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SPEAKERS

Jeff Rowses, Anthony Sanders, Scott Lincicome

A Anthony Sanders 00:10

"Give, give. They cry and take. For willful men are they who taxed our cake and took our cake to throw our cake away. The cake grows less and less for profits-less than two- but land will pay at last, I guess, for land. One watcher loo, they mix our bread with bran. They call potatoes bread, and get who may or keep who can. The starved, they say, are fed. Our rivals fat and fast, but we are free to pay- and dearly they shall pay at last, who threw our cake away?" That is a poem called The Taxed Cake. It's from an old book called The Splendid Village: Corn Law Rhymes and Other Poems by Ebenezer Elliott from 1833. As the title suggests, it's a poem about the Corn Laws. The Corn Laws are some of the most hated tariffs in history. Well, we have some of our own hated tariffs today in America in 2025. Now, instead of writing poems about them, however, it seems like we have some litigation- and because of a little judicial engagement, they've been found unlawful. We're going to discuss all this with a tariff expert this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on June 4, 2025, and we have back on the show Scott Lincicome. He is tariff expert extraordinaire at the Cato Institute, and we're going to get to his analysis, his predictions, his whatever about the latest in tariff news and tariff litigation in just a little bit. First, I want to introduce my colleague who will be discussing another case later, and that is Jeff Rowses, senior attorney at the Institute for Justice and all-around extraordinary litigator- and at this point, preliminary injunction expert- and he'll be discussing that kind of stuff a little later. So, Jeff, welcome back.

J Jeff Rowses 02:28

Thanks, Anthony.

A Anthony Sanders 02:29

First, a very small announcement before we get to tariffs. We at the Center for Judicial

Engagement are partnering with the Liberty and Law Center at Antonin Scalia Law School, and we are putting on a conference. The conference will be next April, and it is on the 250th anniversary of- not America, which everyone else is going to celebrate this year, and we will too- but the 250th anniversary of the declarations of rights that many states adopted in 1776. We have a call for papers as part of that. The deadline is the end of this month, June 2025. So if you happen to be a scholar on early American history and constitutionalism- or if maybe you know someone who is into that stuff and would want to write a paper about it and present it at our conference- we have honoraria available to those who are selected, plus travel costs. So please apply. You just have to submit a summary of what your paper would be- just 500 words at this point- plus your CV. If you're selected, you can come to the big dance next April. So I wanted to put that out there for those interested, and we'll put a link in the show notes. Now, enough formalities. We're on to Scott. Scott Lincicome is the Vice President of General Economics at Cato's Herbert Stiefel Center for Trade Policy Studies. He is famous on many platforms. He is an expert on many things- not just tariffs- but also a hot sauce chef. So if you want to get into hot sauce, we can do that too. But for now, we want to hear what's going on at the Court of International Trade

S

Scott Lincicome 04:25

Yeah, an interruption of my vacation is what is happening. Literally, I kid you not, mere hours after I had decamped for a dude ranch in the middle of nowhere in Texas, the ruling hit. So you can imagine my family's delight that I'm on the phone basically for the first day of my of my vacation. So that was great. And then there was another ruling the next day, and then the 50% steel tariffs the day after that. I mean, it's further proof that the President is out to get me personally.

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Anthony Sanders 05:03

Well, I believe that. But so you're back from the ranch now?

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Scott Lincicome 05:06

Yeah. It was a relatively short trip

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Anthony Sanders 05:08

So Jeff has his own Texas ranch. Maybe we can talk about ranches in Texas a little later.

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Scott Lincicome 05:14

We should definitely dude ranch it up. So, going back to the CIT, it was a really shocking decision in terms of its breadth and speed. The best way to set the table is a paper that Clark Packard, my colleague at Cato, and I put together in October, laying out the universe of trade laws the President could use to raise tariffs unilaterally. One of those laws was the International Emergency Economic Powers Act, or IEEPA. This was kind of the bazooka of available laws.

