

[Boom! Lawyered: Expand the Courts \(Without Overthinking It\)](#)

Imani Gandy: Hello, fellow law nerds! Welcome to a brand new season of Boom! Lawyered, a Rewire News Group podcast, hosted by the legal journalism team that would make two great halves of one Supreme Court justice. Jess, with all of this talk of court reform, why has no one considered splitting one Supreme Court seat between, I don't know, say, two 46-year-old legal journalists?

Jessica Pieklo: Come on, it's time to think outside the box, if ever there was a time for it. Right?

Imani Gandy: I think so! It's like, get it together, America. Jess and I are ready. Justice for Jess and Imani. I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire News Group is dedicated to empowering you to own your relationship to sex, abortion, parenthood and power. And the #TeamLegal podcast is part of that mission. So a big thanks to our subscribers and welcome to our new listeners.

Imani Gandy: Here we are, season five of Boom! Lawyered. Season five!

Jessica Pieklo: What!?! That's madness.

Imani Gandy: That's wild. We thought we'd be able to take a nice break at the end of last term, because the end of last term, that was a doozy, wasn't it?

Jessica Pieklo: It was a lot.

Imani Gandy: But that whole take a break thing didn't exactly work out so well for us, did it?

Jessica Pieklo: Yeah. It just really didn't because 2020 just... it just keeps happening. Here we were thinking, "Coronavirus had turned everything upside down. We have this big election going on. Ooh, we're in the middle of some exciting changes as a publication. Let's take a break this summer so we can really collect ourselves." And boom, Justice Ginsburg dies.

Imani Gandy: And now here we are in the middle of an election where hundreds of thousands have already started to vote and a Supreme Court justice dies. We know what that means, don't we, Jess?

Jessica Pieklo: Oh totally. That means that it's time to come together as a nation and collectively honor Justice Ginsburg's legacy and reflect on all the ways that her work changed this country. And it's time that the norms and traditions tell us that we wait for the election to play out before, oh, I don't know, rushing to fill a lifetime appointment for the nation's highest court -- one of the most powerful jobs a person can have in this country.

Imani Gandy: It's so cute when you're adorable and optimistic and very naive because not a chance. Not a chance. Justice Ginsburg hadn't even been laid to rest yet. She was still lying in state when President Trump announced Amy Coney Barrett would be nominated to replace her. Republicans followed up and announced confirmation hearings would begin in two weeks with a possible floor vote in the Senate to happen by the of October and a brand new Supreme Court Justice -- Kingdom of God -- hearing arguments in November.

Jessica Pieklo: Is that what we're referring to her as?

Imani Gandy: That's what we're calling her.

Jessica Pieklo: I appreciate, all right.

Imani Gandy: Justice Kingdom of God, because that's as good as, I feel like we've got to continue the tradition. I think the Title VII decision maybe pushed back the "Gorsuck" stuff for a while.

Jessica Pieklo: A little bit, I mean, look.

Imani Gandy: But still on with Brad McBeer. And now we're bringing on Justice Kingdom of God. But if they succeed, they're going to have a conservative supermajority on the Court that will both thwart any progressive policy agenda and roll back rights for decades. It's bad. It's really, really bad.

Jessica Pieklo: But Imani, it's not over. It's really not over. We can remake the courts. I know on this show, we've been a little slow to adopt something like big structural change as a policy solution to Trump packing the courts. But listeners, it is a new season here on Boom! Lawyered. And we are here to admit that we have changed our tune. Bring on court expansion! Let's add an entirely new appellate circuit and fill it full of public defenders, that's what I say.

Imani Gandy: Hallelujah. And you know what listeners? That's really one of the great things about Jess and me is that we're not afraid to admit when we're wrong. We're not afraid to admit when we've been overly cynical about something. And so, that's what we're going to talk about now in this first official episode of the new season of Boom! Lawyered. We are going to talk about court expansion. You get a circuit court and you get a circuit court and you get a circuit. We're going to have 25 circuit courts of appeal. Jazz hands.

[music break]

Jessica Pieklo: Okay Imani, I feel like I need to start with a mea culpa.

