SCOTUS in Session: Tariffs, the "Shadow Docket," and Executive Power
Sam Gandhi, Kwaku Akowuah, and Tacy Flint
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Sam Gandhi:
The Supreme Court of the United States is back in session with a blockbuster docket that could upend the levers of power in America. Issues range from the scope of executive authority and the role of the federal government to the very relevance of the lower courts.

As cases on the so-called shadow docket pile up, some district judges are also speaking out, raising concerns about the risk to the high court's legitimacy. Meanwhile, the business world is watching and waiting for a decision on the administration's unilateral tariffs that could shake the global economy.

Kwaku, has the court figured out what the limit to what the president can do is?

Kwaku Akowuah:
I think it's too soon to know whether the court is comfortable with the very forward-leaning assertions of executive power that have been made by this president.

Sam Gandhi:
That's Kwaku Akowuah, co-leader of Sidley's Supreme Court Appellate and Litigation Strategies practice.

Tacy Flint:
I think there is a problem with the general public questioning whether the Supreme Court is acting legitimately by virtue of the sheer volume of wins that the Trump administration has had on the interim docket.

Sam Gandhi:
And that's Tacy Flint, the other co-leader of that practice. Just how much power will the court cede to the president? Have the lower courts provided

sufficient guardrails, and will those checks and balances last? Will SCOTUS rein in the administration's tariff war, and how should businesses respond? We'll find out on today's podcast.

From the international law firm Sidley Austin, this is *The Sidley Podcast*, where we tackle cutting-edge issues in the law and put them in perspective for business people today. I'm Sam Gandhi.

Hello, and welcome to this edition of *The Sidley Podcast*. Kwaku, Tacy, great to welcome you to Episode 49 of the podcast.

Kwaku Akowuah:
It's great to be back. Thank you, Sam.

Tacy Flint:
Thanks, Sam. It's a pleasure to be here.

Sam Gandhi:
It would be an understatement to say the Supreme Court's last term was consequential. The majority sharply limited federal judges from blocking President Trump's policies nationwide and dramatically restructured the relationship between the courts and the executive.

Kwaku, before we even get to the new cases on the docket for this term, let's talk about how we got to this point. In your mind, what are some of the monumental decisions of the '24, '25 term?

Kwaku Akowuah:
I would start with two, and both of them started off as emergency applications, and we've talked before about the long-term trend at the increasing importance of these emergency applications to the work of the court, and therefore, to the country, and both of these decisions arose, at least in the beginning, in that posture.

So, the first I would flag is the *TikTok v. Garland* decision. This came up late in the Biden presidency, had to do with the validity of a statute that was designed to stop TikTok from operating in the United States, at least as an application controlled, in Congress' view, by Chinese interests.

And it set out a 270-day timeframe for divestiture. This was a law passed by large bipartisan majorities of Congress, in April 2024, and as far as I can tell, by happenstance, that 270-day period ended on January 19, so the day before Inauguration Day.

Now, whether that was coincidental or not, I guess I'm not sure, but no one knew in April, of last year, who would be the president on January 20. So, the challengers went and they attacked that law on First Amendment grounds. They said it violates the First Amendment to burden a platform for speech in that way.

The D.C. Circuit affirmed, and the challengers took up an emergency application right before Christmas, last year. The Supreme Court then, in a sense, turned it into an ordinary review case, as they set the case for fall briefing and argument, but on a very fast clock, with briefing basically over the holidays, and argument on January 10, 2025 and then a decision, a week later, on January 17, right before the law took effect, and they upheld the law.

They said, in a sense, this is an unusual law, this is extraordinary, we're not going to try to carve broadly, here, but we think that Congress, notwithstanding the obvious First Amendment expression, speech implications of potentially shutting down a platform for speech and debate and clever dance in the United States, Congress actually was regulating in a content-neutral way, and it articulated a set of national security interests sufficient to support the law.

So, the law took effect on January 19, 2025 and at this point, I think probably some of your listeners are scratching their heads, thinking, well, I don't remember TikTok being shut down. I saw someone scrolling in the elevator just yesterday, or maybe in my own house.

And of course, that's true. TikTok is operating in the United States, and you know, the reasons for that, actually, I think, were sort of prefigured by a brief filed by then-President Elect Trump, in December 2024, and signed by the man who, today, is the Solicitor General, and they urged the Supreme Court, actually, not to decide the case in the posture that it arrived at the court.

And they suggested, in that brief, that the law might raise different constitutional problems, that it was too much of a straitjacket and so interfered with the President's Article II executive powers to operate in the foreign policy sphere, and as January 20 arrived, and for a moment, TikTok went dark and then came back up, it appears, and the President has issued executive orders to this effect, that he's taken the position that the law leaves more room for the President to operate.

So, he has issued a series of 75-day extensions. There are no such 75-day extension provisions in the statute. There's a, as the Supreme Court described it, a one-time 90-day extension provision that had certain strictures to it.

The President has extended TikTok's ban to operate in the United States by these 75-day margins, a number of times, and most recently has issued an executive order essentially blessing the framework of a divestiture arrangement that, as the executive order describes it, is consistent with the divestiture provisions of the act.

