What the Supreme Court's Transformation Means for Business

Sam Gandhi, Peter Keisler, and Carter Phillips
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Sam Gandhi:
The Supreme Court is transformed. With the passing of Justice Ruth Bader Ginsburg and the confirmation of Justice Amy Coney Barrett, the High Court shifts further to the right. What will this mean for the Biden Administration's agenda? How will this new court rule on business cases? What are the cases to watch in 2021? We'll find out in today's podcast.

Peter Keisler:
Overall, the effect of Justice Barrett's appointment is going to be very substantial.

Carter Phillips:
We're in a brave new world in terms of how much stability there is based on the doctrine of stare decisis.

Peter Keisler:
You're going to start to see a lot of new policies that are going to be subject to review before a court that is not going to be especially deferential.

Carter Phillips:
If I were a general counsel, I would try to figure out how to keep punitive damages issues away from the Supreme Court, but second, I would try as hard as possible to get the issue in front of the court involving the scope of class action.

Sam Gandhi:
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 businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this edition of the Sidley Podcast, episode number 15. Today, we focus on the impact of a Supreme Court with newly confirmed Justice Amy Coney Barrett, specifically how the court's rulings in

2021 could impact the business world. We're joined by Sidley partners, Carter Phillips and Peter Keisler.

Carter is a member of Sidley's Supreme Court and Appellate practice. He's one of the most experienced Supreme Court and appellate lawyers in the country. Since joining Sidley, Carter has argued 79 cases before the high court, more than any other lawyer in private practice. Prior to joining Sidley, Carter served as an assistant to the Solicitor General of the United States.

In that position, he argued nine cases before the Supreme Court on behalf of the U.S. government, and in all, he's now made 88 oral arguments before the court and more than 140 before the U.S. courts of appeals. Peter is a former acting Attorney General of the United States. He's a co-leader of Sidley's Supreme Court and Appellate practice and a member of the firm's executive committee. He's argued a wide range of federal constitutional, statutory and administrative law cases.

Peter's practice representing clients before the U.S. Supreme Court, Federal Courts of Appeals, and Federal District Courts has included a leading role in the nation's most important and successful commercial and regulatory cases in the past several years.

Carter, Peter, great to speak with you today.

Carter Phillips:
It's a pleasure to be here.

Peter Keisler:
Great to be here, Sam.

Sam Gandhi:
Justice Amy Coney Barrett began her Supreme Court tenure one week before election day. Her Senate vote was 52 to 48 and one of the closest in history, and Barrett's appointment was pushed through the Republican-controlled Senate in a mere month. Carter, how could Justice Barrett's presence on the new six to three conservative bench transform the high court?

Carter Phillips:

Well, I think it's important when you think about adding a new justice to the mix. Justice White, many years ago, said every time you add one more justice, it significantly changes the dynamic within the court, and I suspect that will be true in her case as well. The first thing to remember is there was already a five-member conservative majority on the court. So what was once a five-member majority is now a six-member majority, but the fact that Republicans may have appointed six of the justices doesn't really necessarily tell you the whole story, at least if you're interested in viewing the court as a business, and the business interests of the court don't necessarily align perfectly just because somebody happens to be conservative. There's sort of two different types of conservatives who sit on the Supreme Court. There are what we call business conservatives, Louis Powell, Warren Burger, Potter Stewart were business conservatives.

Then there are ideological conservatives — Justice Scalia, Justice Thomas — that can clearly fall into those categories. We know Justice Barrett is a protégé of Justice Scalia, so she's more likely to be an ideological conservative, and I'll just give you a single example of why that makes a difference to the business community. If you take punitive damages and if you asked general counsels a decade or so ago what they thought was the single most important problem they faced they would have told you it's exposure to punitive damage awards.

The Supreme Court more than a decade ago came out with a ruling in the State Farm case that said there is a limit to how much a jury can impose by way of punitive damages consistent with the due process laws. The three dissenters to that opinion were Justices Scalia, Thomas, and Ginsburg. The reason why Scalia and Thomas dissented was because they didn't think the due process clause had any application to what juries decided by way of punitive damage awards.

So it was a majority of business conservatives, ultimately, who decided to impose due process limits. If you look at the composition of the court today, there are a lot more ideological conservatives and the question is if that issue comes before this Supreme Court, how will a Justice Barrett, a Justice Alito, even a Chief Justice Roberts, not to mention Kavanaugh and Gorsuch, how will they react to the question of whether due process limits punitive damages.

So that's one of the ways, and it seems to me Justice Barrett will significantly affect how the court operates going forward.

Sam Gandhi:
Peter, what's your view? How would you characterize her potential impact?

