

[Boom! Lawyered: coronavirus and the Courts](#)

- Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is practicing safe social distancing. I'm Imani Gandy.
- Jessica Pieklo: And 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. And the Team Legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: So Jess, we joke a lot about everything being totally bananas, but I got to say, this coronavirus situation, it's totally fricking bananas.
- Jessica Pieklo: This is probably the one time when we can say literally bananas.
- Imani Gandy: Right? Like there are actual bananas falling from the sky.
- Jessica Pieklo: Infected bananas.
- Imani Gandy: Infected, coronavirus-ridden bananas, but it's also really scary, which got me thinking, you know how most of the Supreme Court justices are pretty damn old?
- Jessica Pieklo: Oh yeah. Like Ruth Bader Ginsburg, for example -- she just turned 87. Happy birthday, RBG, but stay inside please!
- Imani Gandy: And yet I'm pretty sure she could still kick my ass. I've seen her workout routine. She's kind of a badass, but 87 is not young and there's a pandemic now and I'm stressed about RBG versus the 'rona. I've got to say, I mean my money is still on RBG, the 'rona really ain't got shit on her, but that's a bet I don't want to have to make.
- Jessica Pieklo: Yeah, seriously, me either! And I guess that's why I'm extra, extra mad at Justice Kegstand for trotting off to Kentucky last week to go to what? A swearing in ceremony for a former clerk. I mean we get it right? Political payback is real. You don't have to shove it in your faces. Your people are getting appointments. Great, but also don't travel in a pandemic. Right? We need to keep these justices alive.
- Imani Gandy: All of them?
- Jessica Pieklo: Yes, Imani, all of them. Even the ones we don't like.
- Imani Gandy: So I suppose that's why the court announced that it would be postponing all oral arguments set for March.

Jessica Pieklo: It sure is. I mean, quite simply, the coronavirus is turning all of life upside down right now, even the courts. And that's what we're going to talk about this episode. What does it mean for the Supreme court to postpone oral arguments? Is there precedent for this kind of move? What sort of fresh hell will be unleashed by this, Imani? What are other courts across the country doing? Basically we will try and answer the question: what the hell is going on?

Imani Gandy: Oh, that's good, because I for one would like to know.

Imani Gandy: So last Thursday the Supreme Court announced that it would be closed to the public until further notice, but by Monday the court had announced that it would be postponing oral arguments, although the press release made it clear that the justices are still going to conference on Friday, March 20th that's this upcoming Friday, so that they can consider new cases for their docket. And just since you're the resident SCOTUS whisper, why don't you explain what the hell is going on? Why are they conferencing? What is... What's happening?

Jessica Pieklo: A lot, Imani, a lot is happening. Okay, so for starters, the Supreme Court just closed down shop mostly. The cases that were scheduled for oral arguments in March will have to be rescheduled. The court said that it will "examine the options" for rescheduling those cases in due course in light of the developing circumstances, which is very court speak, which: what does that mean? When is that rescheduling going to happen? We really don't have any idea.

Imani Gandy: Oh super. This is off to a great start.

Jessica Pieklo: Yeah, it's sincerely. It's going to be a mess. But okay, I'll give the justices credit. They're at least trying to figure out this shit on the fly, like the rest of us, right? So instead of just shutting down entirely, the court is going to conference on possible cases to take for next term and a conference is where the justices get together and basically debate which cases they want to take and why. So point there for the justices for thinking that, "Hey, we're even going to have a next term."

Imani Gandy: Oh no, that's so apocalyptic.

Jessica Pieklo: I'm sorry, I'm in a dark space right now.

Imani Gandy: It's understandable.

Jessica Pieklo: I'm learning algebra again. I don't know. It's nuts!

Imani Gandy: But some of the justices are going to participate in this conference remotely via phone, because six of the nine justices are over the age of 60 and this pandemic isn't so great for older folks.

Jessica Pieklo: That seems prudent.

