

5-19-2022

Immunization And Indemnification: Rethinking The Us Approach To Liability Protections For Vaccine Manufacturers During The Covid-19 Pandemic

Samantha Topper Berns
University of Miami School of Law

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [Health Law and Policy Commons](#)

Recommended Citation

Samantha Topper Berns, *Immunization And Indemnification: Rethinking The Us Approach To Liability Protections For Vaccine Manufacturers During The Covid-19 Pandemic*, 29 U. MIA Int'l & Comp. L. Rev. 62

()

Available at: <https://repository.law.miami.edu/umicl/vol29/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

TIKTOK, CFIUS, AND THE SPLINTERNET

*Jake T. Seiler**

ABSTRACT

This note will discuss the role that the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) has played in foreign relations and how it contributes to the balkanization of the internet today. The Committee is an interagency body that reviews foreign investments for potential national security threats. Recently, CFIUS has been in the spotlight for its role in the sale of TikTok, a cellphone app owned by a popular Chinese corporation, ByteDance. While much of CFIUS’ review in the past has been focused on Chinese-owned corporations, there is much debate about whether or not countries should opt to sever the internet due to political, social, or economic pressures. Through the example of TikTok, this note will analyze what the right balance is between protecting national security and maintaining a united internet.

ABSTRACT	36
I. THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ORIGINS, DEVELOPMENTS, AND RECENT USAGE	37
A. ORIGINS	37
B. DEVELOPMENT OF CFIUS INVOLVEMENT	38
C. MODERN-DAY CFIUS	40
II. CFIUS AND THE TIKTOK SAGA.....	43
A. WHAT IS TIKTOK?	43
B. CFIUS, PRESIDENT TRUMP, AND TIKTOK.....	46
III. THE SPLINTERNET	52
A. THE IMPORTANCE OF A WORLD WIDE WEB	52
B. WHAT IS THE SPLINTERNET?.....	54
IV. CASE-BY-CASE, BUT FOR TIKTOK, A BAN OR DIVESTMENT IS WARRANTED	57
V. CONCLUSION.....	61

* J.D. Candidate, Class of 2022, University of Miami School of Law.

I. THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: ORIGINS, DEVELOPMENTS, AND RECENT USAGE

A. Origins

The Committee on Foreign Investment in the United States is an interagency board that assists the President in analyzing national security issues that arise from foreign direct investment in the economy.¹ CFIUS was created by President Ford via executive order in 1975, which laid the foundation for who would serve on the Committee, what objective the Committee would seek to fulfill, and how the Committee would carry out their functions.² However, at its inception, CFIUS was widely seen as an obscure and inadequate entity that was hesitant to take any action.³ For example, from 1975 to 1980, the Committee met a meager 10 times.⁴ While CFIUS did investigate a few investments from 1980 to 1987,⁵ the Committee remained largely unproductive until the Exon-Florio provision of the Omnibus Trade and Competitiveness Act of 1988⁶ was implemented.⁷

Fueled by worries surrounding Japanese acquisition of U.S. corporations, the Exon-Florio Provision allowed the President—after determining that other U.S. laws are “inadequate or inappropriate”—to thwart investments that threaten national security (as long as there is “credible evidence” to support that position).⁸ While CFIUS was not expressly mentioned in the Provision, the law transformed the committee into, “an important component of U.S. foreign investment

¹ James K. Jackson, Congressional Research Serv., *The Committee on Foreign Investment in the United States (CFIUS)* RL3888 at 1, (Feb. 14, 2020) [hereinafter CFIUS Report].

² Exec. Order No. 11858, 3 C.F.R. 990 (1971–1975).

³ CFIUS Report *supra* note 1, at 4 (citing U.S. Congress. House. Committee on Government Operations, *The Adequacy of the Federal Response to Foreign Investment in the United States. Report by the Committee on Government Operations*, H. Rept. 96-1216, 96th Cong., 2nd sess., Washington: GPO, 1980. 166–184.).

⁴ *Id.*

⁵ CFIUS Report *supra* note 1, at 5.

⁶ Omnibus Trade and Competitiveness Act of 1988, H.R. 4848, 100th Congress (1988).

⁷ See James K. Jackson, Congressional Research Serv., *The Exon-Florio National Security Test for Foreign Investment* RL33312, (Mar. 29, 2013) [hereinafter Exon-Florio Report].

⁸ *Id.* at 3.

policy with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or blocked.”⁹ The Committee’s power was then refined by the “Byrd Amendment” to the Exon-Florio statute in 1992.¹⁰ This Amendment required CFIUS to investigate proposed investments in situations where two specifications are met: “(1) the acquirer is controlled by or acting on behalf of a foreign government; and (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.”¹¹ As the Committee’s abilities and operations were polished, CFIUS received more and more attention from Congress and the general population alike.¹²

B. Development of CFIUS Involvement

September 11, 2001 fundamentally changed how the United States approached national security threats. In response to the 9/11 terrorist attacks, the U.S. created both the 9/11 Committee and the Department of Homeland Security.¹³ Reactions amongst the American people greatly varied; some relied on faith to deal with the tragedy, some grew angry and turned to violence, but all mourned the devastating loss of life.¹⁴ The psychological response to 9/11 greatly impacted CFIUS and how it was thought to perform in certain situations for years to come.¹⁵

In 2006, the intensified national security attitudes of the public, especially towards Muslim-majority countries, came to surface through CFIUS when Dubai Ports World (“DPW”) purchased six U.S.

⁹ CFIUS Report *supra* note 1, at 6.

¹⁰ *See id.* at 8.

¹¹ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

¹² *See* CFIUS Report *supra* note 1, at 8.

¹³ *9-11 Commission, Homeland Security, and Intelligence Reform*, U.S. Senate Comm. on Homeland Sec. & Governmental Affs., <https://www.hsgac.senate.gov/issues/9-11-commission>.

¹⁴ *Reaction to 9/11*, HISTORY (Sept. 6, 2019), <https://www.history.com/topics/21st-century/reaction-to-9-11>.

¹⁵ *See* CFIUS Report *supra* note 1, at 2.

ports.¹⁶ DPW is a port operations company based in Dubai, United Arab Emirates (UAE).¹⁷ The potential control of ports by a UAE-based firm led to vehement debate by members of congress surrounding how CFIUS needed to respond.¹⁸ Some members of Congress believed that the Byrd Amendment required CFIUS to perform a “full 45-day investigation of the transaction because DP world was ‘controlled by or action on behalf of a foreign government.’”¹⁹ However, those on the Committee argued that the Byrd Amendment did not *mandate* this but gave them discretion to perform a 45-day investigation.²⁰ Furthermore, CFIUS members claimed that they found an extended review of the investment unnecessary because they already performed a 30-day investigation of DPW’s purchase and concluded “that the transaction ‘could not affect the national security [of the United States].’”²¹ Ultimately, the debate was never resolved; DPW sold the ports to an American owner due to the excessive attention the acquisition received from the general public and politicians alike.²² Still, the DPW controversy caused increased scrutiny on CFIUS, which led to sweeping reform.²³

President Bush and Congress signed the Foreign Investment and National Security Act of 2007 (“FINSAs”), which was the most comprehensive reconstruction of CFIUS to date.²⁴ FINSAs gave CFIUS new statutory powers, increased Congressional supervision of the Committee, and established procedures for the Committee to report their findings according to deadlines.²⁵ The review process laid out by FINSAs involves a 30-day review process, followed by a 45-day investigation if deemed necessary after initial review, and finally a 15-day period for the President to make a decision on the Committee’s

¹⁶ *Id.* at 1.