Peter Keisler:
I agree with everything Carter just said, but I would also add that overall the effect of Justice Barrett's appointment is going to be very substantial, and that's particularly so given how closely divided the court has been in recent years and who it is that Justice Barrett's replacing.

If you look at this appointment in comparison with earlier ones from the same administration, they have reflected progressively wider gulfs between the new justice and the justice being replaced. So if you start out with Justice Gorsuch, he replaced Justice Scalia. He said, upon being nominated, that Justice Scalia's philosophy and his were the same, and of course as Carter said, every new justice brings something new to the court and Justice Gorsuch has already voted in some cases in ways differently than we would have expected Justice Scalia to vote. But at the end of the day, that is as status quo, steady as she goes appointment as you're going to get.

Then you move to Justice Kavanaugh replacing Justice Kennedy. Justice Kennedy was a pivotal swing vote, joined the more liberal members of the court in some very critical cases as well as the more conservative members of the court in others. Justice Kavanaugh, while, again, he's his own person, is much more likely to be joining the conservative side of the court in the cases in which Justice Kennedy was more of a swing Justice.

But then you get to Justice Barrett. Look, she, like Justice Gorsuch, when she was nominated said Justice Scalia's philosophy is my philosophy. Unlike Justice Gorsuch though, she is replacing Justice Ginsburg who was on the opposite side of Justice Scalia in most of the really high-profile cases. If you look at the list of five-to-four decisions in which Justice Ginsburg provided a decisive fifth vote, they run the gamut on some of the most high-profile cases the court hears, from abortion to climate change to search and seizure law to death penalty law. And even on the business side, Justice Ginsburg and Justice Scalia were on opposite sides of key

cases on, for example, class actions. So there is a very significant difference. When you think about it, if you take all these appointments together and particularly if you think about where the court would have been if Merrick Garland had been confirmed to Justice Scalia's seat, President Trump has probably been the most consequential president this century in forming the future trajectory of the Supreme Court, even though he had only one term and Presidents Obama and Bush both had two.

Sam Gandhi:
Specifically, Peter, what are the areas of law that you think she may have the most impact by her appointment?

Peter Keisler:
Well, let's start with one area in which even in her brief time at the court she's already flipped a result from what it would otherwise have been and that is in the area of religious liberty. The court, since the pandemic began, has seen a series of applications for emergency relief filed by houses of worship, churches and synagogues who are complaining about the restrictions on their occupancy imposed by state and local governments. And until Justice Barrett's appointment those cases were going five to four against the religious institution with the Chief Justices joining Justices Breyer, Ginsburg, Sotomayor, and Kagan to say that state and local governments ought to be given latitude in this area.

As soon as Justice Barrett joined the court, the next such application went the other way with the Chief Justice in dissent. So there was already a majority of the court concerned about those religious liberty issues and of the view that states and the federal government were often not sufficiently sensitive to those concerns that the hand of that view on the court has certainly been strengthened now.

Sam Gandhi:
What do you see, Peter, as some of the clues from her past writings and the opinions on how she may rule, including on some of the imminent cases such as the case on Obamacare or the ACA?

Peter Keisler:
Well, a couple of things there. I mean first of all, there is a limit to how much you can infer from someone's work on the Court of Appeals when

they are diligently applying Supreme Court precedent to project what they will do on the Supreme Court when they have a freer hand in trying to shape that precedent. But a few thoughts, first of all, on the Affordable Care Act, I think that's going to be a non-issue.

The real issue in the Affordable Care Act case, the one that everyone is understandably concerned about is will any constitutional deficiency the court finds in the particular provision that imposes a mandate to buy insurance, will that deficiency lead to the invalidation of the entire act. That turns on a wonky legal doctrine known as severability. The argument that the entire act should be invalidated if the court finds that one provision unconstitutional was always an exceptionally weak argument and at oral argument it was clear there are already at least five justices, not including Justice Barrett, necessarily, we just don't know about her, but a least five justices, and maybe as many as nine, for the view that the act would stand even if the mandate is found unconstitutional.

Sam Gandhi:
And Justice Barrett said as much in her confirmation hearing when she referred to the doctrine of severability in the context of the ACA.

Peter Keisler:
Yes. She noted that that was going to be key. She was very careful, as nominees always are, not to tip her hand but at this point, even if she were to vote the other way and I don't predict she will because, as I said, the argument for invalidating the entire act is extremely weak, but even if she did, I think she would be in dissent.

On the other hand, one area where I think she may well change things is the Second Amendment and the constitutional review of gun control regulations. Ever since the court's landmark Heller decision the court has declined repeated cert petitions seeking to raise further issues about gun control before the court, and I think that has to be because the justices who are most interested in expanding the scope of constitutional protections in that area have concluded they don't have five votes.