Imani Gandy: Yeah, it seems prudent. Now, it's not unprecedented for the court to postpone oral arguments in the face of a health crisis. Over at SCOTUSblog, Tom Goldstein has a really good piece discussing what happens when the court has to function during trying times. Now one thing that's interesting about the piece that Tom Goldstein wrote is that a mere day after he published the piece, it was already outdated. And that's because Goldstein was focused on how the court is going to function during times of crisis when the court is simply closed to the public.

Jessica Pieklo: But by Monday, as Imani said, the court had announced it was just postponing arguments entirely, and that's unprecedented.

Imani Gandy: But still, Goldstein's article is interesting and worth discussing.

Jessica Pieklo: So one thing that sets SCOTUS apart from other government institutions is that the court places a lot of weight on consistency and functioning, even if other governmental institutions are shut down. So, for example, during the 2016 snowpocalypse, you remember that Imani?

Imani Gandy: I remember the snowmageddon.

Jessica Pieklo: Or Hurricane Sandy, there is another one. The court was open for argument, even though the rest of the government at times had shut down.

Imani Gandy: But as Goldstein notes in his piece and as the announcement on Monday confirms the coronavirus pandemic is a different beast and is more akin to the Spanish flu of 1918 than it is to the snowpocalypse or to Hurricane Sandy.

Jessica Pieklo: And that was the flu that wiped out like half the world's population basically. Right?

Imani Gandy: Well, not half the world's population, but it did wipe out a lot of people. It's the deadliest pandemic in history and according to some research that I did on history.com it infected 500 million people worldwide, which is about one third of the population of the planet. And it killed somewhere between 20 and 50 million people.

Jessica Pieklo: Okay, hold on. I mean it's a pretty bad pandemic when there's a 30 million person disparity between the lower and upper limit of the fatalities. I mean, 20 million, 50 million, there's no number in there that's more precise.

Imani Gandy: If you hate that, get this. Some estimates say that 100 million people died and that's 3% of the world's population.

Jessica Pieklo: What? We're just grabbing numbers.

Imani Gandy: Yeah, pretty much.

Jessica Pieklo: Spanish flu lottery.

Imani Gandy: Exactly.

Jessica Pieklo: I mean, 20 million, 100 million, that's the best these people can do, really? Good grief.

Imani Gandy: Well there was no vaccine at the time, and medical record keeping wasn't what it is today, which really like they didn't have computers back then? Get it together, 1918. But I digress. So here's the deal. The coronavirus is a disaster for older people and since the Supreme Court bench is stacked with older people, this country just can't afford for these justices to get sick.

Jessica Pieklo: Can't they though?

Imani Gandy: I mean look, I don't wish anyone ill. All I know is that Briar and RBG better stay alive at all costs.

Jessica Pieklo: Okay, so they're postponing arguments, but why Imani? Couldn't they just do them all by video conferencing?

Imani Gandy: Or via text message even, right? All the lawyers would have to make their arguments using emoji and if anyone used an eggplant emoji, they would immediately get sanctioned. But seriously, or like the peach emoji, ass cheeks and eggplants.

Jessica Pieklo: I'm just imagining Justice Alito posing a question as a bunch of the poop emojis. Justice Alito's questions are only poop emojis. I'm sorry.

Imani Gandy: And then Clarence Thomas would just be that one with the zipper over his mouth.

Jessica Pieklo: Or like the text bubble when you see them typing, but they never actually send anything. [laughter] We've lost it, listeners!

Imani Gandy: But seriously. Yeah, we're getting back on the rails. The reason that the Court is postponing arguments according to this article by Tom Goldstein is that if they were to have them but to keep the court closed to the public, then they'd be holding public proceedings with no public, because you have to remember that oral arguments before the Supreme Court are public proceedings.

Jessica Pieklo: I got another question for you, Imani.

Imani Gandy: Hit me.

Jessica Pieklo: Why not just live stream the arguments then? I mean, the D.C. Circuit livestreams oral arguments, it's not like our nation's capitol doesn't have the capability to do this.

