# TIKTOK BANS: A TAKINGS CLAUSE BLUNDER?

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## Introduction

TikTok is safe—for now. But one by one, its defenses are winnowing. In *TikTok Inc. v. Garland* (2025), the Supreme Court held that the latest ban on the app does not constitute a Free Speech Clause violation under the First Amendment. Thirty-nine states now ban TikTok on state government devices. And the app's survival is currently holding onto President Donald Trump's negotiations by a thread.

So, what's left for TikTok users? They are not out of options altogether; there is a Fifth Amendment claim that has mostly flown under the radar. Of the four primary cases challenging TikTok bans that affect private devices, all but one raised the argument that banning TikTok constituted a taking of property.[1] The only court to explicitly find no per se regulatory taking in these bans was the D.C. Circuit. On appeal, the Supreme Court did not address the question.

In this Case Note, I explore the possibility that individual TikTok users (sometimes called "creators" or "influencers") could sue states under a Takings Clause theory and create a circuit split. If they did so, courts will need to answer (1) whether the account holders hold an actionable property interest in their accounts; and (2) if so, whether permanently and totally depriving users of access to their accounts constitutes a taking.

## I. Neglected Takings Claims in Anti-TikTok Litigation

Challenges to a TikTok ban in 2020 primarily attacked executive power, but they exposed an interesting nugget: the app users' interest in the platform. On August 6, 2020, the Trump administration issued Executive Order 13,942, prohibiting "any transaction by any person . . . with ByteDance Ltd.," TikTok's parent

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[1] Four cases have challenged the bans as to private devices: *TikTok Inc. v. Trump* (D.D.C. 2020); *Marland v. Trump* (E.D. Pa. 2020); *Alario v. Knudsen* (D. Mont. 2023); and *TikTok Inc. v. Garland* (2025). All but *Alario* raised the argument that banning TikTok constituted a taking of property.

company. In response to the Executive Order, TikTok sued and won a partial preliminary injunction in *TikTok Inc. v. Trump* (D.D.C. 2020). While it was the company who sued, its users' interests were the backbone of TikTok's win: the district court measured the scope of presidential power against TikTok users' ability to engage in personal communications and import or export informational materials. The Executive Order exceeded the government's authority under the International Emergency Economic Powers Act because it "prevent[ed] . . . users from sharing noncommercial personal communication." After this, and before *TikTok* was ultimately dismissed, a TikTok user in *Marland v. Trump* (E.D. Pa. 2020) sued to enjoin the same Executive Order. There, the district court granted an injunction to allow TikTok "to remain available not only to Plaintiffs, but also to their millions of followers." President Joe Biden then revoked Executive Order 13,942, issuing in its place a narrower one that applied only to government devices. Both suits raised the Fifth Amendment argument, and both courts set it aside to address executive power instead. While the Takings Clause fell through the cracks, the TikTok users' interest seemed to peek through as a legitimate basis for a claim.

Litigation spiked in the form of Free Speech Clause claims when state and federal legislation tried to reach the app on personal devices again. In May 2023, Montana became the first state to completely prohibit TikTok from being offered in app stores and used on private devices. Montana TikTok users and the company quickly sued in federal district court to enjoin enforcement of the new law in *Alario v. Knudsen* (D. Mont. 2023). They did not claim that the ban constituted a taking but won a preliminary injunction on Free Speech and Commerce Clause grounds. Obscured by the First Amendment spotlight, the Takings Clause again fell through the cracks.

But the Supreme Court just moved the spotlight off the First Amendment—and perhaps onto the Fifth. On appeal from the D.C. Circuit, TikTok and ByteDance had sought to enjoin enforcement of a new legislative ban, the Protecting Americans from Foreign Adversary Controlled Applications Act. The Act gave TikTok's parent company a choice: divest from Chinese ownership or get out of town. In a per curiam opinion, the Court found no First Amendment violation. Like *TikTok*, *Marland*, and *Alario*, the opinion said nothing about the Fifth Amendment. But unlike those cases, its predecessor *did* have something to say about it.

One month before the Supreme Court took the First Amendment appeal, the D.C. Circuit rejected TikTok's argument that it faced a per se regulatory taking. The company (not the users, who were not party to this suit) claimed the Act would render it "defunct" in the United

States. In other words, TikTok argued that, as a company, it faced the kind of regulatory taking that would "completely deprive[ ]" it of "*all* economically beneficial use" of the app. The D.C. Circuit found only an "attenuated" connection between the Act and any diminution in value. Because the "Act authorizes a qualified divestiture before (or after) any prohibitions take effect," Judge Douglas Ginsburg noted, TikTok faced "a number of possibilities short of total economic deprivation." This is the only federal court opinion to date that grapples with whether preventing private TikTok usage is a taking.