Justice Barrett, when she was on the 7th Circuit, dissented from a decision upholding a restriction on gun ownership that was applicable to felons saying she thought it would be unconstitutional to apply that restriction to

felons who had been convicted of non-violent felonies. So she's at least suggested a receptiveness to broadening the precedent in that area that I think in combination with at least four other justices on the court is likely to shift the law somewhat there.

Sam Gandhi:
Carter, what other imminent decisions should we be watching for in the remainder of this term that could be affected by her appointment?

Carter Phillips:
I'm not sure how much the sort of pending docket's going to be affected by her, but I do think the two areas that obviously people are going to want to focus on for the foreseeable future, one is in the abortion area. And so the question of whether *Roe v. Wade* is good law is an issue about which the Justice wrote before she went on the bench when she was an academic. So there's serious question whether she thinks the court got that right.

As a matter of the doctrine of stare decisis, it isn't the fact whether they got it right or not as opposed to not being enough to justify tossing it, but certainly she, during her hearings, did not go down the path of saying that there was anything super about *Roe v. Wade* as a precedent that would warrant not reconsidering it at this point. Now, that said, the court doesn't need to go all the way to saying that states can in fact outlaw abortions. They can go a long way in that direction by simply upholding a lot of state restrictions on a woman's exercise of the abortion right and that will effectively halt abortions. So it'll be interesting to see how far she's willing to go and sort of how quickly the states can get one of those issues up there.

My guess is it will be not long. I don't know whether it will be this term or early next term but the states have already started to adopt those kinds of restrictions, and I suspect one of them will get that issued there.

The other one that is probably more hopeful for the business community I suppose is the class action area because the court doesn't have any specific class action cases at the moment. But if you look at the three most important class action decisions in the last decade, they were all written by Justice Scalia and each one was designed to shift the court back in the direction of fewer class actions. At least from Justice Scalia's point of view,

and he had four other justices at the time joining him, the class action device had become essentially nothing more than a way of dealing with plaintiffs cases where there were a lot of plaintiffs and that the kind of coherence that you would need in a claim in order to justify treating it as a class action with all of the risks that that imposes on a defendant by the size of the potential liability had become out of control.

Justice Scalia's passing sort of put in question whether the court was going to continue to move in that direction. I think Justice Barrett reinforces the idea that there are at least five or maybe six justices who will be prepared to go back to the original understanding of Rule 23 and cut back on class actions going forward. So I'm assuming that business is going to take one of those issues up to the court as soon as possible.

Sam Gandhi:
Let me move towards kind of federal power and separation of powers. Carter, there's a view that Congress has emerged from the end of the Trump administration with weakened power to check the president or frankly to exercise oversight of the federal government or agencies of the federal government. What do you think?

Carter Phillips:
So there are a couple of issues here that probably we ought to try to pull out and understand carefully. The first one is because this one isn't really particularly Trump-oriented, but the Supreme Court has now, for some time, begun to limit significantly Congress' commerce clause authority and so the court has struck down a number of statutes as an excess of Congress' power to enact legislation. Indeed, I think if the Affordable Care Act were before this court on a clean slate and you were just asking the question whether or not the Affordable Care Act was within Congress' commerce clause powers, I'm not sure there are more than three votes right now to uphold it.

As you recall, Chief Justice Roberts, while he upheld the statute on taxing authority grounds, held that it would have been unconstitutional in the commerce clause. That suggests to me that there are probably six justices who would say the Affordable Care Act is unconstitutional. Candidly, that ruling and the notion that not everything that essentially touches interstate commerce is properly enactable by this Congress is going to…that's a

significant restriction on what Congress is going to be able to do. The legislators are going to have to be cognizant of that limitation on their authority going forward, and I don't see any weakening of the court in enforcement on that score.

In terms of the Trump administration and its relationship with Congress, to be sure, that was a pretty adversarial relationship. In fairness of disclosure, I did represent the House of Representatives in a number of disputes particularly involving the border wall funding. I think some of those disputes are probably not going to be continuing because the new administration will take a different tack, but the fundamental questions of the scope of congressional authority to issue subpoenas and under what circumstances, particularly with an executive branch that's unwilling to be cooperative remains a pretty significant issue.

The court hasn't finally resolved it. We know that there is some basic subpoena power, but there will be limits on how much Congress can make the Executive Branch's life miserable. My guess is, candidly, President Biden will be just as happy if it turns out that the Senate remains in Republican hands to have a little more authority to say no to the Senate when it comes knocking on his door than he would have thought he had at least prior to the Trump administration.

Sam Gandhi:
Let me follow up on that, Carter. You said that it's kind of less about Trump but do you think the justices may react differently to Executive Branch decisions when the decisions of the Executive Branch are a little bit less to their political liking?