There are other, narrower laws that Trump has used in the past and might use in the future, but nothing was as vague, open-ended, and dangerous as IEEPA. At the time, we noted that this probably wasn't the route Trump would go, and legal scholars were really divided on whether Trump could impose tariffs under it and whether that was constitutional. But again, we didn't think he was going to do it- and then he did. The very first major Trump trade action of his second term was these tariffs on imports from Canada, Mexico, and China under IEEPA, justified by the claim that fentanyl coming across our borders constituted a national security threat- a national emergency. Declaring a national emergency under IEEPA unlocks broad trade powers, so a bunch of tariffs were imposed. Then in April, we got the Liberation Day reciprocal tariffs, which caused markets to tank, triggered panic, and disrupted trade talks. Along the way, several importers- small importers and U.S. states- challenged the tariffs in various U.S. courts. One of those courts was the Court of International Trade (CIT), which handles tariff cases, anti-dumping laws, and customs-related issues. The Trump administration was trying to push all the litigation into CIT, rather than other courts like those in California, Florida, or the D.C. district. So, we knew CIT was hearing these cases, but it was a real surprise how quickly the decision came down- and the decision itself. Sorry, that's a big wind-up. But the decision effectively enjoined the tariffs on the grounds that the President did not have the power to impose global tariffs like he did under IEEPA.

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Anthony Sanders 08:15

Before you get to the the opinion I just want to ask, why was the administration trying to get out of these other courts. Is it because that's some crazy judge that's going to do another one of these nationwide injunctions, and according to international trade, they're pretty buttoned down conservative trade guys who are just going to go with the government?

S

Scott Lincicome 08:35

Yeah, and so, going back to our paper, one of the risks we noted- because our paper was really just a call to arms of sorts- was that we didn't know how the courts would handle these tariff laws, particularly IEEPA, but also others. One of the reasons there was risk beyond just legal uncertainty was that the courts, especially the Court of International Trade, and also the Court of Appeals for the Federal Circuit (which is now reviewing the CIT decision), had largely rubber-stamped various tariff actions during Trump's first term. Now, those were under different statutes- Section 232 for national security, Section 301 for the China tariffs- but generally, the CIT had been quite deferential. Not entirely, but pretty deferential. So, it made sense for the Trump administration to try to steer litigation back to that court. They also wanted to reach the CAFC, which had been really deferential to the President. The CIT had pushed back a little on procedural grounds- nothing major on substance- but then the CAFC overruled even that. So, the Trump administration had good reason to try to get to the CIT. But then, the CIT issued this ruling last week, actually.

J

Jeff Rows 10:04

If I recall the opinion that CIT seemed to say that it actually had exclusive jurisdiction over this specific which might also explain one of the reasons why the Trump administration wanted to land there was actually legally required to litigate them there. And I think that in either a

district court in the Ninth Circuit, or the Ninth Circuit itself just said we don't have jurisdiction to rule on California's challenge.

S

Scott Lincicome 10:26

Right, and so this is kind of one of those very lawyerly but important preliminary debates in these cases, because some plaintiffs- who have been doing a bit of forum shopping around the country- have argued that IEEPA is not about tariffs. It's not a tariff law. In fact, one of their main substantive arguments is that the President does not have the authority to impose tariffs under IEEPA, and that because of that, the Court of International Trade doesn't have exclusive jurisdiction- since the case isn't about tariff policy per se, but rather foreign policy. In fact, a ruling that came out of the D.C. district court- the second day of my vacation, actually- held that it did have jurisdiction specifically because IEEPA was not a tariff statute. It talks about regulating commerce more broadly, which, in their view, allows courts beyond the CIT to weigh in. But in general, so far, other courts- including, I believe, one in Florida and the one in California you mentioned- have said, no, the CIT has to deal with this. So having the CIT issue this kind of decision is one of many shocks. I think the other big surprise was the injunction. Or at least, it was a surprise to some. One of the big issues in these tariff cases- and something I think was a calculated gamble by the Trump administration- was that it doesn't help a plaintiff, say an importer, to win two years down the road if they've had to pay tariffs the entire time. And this is something the Trump administration denies, but they're wrong about this. Having worked with importers, I can tell you that they are wrong. You have to provide deposits for any duties owed the moment those goods enter the United States- not after you've made a sale, but immediately upon entry. There are a couple very small exceptions.

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Anthony Sanders 12:33

It's kind of the same thing as like tax injunctions, right? The government says you have to pay the tax and then try to get it back. You can't just enjoin the tax.

