

## BOOM! LAWYERED: REMEMBER WHEN WE COULD HUG?

Imani Gandy: Hello fellow law nerd! Welcome to another episode of Boom! Lawyered, a Rewire Newsgroup podcast hosted by the legal journalism team that has finally watched WandaVision. And all I have to say is, Oh, my God. Oh, my God. I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire News Group is dedicated to inspiring 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 a welcome to our new listeners.

Imani Gandy: Hey, Jess.

Jessica Pieklo: Yeah?

Imani Gandy: I kind of miss seeing your face.

Jessica Pieklo: I know. I mean, see your face on video all the time.

Imani Gandy: I see your face now on video, and we chat and whatever. But I haven't ... I'm not a hugger. I don't really want people to touch me.

Jessica Pieklo: Oh, I am.

Imani Gandy: But I want to hug you.

Jessica Pieklo: I want to grab you by the cheeks and muah.

Imani Gandy: And the last time I was able to do that was literally one year ago. One year ago, you and I were in Washington DC for oral arguments for June Medical Services. Do you remember June Medical Services, that case that happened lo those many years ago? That was just on year, but it seems like it was forever.

Jessica Pieklo: One year ago to the day.

Imani Gandy: To the dizzay, as Snoop Dogg would say.

Jessica Pieklo: I mean, time is a trick, obviously.

Imani Gandy: It is.

Jessica Pieklo: But how has it been 365 days since I gave you a hug, slapped you on the arm and was like, "What the fuck is that nonsense?"

Imani Gandy: Exactly, since we had a beer, since maybe you twerked in a hotel lobby.

Jessica Pieklo: Ate a \$20 salad at the hotel.

Imani Gandy: Yeah, those were the days, and I miss those days. So that's what we're going to talk about today. This episode's going to be a little bit different because we're going to be taking a look back at the ways that the courts and the country has changed in the year of COVID. So here we are, a year out from the June Medical Services oral arguments. And I have to say, if I had known that was going to be the very last trip that I would take before the onset of COVID, I don't think I would've done anything differently. It was a fantastic trip. We met so many great people. For example, I met our president and editor-in-chief for the first time, Galina Espinoza. She interviewed me for a Facebook Live, and that was super fun.

We did this professional photo shoot. We went to a radio studio and recorded our first in person Boom! Lawyered, which was great. We bellied up to a bar for about six hours with our producer, Marc, and threw back beers. It was a really, really great trip. And then we ended up winning the case. Not you and me personally, because obviously, we didn't argue it, but abortion rights advocates and activists won June Medical Services, so all in all, it was a great trip. And then here we are a year later, I haven't seen you in a year. I barely have left the house in a year. And can you talk me down from the ledge? Because I'm a little bit verklempt.

Jessica Pieklo: I mean, it was such a great day though. Do you remember the energy outside of the courthouse?

Imani Gandy: Yes.

Jessica Pieklo: There's nothing quite like a Supreme Court rally to get you really fired up if you're a big nerd like me and Imani, and I'm guessing many of you listening to this show. I mean, it was lovely to see so many people out there just rallying around abortion rights and access. And we got that amazing picture of us in front of the court with the thank God for abortion sign. Still to this day, one of my favorite pictures of us. And you're right, that's literally the last time that I left the state of Colorado. And I'm just kind of blown away that here we are. And in some ways, everything has changed, even though we have been kind of preserved in amber because of the pandemic.

I mean, we got this really great decision, which I don't think we were expecting. Right? We won, again, not me and you, Imani, but we, the collective we, won June Medical Services, which we weren't totally expecting, but now, here we are in a new Supreme Court term and playing that waiting game of: Is the court going to take another abortion rights case, or are they not? There's this Mississippi 15 week ban that the court has been thinking about taking now, oh, I don't know, five times. So I'm glad we're talking about how good that day felt because when I think about abortion rights and the court, I definitely don't feel warm and fuzzy like I did that day.

Imani Gandy: Yeah. It's gotten rougher.

Jessica Pieklo: It has.

Imani Gandy: I mean, for example, since that day, Ruth Bader Ginsburg died. And that was a real blow. I mean, that was a real blow. And I remember that day. I'll never forget that day because I remember about two weeks prior, you and I had a conversation with our producer about, we have to talk about what happened in the eventuality that she dies. And I was like, "No, no. I'm not doing it."

Jessica Pieklo: You refused.

Imani Gandy: I shut down.

Jessica Pieklo: You literally refused. You were like, "I will not have this conversation, and I am out."