¹⁷ Natasha Turak, *Dubai’s massive port operator DP World is delisting and returning to private ownership*, CNBC (Feb. 17, 2020, 2:33 AM EST), <https://www.cnbc.com/2020/02/17/dubais-dp-world-is-delisting-and-returning-to-private-ownership.html>.

¹⁸ See CFIUS Report *supra* note 1, at 1.

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1.

²³ See *id.* at 12.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2, 12.

findings.²⁶ The review stage requires the Director of National Intelligence (“DNI”), an ex officio CFIUS constituent, to perform a rigorous examination of national security threats that may be posed by the particular investment.²⁷ If the review indicates that either: “(1) CFIUS determines that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated during or prior to a review of the transaction; (2) the foreign person is control by a foreign government; or (3) the transaction would result in the control of any critical infrastructure by a foreign person, the transaction could impair the national security, and such impairment has not been mitigated[,]” then a 45-day investigation is necessary.²⁸

C. Modern-day CFIUS

President Obama used CFIUS power through FINSA twice during his tenure.²⁹ In 2012, the President blocked a Chinese owned firm from acquiring a wind farm near a U.S. Navy base.³⁰ In support of his decision, President Obama stated that “[t]here is credible evidence that leads me to believe that Ralls Corporation . . . might take action that threatens to impair the national security of the United States[.]”³¹ President Obama blocked another transaction with a Chinese corporation in 2016, this time prohibiting the sale of a semiconductor company with U.S. based assets to a Chinese investment firm.³² The trend of increased skepticism towards Chinese-owned corporations has been further bolstered by President Trump and the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).

The development of FIRRMA was grounded in the idea that “the national security landscape has shifted in recent years, and so has

²⁶ *Id.* at 12.

²⁷ *Id.* at 13.

²⁸ *Id.*

²⁹ John Schaus, *President Obama’s Second Order on CFIUS*, CTR. FOR STRATEGIC & INT’L STUD. (Dec. 5, 2016), <https://www.csis.org/analysis/president-obamas-second-order-cfius>.

³⁰ *Id.*

³¹ *Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation*, 77 Fed. Reg. 60, 281 (Oct. 3, 2012).

³² Schaus, *supra* note 29.

the nature of the investments that pose the greatest potential risk to national security.”³³ Particularly, Members of Congress were apprehensive of China’s investments in the United States technology sector.³⁴ When enacted on November 11, 2018, FIRRMA began to allow CFIUS to discriminate among investors from countries that are deemed to be of “special concern,” that have “demonstrated or declared [a] strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. leadership in areas related to national security.”³⁵ Using CFIUS power under FIRRMA, President Trump blocked the largest deal in tech history when he prevented Broadcom, a Singapore-based corporation, from buying U.S. owned Qualcomm.³⁶ While President Trump declined to expand on the evidence that led him to his decision, National Security Council presentations have provided clear reasoning for the blockage.³⁷ According to the reports, the National Security Council emphasized the United States’ need to develop a centralized nationwide 5G network to protect against cyberattacks and information misuse by the Chinese government.³⁸ Following that suggestion, CFIUS and President Trump were clearly quite mistrustful of giving a company based in Asia control over one of the United States’ premier tech companies.³⁹ The Trump Administration and CFIUS’ stringent position was displayed again when the Committee took issue with Chinese investment in a popular dating app.⁴⁰

³³ CFIUS Report *supra* note 1, at 1 (quoting *Federal Register*, vol. 83 no. 197, Oct. 11, 2018, p. 51322).

³⁴ *Id.* at 11.

³⁵ *Id.* at 2.

³⁶ *See id.* at 23.

³⁷ *See* Jonathan Swan, David McCabe, Ina Fried & Kim Hart, *Scoop: Trump team considers nationalizing 5G network*, AXIOS (Jan. 28, 2018), <https://www.axios.com/trump-team-debates-nationalizing-5g-network-fl1e92a49-60f2-4e3e-acd4-f3eb03d910ff.html>.

³⁸ *Id.*

³⁹ *See* Hamza Shaban, *Trump blocks Broadcom’s \$117 billion bid for Qualcomm out of national security concerns, a highly unusual move*, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/12/trump-blocks-broadcoms-117-billion-bid-for-qualcomm-out-of-national-security-concerns-a-highly-unusual-move/>.

⁴⁰ *See* CFIUS Report, *supra* note 1.

Grindr LLC is a US-based online dating application created for members of the LGBTQ+ community.⁴¹ In 2019, CFIUS informed Beijing Kunlun Company that its 60% ownership in Grindr constituted a national security risk.⁴² Subsequently, Beijing Kunlun Company sold its position in Grindr to an American investment firm, San Vicente Acquisition LLC, for approximately \$608.5 million.⁴³ While the reasoning behind CFIUS' concern was not publicized, the likely reason is that doing so could reveal classified information about government perspectives.⁴⁴ However, the most logical rationale behind the Committee's concern is that Grindr collects tremendous amount of personal data from each of its users—data that could theoretically be used to track US citizens, blackmail government officials, or otherwise be misappropriated.⁴⁵ In fact, almost all IOS apps and 84% of Android apps can access user contacts, locations, and other sensitive information.⁴⁶ With data protection at the forefront of CFIUS protection, both the Committee and the Trump administration have attacked their most popular opponent yet: TikTok.

⁴¹ *The World's Largest Social Networking App for Gay, Bi, Trans, and Queer People*, GRINDR, <https://www.grindr.com/>.

⁴² Carl O'Donnell, Liana B. Baker & Echo Wang, *Exclusive: Told U.S. security at risk, Chinese firm seeks to sell Grindr dating app*, THOMSON REUTERS (Mar. 27, 2019), <https://www.reuters.com/article/us-grindr-m-a-exclusive/exclusive-us-pushes-chinese-owner-of-grindr-to-divest-the-dating-app-sources-idUSKCN1R809L>.

⁴³ Echo Wang & Chibuike Oguh, *Grindr's Chinese owner says to sell social media app for \$608 mln*, THOMSON REUTERS (Mar. 6, 2020), <https://www.reuters.com/article/us-grindr-m-a-investors-exclusive/grindr-chinese-owner-says-to-sell-social-media-app-for-608-mln-idUSKBN20T0IR>.

⁴⁴ *Id.*

⁴⁵ See Sarah Bauerle Danzman & Geoffrey Gertz, *Is it a threat to US security that China owns Grindr, a gay dating app?*, BROOKINGS (Apr. 8, 2019), <https://www.brookings.edu/opinions/is-it-a-threat-to-us-security-that-china-owns-grindr-a-gay-dating-app/>.

