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NATIONAL SECURITY OR YELLOW PERIL?: AMERICA'S APPROACH TOWARD TIKTOK AND HUAWEI

Anthony Han

ABSTRACT

The U.S. government's treatment of TikTok and other Chinese-adjacent tech struggles to maintain objectivity and belies the Sinophobia that lingers within the political hegemony. The U.S. is no stranger to Anti-Asian sentiments and policies. This Article will give an overview of America's historic mistreatment of Asians, both foreign and natural-born, before analyzing the government's treatment of short-form video media giant TikTok and telecommunications company Huawei. This analysis[1] will seek to differentiate legitimate security concerns and measures from inequitable ones in either justification or administration.

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INTRODUCTION

"*[T]he question we face today is not the law's wisdom, only its constitutionality.*"

—Justice Gorsuch, concurring in *TikTok Inc. v. Garland* (2025)[2]

On April 24, 2024, the Protecting Americans from Foreign Adversary Controlled Applications Act[3] was signed into law by President Biden. This Act serves to effectively ban TikTok in the United States unless the app is divested from ByteDance, Inc., its Beijing-based parent company.[4] On January 17, 2025, the Supreme Court unanimously upheld the Act's constitutionality, finding that Congress' "well-supported national security concerns"[5] outweighed the free expression issues implicated by the ban.

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1. This Article was initially written in March 2024, shortly after the passage of the U.S. House of Representatives Bill initially supporting the ban. While revisions have been made to update the Article to reflect more current events, certain anachronistic statements or sections may remain.
2. 145 S. Ct. 57, 75 (2025) (Gorsuch, J., concurring).
3. Pub. L. 118-50. H, 138 Stat. 955.
4. *Id*.
5. TikTok Inc. v. Garland, 145 S. Ct. 57, 72 (2025).

However, it is unclear whether congressional concerns truly are as well supported as the Supreme Court would like us to believe. By weighing the long history of anti-Asian sentiment and paranoia against the legitimate security concerns posed by TikTok's continued operation, this Article aims to clarify the validity of the TikTok ban.

HISTORY OF THE YELLOW PERIL

"The coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof . . . "

—The Chinese Exclusion Act (1882)[6]

While there were widespread incidents of hate crimes against Asian Americans[7] prior to its enactment, the U.S. took its first official stance against Asian migrants with the passage of the Chinese Exclusion Act in the late 19th century.[8] The Act placed heavy limitations, all but banning the entry of Chinese migrants, and was the first federal law to prohibit entry of an ethnic labor group.[9] The Act justified this ban as a protection of the social fabric of America and found much of its popular support because of the propagation of the "yellow peril" myth, which warned of an encroaching Asian threat.[10]

What the yellow peril actually entailed constantly shifted over time, morphing to fit the propagandic needs of American society. It began with Chinese laborers, who had little choice but to work for middling wages to support their families overseas and to repay the loans they owed to the patrons of their voyage.[11] As such, they were desirable because they would accept lower wages than their white counterparts.[12] White working-class men felt threatened and displaced within the labor market, leading them to discriminate severely against the Chinese and label them as "filthy yellow hordes."[13]

Chinese immigrants, like most others, formed communities—Chinatowns—that soon fell victim to discriminatory propaganda; these neighborhoods gained a reputation as red-light districts, opium dens, and gambling areas.[14] This reputation was used as a weapon as

6. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

7. *See* Kelly Wallace, *Forgotten Los Angeles History: The Chinese Massacre of 1871,* LOS ANGELES PUBLIC LIBRARY: LAPL BLOG (May 19, 2017), https://www.lapl.org/collections-resources/blogs/lapl/chinese-massacre-1871 [https://perma.cc/4XSN-TY5R], where 18 Chinese men and boys were massacred by a mob of rioters following the death of Robert Thompson, a civilian who was caught in the crossfire of a shoot out between several Chinese men. Only one of the victims is thought to have participated in the gunfight, and the body count equated to a ten percent of the Chinese population in Los Angeles at the time.

8. Nina Strochlic, *America's Long History of Scapegoating Its Asian Citizens*, NAT'L GEOGRAPHIC (Sept. 2, 2020), https://www.nationalgeographic.com/history/article/asian-american-racism-covid [https://perma.cc/MHU8-Y76F].

9. *Id.*

10. *Id.*

11. *Chinese Immigration and the Chinese Exclusion Acts*, OFF. OF THE HISTORIAN: MILESTONES IN THE HIST. OF U.S. FOREIGN REL., https://history.state.gov/milestones/1866–1898/chinese-immigration [https://perma.cc/XTK5-QNRS].

12. *Id.*

13. Tim Yang, *The Malleable yet Undying Nature of the Yellow Peril*, DARTMOUTH COLL., https://www.dartmouth.edu/~hist32/History/S22 [https://perma.cc/2PWV-9HRT].

14. OFF. OF THE HISTORIAN, *supra* note 11.

anti-Chinese proponents argued that these neighborhoods "lowered the cultural and moral standards of American society."[15] Others relied on a less subtle stance geared toward preserving the white purity of America's racial composition.[16] The Chinese Exclusion Act remained in effect until 1943 and was only repealed due to China's allyship during World War II,[17] demonstrating a central theme in the treatment of Asians throughout American history: our acceptance would be conditional upon our threat level.

The object of the yellow peril was shifted from the Chinese to the Japanese during WWII. Following the attack on Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066, which forcibly relocated vast amounts of Japanese Americans.[18] Originally, the plan was to make them farm laborers, but it was met with harsh opposition from state and local officials.[19] Their excuses ranged from fearing for the safety of Japanese Americans— "our people cannot tell an American-born Japanese from an alien"[20]—and undiluted racism— "We want to keep this a white man's country . . . . All Japanese [should] be put in concentration camps for the remainder of the war."[21] The Los Angeles Times voiced its support for EO 9066, stating that Japanese internment was necessary to "insure reasonable safety from spies and saboteurs."[22] Interestingly, approximately 14,500[23] people of German or Italian descent were interned under a separate order, and while their experiences certainly should not be overlooked, the scale of their internment pales in comparison to the roughly 110,000 Japanese Americans who were placed into internment.[24]