So, it seems like the President is interpreting the law in a manner that is inconsistent with the face of the law but consistent with an articulation of the executive power that essentially forces the law to have broader scope for the President to negotiate and exercise leverage in particular ways, really, sort of in all ways, a rather extraordinary encounter between the courts and the President and Congress in this domain.

Sam Gandhi:
Do you think that the illogical extension of that case is that basically the president could ignore a federal law against sanctions against a particular country because it interfered with his or her foreign powers, rights, or…pardon me, his or her rights under Article II?

Kwaku Akowuah:
I think it's fair to say that the brief section of this amicus brief, it was four or five pages, describing the combination of factors that gave rise to a concern in this particular case, it's not a fully fleshed-out vision of exactly how far this revising power may extend, but I think its spirit is to say that if a law deprives of the president of all flexibility, it may raise Article II concerns or violate Article II.

And I think most of the sanctions laws, of which I'm aware, and we should loop in our amazing trade and sanctions experts to give us a full view on this, do provide the president with very significant discretion as to the wheres, and whens, and whys of how sanctions are imposed.

And then, of course, the inherent discussion of how do you enforce, and when do you enforce, against particular actors who may arguably have violated the sanction's regime? So, I'm not sure how exactly the theory resonates that across other statutory schemes, but it's a great question and one that I think we're only seeing the very tip of the iceberg on, at this point in the TikTok case.

The other case that comes out of the emergency docket, shadow docket, what have you, segment of the court's work is the *Trump v. CASA* case. That comes from another January Day 1 executive order, in which the President took a, as far as I can tell, unprecedented but certainly out of the box view of what the 14th Amendment means and the Citizenship Clause of the 14th Amendment.

So, the Citizenship Clause of the 14th Amendment says in terms that U.S. citizenship is guaranteed to anyone who is born in the United States and subject to the jurisdiction thereof, and that subject to the jurisdiction thereof phrase does some limiting work, and the question is how much?

And the traditional view has been, well, it really is limited to individuals who are born in the United States but owe a specific allegiance and have a kind of legal relationship to another sovereign, so Indian Tribes, traditionally, although statute law makes clear that members of Indian Tribes are full American citizens.

But in the constitutional sense, there's room, it's been thought, for members of Indian Tribes to be thought of as not subject to the jurisdiction of the United States. Children of diplomats, I think, is the other classic category, and what the executive order posits is that people whose parents, at the time of birth in the United States, don't have specific kinds of lawful presence in the United States, don't have a right to citizenship.

So, of course, that was enormously controversial from minute one, prompted significant and swift litigation. All the lower courts that have reached the merits of the question have said, Mr. President, you're wrong, that's not the proper understanding of the 14th Amendment.

But when it reached the Supreme Court, that wasn't the issue was who's right and who's wrong about how to read the 14th Amendment in the federal statute. It was whether the district court, and specifically here, the district court in Maryland, went too far in announcing not only that the President was wrong, but that the President was enjoined against all people across the country from applying that view of birthright citizenship.

And as to that, the Supreme Court said probably the district court went too far. That is, it ended a general practice of universal or nationwide injunctions in which one district court can pronounce to the whole, that is not just giving relief to the specific plaintiff before the court, but as to everyone, said that's beyond the equity power of a district court.

But it also left room to say it's clear that it's important that each plaintiff who does win gets complete relief as to them, and what exactly that means in any individual case can be complicated.

For example, you can have a class action, and so, now, it's not just one individual but all persons similarly situated within the class. You can have organizational plaintiffs, state plaintiffs, and what it means to grant complete relief as to those organizations and as to a particular case might be very broad.

So, the Supreme Court didn't decide what that meant specifically as to any of the plaintiffs in the cases before the court, but sent it back to the lower courts to figure out the specific application, and in so doing, really, I think, heightened the importance of class action practice and state plaintiffs and organizational plaintiffs in these kinds of challenges, where folks are seeking injunctive relief against the government.

Sam Gandhi:
So, if I'm a company that sells products nationwide, and I want to impose an injunction in federal court, does that mean I've got to go to every single

district to enforce that, because there won't be a nationwide injunction, even if I'm right?

Kwaku Akowuah:
Thankfully, no, Sam. A plaintiff can get, in one district court, complete relief as to that plaintiff. So, the company that sues…some situations that come to mind here, so, I'd say, a nationally applicable standard can get relief as to itself across the country.

The question arises…is more pronounced in the kinds of cases where the court is saying what the President is doing as to a huge number of people is unlawful, must I force all these people to go to court, individually, or can I just say what goes for one goes for all?

And what the Supreme Court said is, generally, no. Generally, you have to go to court to get your own relief as a plaintiff, subject, again, to class action procedure and organizational plaintiffs and other settings in which it's the natural consequence of ruling for a particular plaintiff is to give relief to others similarly situated.

Sam Gandhi:
Tacy, which cases stand out to you as significant for the country during the last term?

Tacy Flint:
I'll talk about a few. First one is *Seven County Infrastructure Coalition v. Eagle County*. This was an important administrative law case that added a really crucial wrinkle to the Supreme Court's decision the term before in *Loper Bright v. Raimondo*.