Carter Phillips:
Well, certainly the court's struggled with that issue previously. If you go back and try to figure when did Chevron come into existence and the whole idea of deference to federal decision-making. I mean Chevron came in right after the Reagan administration came into office with a fundamental shift of the deregulatory shift. That was certainly a position that the conservatives were quite comfortable with and probably more comfortable with being deferential. It'll be interesting to see how the court deals with a more liberal administration.

Obviously, the justices, to some extent try to come up with methodologies for decision-making that make it irrelevant what the political issue happens to be or the political preferences, but I think it's probably more of a hope than it is a reality that the individual justices completely eliminate those kinds of political concerns when they're trying to decide whether or not a decision by a government official is correct or incorrect.

Sam Gandhi:
Peter, what's your perspective on that in terms of given the composition of the court how concerned the Biden administration would be about legal challenges to its policy decisions? Because as we've seen in the aftermath of the election, the spate of litigation from the pollical right is unending and we don't really expect that to really cease in the Biden administration.

Peter Keisler:
I think you start with the proposition that we are a litigious society, and whether you have a Democratic or a Republican administration, any controversial action will be challenged in court. When I was in the Justice Department, if I picked up the paper on a Tuesday and read an announcement of some controversial policy, I knew there would be a lawsuit filed by Thursday. I mean that's just the way it is. So I'm sure the incoming administration is going to think very carefully about how best to craft its policies so as to withstand what it will presume correctly will be inevitable court challenges.

When it does so, it's going to face an issue that really bedevils every administration, which is the basic strategic question of how much do you try to accomplish legislatively. How much do you try to accomplish through unilateral Executive Branch actions like regulations and executive orders and enforcement cases? The former, the legislative approach, that's harder on the front end, because getting something through Congress is notoriously, and in terms of the Constitution's design, deliberately difficult, it will be even more so if the Senate stays in Republican hands. But even if the Democrats win the two Georgia runoff elections, you're talking then about a 50/50 Senate with the tie-breaking vote cast by the Vice President.

So the legislative route is tough. It's much easier on the front end to just issue an order but then that's harder on the backend, which is when it comes to court, because of course there are all sorts of doctrines which

give much greater respect and deference to legislative decisions embodied in statutes than unilateral Executive Branch actions. As Carter referenced, that is particularly the case when you have a court which is increasingly skeptical of broad Chevron deference to administrative agencies.

Sam Gandhi:
You're listening to the Sidley Podcast and we're speaking with Sidley partners Carter Phillips and Peter Keisler about the business and policy implications arising out of the new six-to-three conservative majority on the Supreme Court. So we've talked about Chevron deference a little bit, let's actually get into it and that's the principle of administrative law that says courts should generally defer to interpretations of statutes made by the agencies that have to enforce them.

I'll open it up to both of you, Carter and Peter, you've both had a lot to say about this already, but how deferential do you really think this new court will be? I'll go to Carter first.

Carter Phillips:
Well, I will tell you that my view of Chevron deference is that it's been tough for the last 30 years basically having to litigate against federal agencies because they end up with a very heavy thumb on the scale in support of their position. It's a pretty easy solution to a court to say, well, it's not the way I would have decided it, but it's not my job and I'll let the agency decide that. I do think in the lower courts you get a lot of that kind of a reaction. So it's an interesting dynamic. This is going to be a huge shift if a court makes a fundamental change and says, you know what, Chevron was never right to begin with. This notion that you sort of almost slavishly defer to policy choices simply because Congress couldn't make a choice on its own and left it to an agency either expressly or by necessary implication, that's going to be a really significant change.

It will be interesting to see, as the court has had these kinds of deference issues in front of it prior to Justice Barrett going on the court, and it has shaved off deference in the concept of our deference, which is a wonkish term as well about when an agency adopts its own regulation and then interprets the regulation and therefore do you defer to its understanding of its own regulation. The court cut back on it. Didn't overrule it, didn't say that's not a valid way of thinking about the world, but it did cut back

significantly on the kind of extreme deference that was given to agencies in interpreting their own regulations.

You could tell in that case in the fight over that issue that the court was struggling with. It'll be more interesting with a six-member court of people who are skeptical about Chevron, whether or not they may in fact do something that would be much, much more dramatic in terms of saying for a lot of cases, a lot of issues, you don't defer. That, obviously, in some ways I think it will make it easier. The kind of perfect case, if you could get it there, would be one where you thought that the whatever policy was being adopted had been adopted by the Biden administration was one that you figured the majority of the court didn't like anyway. So you take up something they don't want to uphold and then give them an excuse to announce a broader interpretation about when deference is appropriate across the board. I see that as a huge fight for the next few years.

