TikTok's last dance

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"On January 19th, we still have President Biden, and on January 19th, as I understand it, we shut down." With these words, which foreshadowed the final end of the TikTok app in the United States, Noel Francisco, the legal representative of the Chinese parent company ByteDance, spoke during oral hearings before the US Supreme Court on January 10, 2025. Just one week later, the Supreme Court published its judgment: TikTok's appeal was dismissed. The court concluded its 20-page (!) ruling with the words:

> *"There is no doubt that, for more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok's data collection practices and relationship with a foreign adversary. For the foregoing reasons, we conclude that the challenged provisions do not violate petitioners' First Amendment rights."*

This seems to have sealed the fate of the app for the time being – but what remains? The Supreme Court grants US policymakers considerable room for maneuver when assessing national security issues. While this is legitimate, it raises concerns that such decisions may lead to ongoing restrictions on freedom of expression in an increasingly digitalized world. At the same time, the ruling cements double standards by subjecting foreign platforms like TikTok to stricter regulations, while domestic platforms benefit from milder data protection and regulatory requirements (see here). The problem of platform regulation in the United States remains unresolved. Even the attempt by the new-old US President Trump to temporarily suspend the ban by means of an executive order does little to change this. Unless Trump succeeds in transferring the app with its 170 million users – almost half the US population – to a US company, the issue is unlikely to be resolved. How likely such a scenario is remains to be seen, given the current legal and political framework.

A retrospective

Although TikTok is extremely popular among the US population, the app has long been perceived by political decision-makers of all stripes and at all levels of government as one thing above all else: a threat to national security interests. This is due to the assumption that the Chinese state is secretly tapping into US-users' data. Corresponding laws that make this possible exist in China anyway – a key argument of the US House of Representatives, to which the Supreme Court refers in its judgment. The strict rules on the app are also driven by concerns over surveillance, the spread of misinformation, and the targeted manipulation of public opinion.

The list of US government efforts to enforce a ban on the app is correspondingly long. It is worth mentioning Trump's (unsuccessful) attempt during his first term in office to either ban the app via an executive order or to force its sale to a US company. The failed attempt by the US state of Montana to ban the use of the app within its territory from January 1, 2024, also attracted considerable attention. Finally, the passing of the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACAA), also known as the Divestment or Ban Act, marked a real turning point. This law, passed under the Biden presidency in April 2024, stipulates that digital applications owned by foreign companies classified as threats to national security can be banned. TikTok and ByteDance, the parent company of TikTok, are specifically mentioned. In concrete terms, this means that Apple, Google and other US companies are no longer

allowed to offer TikTok in their app stores if the Chinese parent company ByteDance does not sell the app. The deadline for the cessation of activities or the sale ended on January 19, 2025, by which time the app would have been banned if President Trump had not issued an executive order postponing the ban for 75 days (see below).

A journey into the unknown

TikTok and a group of content creators filed their complaint against the aforementioned PAFACAA, claiming particularly that it violated the First Amendment, namely the freedom of speech. How the Supreme Court would rule in this case was not entirely foreseeable, which became particularly clear during the oral hearing before the Court on January 10, 2025. During the hearing, the arguments of both sides were critically scrutinized by the judges.

The case law on similar cases preceding the judgment did not provide any clear guidance either, even though the First Amendment has tended to be weighted more heavily than conflicting interests. President Trump's executive order concerning TikTok was explicitly mentioned and subsequently stopped by a court referencing the First Amendment. The law passed in Montana was also overturned on the grounds that it impermissibly encroached on the powers of the federal government. In addition, the Supreme Court's ruling in Lamont v. Postmaster General from 1965, which we have already referred to as a leading case in an earlier post on the Verfassungsblog, indicated that it might be difficult to overcome the hurdles of the First Amendment.

However, the D.C. Circuit Court, as the lower court, took a different view: in TikTok, Inc. v. Garland, all judges concluded that the ban was constitutional, despite differing dogmatic approaches. They viewed the PAFACAA as the less intrusive method to address national security concerns.

The judgment

Aside from the external circumstances, which the court highlighted almost apologetically, the first substantive feature of the case was that the controversial law only indirectly restricted constitutionally protected expressive activities. This restriction arose indirectly from the ban on the use of the app or the obligation to sell the corresponding part of the company to the United States. The Court highlighted a key distinction between measures targeting the control of a communications platform by a foreign-owned company and previous restrictions on non-communicative activities that affected communication options, which have been assessed in earlier cases.