Imani Gandy: All right, Jess. I feel like I'm going to give you the space to just sit in your feelings. Just talk to me, tell me what's going on with, catch me up on you.

Jessica Pieklo: The Barrett nomination is inspiring a whole new refreshing of my Catholicism. This is an effort for me to confess.

Imani Gandy: Oh boy.

Jessica Pieklo: We've talked a lot about how Republicans are jamming the courts full of these unqualified ideologues. Over 200 of them. And during the debate, Trump was like, "I'm going to get 300 of them." They're on the bench for life. I'm already sweaty about this. And yet, when folks had asked us about it and asked me about what we can do about it and everyone was like, "This is terrible. What can we do about it?" And I feel really bad because I was effectively like the shruggy guy. I was like, "Meh, I don't know [about] court expansion." But I have been radicalized. My mind is changed. It is time to expand the courts.

Imani Gandy: Okay Jess, while we're doing mea culpas, I feel like I should also. I'm not Catholic, but I'm going to confess as well. I've been very negative about the prospect of expanding the courts. I've been, "Oh, Biden's never going to expand the court. Democrats don't have the spine to expand the courts." And while that may be true, I have faith that law nerds like those of you listening to this podcast and other people who care about the judiciary, are going to rise up and make the case that Biden and Harris, should they win, should expand the courts. I believe in us now and I didn't before. That's my mea culpa. And quite frankly, it's the only reasonable policy response to conservatives in the last couple of years and the outright shenanigans that have been going on in the federal courts.

Jessica Pieklo: Totally. I could not agree more. Let's talk about expanding the court versus packing the court because that's something that's out there in the dialogue. And I think that that's really important to sort of talk about the difference. Expanding the court is that, I don't know, administrative procedure reaction that I got. That's big structural change and why am I talking about expanding the court? Why are we not talking about packing the court right here? That's because conservatives have appointed, like we have talked about a lot on this show, hundreds, hundreds, hundreds of judges. We need a response that matches that in kind. It's not just enough to give a judge or two, we need hundreds.

Expanding the court means yes, adding seats to the Supreme Court, but it means more than just that. It means increasing the number of judges altogether and building out more judicial districts as a possibility even. And this is important because these are all things that Congress can do via legislation. There's not even any need to monkey around with the Constitution at all. This is literally something that Congress, a bipartisan effort, even if they wanted to, could say, "You know what? The federal judiciary is in crisis and we're going to fix it."

Imani Gandy: Well, considering that Republicans have been ramming these judges through, I don't necessarily think it's going to be bipartisan, but who knows? We might be

able to peel off a couple of reasonable Republicans. Let's not be cynical already after I've already performed my mea culpa for being too cynical.

Jessica Pieklo: It's a new season.

Imani Gandy: It's a new season. We are shiny, happy Jess and Imani. We are holding hands in everything. But this is important because of the conservative strategy to take over the federal courts was to first starve the federal courts of resources. Even back before the Obama administration, the courts were in crisis because Republicans refused to fund and staff them.

Jessica Pieklo: And that's so important. That is one of the reasons why people wait years and years and years before they have their day in court. Really expanding the court is about access to justice broadly, regardless of all the shenanigans. And like we said, expanding the court is different than packing the court, which is this term getting tossed around. And I think has some negative connotations.

Imani Gandy: It does because, A, packing the court is what Republicans have done. And, B, when you say packing the court, it harkens back to the New Deal days when FDR threatened to do just that. He threatened to unilaterally expand the court as a way to get his legislative priorities upheld. In some sense, this is a very familiar story. The Supreme Court has more often than not stood in the way of social progress. And so sometimes we're forced to take a political response, but I don't think that packing the court sends the right message because, A, FDR wasn't successful and, B, that's not what we're doing. We're not, I really like this, the framing that you, I think you first brought it up in our last episode, the framing of this is about access to justice. It's not just about trying to get back at Republicans or to stick more Democrats on the court. It's about enabling regular people to not have to wait four and five years to get their case in front of a judge.