S

Scott Lincicome 12:42

And so the Trump administration has argued there's no harm here- which, as you all know better than I do, is key to getting an injunction. Their position is that because importers can eventually get a refund, there's no irreparable harm. But in reality, if you're devoting massive amounts of capital to these duty deposits, your access to financing shrinks significantly. Banks become hesitant to lend when you're tying up capital, and there are actually economic studies showing that the minute a company becomes subject to something like an anti-dumping order- even just the potential of future duties- it sees a dramatic reduction in access to capital, even if it's not yet making real deposits. So, this was a big issue, especially for larger companies that have more access to capital, can hoard inventory, or shift supply chains. But one of the creative things that happened in these cases is that the plaintiffs have been smaller businesses- except for the states, of course- and those are the ones who can clearly show harm. They can say, look, we only have 20 employees, or even fewer in some cases, and we don't have the capacity to issue more stock or call up a dozen banks for capital. That made the harm argument much more tangible. So even though people like me, and others, were sympathetic to the substantive

legal arguments about IEEPA, I was definitely not expecting an injunction. I thought this would play out over the next couple years. For all of this to happen- and to happen in a matter of weeks- was a huge shock, and I think it was also a shock to the Trump administration.

J Jeff Rows 14:40

Right. And, you know, it's worth noting- since Anthony called me the preliminary injunction expert earlier- that this case is actually a summary judgment case, which is really unusual. It's exceptionally rare for something to go all the way to summary judgment this quickly. But just a twist on the remedies piece- in a preliminary injunction, there's this doctrine where you can get an injunction for financial harms, which normally you can't, because if someone causes you financial harm, you usually have a remedy at law. But because the United States is sovereign, you can't sue the government for money in most situations. So that's one reason why you can get what would otherwise be a reparable financial injury enjoined through a preliminary injunction- sovereign immunity. But when I saw this was a summary judgment ruling, not a preliminary injunction, I was really surprised by that. Yeah, and I was also going to say, what's going on here is something I've seen in other cases around the country, which is trial courts being both diligent, intellectual, and quick. A lot of these challenges are raising issues that haven't really been litigated much before, because some of the Trump administration's policies are very aggressive uses of executive authority. And so lower courts are recognizing that these issues need to be dealt with quickly by the courts of appeals and maybe even the Supreme Court, and they're really burning the midnight oil on this.

S Scott Lincicome 16:08

Yeah. And I would add that on the economic side of things, recognizing the immediate or potential damage that these tariffs cause American companies is pretty great from my view. Because it just wasn't clear, to me at least, that we were gonna we were gonna get that type of acknowledgement. So, going back to our other tariff debates. It's proof, again, that Americans are paying these tariffs

J Jeff Rows 16:44

Right. In the common perception, it's like, the great thing about tariffs is, China is a bad guy, and a tariff is a way of hitting the bad guy on the head with a stick, but what you're actually doing is hitting an American on the head with a stick, and that has a downstream effect on the Chinese supplier or something like that.

S Scott Lincicome 17:05

Yeah, yeah. And coincidentally, and adding to the comedy of my vacation interruption, the plaintiff in the DC district court case was actually a small business owner that I interviewed over at the Cato website. We have a video of it, guy named Rick Woldenberg who owns a educational toy company. And so Rick and I talked at length about the real financial difficulties that these tariffs put his company in. He said that they basically had to cut their entire ad budget, stop building a new warehouse, and do all of these other things to just try to stay afloat

while the litigation was pending. But Rick and I talked in April, and he really had very little- and he was a he's a very optimistic guy, I think you have to be at this point- but even Rick had very little confidence that he was going to get a resolution so quickly. And so it was really a stunning and wonderful development.

A

Anthony Sanders 18:10

So it seems like we have this final judgment. It is being appealed. I know it's been stayed by the Federal Circuit, but eventually it will get ruled on at that court. It seems like the meat of the analysis is that there's this super broad language- and it's kind of a don't hide elephants and mouse holes, kind of argument to quote Justice Scalia- under, maybe the major questions doctrine, maybe the non delegation doctrine, but the opinion never really differentiates between the two- which, I know some other commentators have talked about that, but in my own read, kind of raised a question mark, like there's a little bit of hand waving here that's going to need to get fleshed out by the time it gets to the Supreme Court.