To summarize the state of the litigation: the First Amendment door is closed; only one decision has addressed a Takings Clause argument; that argument came only from the company, not from the app's users; and that argument only tested the "all beneficial use" per se regulatory taking theory, not the "permanent physical invasion" taking theory. If the app does not survive the negotiations with China or more state bans, plaintiffs may seek to create a circuit split on "all beneficial use" or take the less-traveled path of "permanent physical invasion." This seems especially viable for TikTok "influencers" and others who earn revenue through their accounts. As the platform remains popular, the list of revenue-earning users is long. Small businesses sell their products through TikTok, artists and musicians use their accounts as their stage, comedy accounts upload videos the way television networks air shows on cable, and makeup artists promote products and upload performative makeovers. Users like these may find success in the framework of the Takings Clause.

## II. The Takings Clause

The Takings Clause doctrine has developed both categorical rules and balancing tests. As to the former, land use regulations that "sacrifice *all* economically beneficial uses" of the property or the permanent, physical occupation of one's land will always constitute a taking. Conversely, a nuisance regulation will never constitute a taking. Balancing tests weigh the extent to which the government's interference diminishes the property's value (or interferes with reasonable and distinct investment-backed expectations) against how the interference furthers the health, safety, and welfare of citizens.

The Supreme Court recently clarified the two types of takings. In *Cedar Point Nursery v. Hassid* (2021), the Court cautioned against the old distinction between "physical" and "regulatory" takings. Instead, it framed the categories of takings as "physical appropriation[s]" and "use restrictions." Physical appropriation presents a "categorical obligation" on the government to provide just

compensation, and it occurs "[w]hen the government physically acquires private property for a public use." Use restrictions, on the other hand, constitute takings only when they "go[ ] too far," which is determined by "balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."

Notably, Judge Ginsburg's one-paragraph discussion of the Takings Clause in *Garland* only touched on diminution-in-value claims. It did not address whether TikTok faced the other kind of per se taking, where government action "requires an owner to suffer a permanent physical invasion of her property."

## III. Property Interests in TikTok Accounts

Assuming the accounts and their content are property, to whom do they belong? If the answer is solely ByteDance (or whoever corporate ownership may transfer to), then the users have no property interest in their accounts. Their content grows from the accounts, like crops, but the crops are distinct from the farm itself. As a result, any Takings Clause argument would need to rest on the intellectual property housed in the accounts, rather than on the accounts themselves. But if the answer includes the users, their accounts seem more akin to a field on the farm, eligible for the protection of the Fifth Amendment. However, the distinction between user-generated "content" and "accounts" is muddled.

A TikTok user's property interest—if any—is somewhat defined by the platform's Terms of Service agreement, last updated in November 2023. "When you submit User Content through the Services," it reads, "you agree and represent that you own that User Content." The "represent that you own" clause can be read more than one way. One interpretation is that the user promises the content they upload is not stolen. Another is that, upon posting their content, the user holds out to the viewers that they hold a property interest in that content. Under § 7, the Terms of Service further state that the user "will own any User Content . . . [they] upload or transmit through the Services," despite TikTok owning "all content" (like images, photos, audio, videos, and music on the app, as well as the app's look and feel), and despite User Content being "non-proprietary." It is unclear what the accounts themselves are in relation to "User Content." Users arguably create them "through the Services," and accounts are essentially the sum of the videos—the content—uploaded to them. Then again, the app's look and feel (which the user does not own) is arguably the sum of all its accounts.

TikTok's Intellectual Property Policy, last updated on March 27, 2025, supports content ownership in the user because it does not make the user agree to transfer away their copyright. Copyright ownership lies with the creation's "author"—its "originator." Per § 201 of the Copyright Act, even if there are multiple contributors to the work, the overall copyright owner (here, the user) retains the ownership privileges absent an express transfer of the copyright. The Intellectual Property Policy, in other words, does not explicitly claim to own the copyright in any content the user creates.

However, there may be limits to what the user owns. As for platform revenue, TikTok's Terms of Service seem to contradict their support page on users' promotional rights. According to the Terms of Service, the user "[has] no right to share in any such revenue, goodwill or value whatsoever." This platform revenue point is unsurprising, but the agreement continues. Except as otherwise provided, the user "[has] no right to receive any income or other consideration from any User Content . . . including in any User Content created by [them]." Moreover, the user "[is] prohibited from exercising any rights to monetize or obtain consideration from any User Content within the Services." The Terms of Service further "[grant] a non-exclusive, limited, non-transferable, non-sublicensable, revocable, worldwide license to access and use the . . . Content solely for [the user's] personal, *non-commercial* use" (emphasis added). But the Terms of Service are not the entire story. On the "Promoting a brand, product, or service" page, the company expressly states that the user "can post content that promotes a brand, product, or service on TikTok," including "[p]romoting yourself or your own business" or "a third party brand . . . in exchange for payment or any other incentive." All the user must do is disclose their commercial relationship with the brand. Users who wish to turn a profit face a minefield of mixed messaging from the platform.