Jessica Pieklo: Right. And you had mentioned how this story is kind of like the one we have from history and FDR in this fight over all sorts of progressive legislation and trying to get that enforced. It's also really different in that, in this conversation, we have the nomination of Amy Coney Barrett. With her nomination it sort of rises to the surface, this decades-long politicization that Republicans have done of the courts. And so that's why packing the court is probably something we should move away from as we're talking about policy really more towards expanding.

Imani Gandy: Yeah. And packing the court just sounds bad.

Jessica Pieklo: It does.

Imani Gandy: And it just takes away from the fact that the federal judiciary is in crisis. We just heard in the debate recently, Donald Trump saying that he was going to send the ballots to the court so the court could take a look at them. It's pretty

fortuitous that he's now got a chance to install someone who doesn't really have a restrictive view of executive power and is basically going to do whatever Trump wants her to do. It's making me sweaty. I'm already sweaty. It's the first episode.

Jessica Pieklo: So sweaty.

Imani Gandy: I'm already sweaty.

Jessica Pieklo: We're already sweaty. The Jess and Imani story. And I think too, the other part of this conversation that is really important right now is that, we aren't just facing a legislative battle. This isn't just something that is happening in the vacuum. Folks are actually understanding that the federal courts are a fully politicized and political branch and therefore they need to be addressed as one. And we've got a couple of legislative proposals that are actually doing just that, which is kind of wild.

Imani Gandy: What kind of legislative proposals are we talking about here?

Jessica Pieklo: All right. They're wonky, bear with us. We'll sort of go through a little bit, but representative Ro Khanna and Joe Kennedy introduced a bill that would add term limits to the Supreme Court. I'll walk through a bit of this.

Imani Gandy: Yeah, because I'm not really sure how adding term limits makes the court any less partisan. It seems like it would make it more partisan.

Jessica Pieklo: Oh yeah. Hold that question because I don't think that how I'm about to describe the plan is going to really satisfy you. Listen, this is how it goes. There are nine justices who would serve for 18 years with staggered terms and a new justice would be picked every two years when a president is elected. That means in one presidential term, there are two guaranteed Supreme Court justice picks. And then justices would retire down to lower appellate court terms after the end of this 18 year term, assuming they don't retire sometime in between them.

Imani Gandy: I'm going to be honest, this is already too much math for me.

Jessica Pieklo: I feel like I should have a blackboard behind me.

Imani Gandy: Yeah. I don't math so good.

Jessica Pieklo: We start with nine and then maybe we add two and then maybe we subtract one and then we add another two and then we... But yeah, implementing the plan sounds that wonky. The current justices remain on the term for life because you can't just automatically take away their lifetime appointment. That means that if this plan were enacted, for a while, there'd be more than nine

justices on the court, which by the way, would be Republican appointees so that's not really doing a lot in terms of balance.

Imani Gandy: Well, there were some ideas about justices rotating in and out of the circuit courts into the Supreme Court and out of the Supreme Court. But if the circuit courts are already so packed with Trump judges and we don't expand the court so that they're not 25 or however many percent Trump judges they will be by the end of his presidency, then I'm not sure how rotating circuit court up to the Supreme Court would really help the balance in terms of partisanship. Am I speaking out of my butt here?

Jessica Pieklo: No. No, you're exactly on it. I think this is one of those plans that sounds good on paper and in sort of a long explainer, but it doesn't really do anything to address the partisan and political nature, like you pointed out.

Imani Gandy: Okay. Let's talk, go back to this other plan. This nine justices serving for 18 years plan. If Joe Biden wins this election, under that plan, if Barrett is confirmed before then, the court would be up to nine justices. But then Biden as president would be guaranteed two justices, regardless if there are any vacancies or not. Got it so far? Okay.

Jessica Pieklo: So far you're tracking.

Imani Gandy: If he were reelected, he would have four SCOTUS picks. And so then there would be, what's nine plus four? I'm bad at math.

Jessica Pieklo: 13.

Imani Gandy: 13. There would be 13 SCOTUS judges on the Court. Is that what we're saying?

