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The TikTok Case, National Security, and Foreign Investment

New Opportunities Under Trump 2.0

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- Against the backdrop of intensifying U.S.-China competition, the U.S. government has increasingly invoked “national security concerns” to restrict not only Chinese firms but also companies from allied nations.

- With each change in administration, policy priorities and enforcement practices can shift dramatically. Anticipating these shifts, businesses have turned to litigation as a means of delaying legal implementation. In particular, the impending inauguration of President Trump—known for his transactional political style—presents new avenues for negotiation.

- Regardless of changes in presidential administrations, Congress and U.S. intelligence agencies have consistently shown a tendency to tighten foreign investment regulations, creating a persistently uncertain environment for foreign companies. Under the incoming Trump administration, the question becomes how to strike a balance between national security and the protection of foreign companies’ rights. The TikTok case and Nippon Steel’s attempted acquisition of U.S. Steel serve as key litmus tests for how these developments might unfold.

On January 10, the Supreme Court heard oral arguments in TikTok v. Garland. In this case, the U.S. government is asking the justices to uphold a federal law—signed by President Biden in April—that would shut down TikTok in the United States by January 19 unless ByteDance, its Chinese parent company, divests ownership to address national security concerns. Court observers are split after oral arguments. Some were much less confident that the Supreme Court would uphold the lower-court’s decision affirming the law’s constitutionality while others say that the law’s intended purpose addressed a “compelling interest” (national security risks emanating from the CCP) that even a restriction on constitutionally guaranteed rights (freedom of speech) would be justified.

Separately, in response to President Biden’s order blocking Nippon Steel’s acquisition of US Steel, the companies involved have filed two lawsuits. The first challenges the order on due process grounds, and the second seeks an injunction to prevent the head of Cleveland Cliffs and the United Steel Workers from further collusive or anticompetitive behavior. The former is relevant for the purposes of this analysis.

The TikTok and Nippon Steel cases differ in their specifics, with the former concerning freedom of speech and the latter focusing on the right to due process, both constitutionally guaranteed rights. However, they share a crucial similarity: both hinge on the U.S. government’s invocation of “national security concerns” to justify measures that potentially restrict constitutional rights. This parallel raises broader questions about the balance between national security and individual liberties. How the courts rule on these issues will become crucial case-studies for foreign investors operating in the U.S.

However, this analysis does not delve into the finer points of law. Instead, it focuses on how the forthcoming presidential transition to Donald Trump—known for his freewheeling, transactional style—presents both sets of plaintiffs with a unique opportunity to advance their claims. As geopolitical developments increase government scrutiny of national security risks stemming from foreign direct investments—including those from allied nations such as Japan—the following analysis argues that Trump's inauguration offers legal strategies that would not otherwise have been available to foreign investors.

1. The TikTok Case

Last April, the U.S. Congress passed the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACA), which President Biden subsequently signed into law. The legislation requires ByteDance, TikTok's Chinese parent company, to divest its U.S. operations by January 19, 2025, or face a nationwide ban on the app's availability.

TikTok and ByteDance have challenged the law's constitutionality, arguing that it violates First Amendment rights and lacks sufficient evidence to substantiate claims of a national security threat. In December 2024, the U.S. Court of Appeals for the D.C. Circuit upheld the law, rejecting TikTok's constitutional and evidentiary arguments. TikTok has since appealed to the Supreme Court, which heard oral arguments earlier today.

If the Supreme Court rules in favor of the U.S. government, TikTok will cease operations on January 19th. What that looks like in practice is still unclear. Most likely, the first step would be removing the app from Google and Apple app stores—a measure with precedent, as Apple previously pulled WhatsApp, Signal, and Telegram in China at the Chinese government's request. While it would remain legal to keep TikTok on existing devices, the platform itself could no longer provide updates. Technically, users might circumvent the restriction with a VPN, but officially, TikTok would become unavailable in the United States.

