS. UNITED STATES TECH WAR

Beginning in December of 2017, the National Defense Authorization Act ("NDAA") barred the Defense Department from procuring certain telecommunications equipment or services from Huawei, one of the largest telecom companies in the world.⁴ In 2018, the NDAA restricted all executive branches from procuring such services from Huawei.⁵ With a final blow to the tech company in 2019, then-President Donald Trump ("Trump") made a major move in the Chinese technology battle by adding Huawei to a so-called "Entity List."⁶ Any company added to this list is unable to do business with any organization that operates in the U.S.⁷ This effectively banned Huawei in the U.S., causing the company to "completely revamp how it creates and releases smartphones."⁸

One year later, Trump signed an executive order to issue broad sanctions against TikTok, which included outlawing transactions between U.S. citizens and TikTok's parent company, ByteDance.⁹ This would ultimately remove the popular application ("app") from Apple and Google's app stores and cut off any advertising from American companies.¹⁰ However, nothing ever came of this order due to a series of legal challenges and Trump's elec-

4. Alexander Alper, *U.S. Actions Against China's Huawei*, REUTERS, [https://graphics.reuters.com/USA-CHINA/HUAWEI-TIMELINE/zgvomxwlgvd/\[https://perma.cc/M5GY-TGM2\]](https://graphics.reuters.com/USA-CHINA/HUAWEI-TIMELINE/zgvomxwlgvd/[https://perma.cc/M5GY-TGM2]).

5. *Id.*

6. C. Scott Brown, *The Huawei Ban Explained: A Complete Timeline and Everything You Need to Know*, ANDROID AUTH. (Dec. 12, 2022), [https://www.androidauthority.com/huawei-google-android-ban-988382/\[https://perma.cc/3RNR-ZAP8\]](https://www.androidauthority.com/huawei-google-android-ban-988382/[https://perma.cc/3RNR-ZAP8]).

7. *Id.*

8. *Id.*

9. Bobby Allyn, *Trump Signs Executive Order That Will Effectively Ban Use of TikTok in the U.S.*, NPR (Aug. 6, 2020, 11:21 PM), <https://www.npr.org/2020/08/06/900019185/trump-signs-executive-order-that-will-effectively-ban-use-of-tiktok-in-the-u-s> [https://perma.cc/7YKZ-6SXH].

10. *Id.*

tion loss shortly thereafter.¹¹ Although TikTok appeared to reach an agreement to sell part of the company to Oracle for American management, “the deal never closed, and a federal court ruled against Trump’s attempt to block the app.”¹²

In 2021, President Biden revoked Trump’s executive order, citing a slew of issues in the courts, challenging the ban, and leading judges to temporarily block the order during the pendency of the cases.¹³ In its place, Biden issued a new security review that recommends “‘additional executive and legislative actions to address the risk associated with’ apps subject to the jurisdiction of a foreign adversary.”¹⁴ Today, “[t]he Biden administration and TikTok have drafted a preliminary agreement to resolve national security concerns posed by the . . . app.”¹⁵ The proposed deal, however, is “facing hurdles” over its terms in negotiating its ownership structure.¹⁶ Florida Senator Marco Rubio commented that “‘anything short of a complete separation’ of TikTok from ByteDance ‘will likely leave significant national security issues regarding operations, data and algorithms unresolved.’”¹⁷ In June of 2022, the New York Times reported that TikTok’s employees in China had access to the company’s recent U.S. data. .¹⁸ If the agreement does prevail as is, “it is likely to be highly scrutinized, as TikTok has become a symbol of the ‘Cold War-like atmosphere’ in relations between Beijing and Washington.”¹⁹

III. TIKTOK AND HUAWEI’S OVERLAP

After Trump’s attempted ban, and as President Biden continues to tackle foreign data security concerns, many compare TikTok to Huawei and ques-