⁴⁶ Siobhan Harmer, *Are Your Apps Collecting Your Personal Data?*, LIFEHACK, <https://www.lifehack.org/articles/technology/are-your-apps-collecting-your-personal-data.html> (last visited Dec. 20, 2020).

II. CFIUS AND THE TIKTOK SAGA

A. What is TikTok?

Musical.ly was a social media application that allowed users to create videos of themselves lip syncing to popular songs.⁴⁷ After a 2017 sale to Chinese technology company ByteDance, the app was rebranded into what is now known as TikTok.⁴⁸ With over 1.5 billion downloads, TikTok is one of the most popular social media applications in the world.⁴⁹ Essentially, the app is a “bite-size version of YouTube,” where users can upload, share, and watch short videos up to 1-minute long.⁵⁰ In the United States, 18-24 year old people account for the largest percentage of users with 42%.⁵¹ However, adult users have steadily grown since the inception of the app, with people over the age of 30 accounting for roughly 30% of U.S. users.⁵² Some of the more shocking statistics relate to the daily usage of the application. The average user spends 52 minutes per day on the app and 90% of users scroll through the app multiple times a day.⁵³ So, what is on the app that is making people check it so frequently? After viewing the 10 most liked videos, you may be dumfounded as to how someone could spend 52 minutes of their day on the app; it is mainly people filming

⁴⁷ Dami Lee, *The popular Musical.ly app has been rebranded as TikTok*, THE VERGE (Aug. 2, 2018), <https://www.theverge.com/2018/8/2/17644260/musically-rebrand-tiktok-bytedance-douyin>.

⁴⁸ *Id.*

⁴⁹ Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2020)*, BUS. OF APPS (Oct. 30, 2020), <https://www.businessofapps.com/data/tik-tok-statistics/#:~:text=Sensor%20Tower%20stats%20reveals%20TikTok,was%20downloaded%20219%20million%20times>.

⁵⁰ Katie Sehl, *Everything Brands Need to Know About TikTok in 2020*, HOOTSUITE (Mar. 2, 2020), <https://blog.hootsuite.com/what-is-tiktok/>.

⁵¹ *Id.*

⁵² Brandon Doyle, *TikTok Statistics – Updated January 2021*, WALLAROO MEDIA (Jan. 1, 2021), <https://wallaroomedia.com/blog/social-media/tiktok-statistics/>.

⁵³ Maryam Mohsin, *10 TikTok Statistics That You Need in 2020 [Infographic]*, OBERLO (Sept. 3, 2020), <https://www.oberlo.com/blog/tiktok-statistics#:~:text=At%20the%20start%20of%20the,million%20in%20just%20six%20months>.

themselves dancing, lip syncing, or performing other activities.⁵⁴ While the content on TikTok may seem mindless in general, some users take to the platform for more serious purposes such as discussing political views.⁵⁵ Both conservative and liberal agendas are represented on the app with accounts such as “@TikTokRepublicans” on the conservative side and “@liberalhypehouse” on the progressive side.⁵⁶ Overall, it is clear that there is a variety of content that is being both created and shared on the TikTok platform.

The amount of money that surrounds the viral social media application is quite astounding. In 2019, TikTok’s owner—ByteDance—more than doubled revenues from \$7 billion to \$17 billion.⁵⁷ ByteDance also owns Douyin, the Chinese version of TikTok, and Toutiao, a news station. As such, the financials of the company are quite impressive; some analysts value the company in excess of \$100 billion.⁵⁸ One analyst believes that ByteDance could be worth up to \$180 billion in an initial public offering (“IPO”), which would dwarf recent IPOs such as DoorDash (approximately \$60 billion)⁵⁹ and Airbnb (approximately \$47 billion).⁶⁰

However, the lucrative application does not only provide for its owners; app-users are also making incredible sums of money for

⁵⁴ See Jazmin Duribe, *What is the Most Liked Video on TikTok? Here are the Top 10*, POPBUZZ (Jan. 8, 2021), <https://www.popbuzz.com/internet/social-media/most-liked-video-tiktok/>.

⁵⁵ See Siddharth Venkataramakrishnan, *TikTok Becomes Political Platform ahead of US Election*, FIN. TIMES (June 1, 2020), <https://www.ft.com/content/c4c09793-993e-4ffd-9e46-2c609f98b79d>.

⁵⁶ Taylor Lorenz, *The Political Pundits of TikTok*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/02/27/style/tiktok-politics-bernie-trump.html>.

⁵⁷ Sam Shead, *TikTok owner ByteDance Reportedly Made a Profit of \$3 billion on \$17 million of Revenue Last Year*, CNBC (May 27, 2020), <https://www.cnbc.com/2020/05/27/tiktok-bytedance-profit.html>.

⁵⁸ *Id.*

⁵⁹ Jessica Burszynsky, *DoorDash skyrockets in market debut, closes up 85%*, CNBC (Dec. 9, 2020), <https://www.cnbc.com/2020/12/09/doordash-ipo-dash-trading-nyse.html>.

⁶⁰ Matthew Fox, *Airbnb prices IPO at \$68 per share, will raise \$3.5 billion*, BUS. INSIDER (Dec. 10, 2020, 7:07 PM), <https://markets.businessinsider.com/news/stocks/airbnb-ipo-stock-offering-price-filing-airbnb-trading-debut-nasdaq-2020-12-1029879403>.

creating content on TikTok.⁶¹ Many users team up and move into extravagant homes together in order to amass more followers.⁶² Other successful users have been able to parlay their success on the app into wildly different and profitable careers. For example, one Teenage TikTok celebrity, Josh Richards, has transitioned from creating dancing videos on the app to venture capital investing.⁶³ Clearly, there is no shortage of money and influence in the TikTok world, which poses the question: how does a user get started?

To sign-up for the app, one must enter a username, email address, phone number, or link another social media page to create an account.⁶⁴ Notably, there is an agreement below the sign-up page that indicates that by creating an account, the consumer agrees to TikTok's terms and conditions. Once users creates an account, they can then add a profile photo, explore content uploaded by other users, and create their own videos.⁶⁵ Whether a user is or is not actively using the app, TikTok collects a wide-variety of data, including: videos watched, videos commented on, location data, phone model used, operating system used, keystroke rhythms, internet address, browsing/search history, in-app messages, and phone/social network contacts, age, and posted user content.⁶⁶ While this may seem excessive, many of the world's most popular social media applications collect just as much, if not more, personal data from users.⁶⁷ TikTok officials have spoken out

⁶¹ See Todd Spangler, *TikTok's Highest-Earning Star Is Addison Rae, Who Takes Home \$5 Million per Year (Report)*, VARIETY (Aug. 6, 2020), <https://variety.com/2020/digital/news/tiktok-highest-earning-stars-addison-rae-charli-damelio-1234727502/>.

⁶² See James Leggate, *TikTok 'content houses' take on luxurious LA mansions. Look inside*, FOX BUS. (June 12, 2020), <https://www.foxbusiness.com/lifestyle/tiktok-content-houses-take-over-beautiful-la-mansions>.

⁶³ Sara Fischer, *TikTok mega-star Josh Richards pivots to VC investing*, AXIOS (Dec. 8, 2020), <https://www.axios.com/josh-richards-tiktok-vc-investing-1282506b-2102-491e-b644-26bea97896f6.html>.

