

The Regulatory Dilemma of the U.S. Government: The Protecting Americans from Applications Controlled by Foreign Adversaries Act and the Limitations to Freedom of Speech

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Abstract: This article examines the legal issues surrounding First Amendment challenges in the “Protecting Americans from Applications Controlled by Foreign Adversaries Act.” After introducing the background of the bill and an overview of the First Amendment and freedom of speech in America, this article uses case law research methods to explore the unconstitutional determination of the bill and the balancing approach adopted by the court when national security and free speech rights conflict. Finally, this article reaches a conclusion that based on past cases, intermediate scrutiny can only be passed if the federal government can submit sufficient evidence to prove that national security risks actually exist, and demonstrate the bill does not excessively restrict freedom of speech beyond necessary. The United States protects the freedom of speech in the Constitution from arbitrary infringement through the checks and balances between the courts and the legislature, so different levels of scrutiny tests are set up. However, as long as the government can provide sufficient evidence to prove that there is a more compelling government interest, it can pierce the protection of the First Amendment.

Keywords: Freedom of speech, First Amendment, national security, TikTok, foreign adversaries

1. Introduction

On March 13, the US House of Representatives passed the bill called the “Protecting Americans from Applications Controlled by Foreign Adversaries Act,” (HR 7521)(herein referred to as the TikTok ban), leaving a social media platform “TikTok” two choices -- be compliant by finding a U.S. buyer, or get banned throughout the U.S. Although it is far from becoming a law since at this article is written, it was just provided to the Senate, civil liberties and TikTok users who grow their business on this platform worried about the threat looms ahead.

Concerns about TikTok and its foreign ownership gave born to the TikTok ban, including national security, data privacy, disinformation and propaganda and so on. But in a nation that protects and prioritizes freedom of speech in its constitution, the First Amendment becomes the toughest block for legislators and the most solid backing for act opponents [1]. David Greene believed that any ban on

TikTok could lead to First Amendment challenges unless the government demonstrated a significant interest [2].

Although other factors like economic implications or executive power overextension also play a crucial role in this TikTok saga, this paper will focus on the First Amendment challenge, which probably would be the key point for the both parties to argue if it is brought to the court. It would discuss the legal basis for both sides with historic perspectives and a possible outcome would be given with reasons.

2. Freedom of Speech and the First Amendment

When discussing the freedom of speech, whose history predates modern international human rights instruments, the Universal Declaration of Human Rights (hereinafter referred to as UDHR) is inevitable, which is described as a milestone document by the United Nations. Being the inspiration for seventy human rights treaties, the UDHR Article 19 laid a foundation for a broad definition of the freedom of speech, indicating two things of the freedom of speech. One is that the right has an equality nature, and second, the protection of free speech extends its literal meaning from delivering one's thoughts to seeking and receiving information regardless of the means and frontiers.

Nevertheless, it seems too good to be true that a right would entitle people to absolute freedom. Professor Dershowitz believed "no right is ever absolute, nor shall freedom of speech [3]." The fact that many law experts advocate the U.S. government abridging speech that is of great offense or disgust under the rule of reason, such as Justice Felix Frankfurter, corroborates such an idea. The amended version of Article 19 in the ICCPR further stipulated that the freedom of speech comes with "special duties and responsibilities" and is never boundless. The sacrosanctity of the freedom of speech is shaken when the rights or reputation of others clash with the right to express freely, when freedom of speech is outweighed by an even more compelling government interest, or when the nature of speech happens to be in the commercial world. It might seem more of a nominal "political prize" instead of "an independent value," as Stanley Fish said in his book [4].

The First Amendment, being the most important legal basis safeguarding the freedom of speech in the U.S. at the constitutional level, has exceptions approved by the Supreme Court of the United States. The exceptions allow restrictions on malicious speech, commercial speech and others that will infringe on the rights of others, such as the right of privacy or the right of reputation.

Despite the exception mentioned above, the freedom of speech may also be limited when achieving more compelling government interests is required. The legal standard for this is called "strict scrutiny," which is an analytical process that the court will apply if a content-based law faces a first amendment challenge. The law can only be passed if it is the "least restrictive means" of advancing a "compelling governmental interest," such as national security, and judicial fairness. When such interest is recognized, the test would be lowered to the "intermediate scrutiny" which is less rigorous than the "strict scrutiny," under which the law should be "narrowly drawn" to advance a "substantial" governmental interest.

Overall, a law that limits the freedom of speech is very unlikely to pass the scrutiny. Such tests exist as a scale, balancing the right of free speech and other social interests.

