

Imani Gandy: Hello fellow law nerds. Welcome to a special confirmation hearing episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that really misses spending days on end live tweeting confirmation hearings, having Kavanaugh flashbacks. I'm Imani Gandy.

Jessica Pieklo: And I'm just Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web, and the Team Legal podcast is part of that mission. A big thanks to our subscribers, and a welcome to our new listeners.

Imani Gandy: Today we had day one of the confirmation hearing of William Aka Bill Barr and Jess, I mean you live treated the first, the morning session, so I'm going to shoot it over right to you, what were your initial impressions after you finished watching the morning session?

Jessica Pieklo: It's a huge contrast, the Barr hearings have been day one, compared to the Kavanaugh hearings. We didn't have anyone getting all puffy faced, and swearing, spittle-

Imani Gandy: Nobody cried.

Jessica Pieklo: ... nobody cried, not yet. We still have tomorrow. It was pretty mild compared to the Brad McBeer hearings. But, that's not without some action and I think that what's important in the Barr confirmation hearings to pay attention to, is the action's going to be really snoozy, but it's still action. We expected the hearings to start with some Russia talk, and it did. A lot of it focused on Russia, but he gave some really important signals as to where he stands on civil rights laws and how, as Attorney General, he would enforce those civil rights laws.

Imani Gandy: What sort of signals are you talking about? What made your Spidey sense tingle?

Jessica Pieklo: Folks who are not real keen on federal civil rights laws like to go back to this idea of local control, and Bill Barr brought this up a lot. He talked about this idea that some areas of law enforcement should be decentralized. This is a huge flag for those of us with experience in federal civil rights laws because, you know, generally speaking, you don't want to leave the enforcement of federal civil rights up to local law enforcement. We saw in the Rewire.News documentary, Care In Chaos, for example, what that looks like for the abortion clinic in Charlotte, right? Local law enforcement is doing nothing and that clinic is besieged by protestors. That's the kind of civil rights world that Bill Barr envisions.

Imani Gandy: And that's not actually surprising, right? Because back in the '90s, he was the one who actually advocated for lifting the federal injunction when it came to enjoining protestors at the Wichita clinics. Right? I mean he was the one who

said, We should lift this federal injunction and just let the states take care of it,"  
And then what happened?

Jessica Pieklo: Right. Bill Barr was Attorney General before the FACE Act was enacted, and at that time clinic protests were bananas. I mean, we're starting to see it inch towards there.

Imani Gandy: So. Wait, Jess, I just want to interrupt you real quick so you can explain what the FACE Act is, just in case our listeners don't know what it is.

Jessica Pieklo: Oh, thank you. No, that's great. No, the FACE Act is a piece of federal legislation that was enacted during the Clinton administration, Attorney General Reno was a big proponent of it, so snaps to her for that. That is, that protects ... It's the Federal Access to Clinic Entrances Act.

Imani Gandy: Yep.

Jessica Pieklo: I always have to step through it.

Imani Gandy: Yeah, exactly.

Jessica Pieklo: It's a federal law that was passed in response to massive antiabortion protests that were ... like the Summer of Mercy in Wichita, Kansas, for example, where protestors were coming in by the thousands and sieging clinics, busting in and handcuffing themselves to gurneys. Law enforcement would come in, arrest them, they'd get bonded out, they'd do it all over again. The federal government said, "This is bananas, it's untenable. Someone's gonna get hurt." They passed the federal FACE Act.

Before that happened, Bill Barr was Attorney General and was basically kind of saying, "Yeah, like, go ahead, go bananas folks," in terms of clinic protests. And he even signaled that we would see that should he be confirmed as Attorney General as well. In the morning sessions, Senator Blumenthal asked the only abortion question, or series of abortion questions, and you know, Bill Barr is an experienced attorney. He knows his way, not only around a courtroom but around a confirmation hearing, and so he very deftly said that he believes Roe versus Wade is settled law and the Blumenthal asked, "Well, as Attorney General would you defend it?" And he said, "Well, that's the job of the Solicitor General, so I would just defer to their judgment and how best to position the Department of Justice's response in a direct challenge to Roe,"

Imani Gandy: Which is ridiculous, first of all.

