

The RESTRICTing Liberty Act



By Paul Engel

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- Once again the American people may be succumbing to fear and letting the federal government pass legislation that will be used to restrict our rights.
- In an attempt to regulate the activities of TikTok and their alleged espionage, Congress is debating the RESTRICT Act. But would it do what Congress is claiming?
- Are we witnessing the repeat of the PATRIOT Act?

There has been plenty of talk lately about TikTok, its connection to the Chinese Communist Party, and what American politicians should do about it. Several states, and I believe federal agencies, have banned it from government owned devices, but is that enough? There are those who are calling for drastic actions to protect the American people from this software. Just like after 9/11 though, it appears those in government are ready to use a howitzer to take care of a flea.

Senator Mark Warner of Virginia, along with a dozen others, have proposed the “Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act”, also known as the RESTRICT Act. It appears the American people have not learned from our rush to protect ourselves in 2001. Then the PATRIOT Act infringed on the rights of millions of patriotic Americans. Similarly, it appears that the RESTRICT Act is setting us up to further restrict our rights and liberties.

Let’s start by making sure we understand a few points about

this legislation. We'll begin with some definitions

(B) COVERED ENTITIES.—The entities described in this subparagraph are:

(i) a foreign adversary;

(ii) an entity subject to the jurisdiction of, or organized under the laws of, a foreign adversary; and

(iii) an entity owned, directed, or controlled by a person described in subparagraph (A) or (B).

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This act would apply to a foreign adversary, someone subject to the laws of a foreign adversary, or someone or something controlled by a foreign adversary. I think we all understand what makes something foreign, but what's an adversary?

one that contends with, opposes, or resists : an enemy or opponent

Adversary – Merriam-Webster's Online Dictionary

So when this legislation discusses covered entities, they mean anyone who is under the jurisdiction or controlled by a foreign enemy of the United States. Is that clear enough for you? Wait, there's more. This legislation has its own definition of a foreign adversary:

(8) FOREIGN ADVERSARY.—The term “foreign adversary”–

(A) means any foreign government or regime, determined by the Secretary, pursuant to sections 3 and 5, to have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or the security and safety of United States persons; and

(B) includes, unless removed by the Secretary pursuant to

section 6–

(i) the People’s Republic of China, including the Hong Kong Special Administrative Region and Macao Special Administrative Region;

(ii) the Republic of Cuba;

(iii) the Islamic Republic of Iran;

(iv) the Democratic People’s Republic of Korea;

(v) the Russian Federation; and

(vi) the Bolivarian Republic of Venezuela under the regime of Nicolás Maduro Moros.

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This is where we start seeing the fundamental problem with this legislation. Basically, this would define a foreign adversary as any government that the Secretary thinks is one. Which secretary?

(16) SECRETARY.—The term “Secretary” means the Secretary of Commerce.

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Are you prepared to give the Secretary of Commerce such power? Before a country is declared a foreign adversary for the purpose of regulation, shouldn’t an elected body, such as Congress, be involved? Let’s see just how much trouble the Secretary of Commerce can make for us.

In General.—The Secretary, in consultation with the relevant executive department and agency heads, is authorized to and shall take action to identify, deter, disrupt, prevent, prohibit, investigate, or otherwise mitigate, including by negotiating, entering into, or imposing, and enforcing any mitigation measure to address any risk arising from any

covered transaction by any person, or with respect to any property, subject to the jurisdiction of the United States that the Secretary determines—

RESTRICT Act

Let's pause here for a moment. The Secretary is authorized to deter, disrupt, prevent, prohibit, investigate, or otherwise mitigate any transaction that one of the covered entities I've already listed has any interest in, as long as he or she believes there is a risk to the United States? Is anyone else having PATRIOT Act flashbacks? What limits can the Secretary use to identify, deter, disrupt, prevent, prohibit, investigate, or otherwise mitigate such risk? What risks is the Secretary supposed to be on the look out for?

that the Secretary determines—

(1) poses an undue or unacceptable risk of—

(A) sabotage or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology products and services in the United States;

(B) catastrophic effects on the security or resilience of the critical infrastructure or digital economy of the United States;

(C) interfering in, or altering the result or reported result of a Federal election, as determined in coordination with the Attorney General, the Director of National Intelligence, the Secretary of Treasury, and the Federal Election Commission; or

(D) coercive or criminal activities by a foreign adversary that are designed to undermine democratic processes and institutions or steer policy and regulatory decisions in favor of the strategic objectives of a foreign adversary to the detriment of the national security of the United States, as

determined in coordination with the Attorney General, the Director of National Intelligence, the Secretary of Treasury, and the Federal Election Commission; or

(2) otherwise poses an undue or unacceptable risk to the national security of the United States or the safety of United States persons.

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What's an undue or unacceptable risk of sabotage of our information and communications infrastructure? Could crypto currency be considered an unacceptable risk to our digital economy? We've already seen claims that those who spoke out about problems in the 2020 and 2022 elections were interfering with elections. And remember when Donald Trump and others were accused of actions coercive or criminal activities? Don't forget, the Trump organization was also accused of housing foreign servers that they claimed were used to influence the election. What about those who pointed out the illegal actions by the FDA, CDC, Attorney General, DOJ, and White House, and those who refused to take an experimental COVID jab? Could they be accused of attempting to steer policy and regulatory decisions or was it just an unacceptable risk to the national security?