11. *Donald Trump-Era Ban on TikTok Dropped by Joe Biden*, BBC (June 9, 2021), <https://www.bbc.com/news/technology-57413227> [<https://perma.cc/75PQ-B6DX>].
12. Lauren Hirsch, David McCabe, Katie Benner & Glenn Thrush, *TikTok Seen Moving Toward U.S. Security Deal, but Hurdles Remain*, N.Y. TIMES (Sept. 26, 2022), <https://www.nytimes.com/2022/09/26/technology/tiktok-national-security-china.html> [<https://perma.cc/F4X7-GSUT>].
13. Jeanne Whalen & Ellen Nakashima, *Biden Revokes Trump’s TikTok and WeChat Bans, But Sets Up a Security Review of Foreign-Owned Apps*, WASH. POST (June 9, 2021, 1:33 PM), <https://www.washingtonpost.com/technology/2021/06/09/tiktok-ban-revoked-biden/> [<https://perma.cc/M7PK-TV46>].
14. *Id.*
15. Hirsch et al., *supra* note 12.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

tion its future operating in the U.S.²⁰ It is important to note key similarities and differences between the companies before addressing the bigger picture—how courts are responding.²¹

TikTok and Huawei share an important trait: Both are owned by the same parent company, ByteDance.²² Former employees said the boundaries between TikTok and ByteDance are “so blurry as to be nonexistent.”²³ ByteDance’s complicated history is riddled with lawsuits over a myriad of privacy issues, including collecting data on underaged children without parental consent.²⁴ But TikTok and Huawei operate in “very different” lines of business.²⁵ While Huawei operates as a telecom company dealing with a complicated global supply chain, TikTok is a “social media app beloved by teens.”²⁶ Most notably, TikTok does not have access to “critical infrastructure networks that are core to national security.”²⁷ They do, however, collect personal information on Americans that could ultimately undermine national security if it were to wind up in the hands of hostile foreign governments and their officials.²⁸

The effort to ban TikTok stalled out in the last months of the Trump administration, leaving open the question of what the future looks like for TikTok, especially with its stark similarities to Huawei.²⁹ Just like the “close inspection” in which Huawei has found itself in recent years, TikTok is “not

-
20. See Brian Fung, *Why the Trump Administration’s Win Over Huawei Could Be Bad News for TikTok*, CNN BUS. (July 16, 2020, 4:44 AM), <https://www.cnn.com/2020/07/16/tech/huawei-tiktok-trump/index.html> [https://perma.cc/E8ZC-ETBA].
 21. See *Huawei Techs. USA, Inc. v. United States*, 440 F. Supp. 3d 607, 654 (E.D. Tex. 2020); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 86 (D.D.C. 2020); *Marland v. Trump*, 498 F.Supp.3d 624, 645 (E.D. Pa. Sept. 26, 2020).
 22. Maggie Miller, *Commerce Dept. Still Weighing Approach to Huawei, TikTok*, THE HILL (Apr. 7, 2021, 5:03 PM), <https://thehill.com/policy/technology/547013-commerce-dept-still-weighting-approach-to-huawei-tiktok/> [https://perma.cc/7FMQ-Z9YJ].
 23. Salvador Rodriguez, *TikTok Insiders Say Social Media Company is Tightly Controlled by Chinese Parent ByteDance*, CNBC (June 25, 2021; 4:35 PM), <https://www.cnbc.com/2021/06/25/tiktok-insiders-say-chinese-parent-byte-dance-in-control.html> [https://perma.cc/QPL6-TGD3].
 24. *Is a TikTok Ban in the United States Possible?*, FORBES (Nov. 3, 2022), <https://www.forbes.com/sites/qai/2022/11/03/is-a-tiktok-ban-in-the-united-states-possible/?sh=79b610ac7eaa> [https://perma.cc/3XD5-4Y6W].
 25. Fung, *supra* note 20.
 26. *Id.*
 27. *Id.*
 28. *Id.*
 29. Miller, *supra* note 22.

trusted because of its connections to China.”³⁰ Cybersecurity experts argue TikTok, being so interwoven with its parent company, could present many risks.³¹