2. Implications for Nippon Steel and U.S. Steel

There are clear parallels between Nippon Steel's recent lawsuit—challenging President Biden's decision to block its acquisition of U.S. Steel—and the ongoing TikTok case. In both instances, the U.S. government invokes "national security concerns" to justify actions impacting foreign-owned companies operating within the United States. Solicitor General Elizabeth Prelogar's argument during Supreme Court oral arguments in TikTok v. Garland underscores the potential implications for Nippon Steel's suit:

"[Federal law] requires only the divestiture of TikTok to prevent Chinese government control. And that divestiture remedy follows a long tradition of barring foreign control of U.S. communications channels and other critical infrastructure. So, no matter what level of First Amendment scrutiny applies, the act is valid because it's narrowly tailored to address compelling national security threats."

Elizabeth Prelogar, Solicitor General
January 10, 2025

This statement highlights that national security can serve as a sufficient justification for restricting constitutionally guaranteed freedoms, including freedom of speech. In the case of TikTok, this justification legitimizes a law that compels ByteDance to either sell TikTok or cease its U.S. operations, despite First Amendment burdens on the company and its users. Prelogar's reference to a "long tradition" reflects the judiciary's historical deference to the executive branch on national security matters. For example, the United States has consistently restricted foreign ownership and control of media outlets due to similar security concerns. Under the Constitution, the President wields broad authority over foreign policy and national defense, further solidifying the executive's primacy in these areas. This authority expands as sectors designated as "critical infrastructure" face heightened scrutiny.

A comparable rationale underpins President Biden's decision to block Nippon Steel's acquisition of U.S. Steel. The administration argues that Nippon Steel "might take action that threatens to impair the national security of the United States."

Nippon Steel's legal challenges are now unfolding in two federal courts. One lawsuit accuses President Biden and the Committee on Foreign Investment in the United States (CFIUS) of violating the company's constitutional due process rights. The second lawsuit targets Cleveland Cliffs CEO and United Steelworkers President David McCall, alleging anticompetitive and racketeering activities designed to ensure that only Cleveland Cliffs can acquire U.S. Steel. For the purposes of this analysis, the former lawsuit is most relevant.

Against this backdrop, examining previous instances in which U.S. presidents have blocked foreign ownership of American companies on national security grounds can provide valuable insights. Such a review may shed light on how Nippon Steel's challenge could be resolved—and what it might mean for foreign-owned enterprises seeking to operate in critical U.S. industries.

３. The Ralls Case

In March 2012, Ralls Corporation, owned by Chinese nationals, purchased four wind farm project companies in Oregon and began installing Chinese-origin wind turbines on the property. Because the sites were located close to a U.S. military facility, the CFIUS recommended that the President block the transaction, citing national security concerns. In September 2012, President Obama issued an executive order requiring Ralls to divest. At no point did CFIUS or the president provide the parties with neither the notice of the evidence used to make the national security determination nor the opportunity to contest that evidence.

In response, Ralls asked the court to enjoin (or block the enforcement of) the president's order and to restore its ownership rights in the wind farm companies. In doing so it argued that it was deprived of property without due process—namely, that CFIUS failed to provide adequate notice or an opportunity to address the national security concerns. Although the district court initially dismissed most of Ralls's claims, the D.C. Circuit Court of Appeals reversed in 2014, holding that Ralls did have a property interest in the underlying transaction and was therefore entitled to (1) notice of the official action and (2) the rationale behind the order. The case was then remanded to the district court. Rather than proceed to a full trial on the merits of the due process claim, the parties settled out of court in 2015.

4. What the Ralls Case Tells Us

As already mentioned, courts generally defer to the president on national security. In Ralls, while the courts ultimately allowed Ralls to pursue a claim that it was denied due process, they did not actually review the President's ultimate decision to block the transaction. This reflects a longstanding practice: the judiciary is typically reluctant to second-guess presidential decisions on national security matters. The Constitution grants the President broad authority over foreign policy and national defense, reinforcing this separation of powers.

But, because the case was settled out of court, the due process issue was never conclusively decided. Nonetheless, Ralls shows that while there was the possibility that courts may compel the government to follow constitutional due process procedures, second-guessing a President’s determination on national security grounds is unlikely.

