

## Boom! Lawyered 216: Kavanaugh Hearing, Day Two—Stolen Emails?

- Imani: Hello fellow law nerds. Welcome to another special confirmation hearing episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is getting a little bit sleepy, but it's only Wednesday, so we're going to persevere. I'm Imani Gandy.
- Jessica: And I'm Jess Pieklo. Rewire.News is the leading non-profit journalism outlet devoted to reporting on reproductive and sexual health rights and justice. The #TeamLegal podcast is part of that mission. A big thanks to our subscribers and a welcome to our new listeners.
- Imani: Welcome to our new listeners. Thank you for the feedback we got from yesterday's episode. A lot of you said it really helped. We hope to help more today by talking about some straight up court room drama that happened during the confirmation hearings this morning. Jessica, tell us all this drama going on with Senator Leahy and these stolen emails.
- Jessica: Oh man, this is good stuff. Okay, so by way of context, today's hearing is a little bit different than yesterday's in that it is much less of a dog and pony show. Senators have 30 minutes apiece to ask Kavanaugh questions and go back and forth. During his allotted time, Senator Leahy, who has been on the judiciary committee forever.
- Imani: Since like 1394.
- Jessica: Something like that. He might be a founding member. Anyway, he had the opportunity to question Brett, not Brent, Brett Kavanaugh the first time around when Kavanaugh was nominated to his spot on the D.C. Circuit Court of Appeals. The TLDR on that is that Leahy and some of the other Senate Democrats feel like Kavanaugh was less than forthcoming during that initial testimony.
- Imani: That was back in 2006, right?
- Jessica: Yeah. Correct. That was 2006. Thanks. Yeah.
- Imani: Okay.
- Jessica: One of the areas they think that Kavanaugh was less than forthcoming was about his role in judicial nominations under the Bush administration, and sort of what he did. Well, it turns out that while Kavanaugh was working in the Bush White House and helping shepherd through judicial nominations like Priscilla Owen, who's on the Fifth Circuit Court of Appeals and positively bananas. We can talk about her in a future episode. Republican operatives managed to steal Democrats' emails -- Leahy's, Durbin's and some others that had strategy and approaches to the way they were going to handle the nomination.

Imani: Wow.

Jessica: That's the background.

Imani: Wait. That's a big deal. We're talking about Kavanaugh potentially being involved in some serious unethical behavior while he was at the Bush White House, and again, his time at the Bush White House is part of this cache of documents that the Republicans are refusing to turn over. It's getting kind of juicy, it sounds like.

Jessica: Right. You know, with these Senate hearings, the devil's always in the details. We have this data point that comes out that there were stolen emails and that they happened around judicial nominations and when Kavanaugh was involved in those nominations. Then we also have this data point that the Republicans are refusing to turn over a whole bunch of documents, and have also marked some documents called as committee confidential. This is an important detail, because committee confidential means that members of the Judiciary Committee can see them, they just can't talk about them publicly. We the people can't see them, but the members of the committee can. They have information that the committee members have access to, but they can't use it as an exhibit specifically.

Imani: They just can't talk about, whatever these designated documents are, they can't talk about them in public because we the people aren't supposed to know about them or know what's in them.

Jessica: Yeah. For example, if a stolen email that Kavanaugh was in possession of existed and existed as committee confidential, and Leahy wanted to question him on it, he couldn't show him a copy of that specific email. He can't even really acknowledge that it exists. The punishments are really severe on that. That's one of the data points we have, stolen emails in the past. We have a second data point that is now Kavanaugh's involvement and whether or not these are confidential. Leahy is this brilliant litigator and he knows he can't talk about this document that clearly exists. All right? These emails exist. Grassley more or less said, "Hey, you know, Pat, you're going to get them tomorrow." He manages to get Kavanaugh to acknowledge they exist.

Senator Leahy: You never received an email from a Republican staff member with information claiming to come from spying on Democratic mole?

Kavanaugh: I'm not going to rule anything out, Senator, but if I did, I wouldn't have thought that the literal meaning of that.

Imani: It's an old kind of litigation trick. You may have even seen it in an episode of Law and Order, right, where you get the witness to talk about something and thereby you open the door, right? That's what you always hear in the movies or on the TV. "Oh, you've opened the door to this line of questioning, counselor."