3. Overview of the Act

The act basically makes it illegal for a foreign adversary controlled entity to operate or maintain an application in the United States. The "foreign adversaries" are determined by the Secretary, in 15 CFR 7.4, which lists foreign governments or individuals whose conducts are regarded as adverse to the national security of the United States or its citizens in a serious way or in a long-term pattern including China, Cuba, Iran, North Korea, Russia. Also, the company is defined as "controlled by a

foreign adversary” as long as it is located in those countries or is subjected to the law of the countries, or is subjected to the direction or is owned at least 20% its stake by citizens of the foreign adversaries. As for the enforcement, the Attorney General shall be in charge with regard to the investigation and prosecution.

However, the seemingly strict ban leaves a way out for those applications controlled by foreign adversaries, which is called a qualified divestiture. By the discretion of the president, if the company is no longer owned or controlled by foreign adversaries and cut off all the cooperation on content recommendation algorithms or data sharing agreements, it is absolved from punishment and ban. Apart from that, applications providing product reviews, business reviews, or travel information and reviews by users were not targeted by the act.

The drafting group is clear that the content of the bill should not put pressure on speech, thus they try to avoid mentioning its influence on expression. The committee wants to draw public attention to national security concerns which might be caused by TikTok or the next trending application controlled by foreign adversaries in the United States, and justify forcing the platform to take sides. By doing so, the bill is not to be blamed for the disappearance of a mainstream platform for communication, but for the application’s refusal of divestiture. It just indirectly leads to TikTok’s farewell, and making a foreign-based company to be compliant to the U.S. regulation cannot sound more legitimate.

4. Possible First Amendment Challenge of the Act

The TikTok ban may not have content that can be counted as content-based discrimination since the act says nothing about speech on the application. But one of the potential outcomes of this act is that millions of American citizens lose a media which they voluntarily choose. This might lead us to discuss (1) whether a law that does not regulate content or speech on its face may face a First Amendment challenge if the law will indirectly reach an effect that impedes or restricts the freedom of speech. (2) Whether the freedom of speech includes the free will of choosing the manner of the speech to be delivered? (3) If the citizens have the right, whether it would be revoked when right clashes?

4.1. The Determination of Unconstitutionality: Infringement on Freedom of Speech

The TikTok ban is not complicated in the determination of unconstitutionality. Some may argue that it only restricts the ownership of certain corporation which operates in the territory of the United States, without banning the right to use the application. The law is not content-based discrimination so the court might agree that it is subject to intermediate scrutiny because of its “content-neutral” nature.

Those who believe the TikTok ban would not be unconstitutional on the First Amendment grounds since the ownership of the corporation of an application for communication is not protected by the First Amendment [5]. Alec Stapp believed it is undoubted that no one would allow the Soviet Union to own the News like NBC or CBS during the Cold War, during which a case, *Lamont v. Postmaster General* (1965), held that the Soviet Union had a First Amendment right to distribute “communist political propaganda” via the United States Postal Service.

The argument they made is true but not really helpful to this issue, or the scenario they provide is not a good analogy to ours. TikTok does not claim to defend the Communist party’s right to use the application as a way for propaganda, nor does the nature of TikTok resemble those news agencies or postal service mentioned above. Unlike those, TikTok never takes a role of publishing opinions like the *Economist*, it is more similar to Twitter or Facebook, or the bulletin boards in the schools. The ban is basically planning to remove all the bulletin boards which are frequently used by most of the

citizens in the U.S. based on the reason that the owner of the boards are from foreign adversaries. One could hardly envisage a circumstance that the government will completely “shut down” Twitter or Facebook because of data privacy protection. These never happen not because Twitter or Facebook are born in the U.S., but because the restriction itself infringes free speech.

Nevertheless, determination of unconstitutionality shall have more evidence than the actual restriction, the court gives several levels of tests on that. First, whether the law has “content-based discrimination” or is “content-neutral” will determine which scrutiny it is subjected to. A law that promotes significant governmental interests unrelated to the suppression itself and is narrowly tailored so that no more speech than necessary will be burdened get a chance to sustain under the First Amendment.

Even if the law is decided “content-neutral,” it's too early for the advocates to utter a sign of relief. There is a category of exceptions which would make facially “content-neutral” laws be regarded as “content-based” ones. In *Reed v. Town of Gilbert*, laws that have no justification without reference to the content of the restrained speech, or the laws were adopted merely because the government took an opposite position of the content. It reminds us the TikTok ban advocates mentioned risks and adverse effects of propaganda and misinformation from foreign adversaries, and the Act exempts some companies from providing products reviews or travel information reviews from foreign adversaries. It probably would result in First Amendment concerns because regulations might be seen as “discriminating among media, or among different speakers within a single medium.”

When discussing the constitutionality of the TikTok ban, a 2023 case, *Alario v. Knudsen*, is like a testing ground that provides us with potential outcomes of a TikTok ban having similar content but is a state-specified version enacted in Montana, called SB 419. In the opinion referring to whether the act is content-based or content-neutral, the court did not directly answer or picked either party's argument, the judge believed the question is “like the curate's egg, neither argument is entirely persuasive.” However, the court ruled that the “content-neutral”-level test, which is the intermediate scrutiny, would be “closer to the legal mark.”