⁶⁴ See TikTok, *Creating an account*, <https://support.tiktok.com/en/getting-started/creating-an-account>.

⁶⁵ *Id.*

⁶⁶ See Robert McMillan, Liza Lin & Shan Li, *TikTok User Data: What Does the App Collect and Why Are U.S. Authorities Concerned?*, WALL ST. J. (July 7, 2020), <https://www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084>.

⁶⁷ *Id.*

and claimed that the app does not collect as much personal data as U.S. companies like Facebook or Google.⁶⁸ Yet, those corporations have also come under intense scrutiny by the government for their own data collection practices.⁶⁹ Both Mark Zuckerberg and Sundar Pichai, Facebook's CEO and Google's CEO respectively, have undergone congressional hearings in which they were questioned over their companies' data collection.⁷⁰ Additionally, unlike U.S.-owned corporations Facebook and Google, the data obtained by TikTok goes to ByteDance, a Chinese corporation. Not surprisingly, that is what caused concern for U.S. officials.⁷¹

B. CFIUS, President Trump, and TikTok

The fact that American officials took notice of ByteDance's acquisition of Musical.ly, now TikTok, does not mean that administrators were not skeptical at first. Jon Callas, a technology fellow with the American Civil Liberties Union, claimed that "[c]hinese apps are frequently far more abusive than others – and we hate the others."⁷² Furthermore, in October of 2019, the transaction caught the attention of Senator Marco Rubio who questioned why the app "only had a few videos of the Hong Kong Protests that have been

⁶⁸ *Id.*

⁶⁹ See Sarah Salinas, *Facebook stock drops after reports of FTC probe and UK summons of Zuckerberg in data scandal*, CNBC (Mar. 20, 2018), <https://www.cnbc.com/2018/03/20/ftc-reportedly-to-investigate-facebooks-use-of-personal-data.html>.

⁷⁰ Anita Balakrishnan, *Mark Zuckerberg has been talking about privacy for 15 years – here's almost everything he's said*, CNBC (Apr. 9, 2018), <https://www.cnbc.com/2018/03/21/facebook-ceo-mark-zuckerbergs-statements-on-privacy-2003-2018.html>; see also Jillian D'Onfro, *Google's Sundar Pichai was grilled on privacy, data collection, and China during congressional hearing*, CNBC (Dec. 11, 2018), <https://www.cnbc.com/2018/12/11/google-ceo-sundar-pichai-testifies-before-congress-on-bias-privacy.html>.

⁷¹ Sharon Shi & Liza Lin, *Here's Why U.S. Officials Are Worried About TikTok*, WALL ST. J. (July 23, 2020), <https://www.wsj.com/articles/heres-why-u-s-officials-are-worried-about-tiktok-11595558218>.

⁷² Gavin Phillips, *Are TikTok and Other Chinese Apps Really Stealing Your Data?*, MAKE USE OF (Aug. 20, 2020), <https://www.makeuseof.com/tiktok-chinese-apps-stealing-data/>.

dominating international headlines for months.”⁷³ Rubio also stated that “[a]ny platform owned by a company in China which collects massive amounts of data on Americans is a potential serious threat to our country.”⁷⁴

While national security concerns are typically quite polarizing, the threat of TikTok was acknowledged on both sides of the aisle.⁷⁵ Senator Chuck Schumer and Senator Tom Cotton wrote a letter to the Director of National Intelligence, Joseph Maguire, calling for the Intelligence Community to “conduct an assessment of the national security risks posed by TikTok and other China-based content platforms operating in the U.S.”⁷⁶ Eventually, the chatter throughout the country led to formal governmental intervention.⁷⁷ In late 2019, CFIUS launched an investigation into the billion-dollar acquisition due to fears of political censorship and data collection practices utilized by the app.⁷⁸

On August 6, 2020 President Trump issued an Executive Order banning all U.S. citizens from transacting with ByteDance or any of its subsidiaries.⁷⁹ In support of this ban, President Trump confirmed that the two threats of the application are data collection and political censorship.⁸⁰ As for the data collection issue, President Trump unequivocally stated his distrust for the Chinese-owned tech giant to possess and protect U.S. citizens’ personal information by stating that:

⁷³ Greg Roumeliotis, Yingzhi Yang, Echo Wang & Alexandra Alper, *Exclusive: U.S. opens national security investigation into TikTok – sources*, THOMSON REUTERS (Nov. 1, 2019), <https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL>.

⁷⁴ *Id.*

⁷⁵ See Ben Gilbert, *Democratic and Republican parties warn staff not to use TikTok over security concerns*, BUS. INSIDER (July 13, 2020), <https://www.businessinsider.com/democrat-republican-parties-warn-staff-not-to-use-tiktok-2020-7>.

⁷⁶ Press Release, Leader Schumer, Senator Cotton Request Assessment of National Security Risks Posed by China-owned Video-Sharing Platform, TikTok, A Potential Counterintelligence Threat With Over 110 Million Downloads In U.S., Alone (Oct. 24, 2019).

⁷⁷ Roumeliotis, *supra* note 73.

⁷⁸ *Id.*

⁷⁹ Exec. Order No. 13942, 3 C.F.R. 48637-48639 (Aug. 6, 2020).

⁸⁰ *Id.*

"TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage."⁸¹

President Trump also agreed with Senator Rubio's concern regarding censorship on the app.⁸² The order claimed that TikTok:

"censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities. This mobile application may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus."⁸³

The President emphasized the severity of the risks by pointing out that TikTok had already been banned for Federal Government officials in the United States.⁸⁴ Additionally, India had also already issued a blanket ban on the app.⁸⁵ While this Executive Order put ByteDance's TikTok on notice and simultaneously prohibited transactions with U.S. citizens, President Trump took further steps just one week later.⁸⁶

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297, 51298 (Aug. 14, 2020).

On August 14, 2020, President Trump issued an Executive Order that got mass amounts of publicity from media sources across the country.⁸⁷ Headlines everywhere reflected the President's demand for TikTok to be sold to an American corporation to prevent a nationwide ban.⁸⁸ In an Executive Order regarding ByteDance's acquisition of Musical.ly, now TikTok, President Trump ordered ByteDance to divest all ownership "used to enable or support ByteDance's operation of the TikTok application in the United States" and "any data obtained or derived from TikTok application or Musical.ly application users in the United States."⁸⁹ Without citing particular concerns as he did in the previous order, President Trump stated that there is credible evidence that ByteDance's control over TikTok threatens to impair national security.⁹⁰ In doing so, the President gave ByteDance a maximum deadline of 120 days to complete the divestiture.⁹¹ The order also required that ByteDance submit proof of divestment to CFIUS for review.⁹² ByteDance has since been on the clock to find an American buyer for the highly in-demand application.

When the hunt started, Microsoft was thought to be the most likely potential suitor for ByteDance's TikTok.⁹³ Interestingly enough, the downfall of Microsoft was an over-aggressive offer that the Trump administration surely would have been in favor of.⁹⁴ Microsoft went

⁸⁷ See Nicole Sperling, *Trump Officially Orders TikTok's Chinese Owner to Divest*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html>; see also A.P. News, *Trump orders Chinese owner of TikTok to sell US assets*, A.P. NEWS (Aug. 14, 2020), <https://apnews.com/article/ap-top-news-technology-foreign-policy-politics-business-1f636191b0b9e28c7041fb64fb547801>.