The other party objects, and, "Overruled," and then this big juicy detail comes out. It's pretty amazing that Leahy was able to walk that fine line and get Kavanaugh to admit the existence of the documents, thereby enabling him to question him about it.

Jessica: Yeah. The exchange is really something. You're absolutely right. We rarely get these gavel-banging moments that you think of in Law and Order like, "Order in the court! Order in the court!" This exchange with Kavanaugh was probably as close as we've seen so far. Leahy's asking him about these emails that existed and were stolen and whether or not he had any knowledge of them or were in any possession of them, and if Kavanaugh's email was involved in any of it. Kavanaugh just kind of looks at Leahy, and clearly not prepared for this line of questioning either. If you're watching his body language, he's like turning a little ashen and he's stammering in his answers and shifting in his seat. He just does not look good. Anyway, Kavanaugh says, "Well, do you have a copy of the email?" Leahy kind of twinkles in his eye and says, "You'll have to ask Senator Grassley."

Kavanaugh: But I-

Senator Leahy: Wouldn't it have surprised you that if you got an email saying you got that from somebody spying on ...

Kavanaugh: Well, is there such an email, sir? I don't know. I mean that's ...

Senator Leahy: Well, we'd have to ask the chairman what he has in his confidential material.

Kavanaugh: Yeah.

Imani: Yeah. Good stuff.

Jessica: Law nerds love this kind of stuff. These hearings are often such like, you know, bad shadow theater. Now we actually have something of substance in it. We have Leahy being able to work around the Republican's categorization of certain documents as confidential and get Kavanaugh and Grassley to acknowledge that they exist, and that they exist for the purposes that he said they exist, i.e., Kavanaugh was in possession of stolen emails detailing Democratic opposition to Bush judicial nominees.

Imani: But his emails. But his emails.

Jessica: But his emails.

Imani: The second thing we want to talk about was a part of the hearings this morning that really made me cringe. That was essentially Kavanaugh talking about how, in a particular opinion that he had authored, he managed to explain racism, citing *To Kill a Mockingbird*, and talking about the benefits of racial equality.

Essentially the long and short of this little exchange was Kavanaugh's totally not racist, you guys, because this one time during this case there was a Black guy who was working at some other place and this white guy called him an N word, and Kavanaugh totally said that was a bad idea and that word's bad, and you like totally shouldn't call Black people the N word. Don't worry about it, guys. Kavanaugh's totes not racist.

Jessica: Totes. Honestly, I have to say, Imani, on my drinking bingo card for the Kavanaugh nominations, To Kill a Mockingbird was not a tile I expected.

Imani: Not a tile that you expected at all. If you read about this To Kill a Mockingbird thing, he actually keeps a copy of it on his desk. I don't know, does he think it's like his anti-racist force field or something? If he talks about To Kill a Mockingbird and says, "Don't say the N word," then no one else is going to ask any questions about how his policies are actually going to set Black people back, how his policies actually uphold institutional and systemic racism?

Jessica: He probably has his bookshelf book-ended with To Kill a Mockingbird and his youth basketball coaching manual.

Imani: Oh my God. If I have to hear one more time about how Kavanaugh coached all these Black kids in basketball. You know, you really can tell the kind of man a person is by the way he plays basketball on the court with a bunch of Black kids. Give me a break. I can't. There was also an article in the Wall Street Journal that talks about how he thinks about race relations all the time when he's commuting from his house in his wealthy neighborhood, I think in Rockville, Maryland, which is like a wealthy suburb of D.C., as he's commuting to work through all of these terrible neighborhoods. It's like, really? You know, I'm going to need a little bit more from you than playing basketball with Black kids and thinking that the N word is bad.

Jessica: He sees Black people, Imani. He sees Black people.

Imani: He's actually talked to one or two once, I heard. I don't know. It's kind of weird. He doesn't seem like the type, but hey. I don't know his life. I don't know his life. What I really want to talk about is that irrespective of his personal relationships with Black people or how much he loves the sport of basketball, the fact of the matter is, is that Kavanaugh has shown, through his tenure, through his career, that he's not a friend to Black interests. For example, there was a huge case out of Michigan Law School in about 2003, I want to say, called Gratz v. Bollinger. It was essentially about whether or not the University of Michigan's Law School's admissions process was discriminatory because they had an "affirmative action" process in place in order to ensure diversity and in order to ensure that their entire school wasn't chock full of White dude bros.