Jessica Pieklo: Right.

Imani Gandy: Oh yeah. I mean, if a huge abortion case comes up, it might actually lead to the reversal of Roe. Me, the dude who's been so anti-abortion that he said in 1992

or '91 that he believed that there was no constitutional underpinning for the decision, and that the right of privacy did not extend to abortion, we're supposed to believe that that guy is going to take a back seat to the Solicitor General and say, "No, no. I'm just going to let the Solicitor General handle it." I call bullshit, Mr. Barr.

Jessica Pieklo: Yeah, he's not gonna be hands off on that, and so by not informing, for example, the members of the judiciary committee, how he would participate in that, whether it's a supervisor role, if he'd want to have a little more hands on, Barr was really filibustering those answers. We know from a lot of experience that confirmation hearings don't produce a ton of substance, so really gleaning answers is about connecting dots, and what we can do in the morning session is connect the dots that Bill Barr is outwardly hostile to federal civil rights, and we saw it in response to his abortion answer. And also, mentioning that he's totally cool going in and busting up sanctuary cities because they're terrible and illegal immigration is a scourge on this country that is the result of fentanyl coming in. I mean, his immigration drug comments were just bananas, but he got into that a lot more in the second session too, I think. Right?

Imani Gandy: In terms of the question about immigration, they talked about border security as if there was a literal crisis at the border right now. I mean, the way that they talked about the need for a barrier versus a wall and whether or not there were just heaps of drugs that were pouring in over the southern border, Mexicans and with the rapists and the drugs. I mean, they talked about it as if it's a crisis and Kamala Harris actually got him to admit or to acknowledge, or maybe it was Klobuchar. Either Harris or Klobuchar got him to acknowledge that the drug issue is not a southern border issue, it's a port of entry issue, right? That said something like 87% of the fentanyl in this country is entering through ports of entry, not through the southern border. Now it must be said that a port of entry is a border, so when they say it's a border security issue, technically they're correct. They're sort of flubbing the definition of border.

A port of entry is a border, but what they're talking about when they say border security, they're talking about southern border security. They're not talking about the border with Canada, they're not talking about airports or actual ship boat ports, they're talking about the southern border and there's just no evidence that there are drugs pouring in over the southern border. In order to get around that fact he does say, "Well, there are no drugs that have been interdicted." Meaning, yeah, we haven't caught any people with drugs, but that doesn't mean they're not getting through. And it's now we're talking about hypothetical drugs that are coming across the border and that's why we've shut down the goddamned government?

Jessica Pieklo: I mean, basically. And I think it's important that you mention this national security thing, given Trump's threats to invoke some sort of national security threat or crisis to grab funding for a wall. It sounded like, at least in the morning session, that Bill Barr would support that. Now, I had to peel out and do a very important thing which was go get my first haircut in eight months-

Imani Gandy: And it looks amazing. Let's all give a clap to Jess and our new amazing hair.

Jessica Pieklo: I cut off a whole bunch of it, which was the entirety of the Trump administration so far I've said, and it feels amazing. But Imani jumped in and covered the second half of the hearing for me, so I actually missed a decent amount of it today. What did I miss?

Imani Gandy: Well, first of all, you missed a man who is trying to be confirmed as the Attorney General of the United States, for the second time mind you. You missed that man pretending that A, he didn't know what the Presidential Records Act is, and B, that he didn't know what emoluments are.

Jessica Pieklo: Maybe we should send him a copy of our podcast on the Presidential Records Act?

Imani Gandy: Exactly. Because listeners who have been sticking with us since the Kavanaugh confirmation hearing, we did an entire episode about the Presidential Records Act and what it is, and what it means, and what it does.

Jessica Pieklo: You all could be Attorney General.

Imani Gandy: Right, exact, seriously. Whoever you are out there, listener, you would probably be a better Attorney General than Bill Barr insofar as the PRA is concerned. I'm not going to get into what the PRA is or does, but I do want to point out that Senator Harris, Kamala Harris, was incredulous when Bill Barr said, "The PRA? I don't know what it does. I have no idea what it does." I, personally, was incredulous when he said on multiple occasions that he hasn't really looked into the emoluments clause, and doesn't really understand it or know what it does. Bitch, really?