Sam Gandhi:
Peter, what's your thought?

Peter Keisler:
I think the vulnerability of Chevron and the pressure to reconsider it has been really intensified by larger political trends in the country. I would mention three that kind of interrelate. The first is that the country is pretty closely divided. The second is that the differences between the political parties are really wider than they used to be even though the margins of votes between them in national elections are narrow. Then of course you have the fact that legislation is extremely hard on anything very significant to get enacted. So you have situations where the national government flips in a period of a small number of years between, say, President Obama to President Trump to President Biden.

That means wild swings in the policies that are being adopted and most of the time with no change in the underlying statutes. So for example, the Obama administration, after attempting to get a climate change bill passed, is unsuccessful and then enacts a very sweeping and robust policy through the EPA.

Then the Trump administration repeals it and then the Biden administration will presumably try to reinstate something like it, and you can track that

along all sorts of areas of regulatory policy, and if you're a justice and you're looking at that, you see these very dramatic changes in hugely consequential policies with no change in the underlying statutory law, and I'm sure to a lot of them it feels unnatural to say what the law is should vary that significantly depending on who is president. And that's really what Chevron is about.

Sam Gandhi:
Let me follow up on one somewhat unrelated issue but it's kind of something that you both talked about. Is this the type of court that is going to not necessarily follow the long-time precedents, or is this more going to be an activist court that's going to look at these long-term precedents such as Chevron, potentially *Roe v. Wade* or others and say we're going to finally overturn it because we now have enough of a view to do that? Or do you think that there is some type of institutional brakes that Chief Justice Roberts has kind of said in the past that they want to preserve the legitimacy of the court and they want the court to move slowly as opposed to rapidly.

Carter Phillips:
The reality is if you look at the last three or four terms since Justice Gorsuch went on the court, this court has been more open to the idea of overruling prior precedent than the court has been at any time since I've been watching it and on cases that I think…or at least legal issues that I think it would have been almost unthinkable that the court would have revisited them. I can give you an example of one.

When I was clerking, the Supreme Court decided a case called *Nevada v. Hall*, which had to do with whether or not the State of California could be sued by a state court in Nevada. The U.S. Supreme Court said that it could. Last term or the term before last, the court reconsidered *Nevada v. Hall* and decided that the state court couldn't be sued. One state court can't be sued in another state court. It sort of came out of the blue. To be sure, the petitioner asked whether or not the decision in *Nevada v. Hall* should be reconsidered. That is hardly an issue but I would say is something that has been at the forefront of any litigator's mind at all in the 30 years that that case has been sitting around, and yet the court felt not at all any problem in just sort of picking it out and knocking it down and there are at least eight or ten other situations like that where the court has simply decided stare

decisis wasn't enough of a reason to keep a decision around that the majority believed was wrongly decided.

So I actually think this court is open to those kinds of questions. I think as a litigator, you have to be thinking about whether there is an issue there that the court ought to be reconsidering and put it to these justices in those terms. Candidly, again, if I go back 20 years and a client came to me and said I don't like this precedent of the Supreme Court, I think you ought to file a cert petition asking the court to reconsider it, I think I would have said that's a fool's errand. I'm never going to be able to get the justices to do that. Today, I would have a very different conversation. I'd go and take a hard look at whether or not the legal issue that's on the table is one that a majority of the justices might very well think was wrongly decided and therefore would seriously entertain the idea of granting a petition solely for the purpose of reconsidering a prior ruling.

I think going forward, we're in a brave new world in terms of how much stability there is based on the doctrine of stare decisis.

Peter Keisler:
Yeah. I mean I think that's an accurate assessment, and I would add that at any given point in time, there are at least some justices who have identified an area of law where they are dissatisfied with where the state of precedent is and want to see the court reexamine it and shift it in some way. So for example, Justice O'Connor came to the court from serving on a state court and in the state legislature, very much had a view that the federalism precedents of the court were insufficiently respectful of state interests and sought to rebalance those, and achieved a lot of what she set out to do with obviously the support of other justices on the court.

Justice Powell came on the court believing the court should be more sensitive to business interests and wrote some critical cases in that area. If you look at the court now and say where is their intellectual ferment, where is there some desire to churn things. Just to return to an earlier part of our discussion, you'd have to say Chevron and deference to administrative agencies is at the center of some justices, particularly Justice Gorsuch, but not him alone. Their desire to rebalance the precedent in ways they think would be more appropriate. So that just opens a wide scope of possible

arguments to be made. Because like Carter said in the very different area of abortion, you can do a lot without overruling a prior case.