The Times also responded to calls for the release of Japanese citizens by accusing the Japanese of "[making] for themselves a record for conscienceless treachery unsurpassed in history."[25] Subtly, the image of the yellow peril changed from a savage and hedonistic race to one capable of cunning espionage and infiltration. These prejudiced views not only circulated in public opinion but also found themselves ensconced in the highest court of the land. Justice Black delivered the opinion for the infamous case *Korematsu v. United States*[26] and described the threat of Japanese espionage as "the gravest imminent danger to the public

15. *Id*.
16. *Id.*
17. *Id.*
18. *Japanese American Incarceration*, THE NAT'L WWII MUSEUM, https://www.nationalww2museum.org/war/articles/japanese-american-incarceration [https://perma.cc/2VNT-ZJYQ].
19. *Id.*
20. *Id.* (quoting Montana Governor Sam C. Ford).
21. *Id.* (quoting Idaho Attorney General Bert Miller).
22. The Times Editorial Board, *Editorial*: *75 Years Later, Looking Back at the Times' Shameful Response to the Japanese Internment*, L.A. TIMES (Feb. 19, 2017, 5:00 AM), https://www.latimes.com/opinion/editorials/la-ed-internment-anniversary-20170219-story.html [https://perma.cc/VY59-KRYY].
23. Alan Rosenfeld, *German and Italian Detainees*, DENSHO ENCYCLOPEDIA (Sept. 12, 2024, 5:51 PM), https://encyclopedia.densho.org/German_and_Italian_detainees [https://perma.cc/LG8U-ANFX].
24. *About the Incarceration*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/history [https://perma.cc/R5FA-CWA2].
25. The Times Editorial Board, *supra* note 22.
26. Korematsu v. United States, 323 U.S. 214, 215 (1944).

safety."[27] The majority opinion noted that "approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor,"[28] a far cry from the over hundred thousand Japanese interned during World War II.[29] During internment, the Japanese were administered loyalty tests, through which they were asked two questions: whether they would denounce the Japanese emperor, and whether they were willing to serve in the army.[30] Roughly 8,500 people, mostly men, answered no to both questions, likely out of protest patriotism, but these "no-no boys" were quickly labeled disloyal and sent to Tule Lake internment camp.[31] The overall interment period ultimately lasted until 1948, and those released were given only $25 and one-way transportation back to their homes, which often had been vandalized or looted in their absence.[32]

Less than a decade later, the Korean War led to further fear and discrimination against Asian Americans.[33] The Red Scare, a wave of anti-communist paranoia propagated by Senator Joseph McCarthy, initially passed over Chinese Americans, but China's entry into the war in 1950 heavily affected societal perceptions and suspicions.[34] Federal agencies monitored many Chinese Americans, whom the agencies viewed as "potential subversives."[35] At that time, Chinese Americans struggled with the feeling that "being Chinese is itself a crime"[36] and felt compelled to prove that they were anti-communist.[37] The 1951 San Francisco Chinese New Year parade included a marching band of girls holding anti-communism signs,[38] symbolizing the ever-present need to show fealty. This was a far cry from the treatment given to Chinese Americans during World War II; China's shift from ally to enemy caused a parallel shift in the nation's perception of Chinese Americans.

The formulation of Asians as a yellow peril continued with the Vietnam War. Karen L. Ishizuka notes in her article *Looking Like the Enemy: Political Identity & The Vietnam War* that "[Asian Americans] looked suspiciously like 'gooks,' the epithet that associated

27. *Id.* at 218.
28. *Id.* at 219.
29. DENSHO ENCYCLOPEDIA, *supra* note 24.
30. Cherstin M. Lyon, *Loyalty Questionnaire*, DENSHO ENCYCLOPEDIA, https:// https://encyclopedia.densho.org/Loyalty_questionnaire/ [https://perma.cc/H2BW-GABH].
31. Brian Niiya, *No-no Boys*, DENSHO ENCYCLOPEDIA, https:// https://encyclopedia.densho.org/No-no_boys/ [https://perma.cc/5PL2-6TTR].
32. DENSHO ENCYCLOPEDIA, supra note 24.
33. Charlotte Brooks, *Numbed with Fear: Chinese Americans and McCarthyism*, PBS: THE ASIAN AM., NATIVE HAWAIIAN & PACIFIC ISLANDER EXPERIENCE (Dec. 20, 2019), https://www.pbs.org/wgbh/americanexperience/features/mccarthy-numbed-with-fear-chinese-americans [https://perma.cc/EN4J-LYMD].
34. *Id.*
35. *Id.*
36. *Id.*
37. *See id.*
38. *Id.*

all Asians with the enemy."[39] Ishizuka references an article written by a Vietnam War veteran, Norman Nakamura, to illustrate how rampant Anti-Asian racism was in the 70s.[40] Nakamura, who had just been awarded a Bronze Star, was lying in a cot with severe chest and head injuries.[41] When he noticed that other soldiers were being treated before him, he questioned when he would receive aid and was met with this response: "Oh, you can speak English? Why didn't you tell us you were an American? We thought you were a gook."[42] Nakamura's status as an Asian superseded all his other traits—being in service for his country, being an awardee of a Bronze Star, let alone not even being Vietnamese—and led those around him to affiliate Nakamura with the "enemy."[43]

39. Karen L. Ishizuka, *Looking Like the Enemy: Political Identity & the Vietnam War*, PAC. COUNCIL (May 7, 2019), https://www.pacificcouncil.org/newsroom/looking-enemy-political-identity-vietnam-war [https://perma.cc/4MMK-4UN6].

40. *See id.*

41. *Id.*

42. *Id.*

43. *See id.*



44

These various anti-Asian sentiments and more— including the model minority myth, unequal access to educational and employment opportunities, and perpetuation of hate crimes—continued into the 1990s and beyond. In 1992, the U.S. Commission on Civil Rights released a 242-page report on not only the discrimination faced by Asian Americans

44. *Id.* (citing illustration of GIDRA: THE MONTHLY OF THE ASIAN AMERICAN EXPERIENCE (May 1972)).

in the late 80s and early 90s but also the lack of public awareness of these issues.[45] The report states that:

> The belief is widely held that Asian Americans are a successful minority who no longer suffer from disadvantage. This belief, however, is not supported by the facts . . . . Individual cases of success should not imply that the diverse peoples who make up the Asian American communities are uniformly successful . . . . [T]he success stereotype appears to have led policy makers to ignore those truly in need.[46]

The commission also found that "anti-Asian activity" was still occurring nationwide, stemming from old-rooted factors like "economic competition among racial and ethnic groups" and "insensitive media coverage of minority groups."[47] The portrayal of Asian Americans in media could sustain articles worth of analysis, but harmful stereotypes, perhaps most infamously Mickey Rooney's portrayal of Mr. Yunioshi in *Breakfast at Tiffany's*, pushed the agenda that Asian Americans were foreign, inept, and dangerous. In the modern era, the effect of media portrayals is further exacerbated, demonstrated most keenly in the discourse surrounding COVID-19.

