

January 10, 2025

Volume 5, Issue 1

Online ISSN 2837-3863
Print ISSN 2837-3855

What's Been Happening

1 — Ban or Postpone? Fate Of TikTok Remains Unclear With Supreme Court — 1

[In One Sentence]

- On January 10, the U.S. Supreme Court will hear oral arguments to decide whether to uphold or reverse an early-December Appeals Court ruling to divest or ban the popular video-sharing app, TikTok.
- U.S. President-elect Donald Trump opposed the ban in an amicus brief which asks the Supreme Court to delay the January 19, 2025 'divest or ban' deadline, which is one day before his inauguration, and suggests that he will work on a "political resolution."
- The Department of Justice has urged the Supreme Court to deny the President-elect's request, with Attorney General Merrick Garland deeming the social media company a threat to U.S. national security due to its foreign adversary-held ownership.
- TikTok and the U.S. government filed their closing written arguments to the Supreme Court. The two sides sharply dispute China's influence over the popular social media app and the role of the First Amendment in evaluating the underlying law, the Foreign Adversary Controlled Applications Act, which requires the platform to be sold to an American company or face a ban.

[Mark the Essentials]

- President-elect Trump previously met with TikTok CEO Shou Zi Chew, just hours after TikTok filed its petition to the U.S. Supreme Court, where Trump suggested that he "might" take a different approach with regard to the social media platform's presence in the U.S. market.
- The Biden administration has argued that the popular social media app "permits China to harvest sensitive data about tens of millions of Americans" and "to acquire a potent tool for covert influence operations."
- TikTok and ByteDance dispute the claim and insist that there is no direct or indirect Chinese government manipulation or involvement and argue that the Protecting American from Foreign Adversary Controlled Applications Act violates the First Amendment.

[Keeping an Eye On...]

- On December 18, 2024, five days after the D.C. Court of Appeals denied its request to delay the nation-wide ban that is due to go into effect on January 19, 2025, TikTok won an important reprieve. Citing the need to review the "unprecedented" and "very significant constitutional questions" at hand, the Supreme Court

decided of its own volition to hear arguments on a “highly expedited basis” regarding shutting down the video-sharing app in the U.S. The Court was under no obligation to hear the case; it could have let the appeals court ruling be the final word and let the clock run out on TikTok’s legal options. The reprieve is an important one, and rightly so. Important First Amendment questions remain to be answered even if the Appeals Court thought it wiser to glide over these questions under the pretext of subscribing to the U.S. government’s “informed judgment” of the putative national security threat posed by the app. In the landmark *Lamont v. Postmaster General* First Amendment ruling, the court had ruled that U.S. citizens have a right to receive information from a foreign adversary even if that information amounts to outright “communist political propaganda.” Today, even potentially manipulated subliminal appeals (the government has no evidence of actual manipulation in the U.S.) on a lighthearted foreign adversary-owned video-sharing app is supposedly no good. The D.C. Appeals Court ruling purporting to protect free speech by preventing a foreign adversary from influencing what U.S. citizens view on the app flies in the face *Lamont v. Postmaster General*. In keeping with First Amendment considerations, as per the *Berman Amendment*, restrictions or prohibitions on “informational materials” are excluded from the extensive authority granted to the President under the International Emergency Economic Powers Act (IEEPA). Today, so long as bespoke, non-IEEPA derived authority is utilized, such prohibitions can apparently be enforced—regardless of their underlying First Amendment implications. Looking ahead, the Supreme Court is likely to stay the January 19th deadline and subject the Foreign Adversary Controlled Applications Act, the basis of the TikTok divest-or-ban order, to a constitutional review standard of either intermediate scrutiny or strict scrutiny. As per intermediate scrutiny, the law must not just “further an important or substantial government interest” that is unrelated to the suppression of free expression but that “the incidental restriction [too must be]...no greater than is essential to the furtherance of that interest.” The recited harms must be real, not just conjectural. Under strict scrutiny, the government’s interests must be “compelling” (not just “important or substantial”) and the means to achieve them the least restrictive possible (rather than being just narrowly tailored). Does the government’s national security argument surmount this threshold? Is the U.S. government’s “informed judgment” of potential information manipulation on TikTok so fraught with danger as to warrant the squelching of the expressive rights of its 170 million American users? On this point, we will have to wait and watch how the Supreme Court rules. President-elect Donald Trump, for one, will surely be waiting and watching.

[Expanded Reading]

- [What Happens After The TikTok Ban?](#), *Reuters*, January 6, 2025
- [TikTok Creators Left In Limbo While Awaiting Decision On Potential Platform Ban](#), *AP*, January 5, 2025
- [DOJ Calls On Supreme Court To Deny Trump’s Request To Delay TikTok Ban](#), *The Hill*, January 4, 2025
- [Can Trump Stop TikTok Ban? Here’s What He Can—And Can’t—Do If Supreme Court Upholds Law](#), *Forbes*, January 3, 2025
- [TikTok And Government Clash In Last Round Of Supreme Court Briefs](#), *The New York Times*, January 3, 2025
- [Duelling Arguments Take Shape In The TikTok-Ban Case](#), *The Economist*, January 1, 2025
- [Trump Says It Could Be Worth Keeping TikTok In Us For A Little While](#), *Reuters*, December 23, 2024
- [Trump Meets With TikTok Ceo At Mar-A-Lago As Company Asks Supreme Court To Intervene In Fight Over Federal Ban](#), *CNN*, December 16, 2024