Trump’s 2020 executive order against TikTok showed “vast similarities” to the 2019 executive order issued against Huawei.³² If TikTok is placed on the same Commerce Department watchlist as Huawei, however, the move could be “legally murky” because entities traditionally placed on the list have violated laws or rules around “trade, arms control or intellectual property theft.”³³ However, there is no concrete evidence connecting TikTok to that type of violation.³⁴ Regardless of the similarities between the companies and the government bans, courts have responded to litigation surrounding these issues very differently.³⁵

IV. THE COURTS’ RESPONSE

A. *Huawei Technologies USA, Inc. v. United States of America*

Huawei Technologies’ subsidiary, Huawei Technologies USA, Inc., provided telecommunications equipment and services to eighty-five U.S. wireless carriers, including corporations, schools, and other institutions.³⁶ At this time, the U.S.-China Economic Security Review Commission reported that “[n]ational security concerns ha[d] accompanied the dramatic growth of China’s telecom sector” with “large Chinese companies” posing a threat as they were “directly subject to direction by the Chinese Communist Party.”³⁷ After a year-long investigation into the counterintelligence and security threat posed by Chinese telecommunications companies conducting business in the U.S., the House Permanent Select Committee on Intelligence determined that “Huawei . . . [could not] be trusted to be free of foreign state influence and thus pose[d] a security threat.”³⁸

30. Priscilla Sherman, *The Privacy Risks of TikTok – Why This Invasive App is So Dangerous*, VPNOVERVIEW (July 29, 2022), <https://vpnoverview.com/privacy/social-media/tiktok-privacy/>. [<https://perma.cc/R9ZF-QR7G>].

31. Rodriguez, *supra* note 23.

32. Arief Zulkifli, *TikTok in 2022: Revisiting Data and Privacy*, 55 COMPUT. 77, at 78, <https://www.computer.org/csdl/magazine/co/2022/06/09789294/1DZ8aACAWZi> [<https://perma.cc/9AAT-VSYT>].

33. Fung, *supra* note 20.

34. *Id.*

35. See *Huawei Techs. USA, Inc. v. U.S.*, 440 F. Supp. 3d 607 (E.D. Tex. 2020); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020); *Marland v. Trump*, 498 F. Supp. 3d 624 (E.D. Pa. 2020).

36. *Huawei*, 440 F. Supp. 3d at 619.

37. *Id.* at 620.

38. *Id.*

The 2018 NDAA ultimately prohibited federal agencies from “procuring, extending, or renewing a contract to procure any equipment system or service” if Huawei products constituted “critical technology” of any system.³⁹ The Act also prohibited federal agencies from entering into contracts with entities that used equipment comprised of Huawei products and prohibited heads of executive agencies from expending loan or grant funds to obtain a contract from any “equipment, system, or service” if Huawei products constitute “a substantial or essential component.”⁴⁰

Huawei, seeking to invalidate this statute, filed suit against the U.S. challenging the Act as unconstitutional on three grounds.⁴¹ Huawei asserted Section 889 of the Act: (1) violated the Bill of Attainder Clause; (2) violated the Due Process Clause; and (3) violated the Vesting Clauses.⁴² The Government maintained Section 889 was constitutional on all challenged grounds.⁴³

The court compared Section 889 to the statute at issue in *Kaspersky Lab, Inc. v. United States*, a similar lawsuit in which a Russian anti-malware company was blacklisted by the U.S. Federal Communications Commission because of concerns about its links to the Russian government.⁴⁴ The court held Section 889, like Section 1634 in *Kaspersky*, is a statute that “represents no more than a customer’s decision to take its business elsewhere.”⁴⁵ While this decision was “costly to Huawei,” such a decision falls short of the “historical meaning of legislative punishment.”⁴⁶ The court also held Section 889 did not violate the Due Process Clause of the Fifth Amendment.⁴⁷

Finally, Huawei argued that when Congress enacted Section 889, it adjudicated facts and applied law to Huawei, ultimately exercising executive and judicial powers prohibited under the Constitution’s Vesting Clauses.⁴⁸ But the court disagreed, explaining what Huawei “pejoratively labels as Congress unconstitutionally adjudicating facts is better characterized as a thorough congressional investigation into a potential threat against the nation’s

39. *Id.* at 626.