Imani Gandy: Right, but if they do that, then a lot of measures this country is taking to slow the spread of the virus, the public might wonder why this hasn't been happening the entire time. Right? The public might wonder why oral arguments aren't always livestreamed and the Court just really doesn't want to have that fight, because they don't want to live stain or oral arguments.

Jessica Pieklo: They really don't. And I mean, remember when we had the impeachment trial like 40 lifetimes ago.

Imani Gandy: Yeah. What when that? I feel like I was like 20 then.

Jessica Pieklo: Chief Justice John Roberts was presiding over that and within an hour had been memed and so I'm sure that he's not really eager to get on with that. But you know what, hey SCOTUS livestream oral arguments always. It's a function of democracy. We should all be able to see what's happening in your court. Thank you for coming to my TED Talk.

Imani Gandy: So what's going to happen? Some of these arguments are scheduled for March and they could be postponed to April. Three of the argument dates that are set in April only have one argument scheduled for that day, so they could just essentially cram more arguments into those days.

Jessica Pieklo: Totally.

Imani Gandy: Also the Court could add additional argument days. Generally we think of April as being the last month for arguments and June as being the last month for decisions, but it's not like that set in stone in the constitution or anything, so the Court can just change its schedule. And you know what? We could even have oral arguments during the summer. Won't that be fun for you, Jess?

Jessica Pieklo: Mm. Going to DC when it's hot and sweaty. Oh, that sounds amazing. I mean, I'm sweaty by default, but at like 95 degrees and 82% humidity and I'm blotting from here. That's be great. It's going to be great.

Imani Gandy: Considering that the birth control case is scheduled for the end of April, if the Court remains closed, you might get to go be hot and sweaty in DC to cover those arguments. And I'll be here in California where it's a cool 65 degrees and I'm housebound.

Jessica Pieklo: Imani, we're in the middle of a pandemic and I would think that this would be a time to show some kindness, not to rub my nose in the fact that I might be up to my eyeballs in boob sweat at the birth control cases, so thank you.

Imani Gandy: My apologies, my friend. I apologize truly.

Jessica Pieklo: It's okay. I mean seriously the pandemic, we're all a little loopy right now! But the birth control benefit case is pretty important. And there are cases on the Court docket that are actually important considering we have a presidential election coming up. Like, oh, the fact that the Court was slated to hear arguments on Trump's tax returns on March 31st -- kind a big deal.

Imani Gandy: Kind of. I guess that's important, but do we really think the Supreme Court, which seems to be acting as Trump's bitch right now, is going to force him to turn over his tax returns?

Jessica Pieklo: I mean, no I don't, but it's still an important case to make sure we hear arguments on it.

Imani Gandy: That is true.

Jessica Pieklo: We should still vet the issue.

Imani Gandy: That's true.

Jessica Pieklo: So the clerk could hear those arguments at the end of April for example, and then I don't know.

Imani Gandy: And then tell Trump he doesn't have to turn over his tax returns at the beginning of May, because what even is this farce?

Jessica Pieklo: Imani, you're pretty cynical.

Imani Gandy: That's why you love me. I'm cynical, you're sweaty. We should do a show at Red Rocks. Introducing cynical and sweaty live and in person for the first time.

Jessica Pieklo: Oh God.

Imani Gandy: Oh God, I'm losing it. But I have a bit of a morbid question, is it possible that this pandemic might be useful in so far as it slows down the Trumpification of the courts?

Jessica Pieklo: Oh, that is a fantastic question, but not if Mitch McConnell has anything to say about it Imani, unfortunately.

Imani Gandy: Dammit.

Jessica Pieklo: Mitch. Yes. Senator Turtle is going to muck it up. Last year we wrote a piece about how the Republican takeover of the federal judiciary was almost complete and McConnell's strategy with an assist from his sidekick Chuck Grassley was simple, stall as many nominees chosen by president Barack Obama

as possible. Then by either disregarding or outright changing Senate rules governing the confirmation process, rush through president Donald Trump's nominees.

