



FORUM

When Two Worlds Collide: Evaluating Free Speech and National Security Claims around Trump’s WeChat Ban

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Introduction

Immigrants have come a long way from hopelessly striving toward the 20th-century ideal of full assimilation into American society. Descendants of Jewish immigrants, whom many believed could not be trusted, can now proudly take credit for developments in the sciences, politics, medicine, and the arts; blossoming Chinatowns have replaced enclaves that once shied away from any expression of their heritage for fear of persecution; Mexicans whose ancestors worked under poor conditions and compensation in the fields founded the United Farm Workers to ensure their voices were heard. The stories of immigrants who refused to merely conform to the expectations placed upon them are endless. They have long known that the immigrant experience entails keeping close to — and not abandoning — their unique cultures and communities.

It was thus that President Trump’s August 2020 ban on Chinese messaging service WeChat was met with large-scale trepidation amongst the Chinese-American community. For the unfamiliar, WeChat is the world’s third-largest messaging service and by far the most popular means of communication amongst first-generation Chinese immigrants, with nearly three million active daily users in the US. For many, it is the primary — if not only — means of keeping in touch with fellow

Chinese immigrants and families back home. However, given its Chinese ownership, the app has been subject to intense scrutiny amid escalating tensions between the two countries.

Legal action against the ban was swiftly taken, resulting in a preliminary injunction of the original order. And before further arguments were made, the Biden administration walked back the Trump-era restrictions. However, they also made it clear that they would continue probing the issue and that a further ban was not entirely out of the question just yet. In this article, I examine relevant constitutional arguments that may have been made in favor of the ban had further litigation continued. Whether or not the ban stands to constitutional muster will ultimately determine whether it is a legal restriction with unfortunate consequences or a fundamental violation of certain Americans' right to communicate freely.

I. Background

President Trump initially issued Executive Order 13943 in August 2020, prohibiting “any transaction that is related to WeChat by any person, or with respect to any property... with Tencent Holdings Ltd [the parent company of WeChat]... or any subsidiary of that entity.” The order outlined seven restrictions — each prohibiting a certain type of transaction with WeChat or its parent company — that together would have immediately rendered WeChat services both *useless* and *illegal to use*. In particular, restrictions 1-4 would have crippled WeChat's technological infrastructure and content-distribution backbone, while restriction 6, which bars “any utilization of the WeChat mobile application's constituent code, functions, or services,” would have been nothing short of an explicit ban on using WeChat's services *for then-users* in the United States.

Make no mistake: most of the restrictions of the order could only be reasonably challenged in court by Tencent itself.¹ But restriction 6, whose target is the American populace rather than a service/network/other technology managed by Tencent, could reasonably be challenged by American WeChat users, as it places an explicit restriction on a *place* Americans may go to express speech. My analysis hereinafter will focus on restriction 6, because 1) resolving first amendment challenges to restriction 6 entails tackling issues that would arise in challenges to other portions of the ban, and 2) first amendment challenges to restriction 6 most closely

¹ Foreign entities may bring suit in US courts; see *Servicios Azucareros v. John Deere*.

echo the concerns of American WeChat users, who are the most important stakeholders in this issue.

Constitutionally, time, place, or manner (TPM) restrictions are permissible, but they must 1) apply equally to all forms of speech subject to the TPM restriction (*i.e.* be content-neutral), and 2) pass the test of intermediate scrutiny.² Given that the ban seeks to impose a broad and sweeping restriction on the use of WeChat, it is clear that it passes the content-neutrality criterion: no particular message substance would be favored over another since *all* communication on WeChat would be prohibited. Thus, the only — albeit substantial — remaining obstacle that the ban must overcome is the test of intermediate scrutiny, which requires that a TPM restriction 1) serve a significant governmental interest unrelated to speech content, 2) be narrowly tailored, and 3) leave open adequate channels for communication.

II. Does there exist a significant government interest that would be served by the ban?

As stated in President Trump’s initial executive order, the central motivation for issuing the ban is to protect national security. (The executive order clarifies that other threats, such as those to foreign policy and the economy, derive from the primary threat to US national security.) The precise definition of “national security” is somewhat elusive, but most would agree with the *National Law Review’s* characterization, which says that it “encompasses safeguarding the nation’s borders against foreign threats and terrorism... [which, in particular, may include] cyber-crimes, cyber-attacks, and other internet-based crimes.” And like most, we will grant that national security is a significant governmental interest unrelated to the particular content of restricted speech in this case.

Would the ban — as outlined in the original executive order and implemented in the Commerce Secretary’s addendum — prevent some action that gravely endangers US national security? The executive order would answer affirmatively, holding that the relevant action it prevents is the capture of “vast swaths of information from its users, which threatens to allow the Chinese Communist Party access to Americans’ personal and proprietary information.” This conclusion, however, is based on multiple unsound foundations.