So far, the discussion has focused on user-generated content—it is far less clear who owns the accounts themselves. The Terms of Service dedicate only five short paragraphs to § 4, "Your Account with Us." To use the platform, the user must agree they "are solely responsible . . . for the activity that occurs under [their] account." Responsibility for what happens under one's account might compare to a stick in one's property bundle, but it sounds instead like an acceptance of liability for anything you do. After all, TikTok holds ultimate control when it "reserve[s] the right to disable [the user's] account at any time." Unlike this license-like arrangement, federal and state governments cannot take away a citizen's land "at any time" without just compensation. A user's account, then, is not so analogous to a farmer's plot of land. However, the user "must" ultimately "create

an account"; in other words, the account could not be anyone's property—including TikTok's—if the user themselves had not created it. In this way, comparing accounts to plots of land seems incomplete as far as creation is involved.

Beyond Terms of Service, concepts used in scholarship and case law to determine whether social media accounts constitute property also speak to whose property the accounts may be. For example, the property interest in an email account as a "digital asset" arises in estate conflicts where beneficiaries seek access to a decedent's account. Some scholarship dismisses consideration of these accounts as property because "their value comes specifically from being linked to other accounts," unlike a bank account. However, this mischaracterizes the interests of TikTok influencers—their interest is monetary, even reputational. In other words, the user has an interest in their *account itself*, not just the content therein. It's as if the accounts are a plot of land on which the content creator builds a digital storefront to entice patrons: that storefront is just as crucial to the store's mission as the goods or services themselves. Whether a merchant could find a new storefront is not relevant for a Takings Clause analysis; the same would appear to be true for an influencer.

The monetary interest an influencer has in their TikTok account may "double dip" in a Takings Clause analysis. Compare a farm taken by eminent domain. If its crops add to the monetary value of the farm, to its fair market value, the crops (and their probable yield) guide the calculation of just compensation. But the crops do not merely impact the fair market value of the land. A farmer who owns the plot of land has a property interest in the land, but also any improvements thereon. Therefore, crops grown from the land constitute a property interest, even if only personal rather than real.

Social media cases outside of the eminent domain context can be equally illuminating, but contradictory. In *Biden v. Knight First Amendment Institute at Columbia University* (2021), the Supreme Court faced the question of whether President Donald Trump's then-Twitter account was his own for purposes of the First Amendment. The substantive issue was "whether a government actor violated the First Amendment by blocking another Twitter user," which depended on who owned, and thus had a right to exclude another user from, the account. If the social media account was a public forum, then Trump could not block other users who criticized him. While the Court remanded the case to dismiss for mootness, Justice Clarence Thomas concurred to say it was not a "government-controlled space[ ]." He further noted how "[a]ny control Mr. Trump exercised over [his Twitter account] greatly paled in comparison to Twitter's authority . . . to

remove the account," which muddied the question of how much his Twitter account "resembled a public forum." Whether the public forum discussion transposes onto the property discussion is untested in the social media space.

## IV. Taking the Takings Clause Too Far?

Ultimately, a court wrestling with whether banning TikTok constitutes a taking of the accounts must face the difficult question of TikTok account ownership. On this question, there is an evident lack of clarity from First Amendment social media cases and existing commentary on the proprietary nature of internet accounts. While areas like copyright may provide an interesting path to determining ownership, a court would more likely look to the Terms of Service agreement itself—asking who the parties themselves think owns the accounts. Using Terms of Service agreements connects account property interests to copyright authorship by transferring, or failing to expressly transfer, copyright ownership from the creator to the platform. Relying on contract law in this way also provides a path of less resistance—and less legal novelty—that courts may find most prudent in such unexplored terrain. While avoiding the Takings Clause argument would leave a looming question mark over the proprietary nature of these accounts, it would avoid potentially abusing the Takings Clause itself again.

Even if a court decides that the accounts are the user's, it may find that state police powers defeat characterizing the ban as a taking. States can legislate according to the health, safety, and welfare of their citizens, which may encompass national security concerns. In fact, those who have legislated against TikTok cite these very concerns. So long as addressing national security is a legitimate state police power, a TikTok ban that might otherwise constitute a taking could escape the eminent domain argument.

Despite these obstacles, parties' continued attempts to raise Takings Clause arguments—and the Supreme Court's deafening silence on them—suggest that courts may need to face these questions sooner rather than later. Even if the argument proves to be an uphill battle, state and national fights over the app suggest the battle will happen nonetheless. If a TikTok ban constitutes a taking, it could turn the tide of social media regulation, for better or for worse.

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