So, in *Loper Bright*, back in 2024, the Supreme Court held that the longstanding principle of chevron deference would no longer exist. They overturned *Chevron*. *Chevron* had held that when an agency interprets a statute, courts must, they're required to, defer to the agencies' interpretation of the statute so long as it is reasonable, so long as the statute has enough ambiguity or sort of space within the textual meaning to allow for the agencies' interpretation.

Courts have to accept it even if the court thinks a different reading would be better. So, that had been the law since 1984, 40 years, and the court overturned it in *Loper Bright*, leading to a lot of questions about how agency practice would look, going forward.

Would agency decisions be reversed much more frequently? Would there be a lot more instability as courts engaged in freewheeling statutory interpretation that they hadn't been doing before? *Seven County* provides an important limitation on courts' de novo review of agency action by clarifying, and really in stark terms, in an opinion by Justice Kavanaugh, that courts still should and must defer to agency fact finding.

So, agencies, under *Loper Bright*, get no deference in their statutory interpretation. Courts get to read statutes, themselves, no matter what the agency said, but in *Seven County* we learned that if an agency has authority to make factual findings or take actions based on the way it understands the facts or discretion to act in a particular factual scenario, courts should defer to that.

So, in *Seven County*, the issue was building an 88-mile train track in Utah to transport crude oil, and the National Transportation Safety Board had signed off on that. It had conducted a NEPA analysis, under the National Environmental Protection Act, to look at the environmental impacts of the track.

And it had evaluated all of the impacts nearby, in the geographic area, and said we don't need to look further at impacts of this track in places like Gulf Coast states, where the oil that is transported in Utah, on this 88-mile line of track, will eventually make its way to those states and be refined.

The NTSB said we're not thinking about that, that's beyond our analysis. The D.C. Circuit had overturned the NTSB's decision. It said, no, NTSB, you have to think about these effects, even though they're geographically farther flung from the project, it is part of your job under NEPA to think about all downstream effects, including these.

And in Seven County, the Supreme Court said the D.C. Circuit got it wrong, it was up to the NTSB to determine the scope of its analysis. That statute, NEPA, allowed the agency discretion to determine what effects to consider,

the NTSB had exercised discretion given to it in the statute, and the court wasn't allowed to dig more deeply than that.

Deference is the word of the day, at least when an agency is acting under statutorily conferred discretion. So, *Seven County* really pulls back on concerns that people had that *Loper Bright* would really undermine stability of agency decision-making. So, that was an important case.

Another really interesting case is *Mahmoud v. Taylor*. This is a First Amendment case in which parents had sued because schools in Maryland, in Montgomery County, Maryland, were teaching young children, kindergarteners, first graders, very young children, using materials that were engaged in themes on LGBTQ+ related matters, materials that gave positive descriptions of same-sex marriage, positive descriptions of children pursuing gender identity.

And in a change, the schools were not allowing families to opt out of the instruction based on these materials. In earlier years, these Montgomery County schools had made it possible for parents to opt out if they didn't want their kids to be part of the instruction on same-sex marriage.

They could keep their kids home for the day, and it would count as an excused absence. The school had changed that policy, was not going to excuse absences, and it wasn't going to let parents know when this instruction would occur. That set of facts, the court said, in an opinion by Justice Alito, violated the free exercise rights of these children's parents.

The court said if a school is going to engage in this kind of instruction, the court understood it to be pretty normative, really, like, you know, positive depictions of same-sex marriage and the other topics, if a school is going to engage in this kind of instruction, it has to offer parents a choice to withdraw their children.

Otherwise, it infringes the free-exercise rights of parents. Three justices dissented. Justice Sotomayor wrote the dissent, joined by Justice Kagan and Justice Jackson, and they said this is really contrary to what public education is all about. The way public education works is children are brought together, they're exposed to ideas, their parents may agree with the ideas, they may not.

Of course, their parents may tell them something different when they get home, but part of being a public school student in the United States is learning a wide variety of things, and if parents can opt out based on any idiosyncratic view, then that cohesion is destroyed.

So, that was Mahmoud v. Taylor, and one more really interesting First Amendment case is *Free Speech Coalition v. Paxton*. In that case, the Supreme Court upheld a Texas law that requires websites where at least one third of the material is sexually explicit, pornographic, websites like that are required, under this Texas law, to verify the age of users accessing the website.

So, it's kind of like the online version of, you know, a bookstore or a video store that has an explicit content area. You might have to present an ID to go into that area. That kind of law and policy has been around for a long time and has been deemed acceptable for a long time.

But the problem when it's applied to websites is there isn't a good way to engage in age verification on a website that is not a lot more intrusive and burdensome to adults who want to access this type of sexually explicit content, and it's 100 percent clear in the case law that adults have a First Amendment right to access sexually explicit and pornographic content.

So, the question is, do adults who have this First Amendment right, is it excessively burdened by laws that require the website to impose age verification tests, which make it more difficult, substantially more difficult, for adults to access the materials.

Six-member majority, the same breakdown as the *Mahmoud* case, written by Justice Thomas, said the Texas law is okay. It only needs to satisfy intermediate scrutiny. The First Amendment, like the Equal Protection Clause, jurisprudence has these tiers of scrutiny, strict scrutiny for the most burdensome laws and intermediate scrutiny for a law like this that doesn't actually prevent adults from accessing content or regulate adults' speech directly, but indirectly affects it by forcing adults to go through these steps.