The advent of the pandemic brought a resurgence in violent Asian hate crimes. In a survey conducted by Pew Research Center, around a third of East and Southeast Asian adults said that they personally knew somebody of Asian descent who had been attacked because of their race or ethnicity since the beginning of the outbreak.[48] This violence was exacerbated by the Trump administration's characterization of the virus as the "Chinese virus" or "kung-flu,"[49] ignoring the World Health Organization's warnings that tying geographical or ethnic groups to the virus could have discriminatory effects.[50] John C. Yang, the president of Asian Americans Advancing Justice, noted the similarities between the comments Asian Americans received during the pandemic and those directed at Chinese Americans during the late 1800s.[51]

45. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S (1992).

46. *Id.* at 20.

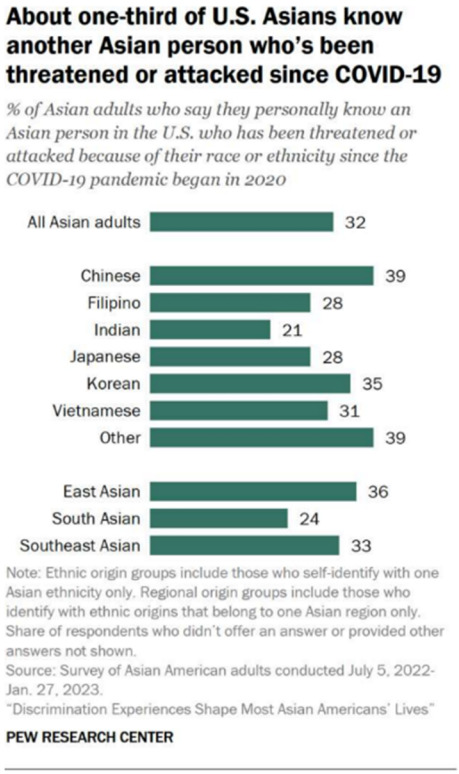
47. *Id.* at 22.

48. Neil G. Ruiz, Carolyn Im & Ziyao Tian, *Asian Americans and Discrimination During the COVID-19 Pandemic*, PEW RSCH. CTR. (Nov. 30, 2023), https://www.pewresearch.org/race-ethnicity/2023/11/30/asian-americans-and-discrimination-during-the-covid-19-pandemic [https://perma.cc/UMA9-2C7M].

49. Deb Riechmann & Terry Tang, *Trump Dubs COVID-19 'Chinese Virus' Despite Hate Crime Risks*, ASSOCIATED PRESS (Mar. 18, 2020), https://apnews.com/article/donald-trump-ap-top-news-asia-crime-virus-outbreak-a7c233f0b3bcdb72c06cca6271ba6713 [https://perma.cc/4F7V-6LMF].

50. *Id.*

51. *Id.*



52

It is difficult to deny the connection between his President Trump's actions and statements and the intended optics of the "Make America Great Again" movement. The phrase was first used by President Reagan in the 1980s, and the current movement seems to advocate for a return to "traditional American values" and appears to glorify the America of the 80s,[53] without regard for increased discrimination faced by marginalized communities at the time. The populist movement further pushes an "America first" stance on trade and foreign policies.[54] Thus, it made sense politically for President Trump to demonstrate America's power and ramp up measures against China given its position as America's top economic, political, and technological contender.

To this end, the first Trump administration made several political anti-China moves, including the imposition of a trade war through tariffs on Chinese products.[55] Trump also enacted the China Initiative, a counter-espionage initiative primarily geared toward Chinese

52. Ruiz et al., *supra* note 48.

53. Adam Volle, *MAGA Movement*, BRITANNICA, https://www.britannica.com/topic/MAGA-movement [https://perma.cc/JFL2-7PZE] (Oct. 28, 2024).

54. *Id.*

55. Ryan Hass & Abraham Denmark, *More Pain Than Gain: How the US-China Trade War Hurt America*, BROOKINGS INST. (Aug. 7, 2020), https://www.brookings.edu/articles/more-pain-than-gain-how-the-us-china-trade-war-hurt-america [https://perma.cc/48TZ-HHLW].

academics within the U.S.[56] This initiative had flavors of EO 9066 and the Red Scare investigations. While there were some legitimate arrests and convictions, the investigations created a culture of fear and damaged the lives of innocent people solely because of their race.[57] Trump justified his political moves by stating that China had committed "the greatest theft in the history of the world" and that it was "rap[ing] our country."[58] Intentional or not, Trump's diction evokes a clear image of the version of the yellow peril present during the late 1800s, specifically about the alleged sexual deviancy of Chinese men.

One of the victims of the China Initiative, Gang Chen, a professor of engineering at MIT, was investigated by the FBI for his affiliations with Chinese institutions, "affiliations that were previously encouraged by academia."[59] While the charges were ultimately dismissed, Chen and his wife had already suffered from psychological and emotional harm; Chen stated his wife often cried in her sleep because of the trauma.[60] Chen also felt pressured to abandon his award-winning research in semiconductors because it was a point of competition between the U.S. and China.[61] Another case involved a New York police officer, Baimadajie Angwang, who was brought under suspicion when he attempted to contact loved ones in Tibet.[62] Similarly to Chen, Angwang's charges were also dropped, but not before months of solitary confinement,[63] a detainment method commonly associated with psychological trauma. [64]

Ninety percent of the individuals prosecuted under the China Initiative were ethnically Chinese, and less than a quarter of these cases resulted in a conviction.[65] Furthermore, these convictions were largely for much more minor charges, many of them being grant fraud and other financial crimes.[66] The list of cases is available on the government page for the China Initiative, and even a cursory glance reveals that the vast majority of these charges are for corporate espionage, tangentially related—at best—to national security.[67] This page even

56. Ryan Lucas, *The Justice Department Is Ending Its Controversial China Initiative*, NPR, https://www.npr.org/2022/02/23/1082593735/justice-department-china-initiative [https://perma.cc/7QB3-F6U3] (last updated Feb. 23, 2022).