2 — Biden Administration’s Final Decoupling Push Targets Legacy Chips — 2

[In One Sentence]

- On December 23, 2024, the Office of the U.S. Trade Representative (USTR) launched a Section 301 investigation into Chinese government practices in the semiconductor industry, with an initial focus on China’s legacy chip sector.
- U.S. Trade Representative Katherine Tai explained that the purpose of the probe is to protect the American and the global semiconductor industry from China’s massive state-driven efforts to build up its domestic chip supply.
- The departing Biden administration has already placed a 50% tariff on Chinese semiconductors that was set to take effect on January 1, 2025.
- China has strongly opposed the Section 301 decision and called the U.S. claims of Chinese “non-market practices” self-contradictory given the prevalence of massive U.S. chip subsidies.

[Mark the Essentials]

- The Biden administration noted that the Section 301 probe will be handed to President-elect Donald Trump when he takes office on January 20, 2025 for completion.
- The probe will expand the previous U.S.-China chip competition scope beyond high-end semiconductors to include older or legacy chips that power everyday consumer electronics and telecoms gear.
- The probe, when completed, could result in additional tariffs or other measures to block Chinese chips from entering the U.S. market, in addition to the existing 50% tariffs and the additional 60% tariffs on Chinese imports threatened by incoming President-elect Trump.

[Keeping an Eye On...]

- First, it was the denial of chips to Huawei during the first Trump administration. Next, it was controls on the supply of advanced node semiconductors to a wide spectrum of Chinese users, along with their designation as “foreign entit(ies) of concern” in the CHIPS Act. Thereafter, it was the turn of semiconductor manufacturing equipment to be denied to Chinese users. Not yet done, on December 23, 2024, President Biden’s U.S. Trade Representative Katherine Tai opened a Section 301 investigation of China’s policies and practices with regard to ‘foundational’—or mature node or legacy—semiconductors. This is not the first chip-related Section 301 action; Trump’s broad-based China Section 301 investigation had led to 25% tariffs on Chinese semiconductors (increased subsequently by Biden to 50% in May 2024). Per USTR’s December 23 announcement, China seeks to use its non-market policies and practices to dominate the global manufacturing of mature node chips, with its share projected to reach approximately 40-50% of world capacity by 2029. It is a foregone conclusion that USTR will find that this overconcentration within the global legacy chip market threatens critical U.S. supply chains for telecoms, automotive, defense, medical and other items. And on the strength of this finding, it will impose trade restrictions on Chinese legacy chips. It is just as foregone that China will challenge and defeat the trade restrictions thereafter at the WTO dispute settlement body’s panel stage, much as it had defeated the Trump Section 301 tariffs at the WTO in September 2020 or, for the matter, the European Community had obtained a favorable GATT commission ruling (related to price fixing) in 1988 against the 1986 U.S.-Japan semiconductor agreement that was the outcome of an earlier Section 301 investigation of Japanese policies and practices. The real question going forward, rather, relates to the purpose and type of restrictions that are likely to be imposed by Trump’s U.S.

Trade Representative following the conclusion of the investigation. Legacy semiconductors are, after all, dime-a-dozen in modern industrial goods. An average car, for instance, contains over 1,700 chips, with just a handful of them fabricated at a facility in China—be it at a foreign-owned or Chinese-owned facility. Reliability and quality considerations are likely to dominate sourcing decisions just as much as considerations of cost are. Besides, semiconductors are intermediate goods where the buyer of record is typically an original equipment manufacturer (OEM) rather than a final branded goods seller. Component tariffs linked to the value added embodied in the chip, rather than on the final product, will thus have to be imposed. This is no simple task. Sorting through legacy semiconductor supply chains is fiendishly complex given the limited visibility into the origin of legacy chips embedded in final products. Finally, the CHIPS Act envisages significant investment in domestic foundational chip production capacity to reshore critical supply chains for telecoms, automotive, defense, medical and other items. Protective tariffs too have already been imposed. One implication of the potential Section 301 measure therefore is that the U.S. is now seeking to reorder the market incentives for global—rather than domestic—production of legacy chips, and thus bifurcate the sourcing choices and supply chains of global OEMs from that of Chinese OEMs. If this is indeed the case, it is not likely to succeed. As Chinese foundries narrow the reliability and quality gap while also enabling Chinese OEMs to deliver a cost advantage *vis-à-vis* their global rivals, a greater share of China-origin mature node chips is likely to be embedded in IT and electronic goods globally. And for this state of affairs, it is the United States' chip export controls starting with the clampdown on Huawei, which concentrated Chinese minds on building out a self-sufficient end-to-end mature node chip production ecosystem, that ultimately and ironically bears a greater share of the blame rather than China's non-market policies and practices.

[Expanded Reading]

- [U.S. Takes Aim At China's Production Of Essential Computer Chips](#), *The New York Times*, December 23, 2024
- [U.S. Launches New Probe Into Legacy Chinese Chips As Tech Pressure On Beijing Escalates](#), *CNBC*, December 23, 2024
- [FACT SHEET: President Biden Takes Action to Protect American Workers and Businesses from China's Unfair Trade Practices in the Semiconductor Sector](#), The White House, December 23, 2024
- [Biden Launches New Chinese Chips Trade Probe, Will Hand Off To Trump](#), *Reuters*, December 23, 2024