

Boom! Lawyered 213: Emergency Pod on Kavanaugh Nomination

- Imani Gandy: Hello, fellow law nerds. Welcome to another special SCOTUS episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is on a work retreat in the middle of the woods and is likely to get kidnapped by some weirdos. I'm Imani Gandy.
- Jess Pieklo: I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. The #TeamLegal podcast is part of that mission. A big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: If you're a new listener right now, I have to give you props because this is a really, really bad episode to be a new listener on. Primarily because we now know who our Supreme Court Justice nominee is going to be and who is it Jessica?
- Jess Pieklo: Brett Kavanaugh.
- Imani Gandy: Brett Kavanaugh, come on down. You're the next contestant on, We're All Fucked. Seriously, Jessica, what does this nomination mean? What does it mean for the American people?
- Jess Pieklo: Well, it means that our rights are squarely on the line. We have a conservative judge with decades of experience ruling against civil rights and for corporate power. When we have a Supreme Court with issues like, can your boss fire you for being gay? Or does Title VII of the Civil Rights Act cover transgender employees from employment discrimination?
- Imani Gandy: Or does Title IX?
- Jess Pieklo: Right. Will we even have a right to an abortion anymore.
- Imani Gandy: Right.
- Jess Pieklo: These are all questions that Judge, maybe, Justice Brett Kavanaugh is going to be set to answer.
- Imani Gandy: What does it mean for Brett Kavanaugh ... Let me rephrase. How pissed is Merrick Garland?
- Jess Pieklo: Oh, yeah. Let's give a little quick bio on Brett Kavanaugh. Trump had done some posturing that said he didn't want any of the hoity-toity Ivy Leagues and yet, he managed to find probably the most establishment conservative Republican candidate on the court that he could come up with. Kavanaugh came up through Georgetown Prep School. As high school, he went through Yale. He is as dyed-in-the-wool traditional conservative institutional as you can get. He's also

been on the D.C. Circuit Court of Appeals for a long time, and during the Obama administration, the D.C. Circuit Court of Appeals was one of the success stories. He plays several judges on the bench. That's important because many of the cases at the Supreme Court hears comes up through the D.C. Circuit. This means that Trump gets another pick on the court that hears cases. The pipeline is coming more and more conservative.

Imani Gandy: The course are really becoming more and more Trumpy, you could say.

Jess Pieklo: They are.

Imani Gandy: Considering Merrick Garland should really be on the bench. Now, he's watching one of his colleagues be elevated to the bench. I feel like Merrick Garland and Hillary Clinton ought to get together and just get wasted, just annihilated.

Jess Pieklo: Yeah. It would probably do them both a little good. I think, too, the idea that we have, I had said it would be very Trumpian to pick Amy Coney Barrett to be the judge to overturn *Roe v Wade*. He could call it feminism and "I love ladies so much." This feels also pretty trolly, right? What better way as a further reality TV president to really stick it to somebody than to pick somebody's co-worker, basically, for the job that you had ripped out from underneath you.

Imani Gandy: Right. Another way that it feels trolly, I have to say that I am glad that he didn't pick a woman because I really was not prepared to have to deal with conservative women yelling at liberal women, progressive women, about how we're not feminist because we don't support this particular woman because they don't seem to understand that feminism isn't about supporting every single woman, but it's about equality. They're never going to get that, but I also have to say, it's a little bit irritating. Already, the zeitgeist in the media about Brett Kavanaugh is that he's this moderate and he's a nice guy and he's a good pick. It's very Gorsuch-ian, if I could --

Jess Pieklo: Gorsuckian?

Imani Gandy: Gorsuckian, if we could coin a term, which is to say that, he seems like a pretty decent guy. He seems like he's moderate. If Trump were to pick Kavanaugh as opposed to Amy Coney Barrett, it would be a nod to the left or to democrats that he's willing to be reasonable, but is Brett Kavanaugh really that reasonable?

Jess Pieklo: No. He has five star rating from the Heritage Foundation, from the Federalist Society. You don't actually get to be a short lister and be a moderate. That's just not how it works.

Imani Gandy: Also, I would have to say that his refusal to check executive power is going to be a big bonus for Trump but a big problem for the rest of us who would like to see this corrupt administration be called to account for its crimes, essentially.

Jess Pieklo: Yeah. Yeah. Absolutely. These are all open questions that the senate, if it does its constitutional duty of advice and consent, will actually dig into and that's a big if.

Imani Gandy: Can you explain to our listeners who don't know what "advice and consent" is or what that is?

Jess Pieklo: The next stage is basically the Dog and Pony Show, right?

Imani Gandy: Mm-hmm (affirmative).

Jess Pieklo: The Senate, in a functional democracy, goes through the process.

Imani Gandy: It's sad that you have to say that.

Jess Pieklo: It goes through the process of seriously investigating the record of the nominee and holding hearings and actually diving into that record. What we've seen though is that that's just not how it works. Already with some Democratic senators saying they're just not sure if they're going to oppose him or not. This idea that somehow, Kavanaugh is the safe bet for Republicans is nonsense. They, more or less, have a veto-proof ability to get any nominee confirmed. This is just more gamesmanship and more playing of the press, which we've seen from this administration.