Whether Chevron gets formally overruled is not, to my mind, the critical question. There is a wide range of principles you could apply in deciding how much deference to afford that in most cases can make the difference whether or not Chevron is formally overruled. That's where I think some of the action is going to be.

Carter Phillips:
I've given some thought to sort of what kind of a world would you live in if you didn't have some form of deference to agency decision-making, and this came up in oral argument in the Supreme Court where I think it was Justice Breyer who asked the question of if you were talking about some kind of a molecule that the FDA said should be used in a particular way for a particular purpose, a subject that he said clearly no court would have any knowledge or understanding of, isn't that something we should defer to the expertise of an agency on. I think most people instinctively would say, yeah, that's right and so there will probably always be some desire to say there are certain issues that courts don't want to get involved with and even if they don't accept Chevron deference, what they'll do is they'll still uphold those kinds of decisions on areas that are just simply beyond the judicial ability to really understand and feel comfortable deciding.

But on the big issues, the big policy choices, the ones where the justices probably feel just as adept as the administrators, not having deference is going to say who's got the best argument. If all that the agency has is the strength of its ability to persuade, I'd take my chances. If I were the business community, with a Peter Keisler making the arguments that are likely to persuade over what I think most administrators would probably be able to come up with. Not an issue of net neutrality or any of the other big issues that are out there.

Sam Gandhi:
Peter, let me bring you to what some of these cases mean for business and regulation. What are some of the cases on the docket that you're watching for an impact on companies and their operations from the change in composition of the court?

Peter Keisler:
What I think most of are less the cases that are currently on the docket, meaning the cases the court has agreed to hear in December and January and February, but I'm thinking more about the cases that will be on the docket in the next couple of years or so based on the new regulatory and enforcement-type decisions that the incoming administration makes.

So for example, in the area of environment law, we're obviously going to have a very different EPA. Carter mentioned net neutrality. That's another example of a policy that was adopted in the Obama administration, repealed in the Trump administration, and certainly people are saying that there'll be a strong push at a new FCC to readopt it, and that will go back to the courts.

In the Department of Labor at the end of the Obama administration there was a rule called the Fiduciary Rule, which imposed some sharp new restrictions and risks of litigation on people who give investment advice. That was struck down by a lower court and never reached the Supreme Court and then abandoned by the Trump administration. You may see new activity there.

So I think you're going to start to see, I was going to say trickle through the system but I don't think it's going to be a trickle. I think it's going to be closer to a flood. A lot of new policies that are going to be subject to review before a court which is not going to be especially deferential to regulatory actions. That I think is where we're going to see a lot more about where Justice Barrett comes down. We're going to see how the court as a whole evolves the Chevron doctrine. That's what I'm watching the most. I think that is actually what's going to be most consequential for the business community, and we're only going to see how that plays out over a period of years.

Sam Gandhi:
I want to shift the conversation a little bit from the composition of the court and certain cases to just the court itself as well as how the court's changed in the midst of this pandemic. President-Elect Biden has pledged to put together a commission that's going to review Supreme Court reform and he proposed this when there was a lot of pressure on him in terms of whether

he was going to actually pack the court as the new president. Carter, what do you think is going to actually happen with that commission?

Carter Phillips:
I think the president will probably go ahead and put together a commission, and I think the commission will take a hard look at the question of whether term limits, because the justices currently have life tenure, whether term limits make sense. Whether it's 18 years or 15 years or 12 years. Then I think it'll take a hard look at whether nine is the right number of justices. I don't think there's ever been a court with more than nine, but the Supreme Court has previously had fewer than nine justices on it. So that'll be a serious issue that the Congress and the president ought to take a hard look at.

I mean obviously it's in the context of a politically hot set of issues at the moment but I actually think the term limit issue is one that's been out there for quite some time and there probably is much or more enthusiasm for sort of revisiting that question as any that's on the table and it'll be interesting to see how that plays out.

I also think there'll probably be an equally hard look at whether or not they have the right number of judges in the U.S. courts of appeals, whether the circuits ought to be cut up. I mean there's long been this thought that having a circuit that includes California and other states ends up with the ninth circuit being wildly too large and then the concern about trying to cut California in half and how do we do that. I think the commission could take up those kinds of issues as well.

At least from my own practice perspective, I would hope that whoever takes a hard look at what the court's doing might raise the question of is it right for the court to be deciding 70 cases a year when it was not that many years back that the court was deciding well more than twice that many. And maybe 150 is not the right answer, but has the system become too difficult for cases to get before the Supreme Court and should somebody revisit the standards for deciding what cases end up on the court's docket.

Sam Gandhi:
One of the big effects that we've seen with the court in this year of COVID is that the court has begun hearing arguments remotely since restrictions

were put in place in the spring. Peter, to what extend does this remote arrangement affect advocacy on behalf of clients?