The court said it's subject to intermediate scrutiny. It passes that because states have a compelling interest in protecting children from sexually

explicit materials. So, it's okay. Justice Kagan wrote the minority, joined, as I mentioned, by Justice Sotomayor and Justice Jackson, and said under ordinary First Amendment doctrine, this should be subject to strict scrutiny because it restricts adults' ability to access speech that they have a constitutional right to access, and if it's reviewed under strict scrutiny, it fails because the burden is too great, and it should be struck down.

Sam Gandhi:
Lower court judges have scaled back some of the administration's more hardline moves, and the Supreme Court's conservative majority has often sided with the President, particularly backing his power over the federal bureaucracy, and Kwaku, given that reality, are the guardrails holding in terms of what we understand as the separation of powers in this country? And has the court figured out, especially under this president, what the limit to what the president can do is?

Kwaku Akowuah:
I think it's too soon to know whether the court is comfortable, across the board, with the very forward-leaning assertions of executive power that have been made by this president. Without a doubt, the government and the solicitor general have been quite successful in bringing emergency applications to the court over the first nine months of this presidency, of this term of the President.

What we don't know, at this point, is how much of that success has been driven by the court's concerns about whether the district courts are going too far in applying interim preliminary equitable power to stop what the President is doing without first having full consideration in the district court.

There's a line in the *Trump v. CASA* opinion, where Justice Barrett says that the appropriate response when a court thinks that the President has gone too far isn't for a court to exceed its own powers. So, it is clear concern about that exercise of authority by the lower courts.

What we haven't yet seen is how the court will react when the merits are fully in front of it in these executive power cases, and we're going to get the very first test of that in the tariff cases, which are going to be argued just a few weeks from now, in early November, and as I think most of our listeners are aware, President Trump has asserted authority under the

International Economic Emergency Powers Act, or IEEPA, to impose large-scale tariffs across the U.S.'s relations with essentially all of our trading partners.

These have been justified in the case of Mexico, Canada, and China by the President's determination that those countries have been insufficiently attentive to blocking the flow of fentanyl and other dangerous drugs into the United States.

With respect to our other trading partners, the sort of reciprocal or liberation day tariffs have been justified by a persistent balance of trade deficits with the United States, which, to the President's mind, hollowed out America's manufacturing base, its defense industrial base, and created emergencies in that sense.

And so, those tariffs have been challenged. They've been challenged on two paths, coming up to the Supreme Court, first at the Court of International Trade to the Federal Circuit into the Supreme Court, and then a different set in the District Court in D.C., and some other filings, but they've all gotten consolidated down to those two lines.

And the lower courts generally have said the conclusions have been that the tariffs go too far. They're not authorized by IEEPA, and the thinking is, essentially, that this is a broad statute. IEEPA is an undoubtedly broad statute that seeks to marshal the economic power of the United States and grant the President very broad authority, subject to some procedural hurdles, to wield that authority in the interests of the United States.

But they say you don't see the word tariff there. You don't see discussion of customs, duties, there. You don't see the kind of procedures that Congress ordinarily applies when it gives the President authority to vary the rates of tariffs that are imposed on imports coming into the United States.

And so, it's a mistake, they say, to read the statute, though undoubtedly broad, to give the President a kind of taxing and revenue-raising power that ordinarily residents in Congress. There's a dissenting view, which obviously aligns with the President's, which is to say that the statute is undoubtedly broad.

It's not written specifically because it's for emergencies. It's designed to give the President maximum authority to meet the emergencies of the world. The President's identified emergencies here. He's followed the procedures in terms of declaring the emergencies and explaining why the tariffs are necessary to meet those emergencies.

And if Congress or others have misgivings about whether a grant of authority to the President is that broad, well, we have remedies for that, and that's for Congress to go back and revise the law. So, I think, in a nutshell, that's how those issues come to the court.

The briefing is underway, and it'll have argument in a few weeks, and I think really will boil down to a contest of, one, is the court willing to think it's appropriate to carve back on the President's assertion of authority and his determinations in a foreign policy and national security space?

We talked about the *TikTok v. Garland* decision, just at the beginning of this year, and there, the court was very deferential, there, to the two political branches' shared views of what's necessary in the foreign policy space, or will the court balk at what would be, in real terms, I think a perpetual grant of authority to not just this president but all future holders of the office, to set tariff rates as the president sees fit to achieve whatever objectives can be achieved through the variation of tariff authority?

Because once the presidents have that in their hands and have the veto power to block any change so that possession of authority by the presidents, I think it's going to be extraordinarily unlikely, in real terms, that Congress will be able to pull it back, and probably every president will have things they think ought to be and can be achieved through raising and lowering tariffs as they see fit.

Tacy Flint:
It'll be interesting to see what the Supreme Court says about the President's power under IEEPA in light of its earlier decisions on applying the major questions doctrine, which it said if an agency takes some action that has a really big effect, that, for example, impacts our nationwide economy, we're going to look to the statute and really make sure that Congress made clear, why don't you give that kind of power to the agency?