Attorneys for the parties are likely aware of these limitations. As such, their legal strategy may be aimed at buying time—specifically, delaying the enforcement of President Biden’s directive to “take all steps necessary to fully and permanently abandon the Proposed Transaction no later than 30 days after the date of this order.” Since only a future President has the authority to rescind or reverse a prior presidential order, a court-ordered stay could give the companies enough time to lobby for support from the next administration. While President-elect Trump has expressed his opposition to the deal, the parties may believe they could convince him with enough sweeteners.

5. Trump Offers a Lifeline to TikTok

In a surprising evolution of his stance on TikTok, President-elect Trump shifted from denouncing the platform as a national security threat in 2020 to actively defending it before the Supreme Court in December 2024. In a brief filed on December 27, Trump described TikTok as a "unique medium for freedom and expression." His change of heart had become apparent earlier in March 2024, when he publicly opposed a bipartisan bill mandating the sale of TikTok or imposing a ban. It was around this time that Trump met Jeff Yass, a cofounder of Susquehanna International Group and a significant donor to Republican causes. SIG owns a 15% stake in ByteDance, TikTok's parent company. Yass’ personal share is 7%. He is a major supporter of the anti-tax lobbying group Club for Growth, which previously hired Kellyanne Conway, a key architect of Trump’s 2016 victory.

In March 2024, Trump told CNBC that he still viewed TikTok as a national security threat but acknowledged its cultural significance, remarking that young people "will go crazy without it." He also criticized moves against TikTok as benefiting Facebook, which he labeled an "enemy of the people."

His views continued to evolve during his 2024 campaign. Trump embraced TikTok as a vital tool for reaching young voters, crediting the platform as a key to his strategy. His youngest son, Barron, reportedly encouraged him to engage with TikTok to win over younger demographics, according to sources familiar with their interactions. By late 2024, Trump had amassed 14.7 million followers on TikTok, a fact that put him at odds with the GOP's anti-China faction. On December 16, Trump met with TikTok executives at Mar-a-Lago, the same day TikTok petitioned the Supreme Court to temporarily block the law requiring its divestiture.

Anticipating a policy shift, the Supreme Court could issue an administrative stay (temporarily halting enforceability of the law while the court considers the case), and incidentally affording more time to allow the new administration to decide on whether it will enforce the law. Different administrations have shifted their enforcement posture on several areas, including immigration, environmental, and criminal justice to name a few, so this would be nothing new. Issuing an injunction would imply the court has considered the merits of the case and decided to either temporarily or permanently halting the enforcement of the law.

On a similar vein, the US Court of Appeals for the DC Circuit, which is handling the Nippon Steel's due process claims, is unlikely to overturn President Biden's blocking order and the review process conducted by CFIUS. Doing so would be unprecedented. But by initiating legal action during a presidential transition, they could potentially delay the enforcement of the order, buying time to negotiate with the incoming administration or explore alternative solutions. Nonetheless, the success of such a strategy is uncertain, given President-elect Trump's stated opposition to the deal.

6. Final Thoughts

As the TikTok and Nippon Steel/U.S. Steel cases show, when foreign companies seek to operate in sectors the United States designates as "critical infrastructure," national security concerns become paramount. While the TikTok dispute revolves around freedom of expression, the Nippon Steel-U.S. Steel case centers on due process, in both instances, "national security" serves as a basis by which foreign entities could be denied certain constitutionally protected rights in the United States.

Moreover, there is a working assumption that, with the inauguration of the Trump administration, U.S. policy on foreign affairs and investment regulation may diverge significantly from that of the previous Biden administration. As Trump's sudden willingness to defend TikTok suggests, national security decisions can be influenced by the president's own political and economic interests. Under such circumstances, foreign companies may reasonably use litigation to delay the enforcement of presidential orders, thereby creating opportunities to negotiate with the incoming administration.

However, if Congress and U.S. intelligence agencies continue to tighten regulations on foreign investment, regardless of who occupies the White House—that leaves foreign businesses in a protracted state of uncertainty. How the government will balance national security with the protection of foreign firms' rights, and how far the president will assert his own interest in search of a "deal" will remain key determinants to the overall investment climate moving forward. The TikTok case and Nippon Steel's bid for U.S. Steel merit close attention as important litmus tests for these evolving trends.

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