S

Scott Lincicome 19:01

Yeah and I gladly defer to y'all on on some of this stuff. You know, having abandoned my bar license years ago. But I agree that it seems that their desire for speed and getting this done sort of trumped-no pun intended- some of those details, and I'm sure they will get fleshed out.

J

Jeff Rows 19:23

Well, and you know, one of the things that was interesting about this decision is that it was a running study in contrast with a prior statute about emergency war powers that had existed since the early 20th century, and then President Nixon apparently had invoked them at one point, and Congress reacted in the early 1970s, and then, I think, it was subsequently amended. But, one of the things that the Court of International Trade said is the emergency war powers thing was super, super broad, and then it was exercised by President Nixon in a way that Congress didn't like. And whatever this statute is, it is necessarily narrower than that war powers thing. And what's going on here looks an awful lot like whatever happened in that war- you know, what President Nixon was trying to do- getting us off the gold standard, et cetera, et cetera, in those days. And so, like, to me, I looked at this and what the court seemed to be saying is, I'm not sure if this is major questions, I'm not sure if it's nondelegation- we're going to interpret the statute so as not to run afoul of those doctrines, whatever they might say- and interpret the statute in light of this predecessor statute. And it kind of comes out as this sort of smudge in the middle that says it feels like the President is in that smudge somewhere where this is against the rules.

S

Scott Lincicome 20:45

The other key point is that following the Nixon actions, Congress not only reformed the Trading with the Enemies Act to create IEEPA, but it also created another provision of law called Section 122, which allows for a blanket tariff for what they call balance of payments reasons- that is, issues like the trade balance and other things. The court is basically saying that, and I should

note that the reciprocal tariffs Trump is trying to implement here- the Liberation Day tariffs- are all premised on a balance of payments crisis or emergency, with the trade deficit being a big emergency. And so, I think that is one of the strongest arguments against using IEEPA to impose at least global tariffs like this: that there is another law that came out of the previous version of IEEPA and Congress's view on this, and that's what you should be using if you want to do this, but you're not using it- and that's a problem.

A

Anthony Sanders 21:55

That was interesting. So I didn't know that background. I knew about when the US went off the gold standard in the early 70s, and that the excuse was this balance of payments thing. And it does seem odd that you would have what essentially seems to be kind of a foreign policy, military statute to do that balance of payments stuff. Any other thoughts about how the Supreme Court or the Federal Circuit are going to look at these matters a little differently. They usually don't have their toe in the waters of tariff policy, but they do think about executive power and balance, and how this goes with other major questions doctrine cases and all that.

S

Scott Lincicome 22:44

Yeah. Given how the CAFC has ruled in other Trump tariff cases previously- I'm pretty skeptical. I obviously, I want the plaintiffs to win in these cases, but I'm pretty pessimistic about the CAFCs review of these decisions. And I think the more likely victory is going to come at the Supreme Court, given how this the current court looks at executive power, kind of has a toe in non delegation stuff, and has major questions doctrine support. It seems that that's where victory lies. To give you an idea of just how deferential the CAFC has been in tariff cases.

A

Anthony Sanders 23:38

I should say that the CAFC is the Court of Appeals for the Federal Circuit. So it's like this specialized court of appeals that gets court international trade patent stuff, some other things.

J

Jeff Rows 23:51

Yeah, maybe the Federal Tort Claims Act in certain situations or something.

A

Anthony Sanders 23:54

Yeah, Court of claims cases, I think, yeah.

S

Scott Lincicome 23:56

Yeah, and so the CAFC has looked at several cases because the CIT hasn't just uniformly rubber-stamped Trump tariff cases. It hasn't been great, but it has pushed back a little. One case I'd bring up is when the Trump administration suddenly raised the tariff on Turkish steel

from 25% to 50%, but did it well outside the statutory timeframe for setting the original tariffs. The Court of International Trade looked at the statute and said, you can't do that- you missed the deadline. You can keep the 25% tariffs as long as you want, but you can't just increase them. The CAFC shot that down and said, no, the law says you can adjust the tariffs somewhere in there, and you can do that. My colleagues and I were rolling our eyes at that. The other similar decision is that the CIT said the Trump administration couldn't expand tariffs to cover downstream steel and aluminum products- so-called derivative products- based on the strict limits in the law about when and how tariffs can be set. The CAFC again said, no, that's fine. Given that background, and some issues with Section 301 as well, I'm not extremely optimistic about this next stage. I think a more likely victory lies with the Supreme Court. But I should note, IEEPA is a different statute, and these tariffs are really different from steel, aluminum, and the China Section 301 cases. So maybe I'm wrong, but it seems that way.