And we're going to presume that it didn't, unless if the importance of the agency action is so big, we're going to presume that Congress wouldn't let the agency do that without saying so, very clearly. So, it'll be interesting to see how or if that comes into the court's interpretation of IEEPA and what it means for presidents' ability to make these really monumental economic decisions.

Sam Gandhi:
Speaking of economic decisions, Tacy, what are some of the cases related to executive power that you're seeing that may give the business community insight, going forward, to the courts' docket?

Tacy Flint:
Any business in a regulated industry is interested in knowing who its regulators are, and there have been a lot of actions since the President came into power related to the President's ability to remove members of commissions where the statute says that member should only be removed for cause, for example, the FTC, the Federal Reserve Board.

So, President Trump has fired a number of commissioners, on various boards, since he came into office, and a lot of those have been challenged, and the major precedent in this area is from 1935. It's called *Humphrey's Executor*. Back in *Humphrey's Executor*, a Supreme Court said that a statute limiting the President's ability to remove Federal Trade Commissioners, the FTC Act, was constitutional.

The FTC Act said the President can only remove Federal Trade Commissioners for cause, and the Supreme Court said, that's fine, Congress can limit the President's removal power, the Constitution does not give the President absolute removal power.

And if Congress wants to create a body that has quasi-judicial function and requires some measure of independence with for-cause protection, that is permissible under the Constitution. In the last 90 years, since *Humphrey's Executor* was decided, there's been a growing understanding in the law called the unitary executive theory.

And the unitary executive theory essentially holds that the President, who's the head of the Executive Branch, has to be able to control the people

acting in the Executive Branch. The President is the only person in the Executive Branch who is ultimately responsive to the voters, because he's the one, he's the only one, whom the voters can remove through elections.

And so, if the President, who has the power to appoint a Federal Trade Commissioner, for example, doesn't have the power to remove Federal Trade Commissioners whose actions he dislikes, the voters have no way of expressing their discontent with a Federal Trade Commissioner that they dislike, because they're not accountable to anyone if the President can't remove them.

So, with this growing unitary executive theory, *Humphrey's Executor* has become much, much questioned, and it's less and less clear whether that remains good law. So, since President Trump came into office and began removing individuals whom he disagreed with, there have been multiple emergency applications fighting those actions.

An early one, early in the term, was *Trump v. Wilcox*, where the President removed commissioners from the National Labor Relations Board and the Merit Systems Protection Board. In that case, the Supreme Court said that firing is okay, we're going to let it go forward while the litigation continues, those commissioners are off while the litigation goes on.

But in the opinion, very short opinion, just like these other emergency docket orders that we've been talking about, the court said, just so you know, everyone, the Fed may be different. It may be harder for the President…we're not committing to this, but it may be harder for the President to remove members of the Federal Reserve Board because, in the court's words, "it's a uniquely structured quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States."

So, even though the Fed was not at issue in *Trump v. Wilcox*, the court went out of its way to make that clear. Since then, there have been other cases following in the same vein. One was *Trump v. Slaughter*, in which President Trump fired a Federal Trade Commissioner.

In that one, the Supreme Court, again, said, as a preliminary matter, as an interim matter, that firing was okay, and it's agreed to hear the case this

term. So, we'll get the final decision of the Supreme Court on whether *Humphrey's Executor* remains good law as to Federal Trade Commissioners this term.

Then, in the most recent order, the President removed Lisa Cook from the Federal Reserve Board. And so, now, that case is also in front of the Supreme Court. In that one, alone, among all of the removal-related emergency orders, the Supreme Court said Lisa Cook cannot be removed from the Fed while the case is underway.

So, uniquely, among these emergency orders, the court has allowed Lisa Cook to remain on the Federal Reserve Board, and her case will also be heard this term. So, the writing on the wall seems to be that the Fed, alone, allows for limitations on removal, and the FTC and other entities don't. So, going forward, it sure looks like presidents will be allowed to remove agency members at will.

Sam Gandhi:
Tacy, given all this, what do you think the future of federal agencies really are?

Tacy Flint:
I think federal agency leaders will be, except for the Fed, removable at will. So, I think that means that they will be pretty much in alignment with the White House. I suppose some future presidents may treat removal differently. They may not remove commissioners whose actions they disagree with.

That certainly doesn't seem to be the case with President Trump, so far. He seems to really demand alignment from commissioners, and assuming he has complete ability to remove commissioners he disagrees with, I think we will see a 100 percent alignment between the commission and the President.

That wasn't Congress' goal when it created the FTC Act, but with this understanding of the Constitution and the unitary executive theory, I think that is exactly what follows.

Kwaku Akowuah:

Congress has a role to play here too. Removal is obviously very, very important, but traditionally, congressional oversight has also shaped how agencies act. At a minimum, Congress can hold oversight hearings, pull people up on the Hill, embarrass them, affect their budget, affect their authorities as new rounds of authorizations come up, and so, there's been a press from agencies coming from the other way.

That is that they also have this other master to serve, who can give and take away tools that the agency and the agency heads might want to have at their disposal, and in this particular moment, where we have all three branches of…both Houses of Congress and the President, control from the same party, Congressional oversight has seemed like a smaller part of the picture.