In *Knudsen*, the court holds that although the law is content-neutral, S.B. 419 directly implicates speech by thoroughly banning a media where people speak, distinguishing a former case law *United States v. O'Brien*, which ruled a law constitutional for it not directly implicate speech. It answered our first question perfectly, that a law which is content-neutral on its face, will still face First Amendment challenge, although it may be given intermediate scrutiny.

Although in this case, Montana failed fundamentally because regulating foreign affairs never is the state's important governmental interest, and Montana has no constitutional authority over foreign affairs, which is within the exclusive domain of the federal government. Also, the court examined the legislative intent and believed S.B. 419 was not in a good position to protect the consumers in Montana, while another law S.B. 384 demonstrated a better and broader way of guarding consumer's digital data and privacy safety. The S.B. 419 was more of a law showing legislator's interest in “targeting China's ostensible role in TikTok.” It is consistent with a ruling in *McCullen v. Coakley*, which says if other alternatives can also satisfy the government interest, then the alternative should substitute the law that burdens the speech, even if the law is content-neutral.

To sum up, although Montana's S.B. 419 regulates non-speech conduct, and the court hesitated to give a clear answer about whether it is content-based or content-neutral, it still received an intermediate scrutiny and failed it. The two governmental interests stated by Montana are rejected because it lacked not only constitutional authority, but also evidence. Since the U.S. government has frequently requested users data from companies like Microsoft, under the guise of “national security reasons,” it seems reasonable for the court to request evidence more than mere skeptical [6]. Even if protecting consumers is accepted as a government interest, the law fails to meet the requirement of narrow tailoring. In other words, a complete ban on TikTok would likely to be seen as too arbitrary,

and it certainly burdens substantially more speech than is necessary to do so. In the end, Montana did not provide sufficient evidence to show the bill will alleviate the harm, or will substantially stop foreign adversaries from stealing the U.S. citizens' data. The act also did not guarantee "ample alternative channels of communication." There's no substitute good for TikTok, chosen by millions of users voluntarily. If other applications are less effective, it would not satisfy such requirements.

What's different with this 2024 "upgraded" version is that the TikTok ban is a federal act, which means foreign policy purposes might well be considered important government interest. If the federal government can find convincing evidence (Montana State's position mainly based on news coverage) showing TikTok has suspicious conduct to prove the harm is real, not merely conjectural, then probably the First Amendment would back off this time.

Lastly, since the lawsuit is in a federal court, it's not absolutely binding. The conclusion driven by this case could not fully anticipate what would happen if it were before the Supreme Court.

4.2. The Right to Freely Choose the Platform for Speech

Whether does the citizens have the right to choose the manner of speech seems obvious. In *McCullen v. Coakley*, abortion opponents claim that the law that forbids them from protesting in the buffer zone of the hospital operating abortion surgeries violates the First Amendment, although it does not contain content-based distinctions. Even if the state justified that the law increases public safety and prevents obstructions as government interest without reference to the content of the speech, it still is held unconstitutional because it is not narrowly tailored. In the court's opinion, public ways and sidewalks, as "traditional public fora", have the historical meaning of being the forum that exists for assembly and communication for the public.

As we are now in the information age for almost a decade, Twitter, Facebook, Youtube, and TikTok of cause, can generally be seen as new "public fora" in which innumerable thoughts and ideas meet and clash without frontiers. Although assembly or protest may still be held offline, those platform becomes a way the citizens know the information for assembly, thus serving a similar function as "traditional public fora." It has been admitted directly or indirectly in the mouth of government officials, experts, or judges, and is evidenced by the user base that is so big that it can not be ignored and brings about the TikTok ban.

In *Coakley*, the court explained why the law is required to be narrowly tailored. It is to prevent legislators from taking a shortcut simply because a complete ban would be more efficient and convenient, meanwhile, it too readily sacrifices speech. It is these aspects and concerns brought by judges that balance the power between the branches and balance the rights or interests are conflicted.

In circumstances like the TikTok case, "using an axe instead of a scalpel" to cut off TikTok may be seen as a means that is the most efficient way to prevent foreign adversaries from getting data information from the citizens.

However, in another case, *Signs for Jesus v. Town of Pembroke*, the court distinguished the *Coakley* case on the grounds that "the connection between an electronic sign ban and an interest in preserving a town's rural character is immediately apparent." The act in *Coakley* was rejected because the police were capable of dealing with those protests at that time and place, and it was more for the convenience of law enforcement than necessity. But when prohibiting electronic identification becomes necessary to satisfy a significant governmental interest in aesthetics, the law is not unconstitutional.