First, the characterization of the information WeChat collects as “personal and proprietary” is misleading, if not plainly incorrect. Upon registering, users must agree to a privacy policy that explicitly describes how one’s information will be

² First developed in *Craig v. Boren*.

shared with other subdivisions of Tencent, service providers (middlemen providing services that enable the functioning of the app), third parties with whom the user interacts, advertising partners, and notably, *governments/regulatory agencies that request it*. Of course, this finding is wholly unsurprising to the average WeChat user. In addition to the common knowledge that using an online service will expose one's information to its administrator, there is also a common cultural element at play: many WeChat users, as first-generation Chinese immigrants, are familiar with the authoritative role the CCP takes in regulating the flow of information and communication. A sentiment of an anonymous user on tech forum *SlashDot* sums up the typical WeChat user's attitudes on this issue: "WeChat is a great app, and I use it all the time. But I have never considered it to be private." Ultimately, users are *knowingly* consenting to share their data with WeChat and its wide range of affiliates, so the suggestion that users' "personal and proprietary" information will land into the hands of an actor that shouldn't have access to it — including the CCP — is both legally and empirically incorrect.

Second, the mere collection of "vast swaths of data" on consenting American users is not in itself a threat to national security, even if this data lands into the hands of presumed US adversaries like the CCP. It is certainly true that WeChat follows the typical social media company strategy of collecting a wide range of identifying information and day-to-day activity data from users that may compromise their individual privacy, but it is difficult to see how such perfunctory data could be used to threaten US national security as a whole. Knowledge of what certain consenting individuals are doing, where they are going, and what some of their preferences are seldom, if ever, provides the edge needed to engineer large-scale attacks on US citizens or institutions. And the US government has implicitly recognized this fact: the combined revenue of the data analytics and online advertising market — both heavily reliant on collection and exchange of highly specific personalized data — totaled almost \$100 billion in 2020 with no indication of slowing down. These markets, which feature thousands of companies of varying sizes, are officially sanctioned — and even participated in — by the US government. Were the possession of terabytes of perfunctory data truly a prospect with imminent national security concerns, history suggests governmental oversight would be swift and uncompromising — or at the very least, more stringent than the lax attitude

currently adopted that treats personal data as little more than an arbitrary, freely exchangeable good.³

In short, there is little evidence to suggest that a blanket ban on the use of WeChat would significantly remedy any existing national security vulnerability.

III. Would the WeChat ban leave open adequate channels for communication?

As established in *Ward v. Rock of Racism*, “the basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded a forum that is accessible and where the intended audience is expected to pass.” In other words, the subject of a TPM speech restriction must be afforded another venue in which the intended audience may reasonably participate in a similar capacity. Appellate court precedent has established this requirement as one admitting a strict interpretation. For example, refusal to grant a permit to the Million Youth March sufficiently close to the movement’s desired location in Harlem was ruled in 1998 to be a First Amendment violation, because the city’s proposed relocation to Randall’s Island would have “adversely affect[ed] plaintiff’s ability to reach its target audience” by “limit[ing] [the movement’s] reach to [only] those who make an affirmative decision to travel to [Randall’s Island].”

The alternatives afforded to WeChat users, unfortunately, are quite worse than a two-mile walk eastward to Randall’s Island. As Peng notes in her testimony, the only available alternatives to contact relatives abroad are costly and provide vastly inferior functionality:

“Without WeChat, I will have to go back to the old way of buying calling cards and making expensive international calls. I will also not be able to reach all of my family members with one click. I will not be able to look at them through video calls with my own eyes. Nor can they see that I am well with their own eyes.”

For the unfamiliar, the reason that Peng would have to go back to calling cards is that most apps that seem like viable alternatives (WhatsApp, Snapchat, Messenger, Line, etc.) are blocked by the Great Chinese Firewall.

³ See [this article](#), for example. Most data exchanged over US networks is unregulated. That is, most companies are not under any obligation not to share your data with third parties, who can in turn do as they wish with that data (including selling it again). And none of them are obligated to tell you what they do with your data.

And for those whose only proficient language is Mandarin (or another dialect spoken in China),⁴ the lack of other Chinese-friendly messaging apps would all but require attaining sufficient proficiency in another language. Even if we discount the many cases where this is effectively impossible (e.g., for senior citizens), such a requirement would fundamentally run contrary to the American notion of free expression. Learning a particular language should never be an explicit prerequisite to communicate, nor is the government within its right to revoke access to platforms so as to implicitly institute this as a requirement.

Conclusion

For now, Chinese-American WeChat users can breathe a sigh of relief. Yet it is clear that the issue is far from resolved, as the Biden Administration has indicated that a subsequent restriction is well within the realm of possibility. However, amid ever-changing political headwinds, American WeChat users can cling steadfastly to the legal rock that is intermediate scrutiny. Indeed, striking down the Trump-era ban would have only required that one intermediate scrutiny criterion be unmet. That the ban spectacularly fails multiple criteria is a serious indication that subsequent administrations will need to dedicate genuine, good-faith effort to crafting a more measured response that does not irreparably sever certain Americans' access to their most significant outlet of communication.

⁴ No publicly available sources have an estimate on the true number of English-deficient WeChat users in the United States. But an extremely conservative estimate would likely lie in the hundred-thousands.