Jessica Pieklo: That's ... I mean, ... Come on.

Imani Gandy: Emoluments, what?

Jessica Pieklo: "I don't know, is that a person? I never heard of him."

Imani Gandy: Is she a bartender? I don't know. Seems pretty cool. It's absurd to think-

Jessica Pieklo: Kind of rings a bell

Imani Gandy: It's just absurd to think that Bill Barr doesn't know what the emoluments clause is or does, or has not familiarized himself with it, especially in light of the myriad lawsuits citing violations of the emolument clause that are currently being litigated. It was just not believable.

Jessica Pieklo: And it's extra nonsense given the fact that there's so little way that senators really have to push nominees in these hearings, and that the emoluments

litigation is active and ongoing. He could have easily said something like, "Well, that's not an issue that I've looked at a whole lot, but I understand it's an active litigation, so I'm happy to get back to you." Or, "I can't comment on that really, specifically because it's in active litigation," and he knows this, so why?

Imani Gandy:

Why go the route of, "Der, I don't know?" Like no doy, what are we? In sixth grade? This is ridiculous.

The second thing that jumped out at me from the afternoon session was the discussion of LGBT rights, specifically under Title VII. Title VII of the Civil Rights Act of 1964 essentially says that employers cannot discriminate on the basis of sex, race, national origin, and some other factors. Glaringly, sexual orientation and gender identity have not been traditionally seen as being included in that because of sex prescription. However, under the Obama Administration, Title VII was specifically interpreted to include sexual orientation and gender identity.

Now we have several cases that are being litigated across the country, and a couple that we're waiting for the Supreme Court to decide whether or not to take, Zarda v. Altitude Express is one, involving sexual orientation. Harris Funeral Homes is one involving trans identity, and so we're waiting for the court to decide whether or not Title VII can be interpreted to include sexual orientation and gender identity.

As Attorney General, it would be Bill Barr's job to decide whether or not he's going to back the Obama administration's position, or the Trump administration's position up to now, which has been LGBT people can basically go fuck themselves. I mean, that's been the Trump administration's tactic, right? Am I right?

Jessica Pieklo:

Oh, absolutely. The Obama administration made these efforts and then this whole wave of federal court decisions came in that said, "You know, what? It makes no sense to read because of sex to not include sexual orientation, because you're relying on your assumptions about how sex works in terms of how you're treating someone based on their sexual orientation, for example. And so this idea that there's this huge, massive conflict in the law is really this talking point that conservatives have drummed up, and it sounds like Bill Barr is really going along with it. I'm guessing he is not gonna decide that Jeff Sessions was wrong and that we should take a more nuanced approach to these cases.

Imani Gandy:

Oh, you would be right. And what's interesting about what he said, is that he said that he personally believes that LGBT people should be able to go to work and not be discriminated against and, at one point, it seemed to me that he also implied or suggested that discrimination in the workplace based on sexual orientation would be unconstitutional. Perhaps under the Equal Protection Clause? But he was not willing to say that VII covers it. So we have this interesting juxtaposition between what he says his personal views are, which is let LGBT people go forth and work and be free from discrimination, versus his

willingness to interpret a statute, Title VII, in such a way as to protect these people.

And then secondarily, which I'm sure you are not surprised to hear, is that he said he believes that there shouldn't be discrimination on the basis of sexual orientation, but that there should be accommodations for religion. And so that's where we get into what I like to call the Masterpiece Cake shopping of America, which is where it's fine to be gay if you want to be gay, but if you're gonna go into a bake shop and ask for a cake to be baked, then that person can say, "Well, it's my First Amendment right not to do so because my cakes are freedom of expression, and also it's against my religious beliefs. I'm an evangelical Christian. You're gay. I win. You don't have rights because religion. Hooray. Hooray. Jesus." I mean, that's essentially where we are with the weaponization of the First Amendment and it's driving me bananas.

Jessica Pieklo:

I just want to spend a moment on this point 'cause I think it's so important. Bill Barr's really trying to have it both ways here in his testimony. The idea that he says he's personally, it's his personal opinion that if you are an LGBTQ employee you should be free from workplace discrimination. Yes. That's fantastic. Everybody give the man a cookie for that. It doesn't change the fact that there are still 26 states where you can get fired just simply for being gay and, as the top law enforcement officer in the country, he would be in the unique position to help finally stir that ship into the port of Title VII protects these employees, end of the story.