That may change either through Congress just wanting to operate differently or through elections that shift the composition of Congress and the dynamics between the Congress and the White House.

Sam Gandhi:
Let's talk a little bit about, Tacy, what you refer to in terms of the emergency docket. In earlier emergency docket dissent, Justice Elena Kagan took to task the court's conduct this year, writing that the emergency docket should not be used to, I quote, "permit what our own precedent bars," or quote, "to transfer government authority from Congress to the President, and thus to reshape our nation's separation of powers."

Kwaku, a lot's been written about what they call the so-called shadow docket. How does it traditionally work and has that changed with this court?

Kwaku Akowuah:
There have always been emergency applications to the court. It's always been possible to go and say, Supreme Court, jump in, right now, and stop what a lower court is doing or another official in the country is about to do. When I clerked at the court, though, that docket was almost entirely occupied with death penalty decisions.

So, a prisoner says I'm scheduled to be executed within…at such and such period of time, here are the reasons why execution should be stayed, and it was very important, I mean, in some senses, one of the more emotionally

draining parts of being a law clerk, dealing with these questions of life and death. But that was the vast mass of what emergency applications at the court were about, certainly my term. Tacy, I think, it was probably the same, yours.

Tacy Flint:
It was. Yeah.

Kwaku Akowuah:
And so, the kinds of questions that are coming up on the emergency docket, you know, and I'm giving you a short timer's view of life behind the curtain at the court, but I think that's not atypical. Back then, questions of the Separation of Powers didn't come up on the emergency docket.

So, what's changed? I think we can tell the story in a few different ways, but I think it is an increase in contests between the President and the lower courts on questions of executive power and the propriety of presidential action. That's not just in this administration.

Sort of there were many emergency applications brought up in the Biden Administration, brought up in the first Trump Administration, and going back further. So, I think you're really talking about a…call it one-to-two decade trend, upward trend, in these kinds of emergency applications becoming more and more common, and the Supreme Court feeling that it should engage more frequently in those debates, in this kind of preliminary setting.

And you know, as I said, I don't think that's not where the Supreme Court…and they've said this publicly, this is not where they think they do their best work. This is not what they, in their dream world, I think they would have everything come up after two or three or four lower courts have made a decision, and there are petitions, and they think about them for a while, and they've got briefs, and they think about them for a while.

But there's no doubt that there's been a huge sea change, and at least where we are now, this is where the center of gravity is, in terms of the work of the court. That's a huge change.

Sam Gandhi:
Tacy, we've heard publicly from both Justice Brett Kavanaugh and Justice

Neil Gorsuch, and they've issued comments basically telling lower courts, specifically certain lower courts, to follow precedent, and how does that square with the court's use of the emergency docket?

Tacy Flint:
It's really difficult to understand the precedential effect of these interim orders. So, I think the Supreme Court has now said, at least some of the justices have said, pretty clearly, that they want district courts to follow these interim orders. So, these interim orders do have precedential effect.

But it's not clear what the holding is. Certainly, you understand that an order says stay this preliminary injunction. You understand what that means, but how do you apply that to the next case? Here's an example. In the case *Vasquez Perdomo*, the district court had granted a TRO banning immigration agents who were operating in the Los Angeles area.

They had been picking up individuals not based on individualized grounds of suspicion but because of their appearance, language, and where they were, near Home Depots and other places where day laborers frequently are waiting for work. So, immigration authorities had been picking up people in those areas.

And a district court granted a TRO saying this is a violation of the Fourth Amendment to be detaining individuals on the suspicion that they will not be citizens, that they'll be in the U.S. illegally, but without an individualized basis for suspicion, and the Supreme Court stayed that TRO in one of these emergency orders.

The emergency order didn't give reasoning. It simply stated the effect of the order, and Justice Kavanaugh concurred and said, I, speaking for myself, Justice Kavanaugh, think it was correct to stay this TRO because, for two reason, one, the plaintiffs here didn't have standing to challenge this order, and two, the actions of the immigration authorities was okay under the Fourth Amendment.

So, district courts that are trying to follow the Supreme Court's order in *Vasquez Perdomo*, unfortunately, don't really know why did the court enter the order it did. We understand that Justice Kavanaugh thought it was appropriate on both standing and Fourth Amendment grounds, but did a

majority of the court agree with him on one ground, the other ground, both grounds?

So, I think district courts want to act in good faith. They want to apply the Supreme Court's precedents, including, as has become clear, their interim orders, but it's just not clear how to do it. And so, that's led to these expressions of confusion, concern.

There was this recent article in *The New York Times*, in which several district judges expressed concerns about the Supreme Court's use of the emergency docket. I think it's just a confusing time.

Sam Gandhi:
If you're interested in information on the energy industry, tune into the latest episode of Sidley's *Accelerating Energy Podcast*, hosted by our partner, Ken Irvin. Ken is joined by Chris Panaro, Executive Director and Assistant General Counsel at Nomura, and they discuss the recent legislation in Texas, known as SB6.

The law is a sweeping overhaul of the regulation of large power users, including solar, battery storage, and datacenters. You can subscribe to Sidley's *Accelerating Energy Podcast* wherever you get your podcasts.