Imani Gandy: And Marc was like, "But it's your job." I was like, "I don't care, Marc. Leave me alone." I was very, very emotional, mostly because I knew how much her remaining alive meant, but also because of the person that she was and the person that she meant to me, and the way in which our friendship was kind of forged in her legacy. There's so much that is wrapped up in her life, and we never got to really mourn that, which was horrible. But I do recall my first instinct was, okay, she died. I have to go buy a bottle of vodka. So I went and I bought a vodka, and I came back, and we did that podcast. And it was a rough day, it was a really rough day. And even just thinking about it is making me a little teary because it was hard. We didn't have time to mourn. We still haven't had time to mourn because: What happened after that, immediately?

Jessica Pieklo: I'm going to blow your mind with something.

Imani Gandy: Okay.

Jessica Pieklo: It's been just about six months since Justice Ginsburg died. Right? This idea that time is a trick, six months. And everything with the Court feels so different, everything. It's not just that, oh, we had a good abortion rights win. But we have Amy Coney Barrett now, and yesterday the Court was hearing oral arguments in a voting rights case. And there's no Justice Ginsburg there to remind everybody about the importance of the voting rights act. Now we have Amy Coney Barrett asking Republicans, "Isn't it true that the reason you support voter disenfranchisement is because you can't win with it?" And on their side, I just, it's bad. It's really bad. I mean, where do we start with that? Right? Justice Ginsburg dies. We're in the middle of a pandemic. The voting is happening at this time. Right? We're talking September. And what do Republicans do? They totally jam through her nomination, or Amy Coney Barrett's nomination. Right?

Imani Gandy: And on top of that, we find out later that literally the day Ginsburg died, Mitch McConnell was already on the phone trying to figure out replacements. Didn't even give her a chance to rest in peace for a hot minute before they were already conspiring and figuring out a way to replace her while voting was already happening. I mean, we can, everyone who's listening to this podcast knows about the Scalia situation, and how they held Merrick Garland for 10 months, however long, because they thought, "Oh, we have to let the people decide." Here we are literally weeks before an election. People are already voting. But the rules change. Right?

Jessica Pieklo: Yep.

Imani Gandy: Because Republicans are not beholden to the rules that they foist upon Democrats, and which Democrats for some reason, continue to abide by, even though they should not.

Jessica Pieklo: Yeah.

Imani Gandy: So we have this nomination, that really creepy super spreader event that was held at the Rose Garden. What was that all about?

Jessica Pieklo: Yeah. And so I mean, the conservatives were so excited to advance Amy Coney Barrett's nomination that they did, they created this super spreader event. And in retrospect now, what a snapshot for so much of the way in which the pandemic and conservatives and just this country would sort of go. Right? Because just recklessness abounded at that Rose Garden ceremony. Nobody's masked. There's kids there, high risk folks. We know a bunch of people ended up catching COVID at it. But hey, guess what, they recovered because they were rich and white and had access to some pretty great healthcare. Funny how that works out. Huh?

Imani Gandy: Right.

Jessica Pieklo: Right? So even then, we got that look, sort of going back, that Wayne's World, do, do, do, do, do, going back in time. But we could take that Amy Coney Barrett nomination party that they threw and say, "Yep. This is pretty much an example for how conservatives will treat COVID and the pandemic," and just everybody's, I don't know, health and safety and wellbeing six months down the road. I mean, hi, Texas.

Imani Gandy: Right. Exactly. Hi, Texas. You literally just had people freezing to death because you were incompetent in the way that you run your electric grid. And now you're just 100% open, no mask mandate, even though there's how many new variants that are floating around the country. I mean, it's irresponsible. It's unconscionable. And I can't help but think that the plan is to keep the deaths going so that they can lay them at Biden's feet during the midterms. And there's

something really craven about a group of people who are willing to let people die so that they can remain in power.

Jessica Pieklo: Yeah. It's real bad, and I feel real sorry for folks in those places because you all deserve better than that.

Imani Gandy: You all deserve better than that. And I can just say I know people who are listening to this podcast probably are not the types that are going to say, "Well, they deserve it because elections have consequences." Come on, guys.

Jessica Pieklo: We're better than that.

Imani Gandy: We have to be better than that. There are millions of people in Texas. There are more Democrats in Texas than there are people in the state of Maine, so let's just-

Jessica Pieklo: That's wild.

Imani Gandy: And then you get people like Stephen King making snarky comments. I'm like, "Bro, you don't even have as many Democrats in your state as Texas has, so let's just be a little bit more understanding." But can we talk about post election and post insurrection United States of America? Because I would've thought that after these numpties stormed the Capitol, leaving five people dead, leaving an entire nation wondering what the fuck is happening, one would think that they would want to get to the bottom of that. And one would think that the Supreme Court would not engage in any sort of behavior that would further foment this sort of anti Democratic behavior. Right? Well, you would be wrong.

Jessica Pieklo: You'd think that. Right? Traditionally, as far as institutions go, the Supreme Court is generally in favor of upholding institutions, and so you would think that means they would be down with insurrections, but maybe not so much.