57. *See* Emily Feng, *House Bill Aims to Restart Controversial DOJ Program That Targeted Chinese Academics*, NPR (Jan. 2, 2024), https://www.npr.org/2024/01/02/1222434141 [https://perma.cc/6MKU-R5TK].

58. Hass & Denmark, *supra* note 55.

59. *Id.*

60. *Id*.

61. *Id.*

62. *Id.*

63. *Id.*

64. Jessica Sandoval, *How Solitary Confinement Contributes to the Mental Health Crisis,* NATIONAL ALLIANCE ON MENTAL ILLNESS (Mar. 17, 2023), https://www.nami.org/advocate/how-solitary-confinement-contributes-to-the-mental-health-crisis [https://perma.cc/QQ4A-DPME].

65. *Id*.

66. *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related [https://perma.cc/XH8U-5V4F] (Nov. 19, 2021).

67. *Id.*

lists charges that did not lead to a conviction, including Angwang's case; the listing is as follows:

> **September 21, 2020**
>
> New York City Police Department Officer Charged with Acting As an Illegal Agent of the People's Republic of China
>
> A criminal complaint charged Baimadajie Angwang, 33, a New York City Police Department officer and U.S. Army reservist, with acting as an illegal agent of the People's Republic of China (PRC) as well as committing wire fraud, making false statements and obstructing an official proceeding. [68]

Indeed, a closer look at the list reveals that many of the cases are indictments and charges, not full convictions. Yet the cases must be clicked open to see any disclaimer that the suspects are innocent until proven guilty.[69] Outrageously, the cases also remain online even after the DOJ cleared the suspects or dropped the charges,[70] serving to make the threat of Chinese espionage more imminent and ubiquitous. The Initiative was eventually shut down amidst accusations of racial profiling and criticisms over its overly narrow framework. Matthew Olsen, Assistant Attorney General for the National Security Division, stated that North Korea, Russia, and Iran must be included to have a more comprehensive approach to the current threat landscape.[71]

The concept of the yellow peril conveniently shifts to encompass the current image that society wants to perpetuate against Asians. It morphed from the early formulations of the Chinese as "uncivilized, unclean . . . lustful and sensual"[72] to the current image of a cunning, spying force. But no matter the era, Asians have always been seen as a threat to American society, and this fear is driving—at least somewhat—the federal government's approach to TikTok and other Chinese and Chinese-adjacent technology.

LEGITIMATE SECURITY CONCERNS

"Everything is seen in China."

—Unnamed member of TikTok's Trust and Safety Department, 2021[73]

The security concerns around TikTok culminate from a combination of America's lax data protection laws and its status as a subsidiary of a Chinese company. ByteDance, its parent company, is headquartered in Beijing, rendering it vulnerable to a Chinese national security law passed in 2017 that empowers the Chinese Communist Party (hereinafter "CCP") to compel companies to turn over data for national security purposes.[74] Currently, there is no evidence that ByteDance—and by proxy, TikTok—has relinquished any data. TikTok CEO, Shou Zi Chew, has testified that American user information is being

68. *Id.*
69. *Id.*
70. *Id.*
71. Lucas, *supra* note 56.
72. Yang, *supra* note 13.
73. Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows That U.S. User Data Has Been Repeatedly Accessed from China*, BUZZFEED NEWS (June 17, 2022), https://firewalltimes.com/tiktok-data-breach-timeline [https://perma.cc/TRU7-7JYF].
74. Kelvin Chan & Haleluya Hadero, *Why TikTok's Security Risks Keep Raising Fears*, ASSOCIATED PRESS (Mar. 23, 2023), https://apnews.com/article/tiktok-ceo-shou-zi-chew-security-risk-cc36f36801d84fc0652112fa461ef140 [https://perma.cc/LRZ5-XXDL].

transitioned to servers controlled by the American company, Oracle, from TikTok's servers in the U.S. and Singapore.[75]

However, in 2022, ByteDance admitted that its employees accessed two reporters' location data in order to identify the source of an information leak. Those employees were later fired.[76] In June 2022, Chinese TikTok employees were found to have been accessing American user data between September 2021 and January 2022,[77] contrary to TikTok's assurances that American user data was overseen by a "world-renowned, US-based security team."[78] In 2023, ByteDance's former head of engineering claimed that members of the CCP had a "superuser" credential that allowed them to bypass any data barriers the company had installed to prevent the CCP from collecting user data, who then used this access to spy on protestors during the Hong Kong protests.[79] The former head also claimed that the CCP also had access to U.S. user data, claiming to be disturbed by Chew's congressional testimony denying any data transference to China.[80] ByteDance has denied both claims.[81]

ByteDance's ownership interest composition is 60% global investors, 20% employees, and 20% founders, with the last category based in Beijing.[82] While it has been attempting to posture itself as a global entity, like most other Chinese companies, ByteDance is required to maintain an in-house Communist Party committee.[83] The CCP also owns a "golden share" in one of ByteDance's subsidiaries, which allows the CCP to involve itself in the day-to-day operations of the company, including having a say in the services provided.[84]

China's intelligence laws also grant it broad, unilateral power in commandeering a company's data. Its National Intelligence Law legally binds ByteDance to aid the CCP in gathering intelligence, and a law passed in 2016[85] grants China jurisdiction over cybersecurity issues "arising both within and outside the PRC's territory."[86] To its credit, TikTok had attempted to disrupt its internal flow of data from the U.S. to China, an endeavor

75. *Id*.

76. Billy Perrigo, *What to Know About the TikTok Security Concerns*, TIME (Mar. 23, 2023), https://time.com/6265651/tiktok-security-us [https://perma.cc/W7RA-KFAJ]. As a quick tangent, this article refers to Mr. Chew as "Shou," his given name and not his family name, likely a mix-up due to the shifting of orders from Western to East Asian naming patterns. However, I expected more from TIME Magazine.

77. Baker-White, *supra* note 73.

78. Michael Heiligenstein, *TikTok Data Breaches: Full Timeline Through 2023*, FIREWALL TIMES (Oct. 5, 2023), https://firewalltimes.com/tiktok-data-breach-timeline [https://perma.cc/A4PH-9L3U].