To harmonize the two cases, if the legislators can prove that the law has a close connection with the government interest and it is a necessity and there is unlikely an alternative way to achieve that interest apart from the one which adds burden to speech, the government can abridge the right of the public to freely choose the media they used.

5. National Security Concern

The importance of national security has already been demonstrated in *Haig v. Agee* (1981), which ruled that “no governmental interest is more compelling than the security of the nation.”

Retrospectively, many acts that infringe freedom of speech by different administrations of the U.S. after the First Amendment were enacted. Although most of these have become a thing of the past, they are still living examples that remind us that under some specific historical periods, when America was in turbulent years, the right to speak freely may no longer be protected when national security is at stake, freedom of expression is valueless if the existence of the nation is uncertain. It is generalized that the state would be given more deference during the war while civil rights like freedom of speech are abridged, which is a type of “national security exceptionalism [7].”

The Sedition Act of 1798 is a paragon of a law showing that national security prevails over freedom of speech. The ruling party at that time was Federalists, who believed that a seditious libel law was backed by English common law, and was undoubtedly constitutional as a necessary instrument of defense. At that time, any criticism or disagreement with government officials was regarded as an attack on the government itself. The First Amendment was interpreted as only containing prior restraint and licensing. This seems to confirm what Fisher said, that freedom of speech seems to be a political bargaining chip. It seems that the definition of free speech is in the service of political parties rather than the value itself.

Likewise, restrictions happened at war times. During the Civil War, opponents who wrote articles were arrested. Controlling the speech was regarded as an important tool to win the battle, and it was adopted by the North and the South. Court in *Near v. Minnesota* (1931) prohibited military secrets from being published in newspapers or in *Debs v. United States* (1919) upheld limiting speech to prevent military recruiting. Also, revealing the identity of intelligence is not protected by the First Amendment. Nevertheless, the court will also prevent the government from using national security as an ostensible excuse to arbitrarily restrict speech. The government must provide proof that national security interests really are in play. The clear and present danger test proposed in *Schenck v. United States* (1919) amplified harmonizing national security and freedom of speech.

After we entered the information age, online media such as Twitter have become a battlefield to protect “national security” in information warfare. Disinformation campaigns in America carried out by foreign adversaries became serious concerns of the U.S. Department of Homeland Security, especially when the First Amendment can be used as a shield for hostile foreign forces to achieve their goals.

Take China’s 2017 National Intelligent Law as an example, ByteDance must obey the dictates of the China government since there isn’t a line that divides the public and private sectors [8]. Regarding whether TikTok will be held to constitute national security risks, *Huawei v. FCC* may be a reference, which provides that determinations by Congress, the President, and other executive agencies, as well as classified information can justify the designation of Huawei, as a national security risk consistent with the public interest. But TikTok and Huawei are essentially different in many ways. TikTok has now become a mainstream media application in the United States, and it has an apparent connection with freedom of speech. However, the sanctions against Huawei are not unconstitutional. The *Huawei v. FCC* case also mainly focuses on the legislative authority of administrative agencies.

In conclusion, when the right conflicts with national security or some larger public concern, it may be revoked. And the determination of national security may be done not by courts, but by other experts or government officials. The court here will act as an institution assuring the evidence is reasonable and sufficient.

6. Conclusion

The case given in this article also demonstrates the checks and balances between the judicial system and the legislative system in the United States when protecting freedom of speech, although this right has been violated in special historical periods in the past. But for now, freedom of speech, as an important basic citizen right protected by the Constitution, is protected by scrutiny tests, which can block many speeches that restrict speech for the sake of convenience. But if national security is really at stake, the First Amendment will not stand in the way. However, whether it is asking too much to demand the government to provide evidence before taking a preventive measure, and at what level of this demand is reasonable, are not involved in this article due to space limitations. And since the TikTok bill is still in its legislative progress, this article may not be able to take into account the subsequent changes, and other crucial factors such as whether the Supreme Court will be influenced by Justice's political beliefs are not mentioned. This may be left for future discussion.

Based on the above discussion, the question of whether the bill can be invalidated by the Supreme Court if it faces a First Amendment challenge after it eventually becomes the law could be analyzed as follows. First of all, because it is more of a "content-neutral" bill, it should be subject to intermediate scrutiny. In order to pass the scrutiny, the federal government has to provide some substantial evidence to prove that national security, as an important government interest, is actually being threatened. In addition, it is necessary to prove that (1) this bill does not discriminate among media, that is, it is not targeting TikTok alone, (2) only by completely banning TikTok can the data security of American netizens and be assured and other situations that lead to national security risks be solved substantially by enacting the bill, (3) the bill is narrowly tailored and provides ample alternatives, which is the more difficult part to prove at the moment. But if the harm to national security is serious enough, perhaps the third point of determination will be relaxed, and there may not even be a need for discussion, allowing the bill to be sustained.

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