J Jeff Rows 26:07

Yeah, I would say, before you shift gears, the other thing that's a little troubling- especially for someone who's a Liberty litigator- is the "emergency," nature of this in general. When the government is given broad powers to declare emergencies, one thing they like to do is declare emergencies that last a long time and keep getting renewed. In this case, like 35 pounds or something worth of fentanyl was intercepted at the Canadian border, and suddenly American businesses importing breakfast cereal made in Canada have to get hit because of that. It all just feels a little bit- not quite like an emergency.

S Scott Lincicome 26:53

And I would add that this was another reason why the courts have generally been okay with this broad emergency power, even though the folks on on this podcast aren't. And the CIT even there was skeptical of some of the emergency declarations.

J Jeff Rows 27:14

Right. And what could be more cliché than the leader saying "you must suffer my fellow citizens, because nefarious foreign powers are doing things and only my strong fist-

A Anthony Sanders 27:29

Especially Canadians. Jeff. I mean, you know about those guys

J Jeff Rows 27:33

I do. I grew up in Canada.

S Scott Lincicome 27:34

And the trade deficit one is similarly ridiculous, not just for the economic reasons. I mean, any economist worth his salt will say that a trade deficit is not necessarily a problem economically. But leaving that aside, we've had a consistent trade deficit for 30 plus years. So how is it an emergency by any legitimate definition? Has it just built up over 30 years, and suddenly the dam is broken.

J Jeff Rows 28:03

It's the meme out of the Incredibles, when everybody is super, nobody is super. And if this is an emergency, then everything's an emergency.

A Anthony Sanders 28:11

Isn't there dozens of declared emergencies at any one time in the executive branch.

J Jeff Rows 28:16

The city of New York declared a rent control emergency following World War Two, when all of these ships arrived with soldiers coming home from Europe, and that emergency has been continuously renewed for like 70-80 years now.

A Anthony Sanders 28:31

Whatever emergency it may be, kudos to our friends at the Liberty Justice Center and Jeff Schwab and a few other lawyers, including your colleague, Scott, Ilya Somin, who are litigating this case and best of luck to them as they go up the chain. So we're going to move along our chain now to the DC Circuit. I mean, we're talking like a premier appellate court here, which for some reason when Jeff first suggested this case to me, I thought it must be the Fifth Circuit because it has Ken Paxton, the Attorney General of Texas, but it's kind of like some extracurricular stuff he's been doing- is why he's there, and this case involves him and Elon Musk and Twitter and Nazis and Media Matters, and a subpoena, that's not really a subpoena. So what's going on?

J Jeff Rows 29:26

Yeah, well, everybody who uses the internet now has to talk about Elon Musk at least once a day, so that's what we're doing. This is a fascinating and sinister case. In November 2023, Media Matters- which the DC Circuit describes as a nonprofit media watchdog- published an article by one of their investigative reporters that made two claims: first, that Elon Musk had endorsed an anti-Semitic conspiracy theory, and second, that ads for "as American as apple pie" companies like Apple and IBM were appearing next to anti-Semitic content on X, formerly Twitter. A few days later, Musk announced he was going to file a thermonuclear libel lawsuit against Media Matters- and he did. Then, shortly after, Ken Paxton, the Texas Attorney General, announced a consumer protection investigation under a consumer anti-fraud statute- the kind

of law normally used to go after someone selling defective air conditioners- aimed at Media Matters for publishing an article with alleged falsehoods, treating core political speech like the sale of a faulty product.