Jessica Pieklo: Yeah, we are. And the four in that calculation that you just did would then be up for 18 year terms while the other nine.

Imani Gandy: Are on lifetime.

Jessica Pieklo: For the lifetime because they're already lifetime.

Imani Gandy: And so, okay.

Jessica Pieklo: Listeners, are you confused? You should be confused. It's so confusing.

Imani Gandy: Just expand the damn court. You know what I mean? I don't want to have to do complex algorithms or algebra in order to figure out who's going to be on the Court and when. There should be no theorems involved. I shouldn't have to call that dude from Numbers.

Jessica Pieklo: Totally. This is like a Nate Silver idea and it's not wonderful in that sense.

Imani Gandy: What was even thinking behind this plan?

Jessica Pieklo: Yeah, I was going to say, the thinking is it creates predictability. Everybody gets all kerfuffled when there's a vacancy and there's a lot of focus. We've heard this with Justice Ruth Bader Ginsburg's death. How dare this one woman not retire when she should have retired because the entire fate of democracy is resting on her shoulders. The thinking behind this plan is that you get away from the importance of individualized nominations, that one person like a Justice Kennedy can have so much power or sway over the court. But you pointed out a couple of minutes ago, the exact problem, which is, if Republicans and conservatives have already appointed one in four appellate circuit court judges and we're rotating folks up in whether it's this plan or adding folks and then rotating them down, none of the politics is out of the court. Maybe the best plan is to just say, the courts are political and we treat them as a political body. I don't know. I kind of hate this plan, I'll be honest.

Imani Gandy: Yeah. And it doesn't do anything to deal with all of the lower court judges that conservatives have jammed through, like the district court judges.

Jessica Pieklo: Yeah. Yeah. And this why expanding the court is the frame and not pack the court, right?

Imani Gandy: Yeah. Yeah. Yeah. I guess it's nice that they're being creative and thinking outside the box, but I feel like maybe get back in the box a bit.

Jessica Pieklo: Yeah, we can workshop it. I totally don't want to be a downer. We started this episode. It is a new season. We are not going to be cynical. We have a lot to work for and push it. I am giving folks credit for thinking big and creatively, but we can work on this. We've got a better plan in us, I bet.

Imani Gandy: I bet we do too. But the idea that there's more of a groundswell for expanding the courts, that we are now on board. Elie Mystal, who we just had an event with recently, is definitely on board. If you got the nerdy lawyers on board, then we can band together with other nerdy lawyers and come up with something that doesn't involve calculus, I feel like. But the real issue in this whole conversation is that no matter what happens with reforming the courts, the short term is likely going to be pretty painful for a lot of folks as the Supreme Court and the appellate courts rule on things like LGBTQ rights, voting rights, abortion rights, police violence. There's an entire list of what's at stake and those stakes are so high for marginalized people. The *Fulton v City of Philadelphia* case has got my nerves just shot already because that case could really spell doom for a lot of anti-discrimination provisions. And I'm nervous. I'm real nervous about it.

Jessica Pieklo: Yeah, the *City of Philadelphia v Fulton* case is real bad. We've got the Affordable Care Act case too, where the Court could decide that the Affordable Care Act needs to get struck down. And we heard during the debate, one of the things

that really jumped out to me was when Joe Biden said one in 1,000 COVID deaths are African-American deaths right now. That is so immediately connecting the Affordable Care Act losing insurance to the COVID crisis and what that means for people of color in particular. These are all things that are on our radar that we are, as we are in this brand new season, I'm going to be covering and really reminding folks and I think ourselves that the long game is important. We're going to feel the immediate pressure of everything as the Supreme Court term opens and as the election is breathing down our necks, but really this is a long game.

Imani Gandy: It is a long game. And it's a long game that I feel positive about. For some reason today I've been feeling calm and positive and I'm just going to ride that wave out because you never know how long it's going to last. Let's wrap up on a positive note. There is there's hope, listeners. There is hope.

Jessica Pieklo: It's a new season.

Imani Gandy: It's a new season.