You're listening to *The Sidley Podcast*, and we're speaking with Kwaku Akowuah and Tacy Flint, the co-leaders of Sidley Supreme Court Appellate and Litigation Strategies practice about the monumental cases of the Supreme Court's last term, the majority's backing of executive power over federal bureaucracy, and the court's use of the emergency docket.

Tacy, you referred to *The New York Times* article that came out recently, and in that article, more than three dozen federal judges voiced concern that the Supreme Court's "flurry of brief, opaque emergency orders in cases related to the Trump administration have left them confused about how to proceed in those matters and are hurting the judiciary's image with the public."

Are there limits to what conclusions can be drawn based on a small sample of judges who responded to *The Times*? There were about 50 or so out of about a few thousand that were reached out to, and yet, a number still did

go on the record. Kwaku, is that unusual for these judges to be speaking out to the press like this?

Kwaku Akowuah:
I think it is unusual. I can't think of another circumstance where you have judges expressing views like this to the press. I do think that there have been times, over the years, when lower court judges have been nonplussed with how the Supreme Court has addressed either a case specifically from their court or otherwise issued a ruling they didn't agree with.

But I don't think we have seen expressions of that come out in the media, as opposed to being expressed in close quarters, within the community of judges. So, that article did strike me as, you know, an important symptom of a moment of some friction between the Supreme Court and lower court judges.

As you mentioned, it's hard to know exactly what to make of it if we're trying to think about the whole federal judiciary. It's a very small fraction of the whole that responded, and I've seen some people suggest, and this might be right, that *The Times* approach oversampled from jurisdictions that are dominated by Democratic-appointed judges, and those may be jurisdictions where you have an outsized number of people who are inclined to think the Supreme Court is wrong. So, I would hesitate to draw conclusions as to where all federal judges are.

Sam Gandhi:
And to be fair, in the sampling, there were some judges that actually did not feel that the court's legitimacy was undermined.

Kwaku Akowuah:
Exactly. There's some that said the Supreme Court is doing exactly the right thing. I still think it's notable, if we just take the raw number, and we say this number, this few dozen judges, were willing to go and tell a reporter here's how I feel, and the kinds of terms that they used. That's unusual, and I think something we ought to all…should keep our eyes on.

Sam Gandhi:

Tacy, what is your view on this, and do you think that the court potentially has a legitimacy problem, based on what you're hearing?

Tacy Flint:
So, I think there is a problem with the general public questioning whether the Supreme Court is acting legitimately, by virtue of the sheer volume of wins that the Trump administration has had on the interim docket. I think that's a function of what Kwaku was talking about before, that the Trump administration is just a much more active user of the interim docket, or the emergency docket.

They've applied for interim or emergency relief way more times than any other presidential administration. I think the first Trump administration and the second Trump administration are numbers one and two in frequency of applications, and the third most frequent, I don't know who it is, but it's way behind on the numbers.

And they've also been very strategic and smart in asking for interim relief in areas that the Supreme Court is willing to give, areas like the unitary executive theory, where the court was moving in that direction before, and the request for interim relief lines up with the evolution of legal doctrine, but put all together, a huge, surprising number of wins, based on a surprising number of application, leads to what I think of an appearance of a legitimacy problem.

Sam Gandhi:
Kwaku, there are a number of important cases before the court related to business interest. What do you see this term as being most relevant to businesses?

Kwaku Akowuah:
So, I would start with a meta trend. I think the most important meta trend is that the Supreme Court is taking fewer and fewer core business cases. So, they're sort of cross-cutting issues, like preemption of state tort law theories, class action, certification, securities cases, punitive damages, the kinds of issues that tend to really just cut across whole classes of business and industry.

Those have become a smaller and smaller part of the court's docket, as it's perhaps been more concerned with kinds of public sector disputes that we've been talking about. In fact, last term, there were three cases where businesses looked to the Supreme Court to curb securities liability and class action liability exposure.

In all three, the court took the case, heard argument, and then declined to issued an opinion. It dismissed as improvidently granted, in the court's lingo. So, I think that's one thing we are looking at is where is the court really looking to be active in business cases?

And there aren't actually that many that have been granted, so far, although we'll see what the docket looks like when we get to the end of the term. There are always major changes between October and April. One case that's interesting and maybe fits this overlap between public sector cases and business cases is a case called *First Choice Women's Resource Centers v. Platkin*.

Now, from the caption, that probably doesn't sound like a business case, and it isn't, in direct terms, a business dispute, but a number of major industry trade associations have filed amicus briefs in that case to talk about its importance, and why.

Well, the issue has to do with whether and when First Amendment challenges can be brought to investigatory demands made by state officials, and when the objection is, it sounds, in the Constitution, in the First Amendment, in particular, and the argument is about whether that challenge, when brought, can proceed in state court or in federal court, which is thought by many to be much more protective of federal constitutional rights, as when they're balanced against the investigatory interests of state officials.

And that dispute and the interest of business organizations in getting involved in the dispute reflects an increase in investigatory demands toward trade associations and interest by state officials in trying to understand better what kinds of conversations are happening within and around trade associations.