79. Zen Soo, *Former ByteDance Executive Says Chinese Communist Party Tracked Hong Kong Protesters via Data*, AP (June 7, 2023), https://apnews.com/article/tiktok-china-bytedance-user-data-d257d98125f69ac80f983e6067a84911 [https://perma.cc/U3XE-QJBN].

80. *Id.*

81. *Id.*

82. Chan & Hadero, *supra* note 74.

83. Laura He, *Wait, Is TikTok Really Chinese?*, CNN (Mar. 28, 2024), https://www.cnn.com/2024/03/18/tech/tiktok-bytedance-china-ownership-intl-hnk/index.html [https://perma.cc/DH9S-NNJZ].

84. *Id.*

85. Rogier Creemers, Graham Webster, & Paul Triolo, *Cybersecurity Law of the People's Republic of China*, DIGICHINA (June 29, 2018), https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017 [https://perma.cc/72U6-DFTD].

86. *Id.*

dubbed Project Texas because of its goal to house all protected private information exclusively at an Oracle server in Texas,[87] but there have been no updates to Project Texas's official page since January of 2023, over two years ago.[88] However, Project Texas was stillborn, having no impact on congressional consideration.[89] Even with the divest-or-ban Act now instituted, China also has the power to block such a sale due to its classification as a tech export.[90]

Furthermore, TikTok's now phased-out moderation guidelines censored videos on topics sensitive to the CCP, including the Tiananmen Square massacre and Tibet's fight for independence; these instructions were rescinded prior to 2023.[91] These former guidelines fueled fears that China was attempting to influence the American population through TikTok's algorithm.[92] Lisa Monaco, the former U.S. Deputy Attorney General stated, "Our intelligence community has been very clear about China's efforts and intention to mold the use of this technology using data in a worldview that is completely inconsistent with our own."[93] Anton Dahbura, executive director of Johns Hopkins University Information Security Institute, noted that information useful to foreign threats was not limited to military or political data, but also included economic, food processing, and educational sectors.[94] However, TikTok's connection to China would be much less problematic if the U.S. enacted broader, stronger data privacy laws over the tech industry. In other words, TikTok's data collection and security risks are magnified because of the risk of Chinese access.

Perhaps a more direct threat lies in Chinese hardware, namely the technology provided by Huawei and other Chinese companies like ZTE. Amidst an ongoing investigation into Chinese espionage, federal officials were alarmed to find Huawei equipment within cell towers near American military bases in rural areas of the country.[95] FBI analysis showed the equipment was capable of intercepting and interfering with highly confidential communications, including those from the Department of Defense (DOD).[96] However,

87. Baker-White, *supra* note 73.

88. *Project Texas Milestones*, TIKTOK, https://usds.tiktok.com/?gad_source=1&gclid=Cj0KCQjwzZmwBhD8ARIsAH4v1gX_bX1lBhf5mbq_gn4zJO6vTrXI7Rp2asFvgKM9U8g4_FWnOVt9rd8aApLJEALw_wcB (last visited Mar. 29, 2024).

89. Matt Perault, *What Happened to TikTok's Project Texas?*, LAWFARE (Mar. 20, 2024), https://www.lawfaremedia.org/article/what-happened-to-tiktok-s-project-texas [https://perma.cc/C9C7-Q48R].

90. Meaghan Tobin, *Why Beijing Could Have the Last Say on Any TikTok Deal*, N.Y. TIMES (Jan. 17, 2025), https://www.nytimes.com/2025/01/17/us/politics/tiktok-ban-sale-china.html [https://perma.cc/M6BU-CW4D].

91. *TikTok Censors References to Tiananmen and Tibet*, BBC (Sept. 25, 2019), https://www.bbc.com/news/technology-49826155 [https://perma.cc/T8VD-ZCQC].

92. Bobby Allyn, *The House Passed a TikTok Ban Bill. But Is the App Really a National Security Threat?*, NPR (Mar. 14, 2024), https://www.npr.org/2024/03/14/1238435508/tiktok-ban-bill-congress-china [https://perma.cc/8GPH-V9Y8].

93. Perrigo, *supra* note 76.

94. Chan & Hadero, *supra* note 74.

95. Katie Bo Lillis, *FBI Investigation Determined Chinese-made Huawei Equipment Could Disrupt U.S. Nuclear Arsenal Communications*, CNN (July 25, 2022), https://www.cnn.com/2022/07/23/politics/fbi-investigation-huawei-china-defense-department-communications-nuclear/index.html [https://perma.cc/QY9Q-E5JB].

96. *Id.*

Huawei strictly maintains that its equipment is only capable of "operat[ing] on the spectrum allocated by the FCC for commercial use. This means it cannot access any spectrum allocated to the DOD."[97] This has not prevented multiple other countries including Australia and Canada from banning the purchase of products from Huawei and similar companies like ZTE.[98] These countries have pointed to the vaguely written cybersecurity laws that grant the CCP broad power over tech and telecom companies.[99] Concerns over Huawei are compounded due to the advent of 5G, which brings problems of separating signals for secure communications.[100]

In response to these concerns, the FCC blacklisted Huawei—among other companies—from its federal subsidy program, restricting recipients of those subsidies from purchasing Huawei products.[101] Congress also approved a near $2 billion budget to reimburse telecom companies for the removal of Chinese-made cellular technology and the installation of non-Chinese technology, an initiative dubbed "rip and replace."[102] However, the costs were higher than the FCC expected, and now, requests are met with a 40 percent cost compensation, with many carriers completely pausing replacement efforts.[103] Rip and replace has disproportionately affected smaller telecom companies who relied on the cheaper products supplied by China.[104] Huawei brought a due process claim that failed as the Supreme Court found that the relevant legislation, Section 889, passed the rational basis test as it did not impinge upon Huawei's private contractual relationships but rather the contractual relationships of the federal government, deeming the right to contract with the federal government "a privilege, not a constitutionally guaranteed right."[105]

The escalation of the U.S.-China tech war has also made it difficult to differentiate efforts between maintaining technological advantage and national security from Sinophobia, or yellow peril fearmongering. On October 7, 2022, the U.S. blocked China's access to the almost exclusively American-made computer hardware necessary to power AI, and in March 2023, Japan and the Netherlands joined the U.S. in enforcing strict export controls on materials necessary for advanced semiconductor manufacturing.[106] China has retaliated with several countermeasures and has enacted policies to become fully self-sufficient in

97. *Id.*

98. Noah Berman, Lindsay Maizland, & Andrew Chatzky, *Is China's Huawei a Threat to U.S. National Security?*, COUNCIL ON FOREIGN RELATIONS (Feb. 8, 2023), https://www.cfr.org/backgrounder/chinas-huawei-threat-us-national-security [https://perma.cc/2JMT-NPA5].