⁸⁸ *Id.*

⁸⁹ 85 Fed. Reg. 51297, *supra* note 86.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Jordan Novet, *Microsoft confirms talks to buy TikTok in U.S., aims to finish deal by Sept. 15*, CNBC (Aug. 2, 2020, 07:27 PM), <https://www.cnbc.com/2020/08/03/microsoft-confirms-talks-to-buy-tiktok-in-us.html>.

⁹⁴ See Todd Bishop, *What Microsoft wanted from a TikTok deal, and why its bid for the hit social video app didn't pan out*, GEEKWIRE (Sept. 14, 2020, 10:32 AM), <https://www.geekwire.com/2020/microsoft-wanted-tiktok-deal-bid-hit-social-video-app-didnt-pan/>.

further than President Trump's order that compelled ByteDance to divest all U.S. interests; the tech-giant proposed to acquire the entirety of TikTok's global operation.⁹⁵ In response, ByteDance rejected Microsoft's original offer and also informed the company that, "they would not be selling TikTok's US operations to Microsoft."⁹⁶ With Microsoft out of the picture, the spotlight turned to Oracle, a U.S.-based computer technology company with a focus on cloud data storage,⁹⁷ and Walmart, a wildly popular U.S. retail chain.⁹⁸

President Trump eventually agreed, in principal, to a deal between ByteDance, Oracle, and Walmart.⁹⁹ The deal that was originally struck would make Oracle the host of TikTok's U.S. data and an investor with a 12.5% stake in the company.¹⁰⁰ Additionally, Walmart would function as a partner for advertising while controlling a 7.5% interest in TikTok.¹⁰¹ However, the deal has since been met with confusion and controversy.¹⁰² For example, the People's Daily

⁹⁵ Dan Thorp-Lancaster, *Report: Microsoft wants all of TikTok, but Trump signs order for new restrictions*, WINDOWS CENT. (Aug. 6, 2020), <https://www.windowscentral.com/microsoft-reportedly-talks-buy-out-us-portion-tiktok>.

⁹⁶ Tom Warren, *Microsoft says it's not acquiring TikTok after ByteDance rejects offer*, THE VERGE (Sept. 13, 2020, 07:19 PM), <https://www.theverge.com/2020/9/13/21360130/microsoft-tiktok-acquisition-bid-rejection-bytedance>.

⁹⁷ *Id.*

⁹⁸ The Editors of Encyclopedia Britannica, *Walmart: American company*, BRITANNICA, <https://www.britannica.com/topic/Walmart> (last visited Jan. 16, 2021).

⁹⁹ Jordan Novet et. al., *Trump agrees to TikTok deal with Oracle and Walmart, allowing app's U.S. operations to continue*, CNBC (Sept. 22, 2020, 02:39 PM), <https://www.cnbc.com/2020/09/19/trump-says-he-has-approved-tiktok-oracle-deal-in-concept.html>.

¹⁰⁰ Todd Spangler, *Oracle to take 12.5% Stake in TikTok Global, Walmart to Get 7.5%*, VARIETY (Sept. 19, 2020), <https://variety.com/2020/digital/news/oracle-tiktok-equity-stake-walmart-trump-1234776014/>.

¹⁰¹ *Id.*

¹⁰² See Martin Chorzempa, *The TikTok Deal Is a Defining Moment for CFIUS*, BARRON'S (Sept. 17, 2020), <https://www.barrons.com/articles/the-tiktok-deal-is-a-defining-moment-for-cfius-51600350898>; Kim Lyons, *US flails against TikTok injunction with new CFIUS deadline change*, THE VERGE (Nov. 13, 2020), <https://www.theverge.com/2020/11/13/21564030/us-tiktok-injunction-cfius-deadline-trump-bytedance-china>; David Shepardson, *U.S. court hears appeal against order blocking TikTok app store ban*, REUTERS (Dec. 14, 2020), <https://www.reuters.com/article/us-usa-tiktok/u-s-court-hears-appeal-against-order-blocking-tiktok-app-store-ban-idUSKBN28O127>; Brian Fung & Jill Disis, *Trump administration*

newspaper claimed that the deal, “[c]aters to the unreasonable demands of Washington. It’s hard for us to believe that Beijing will approve such an agreement.”¹⁰³ Additionally, the logistics of the deal were then scrutinized further in the United States. President Trump claimed that if ByteDance were to be involved in the U.S. operation of TikTok, then “we just won’t make the deal[.]” Currently, the proposed transaction is at a standstill. Courts have halted President Trump’s ban on the app, yet no official merger/acquisition has been made.¹⁰⁴ Most recently, United States District Judge Carl J. Nichols stated that, “Plaintiffs have established that the government likely exceeded IEEPA’s express limitations as part of an agency action that was arbitrary and capricious. When courts encounter an APA violation the ordinary remedy is to stop the ‘unlawful agency action.’”¹⁰⁵ As President Joseph Biden assumes office, it is unclear how CFIUS and the new administration will proceed.¹⁰⁶ Yet, President Biden has certainly been less hostile towards China in general; during a rally in Iowa, Biden scoffed at the idea that China is a foe and said, “I mean, you know, they’re not bad folks, folks. But guess what? They’re not competition for us.”¹⁰⁷ Regardless of how the new administration proceeds, the TikTok saga poses an interesting dilemma: how will we decide where to strike the balance between the President and CFIUS

appeals court order blocking TikTok restrictions, CNN BUS. (Dec. 28, 2020), <https://www.cnn.com/2020/12/28/tech/tiktok-federal-appeal-intl-hnk/index.html>.

¹⁰³ Josh Horwitz & Brenda Goh, *Beijing unlikely to approve Oracle, Walmart’s TikTok deal*: *Global Times*, REUTERS (Sept. 21, 2020), <https://www.reuters.com/article/us-usa-tiktok-china/beijing-unlikely-to-approve-oracle-walmarts-tiktok-deal-global-times-idUSKCN26D048>.

¹⁰⁴ The Associated Press, *Another judge blocks Trump’s TikTok ban; app still in limbo*, ABC NEWS (Dec. 8, 2020), <https://abcnews.go.com/Politics/wireStory/judge-blocks-trumps-tiktok-ban-app-limbo-74604450>.

¹⁰⁵ *TikTok Inc., v. Trump* F. Supp.3d (Dec. 7, 2020).

¹⁰⁶ Tonya Riley, *The Cybersecurity 202: A Biden administration could mean a rest in the U.S. war on TikTok*, WASH. POST (Nov. 12, 2020), <https://www.washingtonpost.com/politics/2020/11/12/cybersecurity-202-biden-administration-could-mean-reset-us-war-tiktok/>.

¹⁰⁷ Adam Edelman, *Biden’s comments downplaying China threat to U.S. fire up pols on both sides*, CNBC (May 2, 2019), <https://www.nbcnews.com/politics/2020-election/biden-s-comments-downplaying-china-threat-u-s-fires-pols-n1001236>.

protecting national security and maintaining a truly global internet that connects the world?