Imani Gandy: After spending three years filling seats with young conservatives, McConnell was ready to pick off the geezers and replace them. He's asking judges appointed in the Reagan and Bush one and Bush two eras to step down or at least consider stepping down so that he can fill those slots with 25 year old numpties handpicked by the Federalist Society.

Jessica Pieklo: Yep. The New York Times reported that McConnell has been quietly promising older justices that he'll replace them with an ideological successor, but basically to get the hell out, while Republicans still have the Senate and the white house.

Imani Gandy: So does that mean they're nervous about the 2020 election? What's going on here?

Jessica Pieklo: I think so. I mean, certainly the administration's bundling of the coronavirus response doesn't bode well for them and I think this is McConnell's way of saying, Hey, we have power now we got to really use it.

Imani Gandy: But then again, Trump could probably lick every door knob in the White House and his base would still hail him as their king. I mean, I'm just saying. So how many judges are we talking about here, Jess?

Jessica Pieklo: Well, according to the Article III Project, which is a right wing group dedicated to installing Trump judges-

Imani Gandy: I have to interrupt. Their website is ridiculous. I was reading this, I was like, "The Article III Project, I wonder what that is." And I went to good old google.com and found this shit, the Article III Project, A3P, because it's got to have a cutesy name, The Article III Project fights for the confirmation of president Trump's judicial nominees. We defend new judges against left wing attacks. We protect the integrity of the confirmation process. We oppose the Democrats' radical court packing term limit and judicial impeachment schemes. I mean really sure, Jan, sure.

Jessica Pieklo: That is some out right fascist nonsense. That sounds... wow. They sound super swell. But according to their tally, there are more than 90 judges nominated by the Reagan and Bush's who are eligible to take senior status. And so senior status is like quasi retirement, their slot can be filled, but the judges still receive full pay and they can hear cases and hire clerks.

Imani Gandy: I honestly don't understand the point of that. Is it just like a promise that they will leave as soon as their slot is filled or what's the deal?

Jessica Pieklo: Yeah, kind of. I mean, think of them as like the reserve squad of federal judges basically-

Imani Gandy: Second string judges.

Jessica Pieklo: Yeah, I don't want to say JV, because they're well-accomplished, but they're there for backup or -- I don't know if this was the case when you were in practice, but did you have those senior partners who would still come into the office and turn on their computers and maybe dictate a memo to the file, but nobody really knew what they did, but if you needed a pleading to be signed or something, it was good to have them around?

Imani Gandy: Yep, we had those.

Jessica Pieklo: Basically judges on senior status are kind of like that, you're happy to have them when you need them.

Imani Gandy: I mean, this might just be me and Lord knows I'm a little bit cynical, but I feel like that these Republicans should focus on getting their shit together when it comes to the pandemic response, rather than barreling ahead with trying to take over the courts.

Jessica Pieklo: I mean, I would say that's fair, especially considering the chaos that court closures are causing and it's not just SCOTUS that's shutting down, courts at every level, state and federal are shutting down because of coronavirus.

Imani Gandy: And if that happens, then they're going to be delays in trials. Now, delays in civil trials, not that big of a deal. Delays in criminal proceedings when people are languishing in jail, waiting for an arraignment or a jury trial, that can't happen because a packed courtroom is practically a Petri dish.

Jessica Pieklo: Well, jails are petri dishes too, Imani.

Imani Gandy: Yes they are. And you know how this country loves its carceral solutions and doesn't really give a flying fuck about people in jail. I literally read somewhere that prisons are trying to sanitize areas like common areas in prisons, which, good luck with that. You've got prisoners stacked nuts to butts. What are you going to do? How is this going to work?

Jessica Pieklo: Impossible.

Imani Gandy: Impossible indeed. And you know the Bay Area right now is on lockdown. We're in a shelter in place ordinance where we're basically not allowed to leave our houses and one of the punishments for disobeying the lockdown is jail time, which doesn't make a whole lot of sense to me.

Jessica Pieklo: [crosstalk 00:17:58].