At the time, Alberto Gonzales, who was White House counsel, assigned Kavanaugh the brief, the Department of Justice brief to soften the language

around the administration's position against affirmative action. He was part of the team that was supposed to make sure that the Bush administration's opposition to affirmative action wasn't seen as too harsh. Ultimately, the final brief said the administration shouldn't embrace diversity as a compelling government interest. *Should not embrace diversity as a compelling government interest.* Frankly, I don't want to hear about how sweet Kavanaugh is when he plays basketball on the court with Black kids, or how he thinks it's really terrible that some Black kids have to live in under-privileged neighborhoods when he's pushing policies that are going to do a disservice to those very same Black kids he seems to care so much about or claims to care so much about.

Jessica: This is really important because the Supreme Court could very likely this term hear a challenge to affirmative action.

Imani: Yeah.

Jessica: This is Kavanaugh signaling exactly where he is on that. It doesn't matter how many times he's read *To Kill a Mockingbird*, he has taken an official position in his judicial opinions and in his time as a litigator in the White House that, as you said, diversity isn't a compelling government interest. Those are important constitutional code words. You know, the fact that, I think, he cited *To Kill a Mockingbird* and kept going back to *Brown versus Board of Education* is his way to try and signal that in fact he's not going to rule against racial justice issues when we all know that, well ...

Imani: Yeah. We all know he is. Just to give you a heads up, that case that's going to be in the Supreme Court is actually brought by Asian American students against Harvard Law School. Point of order, the same group, the same dude who was behind Abigail Fisher's law suit against the University of Texas. I don't know if you guys remember *Fisher v. Texas* from a couple of years back? This shadow organization essentially convinced her to sue, and so this shadow organization is also behind this law suit that is being brought by Asian Americans. There are plenty of Asian American folks who have been talking about how they don't appreciate being used as a shield to essentially destroy diversity in higher education. That's an episode for another time.

Jessica: Yeah. I was going to say, that's a case that's definitely on our radar and we will dive into for another episode. I've got to say, Imani, I was pleased to see the fireworks and the feistiness from the Democrats at the start of the hearing.

Imani: I was too, but I have to say, I've been kind of going off on Twitter about your original idea, pull a Wisconsin and walk out. The more I think about the sham nature of these proceedings, the angrier I get and the more I think that Democrats really should walk out. Not because I think that Democrats should be obstructionist, and not because I think they should just be jerks the way Republicans have been for so long, and have been obstructionist and essentially doing everything that they can to ensure that they maintain a stranglehold on the judiciary.

What we have here is a man who is in the process of being confirmed to the highest court of the land and we don't have all of his documents. What we've seen today is that there are issues in those documents that we need to see. I mean the whole business with Senator Patrick Leahy and the stolen emails demonstrates that there was stuff going on during this period of time that we have a right as the American people to see. The fact that there is one lawyer, this partisan lawyer, Bill Burck, who is deciding for everyone what we're allowed to see and what we're not, is outrageous. I think by even participating in these hearings, Democrats are legitimizing them. I think that if they really want to shake things up and be a little bit more feisty, I honestly think that they should walk out.

Now, people keep saying, "Well, if they walk out, doesn't it mean that they just basically cede the conversation, or they cede the nomination to Republicans?" Do you know what? Where we're standing right now at the end of this procedure, he's going to be confirmed. He's going to be confirmed either way, so wouldn't it be nice to have him be confirmed with an asterisk next to his name for the next 35, 40 years that says, "Yeah, this guy was confirmed after Democrats all walked out because he was hiding his record from the American people." I think that's a powerful statement.

Jessica: Yeah. It would put Brett Kavanaugh right alongside Justice Taney, who was appointed to the Court specifically to preserve the institution of slavery and is widely seen as a more or less illegitimate justice as a result of that. I agree. Hear here. Walk out. Pull a Wisconsin. Do it.

