

Why Banning TikTok is Doomed to Fail

Recent headlines make it no secret that there is a fervent bipartisan appetite to ban the use of TikTok in the United States.¹ James Lewis, Senior Vice President for the Center for Strategic and International Studies, recently told POLITICO, “I don’t really care what Congress writes, or what the administration writes. They’re not going to ban TikTok.”² According to Lewis and other experts, even if Congress could deliver a new law to such an effect, “[a]ll roads lead to court,” where the First Amendment would inevitably prevail.³ Indeed, First Amendment experts have long been sounding the alarm on a potential TikTok ban with, Jameel Jaffer, executive director at the Knight First Amendment Institute, calling social media bans “a hallmark of authoritarian regimes.”⁴

Caught in the maelstrom of sensationalist rhetoric, however, is how exactly the First Amendment would operate should a TikTok ban be challenged in court. For a TikTok ban to survive First Amendment scrutiny, the government would at a minimum be required to show that a ban substantially advances an important government interest in a narrowly tailored manner.⁵ Those interests are supposedly protecting American’s digital privacy and preventing espionage from China.⁶ But as digital rights advocates have pointed out, these interests can be achieved without censoring the flow of information for over 150 million American TikTok users, specifically by advancing digital privacy legislation.⁷ To highlight this point, if China wanted to harvest information on Americans it could legally do so without TikTok by purchasing “limitless amounts of information” from data brokers who stockpile and then sell personal data from online activities.⁸

Overall, the privacy and national security concerns advanced by proponents for a ban on TikTok may be genuine and legitimate. But the reality is that a ban on TikTok would not leave American’s digital privacy more secure. It would, however, leave Americans less free by censoring the speech of millions of Americans. Leaving our government more akin to the authoritarian regimes it seeks to protect us from.

¹ Brendan Bordelon, *Biden and Congress Want to Ban TikTok. At This Point It May be Impossible*, POLITICO (Apr. 16, 2023 7:00 AM), <https://www.politico.com/news/2023/04/16/why-washington-wont-ban-tiktok-00091690>.

² *Id.*

³ *Id.*

⁴ Conor Murray, *A TikTok Ban May Violate Constitution, First Amendment Advocates Say*, FORBES (Mar. 23, 2023 3:59 PM), <https://www.forbes.com/sites/conormurray/2023/03/23/a-tiktok-ban-may-violate-constitution-first-amendment-advocates-say/?sh=24247fc62188>; *Knight Institute Comments on Proposed TikTok Ban*, KNIGHT FIRST AMEND. INST. (Mar. 22, 2023), <https://knightcolumbia.org/content/knight-institute-comments-on-proposed-tiktok-ban>.

⁵ Jameel Jaffer, *There’s a Problem with Banning TikTok. It’s Called the First Amendment*, KNIGHT FIRST AMEND. INST. (Mar. 24, 2023), <https://knightcolumbia.org/blog/theres-a-problem-with-banning-tiktok-its-called-the-first-amendment>.

⁶ Bordelon, *supra* note 1.

⁷ Adam Schwartz & David Greene, *Government Hasn’t Justified a TikTok Ban*, ELEC. FRONTIER FOUND. (Mar. 16, 2023), <https://www.eff.org/deeplinks/2023/03/government-hasnt-justified-tiktok-ban>.

⁸ Glenn S. Gerstell, *The Problem With Taking TikTok Away From Americans*, THE N.Y. TIMES (Feb. 1, 2023), <https://www.nytimes.com/2023/02/01/opinion/tiktok-ban-china.html>.