Imani Gandy: Maybe. But why don't you just inject people who violate the shelter in place order with the Rona and just save everyone some time.

Jessica Pieklo: Yeah. It doesn't seem like putting more people in jail is going to slow the spread of the virus. But I mean I'm not an epidemiologist.

Imani Gandy: Yeah. I'm not either. But I think you might be correct. But the point is, we're just starting to see the impact that the Rona is having on the courts and it's chaos basically.

Jessica Pieklo: Our federal judiciary was already under-resourced and over-stressed, and I mean, as it stands, it can take years from the time that someone files a lawsuit in federal court to the time that they have a trial, years. Staffing concerns is people get sick backlogs on schedules. The impact on all of this, it's going to be really messy.

Imani Gandy: And you know what? State courts are in an even tighter spot financially. It's why we're starting to hear calls for things like a moratorium on evictions. Just having those kinds of proceedings is going to put people at risk, let alone the moral calculus about whether we should be evicting people in the middle of a pandemic.

Jessica Pieklo: And our immigration courts. Here in Colorado, we have an immigration judge who just went on self-quarantine after showing signs he was sick from coronavirus, so there's going to be delays in our immigration courts as well. And I mean that system is barely hanging on by a thread, if at all.

Imani Gandy: Right. And Trump is just moving forward with these ICE roundups. They're rounding up people and then putting them in lines, stacking them, not six feet away from each other. It's just like, "Oh, I can't handle it. It's too much. Can we just end the episode now? We got to end the episode now. I can't do it."

Jessica Pieklo: With like a kitten.

Imani Gandy: Yeah. Just think of a kitten on a branch like, "Hang in there."

Jessica Pieklo: Basically like Pete Buttigieg Judge's whole campaign. Oh man, that was like 10 lifetimes ago.

Imani Gandy: Remember Pete Buttigieg?

Jessica Pieklo: Remember Pete Buttigieg.

Imani Gandy: Who the fuck is Pete Buttigieg anymore? God. Oy. So that's going to wrap it up for us, but before we go, Jess, did you know that Rewire.News is a nonprofit and we depend on donations to keep this podcast and all of Team Legal's coverage going?

Jessica Pieklo: I did. And Imani, did you know that you can go to rewire.news/boomgive to donate? Seriously folks, we appreciate your support so much. If this coverage is important to you in this wild time, we hope that those of you who can throw us a couple of bucks, will throw us a couple bucks to keep us streaming through your ear holes.

Imani Gandy: The link is rewire.news/boom, give that's rewire.news/ B-O-O-M-G-I-V-E.

Jessica Pieklo: And it's also in the show notes in your app.

Imani Gandy: You should follow us on the Twitters @angryblacklady, that's me. @hegemommy H-E-G-E-M-O-M-M-Y, That's Jess. You should join our Facebook group. Answer the questions. If you can't answer the question, just say something that might make Jess and I realize that you're not some sort of anti-choice dumpty and that you like us on Twitter or appreciate work or you're a big fan of abortion rights, yada yada. And Oh, we still have our series is out. Now that you're on lockdown, probably now that you're self-isolating, it's a good time to listen to, we'll hear arguments. You can binge that series in two and a half hours. It's like bing, bang, boom. We'll hear arguments in your face, in your ear holes. It's amazing. Please go subscribe and listen.

Jessica Pieklo: Perfect time to binge.

Imani Gandy: And Jess, do we have anything else?

Jessica Pieklo: I don't have anything else.

Imani Gandy: She's looking at me like, "Bitch, who are you?" I don't even know why we're here. All right, that's going to wrap it up for us. Jess, what are we going to do?

Jessica Pieklo: We're going to see on the tubes folks.

Imani Gandy: She didn't even know the answer to that question. You're like, "I don't know. Go outside and panic?" We'll see you on the tubes, folks.

Imani Gandy: Boom! Lawyered is created and hosted by Jessica Mason Pieklo And Imani Gandy. Marc Faletti produces the show.