

Boom! Lawyered 217: Kavanaugh Hearing, Day Three—Exposed

- 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, I don't know, like I don't even know anymore. I'm Imani Gandy.
- Jessica: And I'm Jess Pieklo. Rewire.News is the leading nonprofit journalism outlet devoted to reporting on reproductive and sexual health rights and justice, and the #TeamLegal Podcast is part of that mission. So a big thank you to our subscribers and a welcome to our new listeners. What a week.
- Imani: What a week, and if you're just starting listening now, I urge you to go back to at least listen to the prior two days because Myyyylanta. These hearings are bananas. I mean, starting off with Cory Booker and his "this is Sparta" moment. My God. Can you tell us about what went on with Cory Booker this morning?
- Jessica: Wow. Has it been a day? And like yesterday, it is still going. We are not even done. Grassley just announced that senators are going to get a third round of questioning tonight. So we are strapped in for a long one. So how did it start? Let's talk about how it ended last night.
- Last night, there was a big fight about documents that sort of carried over and we've talked about that fight in our other episodes of the podcast. So folks can go back and listen to those and get all caught up on the details. What happened was, Booker said effectively that there was email evidence that Kavanaugh had said some very not nice things about racial minorities and had endorsed racial profiling in certain instances and had taken positions when he was in the Bush White House to try and roll back race-conscious affirmative action programs.
- And during his testimony without this email, Kavanaugh had really hemmed and hawed and said, "Boy, I don't remember a lot of that and maybe there was some stuff, but I was kind of just a paper pusher and so shucks, jeez, I dunno. And like really—"
- Imani: Yes. To be fair, he did coach Black kids in basketball, so how bad could he possibly be when it comes to racial profiling?
- Jessica: Well, today we found out thanks to this moment by Cory Booker. So these documents that Booker was questioning Kavanaugh about had been marked confidential by Grassley and Bill Burke, who've we also talked about, they're not nice dudes. And Booker decided to leave them, just to say screw it.
- Imani: Yep. He really did.
- Jessica: Yeah, and I gotta say this is a moment, because we know Republicans, if the shoe was on the other foot, would've leaked these documents weeks ago.

Imani: Oh yeah, absolutely. Absolutely. That's the one thing with Democrats. They are so beholden to decorum and institutional norms, but we are not living in a time period where decorum or institutional norms mean anything. So it was kind of nice to see Booker just be like, #yolo, I'm leaking this shit. Come at me, bro.

Jessica: And it was really a moment because the potential consequences for Booker are extreme. He could face, under the rules of the Senate, expulsion from the Senate. He could get kicked out. So he effectively said, "Do it, I dare you to expel me." And it was a really smart move too, because to expel a senator, you need two thirds of the Senate to vote for that. So there's no way in hell that Grassley is going to get two thirds of the senators.

Imani: Right. A bunch of primarily white dudes are going to vote out the Black senator from New Jersey? That's not a good look.

Jessica: Right. And so he started this and then a bunch of other senators jumped in, right? Durbin was like, "I'm going to jump into this with you." He was ride or die, ride or die. That was like amazing. But what was great is to see how much this shook the Republicans. Because Grassley jumped in right away and said, "No, we'll find a compromise for you. We'll figure out a way to get these documents."

So what's the ultimate end game here? Is it going to end the Kavanaugh nomination? Like is it going to change minds? I don't know, but for that moment in time, it was really effective strategy and great to see the Democrats use procedure in their favor and quite frankly, to get in the mud and fight a little bit, leaking documents like they should. And then Hirono leaked some documents. It was a big, and that was the first hour.

Imani: Everybody was email leaking. Everybody was leaking. I actually tweeted that to Jessica this morning. To the tune of Kung Fu Fighting, "everybody was email leaking."

Jessica: So that was setting the stage, right? Fireworks out of the gates. We're not even into questioning and already we've got Democrats leaking emails, we've got Grassley like scrambling to make sure that he doesn't have Republicans trying to vote the Black guy out of office. It's a mess. And so from there, the questioning gets really, really heated, as you expect. Democrats are questioning Kavanaugh very vigorously, Republicans are jumping in to rehabilitate him. And then there's this moment with Ted Cruz, and I want to just kind of like pause here for a moment.

Kavanaugh clip: The question was, first was this a substantial burden on their religious exercise? And it seemed to me quite clearly, it was. It was a technical matter of filling out a form in that case with that. They said filling out the form would make them complicit in the provision of the abortion inducing drugs that they were, as a religious matter, objected to.

Jessica: Did you just hear Kavanaugh call birth control an abortifacient?

Imani: You know, we've been saying for a while that it wasn't just the abortion rights that are on the line, that contraception is on the line. And for those of you who've been

following Jess and I ranting and raving on Twitter over the past seven or eight years, this goes back to some of the issues that were brought up in Hobby Lobby. Right? Whether or not Hobby Lobby, which had a sincerely held religious belief that contraception is an abortifacient. And so the Supreme Court basically said, "Well, irrespective of whether it is or isn't, you sincerely believe that. And so we have to accept that as true.