The regulations under review were content-neutral in their purpose and form. The court supported the government's argument that the aim was to prevent the misuse of data by China. The judges noted that TikTok presented a special case because of its foreign control, its large user base, and the enormous amount of data it handled, including sensitive data. Normally, the Court would apply a strict standard when considering potential violations of the Constitution. However, in this case, it found that an intermediate standard of scrutiny was sufficient. This view was not shared by Justices Sotomayor and Gorsuch in their separate opinions. Nonetheless, both Justices concurred in the judgment's conclusion.

Applying intermediate scrutiny, the Court stated that the government's asserted interest was both important and legitimate. The government and Congress had made this sufficiently clear, and the law's scope of application was narrow. To meet constitutional requirements, the regulation had to pursue an important public purpose that could not be achieved as well by other means, and it had to be no more restrictive of speech than necessary. In the Court's view, these requirements were met. Importantly, the Court's ruling and analysis were based on the public record, without reference to the secret evidence submitted by the government – a point that Judge Gorsuch criticized in his separate opinion.

Nevertheless, the Court made it clear that it did not intend to substitute its assessment of the danger and impact of the measure for the deliberations of the government and Congress. A key word is deference to Congress: The Supreme Court granted the politically responsible institutions a considerable prerogative of

judgment in assessing the danger posed. This enabled the law to overcome the constitutional hurdles that typically apply in cases involving First Amendment restrictions. The key factor was the use of a relaxed standard of review.

Classification and criticism

The court emphasizes TikTok's unique case and the narrow scope of the law. Justice Gorsuch also emphasizes this in his opinion, stating: "All I can say is that, at this time and under these constraints, the problem appears real and the response to it not unconstitutional. As persuaded as I am of the wisdom of Justice Brandeis in *Whitney* and Justice Holmes in *Abrams*, their cases are not ours." However, since the case involves important national security issues in an international context, the Court relies on the judgment of political institutions. This approach is not without precedent: the CJEU adopted a similar stance when it upheld the ban on Russian propaganda broadcasters, citing the specific security threat in Europe posed by Russia's war of aggression against Ukraine. In general, the balance between protecting national and international or regional security and restricting freedom of expression and information is a unique one. Courts often grant political authorities' considerable latitude in such situations.

Nevertheless, this ruling represents a serious encroachment on freedom of expression and information. Cases from the European Court of Human Rights involving the prohibition of apps and content restrictions make clear that such measures are usually incompatible with freedom of expression and information (e.g., Ahmet Yildirim v. Turkey, Cengiz and Others v. Turkey; Akdeniz v. Turkey). The extensive delegation of judgment to political decision-makers also carries the risk that freedom of expression issues may be handled irresponsibly. Another concern is the uncertainty surrounding whether the ban will achieve its intended effect, especially as many users have already migrated to other Chinese apps such as Xiaohongshu. Furthermore, the law reinforces a double standard: domestic platforms benefit from an extremely liberal regime, especially in terms of data protection – frequently criticized but still unreformed – while foreign-controlled platforms face much stricter rules. This disparity is unlikely to change under President Trump. Overall, the law and the judgment do not contribute to a general platform regulation in the United States.

Trump's executive order - an opportunity for TikTok?

When President-elect, Donald Trump spoke in favor of delaying the TikTok ban; he performed a surprising turnaround in his approach to the app. In his amicus letter, submitted to the Supreme Court in December 2024, he called for postponing the law's implementation by several months, arguing that, after taking office, he wanted to find a political solution that could make the ban unnecessary.

However, once the effects of PAFACAA have fully materialized, Trump's options are severely limited. Nevertheless, he has issued an executive order and suspended the ban for 75 days. He justified this decision as follows:

> *"The unfortunate timing of section 2(a) of the Act – one day before I took office as the 47th President of the United States – interferes with my ability to assess the national security and foreign policy implications of the Act's prohibitions before they take effect. This timing also interferes with my ability to negotiate a resolution to avoid an abrupt shutdown of the TikTok platform while addressing national security concerns. Accordingly, I am instructing the Attorney General not to take any action to enforce the Act for a period of 75 days from today to allow my Administration an opportunity to determine the appropriate course forward in an orderly way that protects national security while avoiding an abrupt shutdown of a communications platform used by millions of Americans."*

This temporary reprieve, achieved by instructing the Department of Justice not to actively enforce the ban, allows platforms like Apple and Google to continue to offer TikTok in their app stores. During this time, efforts can be made to find a solution within the framework of the law, which realistically would require

the sale of TikTok to a U.S. company. Notably, the executive order leaves a potential loophole, stating: "My Administration must also [...] evaluate the sufficiency of mitigation measures TikTok has taken to date." However, the legal order is unambiguous: President Trump cannot disregard the law, even in light of the Supreme Court ruling: As a subsidiary of ByteDance, TikTok will not survive in the US.

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