That's one thing that's just grates me. But then, let's talk about this we need to accommodate religious objections to LGBTQ people because besides the fact that it's offensive to have a religious objection to a person, let's just say that, Bill Barr doesn't admit and concede that there is no limiting principle to what he is putting forth in terms of this accommodation. That's a legal phrase.

What do I mean by no limiting principle? If you say, for example, "Look, I have a religious objection to baking a cake for a same sex couple because I don't believe in same sex marriage." If you accept that there is a way for you to avoid civil rights laws there, it is very difficult to say, "Well then how do you not avoid civil rights laws in say, fair housing?" If you are a landlord, then how do you not object to renting to a gay couple. In fact, we're seeing this as Christian charities are trying to turn away transkids from shelters for example, or refuse foster care and adoption placements with LGBTQ families. Bill Barr is playing the cameras when he says these things, and I think that's just really important to say.

Imani Gandy:

And it's also shady. What you said is absolutely spot on. He is in a unique position to make sure that LGBTQ people can go to work and be free from discrimination, to make sure that under Title IX trans students can go to a public school and use whatever frigging bathroom they want to use. He wants you to know that he supports you personally, but when it comes to extending you legal protections to actually protecting you from people who would deny you your

rights, he's a little bit, "But religion ... but the Bible," and that's just not acceptable.

Jessica Pieklo: Yeah. It sounds like he's offering you thoughts and prayers when it comes to protecting your civil rights.

Imani Gandy: Exactly. It's the thoughts and prayers of the law, and just as in gun control, thoughts and prayers ain't cutting it.

Jessica Pieklo: No, it's not. I mean, I started saying that it was a snoozer of a day, but it's actually not. I mean, we covered a whole bunch of stuff that happened in what is a kind of limiting space in these judiciary hearings. Huh?

Imani Gandy: It's just that no one started crying and there was at no point did anyone started yelling about how much they like beer. And so that sort of makes these proceedings seem a little bit more tame than the ones that we covered back in September.

Jessica Pieklo: Wow. Amazing the standard we've set. Closing out from day one, are there things that you're looking for in day two?

Imani Gandy: I'll be looking for senators to press him more on sexual orientation, more on gender identity, more on this willingness apparently to balance the civil rights of a marginalized group of people against the rights, quote unquote, rights of the religious right to be bigots. I want more. I want him to actually explicitly say that he does not support the rights at a federal legal protection level of LGBT people to be free from discrimination. How about you Jess?

Jessica Pieklo: Yeah, I mean I'm going to be looking for that and I think I really want ... I'm hopeful that the senators really draw Barr out more on these draconian immigration and criminal justice views that we heard. He's a huge proponent of locking everybody up, especially if you're brown and nonviolent. And it just really dovetails with what the administration is doing in terms of immigration enforcement, and Barr's own stated views so far on a really harsh immigration policy.

I thought Senator Booker and Senator Harris did a good job starting that conversation. Senator Durbin did also. And I'm really, in addition to the civil right stuff that you mentioned there, looking forward to see them really pushing him because the reality is he was Attorney General in the early 90s with all of these terrible policies, and we have the receipts, we actually have the data that shows his ideas are trash.

Imani Gandy: Yeah. Trash don't work. Mass incarceration, huge failure.

Jessica Pieklo: Yeah.

Imani Gandy: That's going to wrap it up for us today. If you'd like to continue this conversation, you can follow me @angryblacklady on Twitter. You can follow Jess @hegemommy on Twitter, H-E-G-E-M-O-M-M-Y, and please be sure to tune into Jess' Twitter feed tomorrow where she will be back at the helm live tweeting these proceedings.

Jessica Pieklo: Woo. Jazz hands.

Imani Gandy: Jazz hands. All right, that's it for us.

Jessica Pieklo: See you on the tubes.

Imani Gandy: See you on the tubes.

Narrator: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our Executive Producer, and the Rewire.News Editor-in-Chief is Jodi Jacobson.