III. THE SPLINTERNET

A. The Importance of a World Wide Web

In the last 15 years, the internet has taken over as one of the most important technological advancements around the world.¹⁰⁸ The statistics surrounding the web are nothing short of astounding: 4.8 billion people use the internet daily, 4.17 billion people use their mobile devices to go online, people spend 143 minutes online on mobile devices and 28 minutes a day on a desktop, there are 3.725 billion active social media users, and there are more than 1.8 billion websites online.¹⁰⁹ Unsurprisingly, the internet has served incredibly noble purposes throughout its short history. For example, the Arab Spring was a series of pro-democracy movements in the Middle East and Africa.¹¹⁰ Philip Howard, a communication professor at the University of Washington, said that, “[o]ur evidence suggests that social media carried a cascade of messages about freedom and democracy across North Africa and the Middle East, and helped raise expectations for the success of political uprising.”¹¹¹ Howard went on to say that, “[p]eople who shared interest in democracy built extensive social networks and organized political action. Social media became a critical part of the toolkit for greater freedom.”¹¹²

We have recently seen the internet used for political practices in the United States as well. The summer of 2020 was fueled by debates surrounding the coronavirus, police brutality, racial inequality, and

¹⁰⁸ See *The Role of the Internet*, PEW RESEARCH CTR: HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY (Sept. 26, 2011), <https://www.pewresearch.org/internet/2011/09/26/part-5-the-role-of-the-internet/>.

¹⁰⁹ Artem Minaev, *Internet Statistics 2021: Facts You Need-to-Know*, FIRST SITE GUIDE, <https://firstsiteguide.com/internet-stats/> (last updated Jan. 26, 2022).

¹¹⁰ The Editors of Encyclopedia Britannica, *Arab Spring*, BRITANNICA, <https://www.britannica.com/event/Arab-Spring> (last visited Jan. 21, 2021).

¹¹¹ Catherine O'Donnell, *New Study Quantifies Use Of Social Media In Arab Spring*, UNIV. OF WASH. (Sept. 12, 2011), <https://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>.

¹¹² *Id.*

politics in general.¹¹³ Online activism was extremely popular due to the fact that many citizens were stuck at home, making online political discourse a convenient way to stay up-to-date and involved on current events.¹¹⁴ For example, one group of twitter-users donated \$1.8 million to support the Brooklyn Community Bail Fund.¹¹⁵ Another popular form of protest took place on Instagram, where 28 million users posted black pictures in solidarity with racial inequality.¹¹⁶ Clearly, the internet has enabled people from all over the world to voice their opinions and effect the change they would like to see. However, the supremely powerful web does not stop with political benefits; the internet has also charged tremendous economic growth in virtually all areas.¹¹⁷

According to a study conducted by McKinsey Global Institute, “[t]he Internet accounted for 21 percent of the GDP growth in mature economies over the past 5 years[.] If the internet were a sector, it would have a greater weight in GDP than agriculture or utilities.”¹¹⁸ While the tremendous economic impact the internet has is undeniable, it is also far from at its peak.¹¹⁹ According to the Borgen Project, a nonprofit that seeks to address poverty and hunger throughout the world, new

¹¹³ See Lynne Peeples, *What The Data Say About Police Brutality And Racial Bias – And Which Reforms Might Work*, NATURE: NEWS FEATURE (June 19, 2020), <https://www.nature.com/articles/d41586-020-01846-z>; see also *Arguments In The Debate Over Responses To The Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Arguments_in_the_debate_over_responses_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Arguments_in_the_debate_over_responses_to_the_coronavirus_(COVID-19)_pandemic,_2020) (last visited Jan. 21, 2021).

¹¹⁴ See Kalhan Rosenblatt, *A Summer Of Digital Protest: How 2020 Became The Summer Of Activism Both Online And Offline*, CNBC (Sept. 26, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/summer-digital-protest-how-2020-became-summer-activism-both-online-n1241001>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Joanna Penn, *How is the Internet Fueling Economic Growth in the Developing World? New Research*, JOURNALIST’S RESOURCE (July 7, 2015), <https://journalistsresource.org/economics/internet-contribution-firm-development/>.

¹¹⁸ James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity*, MCKINSEY GLOBAL INST. (Oct. 1, 2011), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-great-transformer>.

¹¹⁹ *Id.*

innovations surrounding the internet can help to eliminate poverty.¹²⁰ For example, 5G internet can reduce poverty by reducing energy consumption by roughly 45% and even increasing global economic output by \$12.3 trillion.¹²¹ Internet-based products also attract a tremendous amount of attention from investors around the world. For venture capital firms, internet products dominate their investment portfolios, accounting for \$12.7 billion in the United States as of 3Q 2020.¹²² For perspective, the second most popular sector for VC investment was healthcare, accounting for \$7.9 billion as of 3Q 2020.¹²³ Additionally, the internet drives much of Foreign Direct Investment (“FDI”), which supports 7,808,100 jobs in the United States with \$253.6 billion of inward flow in 2018.¹²⁴

The impact that the web has on the world—and of course the United States—is simply undeniable; it provides for societal efficiencies, gives citizens a platform to interact with one another and share ideas, and fuels robust economic growth across the world.¹²⁵ So what happens when the world wide web becomes not so “world-wide” after all? What would happen if the internet was a divided space of limited communication?

B. What Is The Splinternet?

The “splinternet” is not a new concept, but it will be increasingly relevant as we navigate the innovation of the internet along with policies adopted to protect data, increase privacy, and create a safe online world.¹²⁶ Simply put, the splinternet is dividing the

¹²⁰ Nitya Marimuthu, *7 Ways 5G Internet Could Reduce Poverty*, THE BORGEN PROJECT (Aug. 19, 2020), <https://borgenproject.org/5g-internet-could-reduce-poverty/>.

¹²¹ *Id.*

¹²² Jennifer Rudden, *Value of Venture Capital Investment in the U.S. 2020, by industry*, STATISTA (Dec. 7, 2020), <https://www.statista.com/statistics/423054/venture-capital-investments-usa-by-industry/>.

¹²³ *Id.*

¹²⁴ *Foreign Direct Investment in The United States*, SELECTUSA, <https://www.selectusa.gov/FDI-in-the-US> (last visited Jan. 21, 2021).

¹²⁵ See Robin Miller, *What Makes the Internet So Powerful?*, INFORMIT (Dec. 27, 2002), <https://www.informit.com/articles/article.aspx?p=30345>.