99. *Id.*

100. *Id.*

101. Lillis, *supra* note 95.

102. Cecilia Kang, *'Rip and Replace': The Tech Cold War is Upending Wireless Carriers*, N.Y. TIMES (May 10, 2023), https://www.nytimes.com/2023/05/09/technology/cellular-china-us-zte-huawei.html [https://perma.cc/QBD5-UCLM].

103. *Id.*

104. *Id.*

105. Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607, 652 (E.D. Tex. 2020).

106. Gregory C. Allen, *China is Striking Back in the Tech War with the U.S.*, TIME (July 20, 2023), https://time.com/6295902/china-tech-war-u-s [https://perma.cc/SZ8Q-M5FK].

technological manufacturing, but such efforts have been hampered by the recent trade restrictions.[107]

No evidence has been offered nor has a "smoking gun" been found to suggest that any U.S. data or communications have genuinely been compromised,[108] but when it comes to national security, it is difficult to fault the government for remaining proactive rather than reactive.

WAXING PARANOIA

"Not a single thing that we heard in today's classified briefing was unique to TikTok. It was things that happen on every single social media platform."

—Rep. Sara Jacobs, D-CA[109]

The demarcation of legitimate suspicions and Sinophobia can be difficult to pinpoint, but few clearer examples exist than the senate hearing of several Big Tech CEOs on January 31, 2024, including the CEO of TikTok, Mr. Shou Chew.[110] Senator Tom Cotton (R-AR) asked Chew to declare his nation of citizenship: Singapore.[111] Senator Cotton proceeded to interrogate Chew with a series of questions that many Singaporeans deemed ignorant and even racist, and *Washington Post* characterized Cotton's questions as "McCarthy-esque,"[112] hearkening back to the wave of Communist paranoia during the Cold War. After Chew had already confirmed his Singaporean citizenship, Senator Cotton asked another three times[113] whether Chew was affiliated with China or the CCP, apparently unaware that neither Singapore nor China allows for dual citizenship or that Chinese citizenship is required to join the CCP.[114] Senator Cotton also asked Chew to confirm the existence of the Tiananmen Square Massacre, to declare that China was committing genocide against the Uyghur people, and to denounce Xi Jinping as a dictator[115]—all actions that could incur heavy repercussions for somebody should they interact with the CCP. His objective seems to have been to coerce a confession—direct or indirect—from Chew proving his allegiance to the CCP.

However, it is important to note that the January 31, 2024, hearing was held to discuss the safety of children on various social media platforms, including X, Snapchat, Meta,

107. *Id.*

108. *Id.*

109. Kevin Freking, Haleluya Hadero, & Mary Clare Jalomick, *House Passes a Bill That Could Lead to a TikTok Ban if Chinese Owner Refuses to Sell*, AP (Mar. 13, 2024), https://apnews.com/article/tiktok-ban-house-vote-china-national-security-8fa7258fae1a4902d344c9d978d58a37 [https://perma.cc/Z4P7-JN9J] (quoting Rep. Sara Jacobs).

110. *Senate Hearing with CEOs of Meta, TikTok, X, Snap and Discord about Child Safety 1/31/24 Transcript*, REV (2024), https://www.rev.com/blog/transcripts/senate-hearing-with-ceos-of-meta-tiktok-x-snap-and-discord-about-child-safety-1–31–24-transcript [https://perma.cc/HBN5-S9JC].

111. *Id.*

112. Zen Soo, *Singaporeans Bemoan U.S. Senator's 'Ignorant' Grilling of TikTok CEO*, AP (Feb. 2, 2024), https://apnews.com/article/tiktok-shou-chew-singapore-cotton-af72f8d53686f8bb378aec1193cdee6c [https://perma.cc/Z655-BXWR].

113. *Transcript*, *supra* note 110. The relevant questions were: 1) "Have you ever applied for a Chinese citizenship?"; 2) "Have you ever been a member of the Chinese Communist Party?"; and 3) "Have you ever been associated or affiliated with the Chinese Communist Party?"

114. Soo, *supra* note 112.

115. *Transcript*, *supra* note 110.

TikTok, and Discord.[116] Given the context, Senator Cotton's questions appear even more out of line. When Chew evaded these questions and attempted to keep the question on the topic of child safety on TikTok, Cotton interjected with this bizarre line of questioning:

> Are you scared? . . . . Are you scared that you'll lose your job if you say anything negative about the Chinese Communist Party? . . . . Are you scared that . . . you will be arrested and . . . disappear the next time you go? Are you scared that you'll be arrested and disappear the next time you go to mainland China?[117]

Senator Cotton's derailment of the hearing illustrates the fearmongering potential of the yellow peril myth. The constant misrepresentations of Chew's nationality are a clear attempt at drawing connections to the perceived threat of the Chinese government, even where none exist. Though about seventy-five percent of Singapore's population is ethnically Chinese, Chew is Singaporean and identifies as such.[118] An anonymous Singaporean left a comment on a clip of the hearing stating, "Just because he looks Chinese, doesn't mean he's Chinese."[119] Likely made in passing, this comment captures a core issue of the yellow peril myth, especially the type present during Japanese internment and the Vietnam War—all Asians look like the enemy.

Furthermore, it is clear from the rhetoric and language within the ban itself that TikTok's conspicuous tie to China is the driving force behind its scrutiny. Eva Galperin, the director of cybersecurity at the Electronic Frontier Foundation, posted, "If you think the U.S. needs a TikTok ban and not a comprehensive privacy law regulating data brokers, you don't care about privacy, you just hate that a Chinese company has built a dominant social media platform."[120] Likewise, Julia Angwin, founder of The Markup, an investigative tech news site, wrote, "When you dig into the national security allegations against TikTok, it is telling that most of the charges could just as easily be levied against the U.S. tech giants."[121]

Indeed, Meta has had a proven data leak in which developers from "China, Russia, and other 'high-risk' countries" were able to access Facebook user data prior to 2014,[122] and a 2021 leak exposed millions of Twitter users' non-public information.[123] On a list of the 72 largest data breaches ever to occur, Facebook holds two rankings (#8 and #36) while

116. Soo, *supra* note 112.

117. *Transcript*, *supra* note 110.