40. *Id.*

41. *Id.* at 626–28.

42. *Huawei*, 440 F. Supp. 3d at 628.

43. *Id.*

44. *See Huawei*, 440 F. Supp. 3d at 632; *see also* Mark Hachman, *U.S. Blacklists Kaspersky Antivirus as a Risk to National Security*, PCWORLD (Mar. 28, 2022, 9:59 AM), <https://www.pcworld.com/article/626854/kaspersky-blacklisted-as-a-risk-to-u-s-national-security.html> [<https://perma.cc/7E6T-6GBH>].

45. *Huawei*, 440 F. Supp. 3d at 633 (quoting *Kaspersky Lab, Inc. v. U.S. Dept. of Homeland Sec.*, 909 F.3d 446, 463 (D.C. Cir. 2018)).

46. *Id.* (quoting *Selective Serv. Sys. v. Minnesota Pub. Int. Rsch. Grp.*, 468 U.S. 841, 852 (1984)).

47. *Id.* at 652.

48. *Id.*

cybersecurity.”⁴⁹ The court ultimately held Section 889, as part of an appropriations bill, is the “upshot of an inherently congressional function” and that “the power to investigate is inherent in the power to make laws because a legislative body cannot legislate wisely . . . in the absence of information respecting the conditions which the legislation is intended to . . . change.”⁵⁰

B. *TikTok, Inc. v. Trump*

In May of 2019, Trump issued an “ICTS Order” announcing widespread use of a “communications technology” that may be exploited by foreign adversaries was creating an “extraordinary threat” to the national security of the U.S.⁵¹ Under this Order, Trump declared a national emergency and later reaffirmed his stance in 2020, highlighting “the pervasive threat” posed by the close ties between China-based technology firms and the Chinese government.⁵² Trump then identified TikTok specifically as a source of emerging dangers “given its foreign ownership,” concluding the app’s data collection posed a risk that the Chinese Communist Party can access Americans’ “personal and propriety information,” potentially allowing China to track the locations of Federal employees and contractors, build files of individual information for blackmail, and conduct corporate espionage.⁵³ As a result, Trump directed the Secretary of the U.S. Department of Commerce to identify a list of prohibited transactions with TikTok’s parent company, ByteDance, and ordered the company to divest itself of TikTok’s U.S. operations.⁵⁴

TikTok responded by filing suit alleging the government’s actions violated the Administrative Procedure Act, the First Amendment, and the Due Process Clause of the Fifth Amendment.⁵⁵ For the foregoing reasons, TikTok sought a preliminary injunction arguing they had a “likelihood of success” on some of these claims and, absent an injunction, they would have suffered “irreparable harm.”⁵⁶

The court explained the International Emergency Economic Powers Act (“IEEPA”), although containing “broad grant[s] of authority to declare national emergencies and to prohibit certain transactions with foreign countries,” contained two important limitations relevant in this case.⁵⁷ The

49. *Id.* at 653.

50. *Id.*

51. *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 76–77 (D.D.C. 2020).

52. *Id.* at 77.

53. *Id.*

54. *Id.*

55. *Id.* at 76.

56. *TikTok Inc. v. Trump*, 490 F. Supp. 3d at 79.

57. *Id.* at 80.