Jessica Pieklo: We have a whole season. I'm so excited.

Imani Gandy: Look, Jess and I could be Supreme Court justices by the end of the season. You don't even know, shit could go crazy.

Jessica Pieklo: We need a plan to put Imani and I on the bench. This is the court packing plan for 2021.

Imani Gandy: Exactly. Start a GoFundMe!

That's going to wrap it up for us today. We will be back next week because we'll be covering the confirmation hearings for Amy Coney Barrett. The look on Jess' face right now is spectacular because she knows that she's going to be the one live tweeting them because she's become just sort of the live tweet queen when it comes to these things. How many days with Kavanaugh?

Jessica Pieklo: My fingers are on fire.

Imani Gandy: Oh my God. Just those Twitter fingers. Pew pew, pew pew pew pew, pew pew.

Jessica Pieklo: I like Star Wars.

Imani Gandy: Definitely follow @Hegemommy. If you're not following Jess on Twitter, I honestly, I can't even, there's no one listening right now that's not following Jess. Jess, @Hegemommy, H-E-G-E-M-O-M-M-Y. Me, @AngryBlackLady. I'm not going to spell it because you know how to spell angry, black, and lady. And we've got some new, exciting stuff. Our Instagram is popping. We've got a new art director. We're doing all this cool stuff on Instagram so you should go follow

Rewire News Group over there. You should, oh, what are we doing for our big power week, Jess? You want to talk about our content?

Jessica Pieklo: Ah the content has been dropping. Oh my gosh. Yes. We're starting to do these quarterly themes and the Constitution is at a crossroads. Maybe you have noticed! And we have content all week related to that. Check it out. We've got to look at two different courts, depending on how the election could turn out. We've got to look at a really heated abortion rights battle in Colorado, in Louisiana, where abortion is literally on the ballot. Some really good stuff. We have a very special feature with Imani. I want to let them know what that's all about.

Imani Gandy: You can at least tell them the name of it to get their interest piqued.

Jessica Pieklo: Ooh, so it involves Imani, kaftans and Tawny Newsome of Space Force.

Imani Gandy: Yes. Three words. How many words is that? Four words, Imani, kaftans, Tawny Newsome, four words.

Jessica Pieklo: Four words.

Imani Gandy: You're already so excited you can't contain yourselves. The point is, if you're not following Rewire on Twitter, @rewirenewsgroup, go follow Rewire News Group. We do have a new Twitter handle. Follow us on Instagram. You can still join our Facebook group.

Jessica Pieklo: You can.

Imani Gandy: You really can. And you should. And the questions, we will change the questions. But for now, just give some indication that you know who we are, because we're just, all we're trying to do is keep anti-choicers out because we want it to be a safe space for people to talk about repro rights and justice. And it has become that over the last couple of years. And we love you all for it.

Jessica Pieklo: Imani, I just got to say something real quick though, because it has been bothering me. You and Tawny looked too good to be on Zoom calls on the regular. I take offense. Listeners, you really need to check this out because seriously, you'll see, I don't know. Are there skincare tips?

Imani Gandy: I think maybe because we're both black.

Jessica Pieklo: Because people are glowing. People are literally glowing.

Imani Gandy: Well, it's Tawny. She's a beautiful woman and she's got amazing eyebrows, which I actually talk about it in the chat.

Jessica Pieklo: Oh God, the eyebrows are art like. Check it out. It's so fun. It's so beautiful. It is wonderful.

Imani Gandy: Just two black ladies talking about black lady shit. It was a lot of fun.

Jessica Pieklo: It's so good.

Imani Gandy: And then also if you want to support what we do, we got a lot of new donors last season, a lot of recurring donors.

Jessica Pieklo: Yeah, thank you.

Imani Gandy: And we would love to increase that number. Please, rewirenewsgroup.com/boomgive. That's rewirenewsgroup.com/boomgive. And aside from that, what are we two shiny, happy people holding hands, going to do, Jess?

Jessica Pieklo: We are going to see you on the tubes folks.

Imani Gandy: We're going to see you on the tubes, tu-tu-tubes.

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