118. Soo, *supra* note 112.

119. *Id.*

120. Eva Galperin (@evacide), X (Mar. 23, 2023), https://twitter.com/evacide/status/1638957449909788672 [https://perma.cc/NAZ3-2NUE].

121. Julia Angwin, *How to Fix the TikTok Problem*, N.Y. TIMES (Mar. 20, 2023), https://www.nytimes.com/2023/03/20/opinion/tiktok-ban-big-tech-china.html [https://perma.cc/4F67-W987].

122. Brian Fung, *US Senators Seek Answers from Meta on Whether User Data was Accessed by China, Russia, and Others*, CNN (Feb. 7, 2023), https://www.cnn.com/2023/02/07/tech/lawmakers-meta-user-data-china-russia-index.html [https://perma.cc/2URJ-PAL2].

123. Peter Suciu, *Meta Fined for 2021 Data Breach as Millions of Twitter Users' Data Also Leaked*, FORBES (Nov. 28, 2022), https://www.forbes.com/sites/petersuciu/2022/11/28/meta-fined-for-2021-data-breach-as-millions-of-twitter-users-data-leaked/?sh=5c6cac0bdb6a [https://perma.cc/Q7ZS-7M6M].

Twitter is ranked at #14.[124] Further, Google, perhaps the tech company most deeply ingrained into modern society, generates 80 percent of its revenue from its advertising business, which relies on user data that Google collects from its search engine.[125] Google Analytics also allows companies to track the activity of users of their websites, which the Commission Nationale de l'informatique et des Libertés (CNIL), a French data privacy regulation body, claimed exposed French user data to U.S. intelligence due to Google's lax security during the data transfer from Europe to the U.S.[126]

Regardless of the depth of CCP espionage, the sheer amount of private information collected by social media companies is the primary issue. Angwin also stated, "While Congress has been up in arms about TikTok, it has failed to pass even the most basic comprehensive privacy legislation to protect our data from being misused by all the tech companies that collect and mine it."[127] When enormous social media companies collect millions of Americans' private data, foreign threats are sure to try to crack into the treasure vault; the solution lies in making sure that this vault does not exist in the first place.

Now, the concern with TikTok likely lies with its potential *compliance* with China rather than its poor defenses, but politicians and security experts alike have emphasized the gravity and ubiquity of Chinese espionage. It seems self-contradictory that an entity capable of infiltrating the military and other federal facilities would be deterred by an inability to just ask for the data they want; it could surely access the desired data through other means.[128] A study by Georgia Tech concluded that China "didn't need special legal powers over ByteDance to gain access to data, so much is offered up freely."[129]

While the TikTok ban bill passed with massive bipartisan support, several members of the House of Representatives pointed out the authoritarian direction the government was taking.[130] Rep. Tom McClintock (R-Calif.) noted that "the answer to CCP-style propaganda is not CCP-style oppression," and Rep. Jim Himes (D-Conn.) declared:

One of the key differences between us and those adversaries is the fact that they shut down newspapers, broadcast stations and social media platforms. We do not . . . . We trust our citizens to be worthy of their democracy. We do not trust our government to decide what information they may or may not see.[131]

124. Abi Tyas Tunggal, *The 72 Biggest Data Breaches of All Time [Updated 2024]*, UPGUARD, https://www.upguard.com/blog/biggest-data-breaches [https://perma.cc/TZY8-YFSC] (last updated Sept. 16, 2024).

125. Amy Beloume, *The Problems of Internet Privacy and Big Tech Companies*, THE SCIENCE SURVEY (Feb. 28, 2023), https://thesciencesurvey.com/news/2023/02/28/the-problems-of-internet-privacy-and-big-tech-companies [https://perma.cc/SSQ9-Q7DT].

126. *Id.*

127. Angwin, *supra* note 121.

128. *See* Alan Woodward, *China Could Be Harvesting TikTok Data, But Much of the User Information Is Already Out in the Open*, THE CONVERSATION (Mar. 21, 2023), https://theconversation.com/china-could-be-harvesting-tiktok-data-but-much-of-the-user-information-is-already-out-in-the-open-201897 [https://perma.cc/W6BE-DPTR].

129. *Id.*

130. Freking et al., *supra* note 109.

131. *Id.*

To be sure, a ban on TikTok would be unprecedented and run afoul of "every free market principle and norm" of internet freedom.[132] The sale of TikTok to a big tech company would also generate a slew of anti-trust issues in both the U.S. and China,[133] although that is a topic beyond the scope of this article. Furthermore, even with a divestiture, the vault of private information that TikTok collects—again, not unique to its data collection policies—still poses risks of leakage and hacking by China. Advocates of the bill appear to believe that separating TikTok from ByteDance would add a layer of defense or deter China's alleged espionage. Senator Marco Rubio (R-FL) characterized TikTok as "a platform with enormous power to influence and divide Americans whose parent company ByteDance remains legally required to do the bidding of the Chinese Communist Party."[134]

However, this statement is confusing at best and misleading at worst. The issue of TikTok's connection to ByteDance lies in the latter's obligation to hand over data if the CCP wields its cybersecurity laws. While the forfeiture of such information would be harmful, Senator Rubio appears to be claiming that ByteDance, at the behest of the CCP, could command TikTok as a pro-CCP propaganda tool. No evidence has been shown that ByteDance has handed or would hand over any information, and even less evidence exists to suggest that ByteDance has received or would comply with a demand to weaponize TikTok.

RETROSPECTIVE THOUGHTS ON THE BAN

"The First Amendment means the government can't restrict Americans' access to ideas, information, or media from abroad without a very good reason for it – and no such reason exists here."

—Jameel Jaffer, executive director of the Knight First Amendment Institute at Columbia University[135]

Senator Maria Cantwell (D-WA) stated that "Congress is acting to prevent foreign adversaries from conducting espionage, surveillance, maligned operations, harming vulnerable Americans, our servicemen and women, and our U.S. government personnel,"[136] without offering any actual evidence showing that TikTok/ByteDance have received any requests from the CCP, or that relevant data is held in servers within the CCP's jurisdiction. The legislature's approval of the ban without revealing any concrete information only serves to reinforce the idea of some nebulous, Chinese threat and implicitly signs off on the use of unsubstantiated claims to fight that so-called threat. This is not to say that there is no threat,

132. Chan & Hadero, *supra* note 74 (quoting Karim Farhat, researcher with the Internet Governance Project at Georgia Tech).