So now we're in a situation where the high court has already said to a company, "Okay, yeah, we're going to accept as true that birth control is an abortifacient," and it is not. And I think it's really important to stress that it is not, and do not let Republicans convince you that taking the pill is the same as getting an abortion. Although you should be able to do both.

Jessica: Freely! Abortions on every corner, birth control pills at every pharmacy.

Imani: Taco trucks and abortion trucks. Right?

Jessica: Like, let's do it. Abortion on demand. Yes, I am here for that. But kidding aside, it's really important because, yes, as you said, it's building off of this allusion that happened in the birth control litigation that we've covered a bunch where conservatives get to replace their religious belief that contraception is an abortifacient for medical and scientific evidence that says it's not. And that is critical because not only are they going after abortion rights, as we've talked about, they're going after contraception and Kavanaugh gave it away. I don't think he meant to, but he definitely did.

Imani: Yep. And in a way that is really just sort of cringing, right? Because I mean there's something to be said for how partisan the court is and how partisan these hearings are. But to just really see, to be able to like pick off all of the issues and all of the cases that are at risk because of this particular man and his unwillingness to give a straight answer to a question, it's really alarming to watch.

Jessica: I mean, I don't want to go too far down into the panic hole, but if you have a sincerely held religious belief that contraception is an abortifacient, does that transfer to the state when they try to re-criminalize contraception? These are the kinds of questions that I think we have to ask because these are the kinds of issues that are on the table. So that was a really illuminating moment.

Imani: It was. What else? What else do we have, Jessica? What else happened?

Jessica: Okay. Let's talk about Senator Harris for a little bit. She's just really been doing some great work here.

Imani: Can we just all just wait a moment? Can we just all praise Senator Harris for a minute? Because it is amazing. One of my favorite things to watch is watching this intelligent, brilliant black woman making this white dude squirm. Because if there's one thing I, as a black woman, have noticed throughout my lifetime throughout my 44 years on this Earth, is that white dudes do not like it when black women have authority over them or when black women question them.

So you could see it in his face that he was irritated. And Kamala Harris was just looking at him like, yeah, we're going to do this. So you can hem and haw all you want, but I'm asking my questions and we're going to get through this. So can you explain a little bit about what she was asking him and what happened?

Jessica: Oh sure. So last night when we were talking for the last podcast, Senator Harris hadn't even had a chance to go up yet. So last night sort of set the stage for her brilliance today too. Last night, she managed to set what I can only imagine is, quite frankly, a perjury trap for a Brett Kavanaugh when it comes to conversations and contact he's had with third parties revolving around the Muller investigation. And specifically, a private law firm that is doing some interceding work on behalf of Trump and his associates.

And Kavanaugh said, when asked last night by Harris if he had had any conversations with those folks, he said no. And it was very clear based on the line of questioning and the way she developed it, that she knew something, that she had documents. She's a seasoned prosecutor. She knows her way around a courtroom. She can break a witness. And last night, she broke Brett Kavanaugh.

Imani: Yeah. I mean, I love watching good prosecutors in action because if you are also a litigator, you can see where they're going, but a lot of times witnesses don't see where they're going. And so it's actually kind of amazing to watch a lawyer do that to another lawyer and to have that lawyer be so dense as to not see it coming. I'm sorry, Brent.

Jessica: And last night you could kind of see him get ashen and sunk because he could tell that Harris knew something that he had been trying to prevent others from knowing. So that carried over into today too, and she was just not going to let him monologue on answers. Right? He has been throughout the hearings, like they'll ask a question, do you think something is correctly decided, and he'll go on for five minutes about the history of that case without actually providing an answer. Right? He's filibustering, effectively, is what he's doing when he doesn't like the question.

Imani: And Harris was not about that today. I mean, when she asked him about Obergefell he was like blah, blah. She was like, "I know the history. I've read the cases. Just answer the question." And he's like, "well but ..." Answer the question. I mean, he was like law-splaining the law to a lawyer. It's like, dude, what are you doing?

Jessica: Absolutely. And what was in that exchange in particular, I'm really glad you brought up Obergefell, you know, that's the Kennedy decision that legalized marriage equality, struck same sex marriage bans in the states and is seen as sort of the pinnacle of his legacy on LGBTQ rights. That is, of course, until the, I don't know, garbage decision that was Masterpiece Cakeshop, right? We got that this term, and Kennedy just basically said discriminating against gay people is bad. The government was mean to Christians. We'll see you later. He totally peaced out in that decision.

Imani: We'll see you later, and then literally he resigned. He was like, no, I literally will catch y'all later, like maybe on a boat somewhere in the middle of the ocean.

Jessica: Be in like wine country.

Imani: Right, but it's really important that he brought up this case in response to a question about same sex marriage because I have been saying, if you have been listening to me scream on Twitter for months that LGBTQ rights are far from safe in this country and specifically, same sex marriage is not even safe in this country.