President's authority did not include either "the importation or exportation of information or informational materials" or "personal communication[s], which do not involve the transfer of anything of value."⁵⁸

TikTok argued the Secretary's prohibited transactions list was covered by this exception because the prohibitions would have prevented U.S. users from sharing and receiving content on TikTok.⁵⁹ This content constituted "information materials" and consequently could not be regulated under IEEPA.⁶⁰ The court agreed that because the Secretary's prohibitions are meant to limit, "and ultimately reduce to zero, the number of U.S. users who can comment on the platform and have their personal data on TikTok," the prohibitions, "at a minimum . . . indirectly 'regulate' the transmission of 'informational materials.'"⁶¹

TikTok also argued the prohibitions would "destroy" their online community.⁶² The court disagreed with the government's counterargument that "private messages between friends about TikTok videos" were "personal communications with no economic value," explaining that "such an expansive reading of the phrase 'anything of value' would write the personal-communications limitation out of the statute."⁶³ All communication service providers receive some value from a user's "presence on" their platform.⁶⁴ The court ultimately concluded that absent injunctive relief, TikTok would suffer irreparable harm because barring TikTok from U.S. app stores would halt the influx of new users, and users would be unlikely to return to platforms they had abandoned.⁶⁵

Most notably, the court acknowledged the government's argument "that a preliminary injunction would displace and frustrate the President's decision on how to best address a national security threat—an area where the courts typically defer to the president's judgment."⁶⁶ But the court concluded that although the government provided ample evidence of China's significant national security dangers, the threat posed by TikTok, as well as whether the prohibitions were the only effective way to address that threat, "remain[ed] less substantial."⁶⁷

58. *Id.*

59. *Id.* at 81.

60. *Id.*

61. *Id.*

62. *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 82. (D.D.C. 2020).

63. *Id.* at 83.

64. *Id.*

65. *Id.* at 84.

66. *Id.* at 85.

67. *Id.*

C. *Marland v. Trump*

In addition to the dispute in *TikTok*, individual users of the app took issue with Trump's executive order and filed their own suits.⁶⁸ The plaintiffs in this case offered "an entirely different perspective on the TikTok app" to that of the government and Trump, namely that the plaintiffs profited off the app as influencers.⁶⁹ They provided examples of how TikTok's large audience gave content creators the opportunity to profit from videos, such as earning thousands of dollars per video for fashion brands.⁷⁰ Moreover, they argued that the exposure on TikTok resulted in further "promotional and branding opportunities" for themselves.⁷¹ Without access to the TikTok app, the plaintiffs argued they would lose contact with all of their followers and the professional opportunities being afforded to them.⁷²

Plaintiffs filed suit to enjoin the Secretary of Commerce's enforcement of the executive order.⁷³ The court originally denied the plaintiffs' motion, finding they did not "meet their burden of showing irreparable harm as to their statutory claims."⁷⁴ However, the outcome of *TikTok Inc. v. Trump* preliminarily enjoined the Commerce Identification's prohibition and found that TikTok had established a likelihood of irreparable harm if the prohibition took effect.⁷⁵ The plaintiffs then filed an amended complaint.⁷⁶

The court explained that only the Commerce Identification, which identified the "prohibited transactions related to TikTok" and specified when these prohibitions would go into effect, was capable of being enjoined.⁷⁷ Ultimately, the court concluded the Commerce Identification's prohibitions would have had the effect of shutting down a "platform for expressive activity used by approximately 700 million individuals globally."⁷⁸ The sheer numbers of the potential ban led the court to conclude that "the Commerce Identification presented a threat to the 'robust exchange of informational materials.'"⁷⁹ The government argued this would "unduly restrict the President's ability to respond to national security threats," but as the court in *TikTok Inc. v. Trump* noted, the indirect regulation of informational materials

68. See *Marland v. Trump*, 498 F.Supp.3d at 641.

69. *Id.* at 632.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Marland v. Trump*, 498 F.Supp.3d at 632.

75. *Id.*

76. *Id.* at 633.

77. *Id.*

78. *Id.* at 640.