133. Matt O'Brien, *US Lawmakers Say TikTok Won't Be Banned If It Finds a New Owner. But That's Easier Said Than Done*, AP, https://apnews.com/article/divesting-tiktok-buyer-330c3a10d80aa9223facbfba0296a608 [https://perma.cc/AYQ3-6ZPW] (last updated Mar. 13, 2024).

134. Freking et al., *supra* note 109 (quoting Sen. Rubio).

135. *Knight Institute Comments on Passage of TikTok Ban in Foreign Aid Package*, KNIGHT FIRST AMENDMENT INST. (Apr. 24, 2024), https://knightcolumbia.org/content/knight-institute-comments-on-passage-of-tiktok-ban-in-foreign-aid-package [https://perma.cc/4VCD-FKSP].

136. Bobby Allyn, *President Biden Signs Law to Ban TikTok Nationwide Unless It is Sold*, NPR, https://ww.npr.org/2024/04/24/1246663779/biden-ban-tiktok-us [https://perma.cc/T9AS-LVY9] (last updated Apr. 24, 2024).

but the vague, hand-wavy statements of the dangers of Chinese surveillance only lead to paranoia, not informed decision-making of our data usage.

While this article is not intended to address the constitutionality of the Act, *TikTok v. Garland*, in which the Supreme Court unanimously upheld the ban,[137] illustrates further the lack of any concrete evidence supporting the government's allegations. The Court noted that ByteDance had proposed an agreement meant to alleviate the government's concerns, but the agreement was ultimately inadequate in mitigating national security concerns.[138] The Court held that divestiture was "necessary to address its *well-supported* national security concerns,"[139] but neither the main opinion nor the Congressional Research Service (CRS) Reports[140] offered any concrete evidence beyond TikTok's industry-standard data collection practices and its connection to China through ByteDance.

Justice Gorsuch's concurrence sheds light on ambiguous grounds on which the Court upheld the Act. Even though he maintained that the government supplied "compelling reason for concern," he recognized that attempting to predict what a foreign adversary may do involves "large elements of prophecy."[141] Justice Gorsuch also weighed alternatives to a divest-or-ban scheme. Of note, he remarked that even if Congress were to impose heavy criminal penalties for the exportation of U.S. user data to China, it would "do little to deter the PRC (People's Republic of China) from exploiting TikTok to steal Americans' data,"[142] reasoning that TikTok's development history in China renders it vulnerable to abuse by the CCP. Despite recognizing the risks unique to TikTok that may justify the ban, Justice Gorsuch finished his concurrence by admitting, "I cannot profess the kind of certainty I would like to have about the arguments and record before us."[143]

The reasoning and support that has been revealed since this article was first written in March 2024 lends credence to the government's attempts to protect Americans' data. However, the ban would not address the issues posed by data collection by massive tech companies, suggesting that another motivation may be at play: anti-Asian paranoia. Kate Ruane, from the Center for Democracy & Technology's Free Expression Project, argued, "Congress shouldn't be in the business of banning platforms . . . . They should be working to enact comprehensive privacy legislation that protects our private data no matter where we choose to engage online."[144] Likewise, Senator Edward Markey (D-MA) stated, "TikTok poses a serious risk to the privacy and mental health of our young people . . . . But that problem isn't unique to TikTok and certainly doesn't justify a TikTok ban . . . . American companies are doing the same thing, too."[145] Indeed, without any substantiation on the

137. TikTok Inc. v. Garland, 145 S. Ct. 57 (2025).

138. *Id.* at 64.

139. *Id*. at 72 (emphasis added).

140. *See* Stephen P. Mulligan, CONG. RSCH. SERV., LSB10940, RESTRICTING TIKTOK (PART I): LEGAL HISTORY AND BACKGROUND (2023); *see also* Peter J. Benson et al., LSB10942, RESTRICTING TIKTOK (PART II): LEGAL HISTORY AND BACKGROUND (2024).

141. TikTok Inc. v. Garland, 145 S. Ct. 57, 74 (2025) (Gorsuch, J., concurring) (quoting Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 111 (1948)).

142. *Id*. at 75.

143. *Id.*

144. *Id*.

145. *Id.*

claims of Chinese surveillance, the arguments levied against TikTok could just as easily be brought against any of the big tech firms operating other major social media outlets like X, Discord, Meta, and Snapchat.

Congress's approach toward banning TikTok inadvertently serves as dissemination of yellow peril paranoia as established truths to the general public. Instead, the true solution lies in making sure that these companies do not possess a level of personal data on their consumers such that malicious access to that data would constitute a national security threat. Place restrictions on how accurately a consumer's geographic location can be ascertained, have users choose from age brackets, bar access to contact lists, and prevent apps from communicating with each other and the device itself to collect more information. If the risk to the American people is as high as Congress is claiming, then it must take measures to address the root cause, rather than implement a band-aid fix that only delays inevitable data leaks while reinforcing the notion of Asian Americans as perpetual foreigners and threats.

CONCLUSION

"It really comes down to: do you treat China as a neutral actor – because if you treat China as a neutral actor, then yeah, this seems crazy, that there's some plot behind every tree . . . . However, China has shown us through its policies and actions it is not a neutral actor."

—Anna Puglisi, Senior Fellow at Georgetown University's Center for Security and Emerging Technology[146]

As stated, this paper's objective was to explore the interplay between the legitimate security concerns, which assuredly exist, and the perpetration of the yellow peril myth that has subsisted in America for centuries. TikTok certainly poses a threat, not only from foreign entities, but also as a negative force on the morale, mentalities, and critical thinking of its consumers. The claims about TikTok's deleterious effect on the mental health of the youth, especially, are much more well-substantiated than the risks of ByteDance's connection with China.

However, these dangers do not necessarily arise from TikTok's association with China and the CCP, but from its status as a social media app in general. It certainly should not exist in its current form, but nor should any of the other platforms like Facebook, Instagram, or X. However, it seems clear that its treatment and scrutiny are a result of a political agenda that is likely founded upon legitimate concerns but also undeniably serves to reinforce harmful conceptions of Asians in American society. The true solution in protecting the private information of American citizens is to prevent that information from pooling in the vaults of big tech companies, ripe for abuse not only from foreign threats, but domestic ones as well.

146. Lillis, *supra* note 95.