A

Anthony Sanders 30:49

They both blow a lot of air- hot air

J

Jeff Rows 30:54

Yeah, that's a good point. The press release characterized Media Matters as a radical anti-free speech organization and said it was protecting free speech principles by hitting Media Matters with a sweeping document production demand for everything related to Elon Musk, X, and all that stuff. Unsurprisingly, shortly after, Media Matters filed a Section 1983 suit against Ken Paxton in his official capacity, claiming he retaliated against them in violation of the First Amendment because they engaged in core political speech. The reason I say this is a sinister case is that Paxton's objections were mostly procedural, but even those were based on the idea that because the article contained falsehoods, it was a defective consumer product- not protected by the First Amendment. That defense was barely argued by the Attorney General and quickly dismissed by the DC Circuit. The implications, though, are huge. If you take that theory to its logical conclusion- that political speech containing false factual assertions isn't protected- then it's not just a consumer protection matter. You could impose all sorts of penalties on such speech, like those for unprotected speech in other areas, such as conspiracy, fraud, or child pornography. The DC Circuit recognized this was a sweeping and dangerous idea and that it's very difficult to bring retaliatory actions against free speech. They shut it down pretty quickly. The main argument was that merely investigating someone- even with a sweeping investigation- does not create a cognizable claim, because your speech shouldn't be chilled by an investigation, or at least not one involving document demands that can be challenged in court.

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Anthony Sanders 33:29

So one thing that also got me thinking was something pretty sinister: not all the judges even agreed that Media Matters could challenge this at this point. For most of what they're alleging as harm- that they have to comply with the subpoena- I thought, well, that's your harm right there, because you have to produce documents. But Judge Henderson, in her concurrence, said that's not harmful- that's not standing. I guess that's because there might be some alternative way they could avoid responding, or maybe it's not even required. She noted they also allege harm to their contacts with other entities because of the threat, and that was enough for standing at this stage. That's why she concurred rather than dissenting. But it still struck me as kind of scary that being required to respond to a subpoena itself isn't considered a cognizable harm.

J

Jeff Rows 34:40

Well, it seems particularly crazy when the Attorney General of a state as large as Texas teams up with the world's richest man to go against a nonprofit organization explicitly based on

up with the world's richest man to go against a nonprofit organization explicitly based on disagreement with its viewpoint. That just seems so obviously at the core of the First Amendment. And, you know, like I say, Elon Musk has his separate libel lawsuit going again. Like, if the speech is libelous, then the speech is not protected. Then, at least the assertion about the anti-Semitic conspiracy, if it is indeed libelous, then it is not protected, and he can get damages for that, whatever they are. But what the court found here is that the Attorney General's actions were not actually about libelous speech. It was a bad faith action against Media Matters to punish it, to retaliate against it for its viewpoint-specific speech, and that is a separate issue from libel, and that's why I say this seems actually quite sinister. Now, it's true that the court disagreed a little bit about the nature of the injury for the claim, and I was surprised that they kind of quibbled over certain things. I mean, Media Matters quite plausibly said, we've changed the way we're writing, we've changed the way we're investigating, we have concerns about reporting all these kinds of things. And to say that, well, technically, it's possible that you could have ignored this and then waited for a court order in a Texas court or something like that, and therefore your injury isn't entirely ripe or complete right now, that actually seems to really miss the point that in the United States, when a state as big as Texas, or really any state, teams up with the world's richest guy to suppress speech on the basis of viewpoint, that's something that should concern everybody.

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Anthony Sanders 36:33

Well, Scott, I know this doesn't have to do much with tariff law, but this is definitely a trend that we at IJ deal with across the country about retaliation and using the offices of government to do such things. And there are certain tariff matters, certain investigations that are made in that regard, that don't have much to do with economics and have a lot to do with retaliation of certain kinds. Does it raise any cockles for you?

S

Scott Lincicome 37:01

Yeah, I mean, I think the clearest example that recently came up was with Apple. So Trump didn't like the fact that Apple, instead of making iPhones in America, was planning to make them in India. He got really mad about that and said he was going to slap a tariff on iPhones. But I should note that when it comes to taxes and other economic measures, there seems to be a bit more discretion- at least from government lawyers- because very quickly after Trump said that, he and others in the administration clarified it would apply to all smartphones, not just Apple's. So occasionally we see these cases, but since you can broaden it out to a certain product- even one overwhelmingly made by a single company- they tend to navigate around it. That seems a lot different from what's happening with Media Matters.