¹²⁶ L.S., *What Is the “Splinternet”?*, THE ECONOMIST, <https://www.economist.com/th-e-economist-explains/2016/11/22/what-is-the-splinternet> (last visited Jan. 21, 2021).

internet based on various factors, such as by nation, political ideology, religion, and other interests.¹²⁷ Essentially, the splinternet destroys the global nature of the “world wide web”, and instead creates a fragmented and incohesive online atmosphere.¹²⁸ The effects of the splinternet are widely recognized and include everything from creating significant hurdles for international businesses to prohibiting freedom of speech and thought.¹²⁹

In a fascinating interview conducted by Enrique Dans, a Senior Contributor with Forbes, Spanish journalist Marimar Jiménez fielded questions about how the splinternet is playing out and what effects it is having on our world.¹³⁰ Jiménez said, “It’s clear where we’re headed: from its beginnings as an intrinsically global network, we are now at a moment in which countries like North Korea, Iran, Cuba, China, or Russia already have their national intranets differentiated and isolated from the global internet, while others, like India or the European Union, impose prohibitions or rules that prevent many content providers from operating there.”¹³¹ While it is clear that Jiménez believes that the splinternet is already an issue, the journalist went on to discuss how a U.S. ban on apps such as TikTok would make things even worse, saying that “[l]imiting the activities of Chinese companies in the US market or pressuring their American partners to cut ties with them sets a very bad precedent, which would undoubtedly lead to an escalation of such actions by Beijing.”¹³² While critical of such bans, Jiménez went on to claim that President Trump’s actions were justified due to China’s repeated blocking of access to its market by foreign companies.¹³³ Others feel that blocking apps like TikTok is

¹²⁷ *Splinternet*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Splinternet> (last visited Jan. 21, 2021).

¹²⁸ See Keith Wright, *The ‘Splinternet’ Is Already Here*, TECHCRUNCH (Mar. 13, 2019), <https://techcrunch.com/2019/03/13/the-splinternet-is-already-here/>.

¹²⁹ Jeff Kim, *The Splinternet Is Here and Your Company Needs to Be Ready*, THE NEXT WEB (June 10, 2019), <https://thenextweb.com/podium/2019/06/10/the-splinternet-is-here-and-your-company-needs-to-be-ready/>.

¹³⁰ See Enrique Dans, *A Splinternet Will Take Us in the Wrong Direction*, MEDIUM (Aug. 12, 2020), <https://medium.com/enrique-dans/a-splinternet-will-take-us-in-the-wrong-direction-ef0a0e1f12b9>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

contradictory to previous positions the U.S. has taken on the splinternet.¹³⁴ Dans himself proclaims that the United States is doing the very thing it criticized China for: taking legislative action to regulate the domestic internet.¹³⁵

Others warn of the economic effects that the balkanization of the internet will have. With so many different laws in each country, it becomes quite the daunting task for international businesses to comply. In fact, over 30 nations impose their own data sovereignty regulations. According to Keith Wright, the VP of the Congressional Black Caucus Foundation, “Never have so many governments, authoritarian and democratic, actively blocked internet access to their own nationals.”¹³⁶ This means that businesses operating online need to be aware of every different set of laws and bend to them accordingly – not an easy task when each is so different. This also has a tremendous impact on investors, who have been primarily focused on governance and regulatory factors when deciding to obtain interests in digital companies.¹³⁷ For example, if TikTok receives this type of treatment from the U.S. government, future investors may be skeptical to fund projects that plan on hosting U.S. citizens’ data. We have seen similar concerns in places that have banned Chinese apps, such as India.¹³⁸ Ban threats are certainly not attractive to investors betting on widespread popularity of a social media application.

Another significant impact of a divided internet is that it can lead to tremendous censorship and suppress freedom of speech.¹³⁹ These issues are heightened in authoritarian countries such as Russia and China. Russia recently planned to disconnect the entire country

¹³⁴ *See id.*

¹³⁵ *See id.*; see also Xinmei Shen, *The Story of China’s Great Firewall, the Worlds Most Sophisticated Censorship System*, ABACUS (Nov. 7, 2019), <https://www.scmp.com/abacus/who-what/what/article/3089836/story-chinas-great-firewall-worlds-most-sophisticated>.

¹³⁶ Wright, *supra* note 128.

¹³⁷ Erik R. Peterson & Paul A. Laudicina, *Competing in an Age of Digital Disorder*, KEARNEY, <https://www.jp.kearney.com/web/global-business-policy-council/article/?/a/competing-in-an-age-of-digital-disorder> (last visited Jan. 21, 2021).

¹³⁸ Zhang Hongpei, *India Bans More Chinese Apps, Further Dampening Confidence of Foreign Investors: Expert*, GLOB. TIMES (Nov. 25, 2020), <https://www.globaltimes.cn/content/1207959.shtml>.

¹³⁹ Wright, *supra* note 128.

from the internet in order to mimic a cyber-war.¹⁴⁰ Meanwhile, China issued censorship rules that identified 100 types of banned content and adapted governmental reviews of all content posted on certain applications such as TikTok.¹⁴¹ It is quite well known that the Chinese Communist Party censors the videos that are posted to TikTok. They do this by targeting videos identified by political purposes such as those that mention Tiananmen Square, Tibetan independence, or Falun Gong.¹⁴² Cutting off access to information is one of the largest issues with the splinternet; if everything is fragmented, then each governmental body can determine what its citizens see, post, and interact with. Should CFIUS and the President further contribute to creating a splinternet, or should our government adapt a laissez faire approach in order to allow the free flow of information?

IV. CASE-BY-CASE, BUT FOR TIKTOK, A BAN OR DIVESTMENT IS WARRANTED

Balancing the need for data protection and national security with the functionality of the internet is something we cannot afford to mess up.¹⁴³ Therefore, CFIUS and the Commander in Chief should never take a broad “all foreign apps/websites are banned” approach. However, in this particular situation, CFIUS’ recommendation to ban the app unless divested to a U.S. corporation is certainly warranted, and I argue that it should be enforced by President Biden. This is for three reasons: (1) The problems arising out of the splinternet are over-exaggerated; (2) The utility of TikTok is minimal; and (3) TikTok poses legitimate cybersecurity concerns that the United States needs to protect itself from.

First, while it may be true that if the internet was entirely separated by country there would be significant negative effects, there is no reason to point to an extreme situation when it does not exist. The

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Alex Hern, *Revealed: How Tiktok Censors Videos That Do Not Please Beijing*, THE GUARDIAN (Sept. 25, 2019), <https://www.theguardian.com/technology/2019/sep/25/revealed-how-tiktok-censors-videos-that-do-not-please-beijing>.

¹⁴³ See Neel Achar, *The Importance of Data Privacy*, MEDIUM (June 12, 2019), <https://medium.com/@neelachary/the-importance-of-data-privacy-39c6676eeb58>.

internet is not completely divided.¹⁴⁴ Some argue that banning TikTok would contribute to total balkanization.¹⁴⁵ Of course, a ban on one app does further the splinternet concept. However, the effect is negligible—foreign apps and websites are still flourishing in the United States.¹⁴⁶ As one example, PUBG mobile, an app developed by Tencent, a Chinese multinational tech company, has over 700 million downloads and \$3 billion in revenue since its inception.¹⁴⁷ With that in mind, the concern that investors will completely abandon foreign-owned products is more conceptual than real. While there are risks related to government intervention, there are still plenty of investors who see the upside in internationally based (including Chinese-owned) products.¹⁴⁸

The strongest argument that the splinternet will lead to turmoil is that a divided internet is conducive to censorship and suppression of freedom of speech. However, would allowing all foreign apps to operate in a given country eliminate that problem? The answer must be no. To illustrate, if the United States decided tomorrow that they would not ban TikTok and even allow ByteDance to maintain control of U.S. user data, would that inspire the Chinese government to stop censoring political content? Again, it is doubtful. To put this idea in perspective, note that the United States has tried to alter other countries' governments many times, often to no avail, and

¹⁴⁴ *Facebook Users by Country 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/facebook-users-by-country> (last visited Feb. 9, 2021).