Peter Keisler:
Well, it makes it harder. I mean first of all, it's not only remote, it's audio only so you can't see them and they can't see you and there is a lot that we understand about others and that we communicate to others by what people call body language and you strip that out of the equation entirely. It's all an audio conversation. Then you add on top of that, that instead of it being the kind of free-flowing back and forth that you used to have, it is a series of questions sequentially, justice by justice by order of seniority, with just a couple of minutes at the beginning and a couple of minutes at the end where the advocate is given some chance to riff on his or her own.

That really changes the nature of the conversation. There's been an evolution over many decades from a court where questions were occasional interruptions and advocates were mostly speaking for large lengths of time uninterrupted into a situation which has been, for most of the last couple of decades, certainly since Justice Scalia joined the court, in which most of the time is spent responding to questions. But it is, as I said, a free-flowing conversation in which justices are randomly following up on each other's questions, and you have some opportunity as an advocate to pivot to try to focus the court on aspects that you think are important.

When you turn it into a series of sequential questions with the chief justice doing something that in no other circumstance would you see, which is actually cutting off his colleagues when they exceed the time allotted to them because otherwise it would go on twice as long as it's supposed to before he'd get to the more junior justices. So he's cutting them off and they are asking one-by-one questions. The advocate is now…that completes the evolution to making this almost exclusively a question and answer session. And that is a somewhat different skill to master for many advocates when you really don't have the same opportunity to even attempt for a brief moment of time to seize control of the narrative. But it is, I think, the only way to do it in these times.

Sam Gandhi:
Maybe they've got to learn how to use Zoom.

Carter Phillips:
I think what's going to happen is at the earliest possible moment the court will return to its in-court proceedings because it's pretty clear to me even without the benefit of video, you can discern some dissatisfaction among the justices. I can't even count the number of times Justice Alito has made comment about the very short time that's available to me, which suggests that at least he's chafing a tad with the chief justice's clock. My guess is they all feel that way.

The other thing that's sort of interesting, and it's probably more important to the media than maybe it is to the advocates, is that at the height of the sort of post-Scalia food fight that used to be oral arguments, it was pretty easy to walk out of that courtroom and have a fairly good idea how the justices were likely going to vote. It is much harder to get a feel for that when you get this kind of [unclear 00:42:35.1] hearings the same as you get in a House or Senate committee hearing where they obviously have to come in with certain questions preplanned because they're going to have their moment of performance.

I mean obviously Justice Thomas went years without asking questions. He now feels the need to ask questions because he's being told you have to ask some questions. It's a different world and to me it's much harder to tell are these real questions? Because when you're in a real give and take, people become argumentative, you know what they're really thinking about this. I mean some people can be a devil's advocate, but that's usually not the way the justices behave. Whereas when you're asking kind of questions that you think up ahead of time before you get into the heat of battle, they may or may not actually reflect nearly the strength or depth of your own views on a particular issue the way they do, I think, when it's free form, as Peter described it.

Sam Gandhi:
Does preparing for the Supreme Court argument where you know that one particular justice in person may be monopolizing a lot of the conversation and this time now they have more equal time, has that adjusted how you prepare for arguments?

Carter Phillips:

I will say that I used to always walk around thinking about what was Justice Scalia going to ask me? Because one, I knew he was going to ask questions. Two, I knew more often than not he would be, in some sense, hostile to whatever I was arguing even if he agreed with me at the end of the day. I still think about what do I think Justice Scalia might ask me. I suppose maybe that's a safe way to think about the court, since there are at least three Justice Scalia protégés on the court at this point. But yeah, sure, it makes a difference.

The other thing you've got as an advocate is an ability to filibuster right now. You know there's only a two-minute window or maybe three minutes, whatever it is, of justices asking questions and being in a position to follow up and you being allowed to give your answer to the question. So if it's a question you don't like to answer, it's actually much easier to avoid now than it used to be, because it used to be if a justice got ahold of your leg and wanted to just keep gnawing on you, no matter how much you wanted to get rid of them and move on to something else, there was no chief justice going to say I'm sorry, it's time for somebody else to come in and take over this argument at this point. It's a very different world.

Peter Keisler:
Yeah. The flipside of that is it puts even more of a premium on the need to give concise answers that go to the heart of the question. That was always important but justices are now a bit like members of Congress at hearings. When you see members of Congress, they clearly don't want the witness to go on for too long because they have five minutes and that's all and they cut off the witness after a few seconds. Some of the justices are, sadly, in that same position where you see them interrupting the advocate even more than they normally would because they see their clock ticking, which they never used to and have other questions they want to pose.

That means that if you've got a good answer, you've really got to make sure you get to it early on, because you're not going to have time for a long setup.