79. *Id.*

is excluded by Congress from the president's "otherwise broad emergency powers."⁸⁰

The court also held the plaintiffs demonstrated a "clear likelihood of irreparable harm."⁸¹ The plaintiffs contended they each "tried and failed" to create work as an influencer through other competitive platforms.⁸² Shutting down TikTok would have closed the door on the plaintiffs' influencing activities, and this harm was "not merely possible, but certain to occur."⁸³

V. WHY THE DECISIONS DIFFER

The courts' approaches to a ban on Huawei and a ban on TikTok are vastly different, and this appears to stem from whether the risk presented by the government outweighs the public interest.⁸⁴ In *Marland v. Trump*, the court's decision in part hinged on the fact that the government's descriptions of TikTok's national security threat were "phrased in the hypothetical."⁸⁵ The government noted ByteDance had significant and close ties to the Chinese Communist Party which "*could potentially*" be leveraged to further the Chinese government's agenda.⁸⁶ Moreover, the government argued one of the risks posed by TikTok was "the *possibility*" the Chinese government "*could compel*" TikTok to provide systemic access to U.S. users' sensitive information."⁸⁷

By contrast, U.S. officials discovered through an investigation that Huawei had the ability to "covertly access mobile-phone networks around the world through 'back doors' designed for use by law enforcement" and had this "secret capability" for over a decade.⁸⁸ This was not a hypothetical scenario but concrete evidence that Huawei was able to secretly access personal information that it did not disclose to its local customers.⁸⁹

80. *Marland v. Trump*, 498 F. Supp. 3d at 641; *TikTok Inc. v. Trump*, 490 F. Supp. 3d at 80.

81. *Marland v. Trump*, 498 F.Supp.3d at 641.

82. *Id.*

83. *Id.*

84. *See id.* at 642.

85. *Id.*

86. *Id.*

87. *Marland v. Trump*, 498 F.Supp.3d at 642.

88. Bojan Pancevski, *U.S. Officials Say Huawei Can Covertly Access Telecom Networks*, WALL ST. J. (Feb. 12, 2020), <https://www.wsj.com/articles/u-s-officials-say-huawei-can-covertly-access-telecom-networks-11581452256> [<https://perma.cc/4YTS-2EJQ>].

89. *See id.*

VI. CONCLUSION

Whether TikTok can be banned in the U.S. continues to remain a possibility, although “a lot of water would have to go under the bridge for it to happen anytime soon.”⁹⁰ As recently as November of 2022, FCC commissioner Brendan Carr told the Council on Foreign Investment that it should ban TikTok.⁹¹ This is the “strongest language Carr has used to date” on possible action against the app.⁹² While the FCC has no authority to regulate TikTok directly, Congress previously acted after Carr “voiced concerns” about Chinese telecom companies, including Huawei.⁹³ This is in response to new reports that have challenged TikTok’s claims that U.S. user data is secure, including intelligence that Chinese engineers working for the company “accessed nonpublic user information” like phone numbers and birthdays, and ByteDance instructed employees to “push pro-Beijing messages” to U.S. app users.⁹⁴ Another report proclaimed TikTok was accessing personal data when the consumer was not even actively using the app.⁹⁵

In the absence of “overarching” Congressional laws directed to data privacy and security, it is difficult to regulate such issues with laws that do not yet exist.⁹⁶ This raises critical questions regarding data privacy, security, and digital trade in an increasingly interconnected and global economy.⁹⁷ “Until there is ‘clear evidence’ of ByteDance misusing American user data” like that of its Huawei counterpart, TikTok is unlikely to be banned in the U.S.⁹⁸

90. FORBES, *supra* note 24.

91. Bethany Allen-Ebrahimian, *FCC Commissioner Says Government Should Ban TikTok*, AXIOS (Nov. 1, 2022), <https://www.axios.com/2022/11/01/interview-fcc-commissioner-says-government-should-ban-tiktok> [<https://perma.cc/876X-HCWK>].

92. *Id.*

93. *Id.*

94. *Id.*

95. FORBES, *supra* note 24.

96. *Id.*

97. *Id.*

98. *Id.*; see also C. Scott Brown, *The HUAWEI ban explained: A complete timeline and everything you need to know*, ANDROID AUTH., (Dec. 12, 2022), <https://www.androidauthority.com/huawei-google-android-ban-988382/> [<https://perma.cc/G9YP-7NE7>].