And that's a really troubling trend from the perspective of the trades and the members, who are counting on the trade organizations as spaces where they can think about how to lobby and how to litigate on issues of importance to industry and to do so without that being an open file to state officials, when they want to look and see what everyone is thinking about, in terms of litigation and advocacy.

Sam Gandhi:
And Tacy, what business cases interest you on the docket for this year?

Tacy Flint:
One I'd point to is *Cox Communications v. Sony Music Entertainment*. In that case, record labels and music publishers sued Cox Communications, which is an internet service provider. They sued Cox for copyright infringement based on the actions by users of internet service, of Cox's internet service.

A jury found that Cox had contributorily infringed the copyrights held by the plaintiffs and also that Cox Communications was vicariously liable for the copyright infringement its users engaged in of the plaintiffs' copyrights, and the jury awarded more than a billion dollars in damages against Cox Communications, including willful infringement damages.

The Fourth Circuit reversed or tossed out the jury's verdict on vicarious infringement but allowed the contributory infringement verdict to stand. The question here is the scope of a safe harbor defense under the Digital Millennium Copyright Act that internet service providers have when their users of internet violate copyright. So, the court's going to hear that case this term, and it could be potentially really important for internet providers and copyright holders.

Sam Gandhi:
What are you hearing from clients regarding their concerns about how the court has ruled recently and where the court is going, and what are you telling them?

Kwaku Akowuah:
The case that is prompting the most questions from clients and most conversation with clients, by a very significant margin, was the tariff case

that we talked about before. I think clients are thinking about it in a couple of ways. One, there's a sense that the President's various announcements about what tariffs are going up and down, as to which countries, on which days, are market moving.

And in a way, they're inherently unpredictable, unless you know what's coming next. So, there's concern and attention from that perspective. There are also many clients that are importers or purchasers of imported materials. These decisions are affecting their supply chains, and they're trying to think about how to manage those changes, those risks, and then thinking about what are the implications if the tariffs are struck down?

What happens next? And for the what happens next, I always send them off to our friends, Ted Murphy and others in our arbitration and trade advocacy group, who really know the ins and outs, but I think people are thinking about those cases with pretty intense focus.

You know, and then, I think they're thinking about the guardrail question. To what extent are our dealings with the agencies going to be about politics all the way down? There's one world in which everything's on the table, and it's political, or there's another end of the spectrum where everything is the rules.

It's never been entirely one or the other, but the sense is that it's tipping more and more towards politics, if not all the way down, a long way down, and that poses real challenges for businesses, on a day to day basis, across a whole range of what they need to do.

Tacy Flint:
So, a couple of thoughts. I do think there's a lot of concern that I've heard from clients, and more broadly, about the destabilizing effect of the Supreme Court's seemingly allowing some pretty important principles of law to shift rapidly. I think a lot of this, like, for example, presumed reversal of *Humphrey's Executor*, that a lot of this was coming.

We saw signs of it, but seeing these things come to fruition all at once feels very destabilizing, and there's a lot of concern about that, and concern about whether the Supreme Court will, as we talked about before, impose guardrails on the power of the Executive Branch to follow legislated law.

And then another thing I keep hearing concerns about is that the court is just not acting quickly enough to resolve questions that the business community really needs certainty on. One example is the scope of Section 230 of the Communications Decency Act.

We're just not seeing resolution of important questions like that as the court devotes a lot of its time to the Executive Branch, separation of powers, constitutional issues, and I think my clients are feeling like they just need answers to some of these other legal questions.

Sam Gandhi:
So, as we wrap up the podcast, I'll ask you both, five years from now, do you think that the court will expand executive power or try to limit it beyond where we are today?

Kwaku Akowuah:
That's such a great question, Sam. I think as Tacy was saying, with respect to the removal of agency heads, I think we are going to see a sort of continual expansion of the President's authority with respect to the operations in the federal government and the federal agencies.

And I think we've seen that in some of the disputes about funding and termination of federal employees and the like, which, at least to this point, the Supreme Court has seemed content to let stand or at least content to block the lower courts from blocking.

Where I think there's a lot more uncertainty, in my mind, is when the President reaches outside of the Executive Branch, what then? And that's where I suspect we will see the court be more engaged in limiting executive power.

Tacy Flint:
I think we will probably see the pace of these Executive Branch decisions really slow down in the near term. We've had this raft of decisions in the early stages of the second Trump Administration, and I think we will get resolution on a lot of these interim orders in this term, and maybe next term. So, I think, five years from now, maybe, perhaps, we'll be in more of a point of stasis.

Sam Gandhi:
We've been speaking with Sidley partners, Kwaku Akowuah and Tacy Flint, about why some lower court judges have publicly expressed concerns about the Supreme Court, the business cases to watch this term, and what clients want to know about the court's take on business. Kwaku, Tacy, this has been a great look at the landscape. Thanks for sharing your insights on the podcast today.

Tacy Flint:
Thanks, so much, Sam.

Kwaku Akowuah:
Thank you. It's been great to be here.

Sam Gandhi:
You've been listening to *The Sidley Podcast*. I'm Sam Gandhi. Our executive producer is John Metaxas, and our managing editor is Karen Tucker. Listen to more episodes at Sidley.com/SidleyPodcast, and subscribe on Apple Podcasts, or wherever you get your podcasts.