Sam Gandhi:
Looking ahead to 2021, I'm sure you both have your eyes on particular cases that will be before the court and June will come up pretty quickly. Tell me about them.

Carter Phillips:
The interesting thing about this term, it's a really not interesting term and I think there are two reasons for it. The first one is that it's an election year, and the justices tend not to take a lot of politically hot issues in an election year because I think they worry that it may affect the voting. Then second, I think the justices, after Bush versus Gore, were concerned going in that they may end up with just a flood of litigation coming to them right about now. I think they were unbelievably conservative. I know that there are at least three cases I had that I thought were not necessarily…nothing's the clear grab, but clearly strong cases for the court to take. The court denied all three of them, and I just had this feeling that it was incredibly hesitant to take anything during that time.

The one case that I am looking at that I think will be interesting is the court asked for the views of the Solicitor General last week in an antitrust case on whether a monopolist's efforts to refuse to deal with a competitor is a violation of the Sherman Act. The reason that's an interesting case is it poses the whole question of how is the law today and will the court reconsider refusals to deal and the way it ought to be analyzed. So there's a whole stare decisis element to it.

There's also the fascination of having asked for the Justice Department to weigh in on the case. I'm quite certain that the Biden Justice Department and Solicitor General would give a different answer to the question than a Trump Solicitor General. So it'll be fun to see both how the Solicitor General responds to that invitation and then what the court does with that case and the extent to which it's going to reconsider the kind of basic anti-trust policy.

With the administration in the final days coming out with more and more antitrust actions, especially against big corporations, how the court considers antitrust law is going to be a big ticket item both in 2021 and beyond.

Peter Keisler:
I would just add that I think antitrust is going to be just an extremely interesting area to watch generally, because at least since the 1980s or so, there's been a relatively strong consensus that both political parties have

shared about antitrust law and what was once called the Chicago School, the consumer welfare model was one that…not that there weren't variations in how that was applied depending on which administration was in power, but the range of disagreement was reasonably confined. In recent years, many of the fundamental premises of that school of thought have been challenged and criticized by a new generation of antitrust scholars and practitioners and have gained considerable sway, I would say, on the Democratic side of the fence.

We don't know yet who's going to be head of the antitrust division or who's going to chair the FTC, but at the same time, you have a Supreme Court, which I think is very Chicago School-oriented. You may have an administration which wants to do things very differently and how that particular clash of ideas plays out is going to be, I think, one of the more interesting areas of law to watch.

Sam Gandhi:
What are the takeaways for clients and how should they prepare for the new court in the new year? What are they specifically worried about?

Carter Phillips:
There are two things I would tell the business community because at least in my conversations with them, the two issues they've been most concerned about are punitive damages and class actions as a litigation matter. If I were a general counsel, I would try to figure out how to keep punitive damages issues away from the Supreme Court in order to ensure that there continue to be due process limits on how much juries can inflict by way of liability verdicts.

But second, I would try as hard as possible to get the issue in front of the court involving the scope of class actions, because I think the court's going to be very sympathetic to those kinds of questions. Then I guess the last thing I'd say is we didn't spend a lot of time talking about the importance of textualism, but I think most everybody has got to go back to square one and maybe even go back to grammar school in terms of looking at how to read statutes and how to parse out what a comma means and what a semicolon means and how these phrases go.

The oral arguments, there was one yesterday and on the terms of context and rules of grammar that I literally have not thought about since I was in the third grade suddenly taking the fore in advocacy. I think it's going to cause all of us to have to step back and say we've got to read these statutes for the first time.

Peter Keisler:
Yeah. I would just add that I think the clients that I talk to are most concerned about these massive cases, whether we're talking about class actions or mass tort MDLs and the whole complex of doctrines. Carter mentioned punitive damages, obviously the class action standards, but also things like personal jurisdiction, which tell you how many different plaintiffs from potentially different parts of the country you can cram into a single case in what you see as a favorable state court forum. That's an issue which the court has been interested in recently, has been writing opinions in, and is going to come out with an opinion on this term as well.

When I talk to clients, they are at least as focused and probably more so on what the Executive Branch is going to be doing in the next year as what the court will be doing. But of course, as we've discussed, the court looms as a really significant backdrop to those Executive Branch actions as well.

Sam Gandhi:
We've been speaking with Sidley partners Carter Phillips and Peter Keisler about the newly configured United States Supreme Court and its impact in the new year and beyond. Carter, Peter, thanks for your insights. This has been a great look at what 2021 will hold for the high court, policy, and business. Thanks again.

Carter Phillips:
Thanks for letting us be here.

Peter Keisler:
It's a real pleasure.

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 Podcast, or wherever you get your podcasts.