¹⁴⁵ See Dans, *supra* note 130.

¹⁴⁶ See Pخالate, *Top 100 Chinese, Russian, And Shell Location Apps Popular in the USA*, PIXALATE (Dec. 18, 2019), <https://blog.pخالate.com/top-100-foreign-registered-apps>.

¹⁴⁷ Shayak Majumder, *PUBG Mobile Lifetime Revenue Hits \$3 Billion with 2020 Already Pitching in \$1.3 Billion: Sensor Tower*, GADGETS 360 (July 3, 2020), <https://gadgets.ndtv.com/games/news/pubg-mobile-lifetime-revenue-usd-3-billion-sensor-tower-2256377>.

¹⁴⁸ See Tanner Brown, *Five Chinese Startups You Should Know About*, MARKET WATCH (Nov. 14, 2019), <https://www.marketwatch.com/story/five-chinese-startups-you-should-know-about-2019-11-14>.

with tactics much more severe than banning a social media app.¹⁴⁹ While the concept of acceptance leading to increased freedom sounds utopian, it is unlikely that simply allowing all foreign web products to operate in a given country will cause external governments to change their practices. While I do acknowledge that the concept of the splinternet is worrisome, given the fact that there is still plenty of foreign collaboration and that having a “world wide web” does little in actuality for freedom of speech, it is an over-exaggerated concern in this context.

Second, TikTok’s utility is minimal or even negative. Upon registering for the app, the user is bombarded with short videos of people dancing, lip syncing, and attempting comedic expression.¹⁵⁰ According to Statista, the most popular content categories on TikTok are Entertainment, Dance, and Pranks.¹⁵¹ While I appreciate simple entertainment and recognize that we all need mental breaks, the fact is that there is not much ground-breaking content being shared on TikTok. Additionally, much like many other social media apps, TikTok can have an adverse impact on brain function.¹⁵² Isabel Munson, an artist who examines relationships between technology and behavior, said about the app, “TikTok is a space designed to create confirmation bias—or more accurately, engagement bias. Whereas a therapist might question the usefulness of identifying oneself as permanently aligned with whatever struggle one is experiencing, engagement-driven platforms help frame conditions as points of identity, badges of honor.”¹⁵³ Munson was describing the mental health content on the app, claiming that while it is great to get advice, it is not so great to be

¹⁴⁹ See Anthony H. Cordesman, *America’s Failed Strategy in the Middle East: Losing Iraq and the Gulf*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 2, 2020), <https://www.csis.org/analysis/americas-failed-strategy-middle-east-losing-iraq-and-gulf>.

¹⁵⁰ See Heather Schwedel, *A Guide to TikTok for Anyone Who Isn’t a Teen*, SLATE (Sept. 4, 2018), <https://slate.com/technology/2018/09/tiktok-app-musically-guide.html>.

¹⁵¹ H. Tankovska, *Most Popular Categories on TikTok Worldwide 2020, by Hashtag Views*, STATISTA (Jan. 28, 2021), <https://www.statista.com/statistics/1130988/most-popular-categories-tiktok-worldwide-hashtag-views/>.

¹⁵² See Suyash Varma, *Is TikTok Bad For Your Brain?*, CAMPUS BEAT (May 21, 2020), <http://campusbeat.in/youtube-vs-tikto/>.

¹⁵³ Isabel Munson, *Mirror of Your Mind*, REAL LIFE MAG. (Feb. 1, 2021), <https://reallifemag.com/mirror-of-your-mind/>.

diagnosed with a disorder by a TikTok content creator. Munson went on to say: “As much as it’s important to destigmatize neurodivergence and mental illness, there are risks when these struggles are glorified for clout or presented as static and unchangeable.”¹⁵⁴ The idea that some of the more useful content on the app could actually be dangerous is amplified when considering the audience. As mentioned earlier, the largest demographic of TikTok users are teenagers or younger.¹⁵⁵

Advocates of TikTok do have a fair point in defending its utility: TikTok has created a substantial amount of wealth for some people.¹⁵⁶ While this fact is undeniable, the amount of people economically benefitting from the app is trivial at best. The app has hundreds of millions of users; while a handful have surely benefitted from platform, the vast majority of TikTokers are not significantly profiting from their usage. Aside from its slight economic utility, TikTok is not significantly valuable to our society.

Lastly, and perhaps most importantly, there are legitimate data protection and national security concerns in allowing TikTok to operate as it has in the past. Check Point, an Israeli cybersecurity company, conducted a study of TikTok’s privacy practices and determined that the app “had serious vulnerabilities that would have allowed hackers to manipulate user data and reveal personal information.”¹⁵⁷ Check Point concluded that the issues with TikTok would give attackers the ability to send users hostile links that grant access to all personal information if clicked.¹⁵⁸ After seeing the reports, TikTok claimed that they fixed all of the vulnerabilities that the Israeli company had found.¹⁵⁹ However, TikTok has had more safety concerns since then. Recently, groups like the Campaign for a Commercial Free Childhood and the Center for Digital Democracy

¹⁵⁴ *Id.*

¹⁵⁵ H. Tankovska, *TikTok User Ration in the U.S. 2020, by Age Group*, STATISTA (Jan. 28, 2021), <https://www.statista.com/statistics/1095186/tiktok-us-users-age/>.

¹⁵⁶ See James Wellemyer, *How Teens Are Getting Rich from TikTok*, N.Y. POST (Jan. 22, 2020), <https://nypost.com/2020/01/22/how-teens-are-getting-rich-from-tiktok/>.

¹⁵⁷ Ronen Bergman, Sheera Frenkel, & Raymond Zhong, *Major TikTok Security Flaws Found*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/technology/tiktok-security-flaws.html>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

have complained that TikTok did not adequately protect users under the age of thirteen from data collection practices and content creation prohibitions.¹⁶⁰ According to the executive Director of the Campaign for a Commercial Free Childhood, TikTok's lackluster procedures are "ensnaring perhaps millions of underage children in its marketing apparatus, and putting children at risk of sexual predation."¹⁶¹ Regardless of the effects of the splinternet and the apps utility, the safety issues that TikTok has had are deeply concerning and need to be prevented.

V. CONCLUSION

It will be quite interesting to see how the TikTok saga plays out, but I would urge President Biden to take the CFIUS recommendation seriously and either require a U.S.-based host for data or ban the app. There are downsides to every approach to foreign policy, especially when it involves rapidly developing technology. While I hope to eventually have a more connected world, the reality of the situation is that TikTok poses a serious threat to U.S. citizens' privacy, and it is not useful or valuable enough to take that chance.

¹⁶⁰ Natasha Singer, *TikTok Broker Privacy Promises, Children's Groups Say*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/technology/tiktok-kids-privacy.html>.

¹⁶¹ *Id.*