A

Anthony Sanders 38:14

I would think, too, that when certain foreign policy actions are untested at the Supreme Court level- versus all kinds of domestic actions involving Bill of Rights issues like equal protection, there's a real difference. We saw that clearly with the Trump v. Hawaii case, where it seemed like there was a free exercise problem- at least based on the language Trump used when he first came into office about shutting down Muslims from entering the country. That was obviously an equal protection or First Amendment issue. But then, when it came to traditional immigration powers and foreign policy, the Court was able to uphold those, basically setting

that aside. How exactly they did it, we don't have to get into, but I think if the First Amendment and tariffs ever came head to head, unfortunately there would likely be some judicial abdication to try to not have that come together, because then you have the courts telling the executive what to do with foreign policy, which is going to be hard.

J Jeff Rows 39:19

And maybe, you could actually have a judicially engaged decision that cuts in the President's favor in all sorts of ways when it comes to foreign policy and dealing with these issues- it's reasonable to be pretty agnostic. But when I see something like this, which is core political speech by a left-wing liberal, I don't have any particular opinion about whether their speech is good or bad or right or wrong- that's irrelevant to me as a First Amendment lawyer. What we have is an investigative reporter publishing a piece on a prominent political figure and facing almost immediate retaliation from a government entity. I'm broadcasting today from Austin, Texas, and both Elon Musk and Ken Paxton live here- they're close allies of President Trump. Even though Trump wasn't President in 2023, they're all part of the same complex, part of a larger movement against social media and certain modes of expression that have emerged in recent years. So anyway, this seems very concerning to me. And like I said, just the sheer disingenuousness of using a consumer protection statute, combined with an argument that feels like it belongs in Russia- something like, "Comrade, we have complete freedom of speech in Russia; we love all opinions except false ones, and yours is false, so you don't get protection, comrade, and that's why you're here today, in court, in a cage." Yeah, this is not the direction we want our country to be going.

A Anthony Sanders 41:10

Well said. To close out today, we're going to have a quick episode of "Where Are They Now," since some of our hardcore listeners want updates on cases we talked about three months ago- like, what happened with them? We've got a few updates. One is a case from almost a year ago, MacRae v. Mattos from the First Circuit. It's about a public school teacher who was disciplined- maybe fired- for some social media activity before she was hired that was discovered after the fact. This case has now been relisted at the Supreme Court eight times and is up for a conference tomorrow as we record this, so maybe by the time you hear this, it'll be old news. But it suggests something significant might happen soon. The Court has taken other cases like this lately, so they might vacate and remand, or do something else. Another case I update from time to time is Gilmore v. Georgia Department of Corrections from the Eleventh Circuit, about a strip search in jail of a visitor- not an inmate. We're still waiting on that. It was argued in February before the en banc court. There's also an IJ case, Thomas v. County of Humboldt, which we recently won at the Ninth Circuit. One of our attorneys talked about it- it involved people threatened with ruinous fines in the millions because satellite photos suggested they might be growing marijuana when they weren't. We've asked for cert on one issue we lost: whether the Seventh Amendment right to a jury trial in civil cases applies to the states. That's getting some buzz and people are writing about it. It's now pending at the Supreme Court. We'll see if the Court requests a response. Time will tell if it makes it to the Court, and maybe we'll do another episode about it. For now, I want to thank Scott and Jeff for coming on. Scott, I don't know if you write poems about tariffs yourself, but maybe we've given you a little inspiration for the future.

S

Scott Lincicome 43:52

Yeah, we used to do trade Valentines on Twitter, but ChatGPT has ruined it. Because ChatGPT is just so good at doing silly little poems instantly that you just don't know if somebody's actually thinking of these things themselves, or if it's just the bot.

A

Anthony Sanders 44:15

That's terrible. Well, I mean, you still come up with your own puns, I see, from time to time.

S

Scott Lincicome 44:22

That's true. I haven't outsourced that to AI just yet.

A

Anthony Sanders 44:28

You know, to come up with that poem- which, that was a real poem from a real book- I actually did try to use ChatGPT to tell me. And it came up with a quote from, supposedly, a Charlotte Bronte novel. And then I looked the quote up, and it was made up. It was not actually from Bronte.

S

Scott Lincicome 44:47

Yeah, lots of problems with that in the policy world these days.

A

Anthony Sanders 44:51

Kids don't use AI at home or in class. In other news, we will see everyone next time. And for now, please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.