And so the fact that he started talking about a case regarding religious liberty and whether or not basically evangelicals have the religious right to discriminate against gay, lesbian, bi, transgender folk, the fact that he talked about that case rather than answering the question about Obergefell, which is about same sex marriage, signals to me that they are going to go all religious liberty on same sex marriage, meaning they are going to attack the right of same sex couples to get married based on religious grounds. And we've already seen the way that might work, right? With Kim Davis, we all remember Kim Davis, who in Kentucky was a ... What was she, like as a clerk of some sort?

Jessica: Yeah, she was a county clerk.

Imani: A county clerk, right, who refused to get marriage certificates to same sex couples, claiming that it was her religious right not to do so. So you can see where you really can see starkly where a Kavanaugh court is going to go, and it frightens me, to be quite honest.

Jessica: Yeah. Especially because the question that Harris posed to Kavanaugh was: do you think Obergefell was rightly decided? That isn't like, can you give me your understanding of the evolution of Kennedy's dignity doctrine for LGBTQ people starting from Rover going through whatever? Like it was a yes or no question and Kavanaugh has been on the record repeatedly going back to how he loves Brown versus Board of Education. It was the most rightly decided of all the rightly decided cases have ever been rightly decided. And when pressed for other examples, can't give any. He can't say Roe was rightly decided. He can't say Obergefell was rightly decided.

Imani: What's the case where the court sanctioned excluding Chinese people from the country? Kamala Harris asked him about that. He wouldn't even say that that was wrongly decided. And Kamala Harris is like, "So you know that case hasn't even been overturned," and Brett Kavanaugh was basically like shrug emoji.

Jessica: Yeah, right.

Imani: It's terrifying.

Jessica: So that's where we're at. So some of the Democratic senators have been doing a really great job, I think, building the record against Kavanaugh to the extent that they have the ability to do so with the documents and building the record against the process and Grassley's complicity in it. I mean, the fact that he agreed specifically with Burke to the

manner in which these documents are being disclosed as confidential or not, these are huge. If it will ultimately lead to something, I guess we still have to see.

Imani: Yeah. Yeah. I'm not optimistic, but then again, like I said on Twitter, I will eat a deep fried shoe if it turns out that any of this changes the minds of the senators that we think whose minds can be changed, mainly Collins and Murkowski. I will literally eat a deep fried stiletto shoe if Collins and Murkowski vote against Kavanaugh. I don't think it's going to happen. I think this is a done deal. I do appreciate that the Democrats have shown more spine than I thought they would when we started recording these podcasts, it seems like a year ago-

Jessica: It's always Monday in Trump's America.

Imani: It really is. It's just like a never ending Monday in Trump's America, but ultimately, if Kavanaugh is confirmed, then I would guess that 98.7 percent of the population is not going to remember a thing that happened during these hearings come six months from now. And so what we're going to see is if we've got a Justice Kavanaugh and when he provides that very first fifth vote to decimate some an unenumerated right, a voting right, a right to marriage, right to have children, right to an abortion, any of those rights, people are going to be super pissed and it's going to be a very, very cold comfort when I'm able to say, "I told y'all so."

Because the fact of the matter is, whether or not he's a legitimate justice, a legitimate justice gets the same number of votes as an illegitimate justice. And so just having a big record about how crappy Kavanaugh is and how he may or may not have lied under oath, which is something we can talk about probably tomorrow, but the fact of the matter is he'll be on the bench and he will be on the bench for 30 years. And that will be a done deal. So I'm really, really heated about either walking out or doing something to make the American public realize that these proceedings are, in my opinion, utterly illegitimate because we do not have his full record.

Jessica: Mm-hmm (affirmative).

Imani: So that's my rant for the day.

Jessica: Damn, let's get a whiskey.

Imani: Yeah, let's get a whiskey. We're going to wrap this up because Jessica has got like seven more years-worth of hearing some live tweeting, and I need to probably just throw myself off this first-floor balcony.

Jessica: Just the first floor.

Imani: Just that one. I mean, I don't want to injure myself, I still got a lot of fight in me, but I just kind of want the symbolic gesture of just jumping through a closed window into the street.

So that's it for us today. You can follow our tweet shenanigans on Twitter. I'm @angryblacklady. Jessica is @hegemommy. You can follow Rewire.News @rewire_news.

And join our Facebook group. Go to Facebook, look up Boom! Lawyered, answer the question. Please answer the question. It's just one simple question. Why do you like us? Just a little morale boost. And then we'll let you write in and you can have access to all of our exclusive content and rantings and ravings, and you can meet other, I don't know. What are we going to call fans of our podcast? Boomheads? Lawyerheads? I don't know. I guess just fellow law nerds will work.

Jessica: Fellow law nerds. I was gonna say that one question is like so easy. It's not even like we're asking you to comment of whether Obergefell was correctly decided.

Imani: Right? And the answer to that question is yes anyway. That's it for us. I guess we'll see you tomorrow.

Jessica: Thanks folks. 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.