Imani: I just want to address a point that I've seen a lot of people making on Twitter. There's a hashtag going around, #ImpeachKavanaugh. People seem to think that if or once Kavanaugh is confirmed, then maybe some of the mis-truths or the half statements that he's told during the confirmation process will be grounds for impeachment. I just want to disabuse you of that notion entirely. Once Kavanaugh's on the bench, he's on the bench, unless he does something like, I don't know, murders a child and gets caught. The man is on the bench. There's nothing during these proceedings that are going to provide fodder for impeachment. Just to show you how rare impeachment is, the last Supreme Court justice that was impeached was a man named Samuel Chase, and the Senate acquitted him of charges in 1805.

Jessica: 1805?

Imani: 1805. Really what I'm trying to say is if these Senators were smart, they would walk the fuck out, and maybe throw up deuces as they go.

Jessica: That would be amazing.

Imani: That would be amazing.

Jessica: I'm trying to picture Feinstein walking out and throwing deuces.

Imani: With pearls on. It would be fantastic. Jessica, is there anything else that we missed? What did we not cover? Some more shenanigans and fireworks that happened during these hearings?

Jessica: Well, the funny thing is, Imani, that the hearings are still happening right now. In fact, as of recording, we have four Senators who still have to ask questions, so they're going to be going for a long time. There are a couple of things that we should highlight right now, and anything that we miss you all can be sure that we will hit tomorrow when we recap tomorrow, because these hearings will end eventually, at some point.

Tonight, we had two really excellent moments of questioning for Kavanaugh, and they came from Senators Blumenthal and Hirono, and I want to talk about them just real quick. Blumenthal went right out of the gates and said, "Let's just address the elephant in the room and the fact that it is unprecedented to have the Senate considering a lifetime appointment from a president who is an unindicted co-conspirator." That's just really calling it, and from there he did not relent. He went after Kavanaugh again and again and again on his views on whether or not Trump can fire Mueller, and the extent of Trump's power to direct the Department of Justice in these areas. Kavanaugh wouldn't give a straight answer, and that I think is a real problem and something of real concern, and again shows just how illegitimate these proceedings are.

Then both Hirono and Blumenthal did an absolutely excellent job of holding Kavanaugh's feet to the fire when it came to the Garza v. Hagan case and his dissent. What they did was really effectively lay out that when Kavanaugh says he's going to respect precedence, it's all garbage. They did that by first of all calling Kavanaugh out on the fact that he keeps wanting to talk about Garza as a parental consent case, and it wasn't. If you'll remember, the minor already had judicial bypass granted to her by a court, so parental consent's not even on the table at this point. Both Blumenthal and Hirono made that point over and over again. Then they both really effectively mentioned how Kavanaugh went out of his way in his dissent to find a way to put more obstacles in the minor's place than would have been necessary, and still use that as a way to uphold abortion precedence. That signals that he doesn't have to overturn Roe v. Wade, right, like we've talked about. He can actually do a lot of damage and still keep Roe technically in place. That's really important.

One final thing that Hirono did that I really want to highlight, because it's an important detail that I think is easy to get lost: Kavanaugh keeps saying and making a big deal about the fact that he didn't sign on with a different dissent in Garza, and that was a dissent that argued that undocumented minors don't actually have a constitutional right to an abortion at all. Hirono asked him directly if the reason he's highlighting that is because he disagrees with that statement, that in fact he believes that minors do have this right when they're undocumented and in government custody.

He wouldn't answer that question directly, and that goes to the point and the question of whether undocumented people have constitutional rights broadly, and this is something that we are seeing the right go after in the courts, and that's a really radical position to take. When we have folks doing things like questioning birthright citizenships and all of that, these are signals that Kavanaugh is sending to the right on how he will rule. Both Hirono and Blumenthal flat out said it. I mean Blumenthal said Kavanaugh's dissent in Garza was effectively him signaling to Trump that he should be on the Supreme Court short list. A lot happened. The hearings are still going on, so more could happen. That's what we've got so far.

Imani: That wraps it up for our second special episode of Boom! Lawyered, confirmation hearing edition. You can find us on Twitter. I'm @angryblacklady. You can find Jessica @hegemommy. You can follow Rewire.News @rewire\_news.

Jessica: 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 the Rewire.News editor in chief is Jodi Jacobson.