You may be saying that this would only apply to foreign adversaries. What if you use a service that has servers in one of those designated countries? What if you use a VPN, or cloud service that gets routed through one of them? We've already seen government actors abuse their position against their political enemies; do you really think this wouldn't be used as an excuse one day?

IN GENERAL.—Subject to section 13, with respect to any covered holding referred to the President under subsection (a), if the President determines that the covered holding poses an undue or unacceptable risk to the national security of the United

States or the security and safety of United States persons, the President may take such action as the President considers appropriate to compel divestment of, or otherwise mitigate the risk associated with, such covered holding to the full extent the covered holding is subject to the jurisdiction of the United States, with respect to—

(A) the United States operations, assets, or property of the entity in which the covered holding is held, or of any products or services owned, controlled, designed, developed, manufactured, or supplied by the entity are used in the United States;

(B) any tangible or intangible assets, wherever located, are used to support or enable use of the product or software of the entity in the United States; and

(C) any data obtained or derived from use of the product or software of the entity in the United States.

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There you are, running your business, when the President decides that the equipment you purchased to run your business is a national security risk. He suddenly issues an order compelling you to sell to someone else, because he claims you are controlled by a foreign adversary. You may have to sell your assets, property, or any other holdings you have, along with any data and software, including your proprietary information. Would anyone be surprised that you would be coerced to sell to an entity favorable to the President's political party?

Considerations Relating To Undue And Unacceptable Risks.—In determining whether a covered transaction poses an undue or unacceptable risk under section 3(a) or 4(a), the Secretary—

(1) shall, as the Secretary determines appropriate and in consultation with appropriate agency heads, consider, where

available–

(A) any removal or exclusion order issued by the Secretary of Homeland Security, the Secretary of Defense, or the Director of National Intelligence pursuant to recommendations of the Federal Acquisition Security Council pursuant to section 1323 of title 41, United States Code;

(B) any order or license revocation issued by the Federal Communications Commission with respect to a transacting party, or any consent decree imposed by the Federal Trade Commission with respect to a transacting party;

(C) any relevant provision of the Defense Federal Acquisition Regulation and the Federal Acquisition Regulation, and the respective supplements to those regulations;

(D) any actual or potential threats to the execution of a national critical function identified by the Director of the Cybersecurity and Infrastructure Security Agency;

(E) the nature, degree, and likelihood of consequence to the public and private sectors of the United States that would occur if vulnerabilities of the information and communications technologies services supply chain were to be exploited; and

(F) any other source of information that the Secretary determines appropriate; and

(2) may consider, where available, any relevant threat assessment or report prepared by the Director of National Intelligence completed or conducted at the request of the Secretary.

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If you are a broadcaster, could you have your FCC license revoked? What about a trading agreement or a contract related to the DOD?

All it takes for a country to be declared a foreign adversary for this legislation, is a finding from the Secretary.

DESIGNATION.—The Secretary may, in consultation with the Director of National Intelligence, designate any foreign government or regime as a foreign adversary if the Secretary finds that the foreign government or regime is engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons.

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What if you are unjustly targeted under such legislation? Sure, you could fight it in court, but that would take a lot of time and money. What if you recognize the unconstitutional and therefore illegal nature of this legislation, and following court precedent, realize it's void and unenforceable?

IN GENERAL.—It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any regulation, order, direction, mitigation measure, prohibition, or other authorization or directive issued under this Act, including any of the unlawful acts described in paragraph (2).

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Such a tyrannical act would be nothing without penalties for violating its illegal precepts:

(1) IN GENERAL.—A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of an unlawful act described in subsection (a) shall, upon conviction, be fined not more than \$1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

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Conclusion

Just like after 9/11, we have government actors stoking the fears of the American people with calls of “We have to do something!” And now, just as then, they are taking what are legitimate concerns and stoking the flames of fear in order to pass legislation that can easily and predictably be used to deprive you of your rights. Where is your right to due process, if all it takes to have your actions declared a threat is a decision by an unelected bureaucrat? What about your rights to freedom of speech and press when this legislation would allow government to either shutdown or steal any platform that someone can claim is foreign controlled?

Should Congress consider legislation to regulate the foreign commerce of an entity controlled by a foreign government? Yes, but only to the limits of their powers, which is foreign commerce. However, that is not what they are trying to do here. They are using fear of the apparent espionage of TikTok to claim the authority to regulate, control, and destroy any technology they can somehow claim is controlled by a foreign entity.

Leave it to Congress to drop an atomic bomb when a simple hand grenade would do. And with all of these new investigatory powers, does anyone believe this one or future Secretaries won't use it to spy on Americans and their businesses? If this legislation passes, we would not be jumping out of the frying pan into the fire, but into an inferno that may well consume all of our rights.

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