Imani Gandy: I guess the big question that I'm sure that is on a lot of people's mind is just how screwed are we when it comes to *Roe v Wade*?

Jess Pieklo: Right. I think of this as the spectrum of screw. We have Amy Coney Barrett who, out of the gates, was very clear said, "Forget this. *Roe* is done. I don't believe in any of it. There is no constitutional right to privacy." It was even on record as saying she's willing to be loose and flexible on president. Barrett nomination would have sent a signal that they were going for the whole shebang right out of the gates. A Kavanaugh nomination, I think, says that they're still going for it. They're just going to be trickier about it. Kavanaugh, for example, in the *Garza v Hagan* case, the case of the undocumented minor, who was trying to get an abortion in ORR [Office of Refugee Resettlement] custody, she had gone through all of the processes and everything. Kavanaugh wrote a dissenting opinion that effectively would have, had it been adopted, not only made it impossible for anybody in government custody to get out to get the reproductive healthcare that they need, but also tacitly adopt the idea that these folks don't have full constitutional rights. Imani, you've written about this.

Imani Gandy: Yeah.

Jess Pieklo: This is a real thing that conservatives are going for, right? Attacking the constitutional personhood of immigrants.

Imani Gandy: Right. Right. Yeah. It's quite problematic and quite insidious, I would say. This notion that immigrants don't have constitutional rights. Now, obviously, they don't have the full panoply of rights because immigration law is its own beast, but when it comes to equal protection under the law, when it comes to, specifically, especially, due process under the law, the constitution covers persons.

Jess Pieklo: Right.

Imani Gandy: That's person, not citizens. The framers knew how to -- knew the difference between persons and citizens, right?

Jess Pieklo: Right.

Imani Gandy: The equal protection clause, the due process clause applies to persons. The privileges and immunities clause applies to citizens. It's really insidious and pernicious to make this argument that immigrants don't have a constitutional right when Americans have that constitutional right. I want to say that it seems to me what you're describing is a fast burn. We're going to lose *Roe* right away like tomorrow or a slow burn. The slow burn seems to be more like "Okay, so states are going to start enacting more and more restrictive laws, more trap laws, more admitting privilege laws. Laws requiring abortion clinics to retrofit themselves like hospitals."

Jess Pieklo: Right.

Imani Gandy: Then those laws are going to be subjected to litigation, they're going to go to the Supreme Court, and then this court is likely to say, "What?"

Jess Pieklo: Right. Right. Likely to uphold them.

Imani Gandy: Right.

Jess Pieklo: Another example that we have, they're working their way through the Appellate Courts right now, are D&E bands, right?

Imani Gandy: Right. D&E bands, dilation and evacuation bands, for those who don't know the term.

Jess Pieklo: Right. That is one of the most common forms of second trimester, later term abortions, and many states are trying to outlaw them. Our legislative tracker go to [Rewire.News](#). We've got all of that there. Those state laws are really going to be the focus now because the test is going to be just how far can they stretch that *Casey* line. It's less about overturning *Roe v Wade* specifically, which a Barrett nomination had on the targets and more making *Roe v Wade* meaningless, an abortion legal in name only.

Imani Gandy: Right. As we wrap up here, I think that's probably one of the key takeaways is that we don't necessarily need a court to overturn *Roe v Wade* explicitly in order to decimate abortion rights in this country. If you hear people talking about Kavanaugh, "So moderate, whatever. He's great. He's fine, blah, blah, blah." Don't buy it. That's it. That's us for Boom! Lawyered again. I know we've said this before. We said, I think, what, a week ago that we were going to take a break.

Jess Pieklo: Two weeks ago, three weeks. What is time anyway, Imani.

Imani Gandy: It's a flat circle. We're going to take a break for at least three hours. We'll be back with you in the morning. No, just kidding. We really are going to try and take a break. We're on a work retreat right now. We're actually recording our very first episode in person.

Jess Pieklo: Hi.

Imani Gandy: I'm looking at Jessica right now and that's very exciting, but please join us on Facebook in our [Boom! Lawyered](#) group. Hit us up on Twitter. I'm @angryblacklady. Jessica is @hegemommy. We also have our database ninja in the room. You can't see her because it's an audio medium but ...

Jess Pieklo: Well, let's give it-

Imani Gandy: ... let's give Brie a real quick-

Jess Pieklo: Let's give it up for Brie Shea real quick.

Imani Gandy: Yeah. We'll see you on the tubes.

Jess Pieklo: Yes.

Imani Gandy: Stay positive if you can.

Jess Pieklo: Stay positive.

Imani Gandy: Stay drunk, maybe.

Jess Pieklo: Be good. Yeah. Be kind.

Imani Gandy: Be kind to one another. Peace out.

Brie Shea: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Nora Hurley is our producer. Our executive producer is Marc Faletti and Rewire.News. editor in chief is Jodi Jacobson.