Imani Gandy: It just feels like there are, well, it doesn't feel like, there actually are justices on the Supreme Court who are willing to, I don't know, at least listen to this election truther nonsense and kind of determine whether or not there's any merit to those claims. Right?

Jessica Pieklo: What's your take on that? What is going on with that? Because I don't know.

Imani Gandy: I think that we have a super, super hyper partisan Court, and I think that it has become Democrats versus Republicans on the Court in a way that I don't think it has been in a really, really long time. And in a way, that's disturbing, and that's because of the things that we've been talking about for a year now because they are these federalist society judges who all think the same way, they all come up learning from the same people. Their ideologies are almost identical, so I keep calling it now the six three federalist society court because that's essentially what it is.

You've got the conservative wing, who all think the same. Then you've got Sotomayor and Breyer and Kagan, who will sometimes go in on cases about the tort reform act and other kinds of procedural shit. They'll go and vote with the conservatives. But when it comes to stuff that you care about, that I care about, social justice issues, there's always going to be a split. And I think that they are more beholden to the Republican party, and to Trumpism, than they are to the Constitution, than they are to the institution of the Court. I think with Roberts is the only exception. I think Roberts might still have one foot in the institution door. But Clarence Thomas and Sam Alito, I don't even know what they're doing anymore.

Jessica Pieklo: Yeah. It's really wild. I mean, the legal profession as a whole is a conservative profession. Right?

Imani Gandy: Yeah.

Jessica Pieklo: I mean, it's not the kind of profession that folks go into, I mean, yes, we're trying to make change, but as a whole, the body is conservative. Things don't change quickly. But to see how far to the right it feels like some of these judges and folks, like you've said, who are now on the bench, have taken the profession. It's whiplash. I mean, never in my time as somebody who has been obsessive about the Supreme Court, can I recall a justice like Brett Kavanaugh, so eager to adopt conspiracy theories that are being thrown at them, that they have to correct their own opinion. Remember that in Pennsylvania?

Imani Gandy: Yes.

Jessica Pieklo: The Pennsylvania Republicans were trying every just wild, off the chain argument they could to cast doubt on the election. And Kavanaugh was like, "Totally sounds good," whipped up an opinion around it, complaining about the Court not taking up a challenge to Pennsylvania's electoral counts, and then got the opinion wrong and had to issue a correction.

Imani Gandy: Right.

Jessica Pieklo: What?

Imani Gandy: Yeah. That's not something that happens, because he was going through, he was trying to make a claim about Bush V. Gore, about the ruling in Bush V. Gore that was simply inaccurate.

Jessica Pieklo: Yeah.

Imani Gandy: It was just he got the law wrong, and he's not a stupid man. He's not an unintelligent person. So one has to believe that he basically tried to play fast and loose. He thought he could just slip this opinion in and try to create law out of thin air. And fortunately, a lot of legal scholars were like, "Hey, man, we're

not going to do that today." And he was like, "Ooh, my bad," and had to rewrite it.

Jessica Pieklo: Yeah. It was wild. And I mean, just thinking about his confirmation hearing when he was red faced and frothing about the Clinton conspiracy to keep him off the bench, and how quick he was there. It was just wild. But I mean, while we're talking about Pennsylvania, I have to give a shout out to the Pennsylvania attorney general, Josh Shapiro, who basically out-lawyered the entire Republican party.

Imani Gandy: He did.

Jessica Pieklo: When we do sort of hindsight, what's the debrief from some of the big Court stories of the year, this is going to be one, was the ways in which folks anticipated nonsense claims from the right and out lawyered them. So snaps there because that was some really good stuff. You maybe saved the election and potentially our democracy.

Imani Gandy: And potentially the democracy. It's basically him and Officer Goodman.

Jessica Pieklo: Yeah.

Imani Gandy: It's shocking to me that our democracy is so frail that it really did come down to basically two or three people saving the entire country.

Jessica Pieklo: Stacey Abrams.

Imani Gandy: Stacey Abrams is another one, exactly, exactly. I can't take it. I literally can't take. And now what is Georgia doing? Passing ridiculous voter suppression laws because they're literally afraid of Stacey Abrams becoming the governor of Georgia, which is what she says she wants to do next.

Jessica Pieklo: Oy. That's your line. I just oyed, and you're the one who oys.

Imani Gandy: I know. I'm the oy lady. But can we even have any sort of faith that the Supreme Court is going to handle critical issues in a good faith way going forward? Right? For example, the pandemic, the ways in which the Court has been late night on Friday night, issuing these rulings about how churches don't have to follow mask mandates because you can go to Home Depot and buy lumber. So why should you have to wear a mask in church? Well, I know, because when you go to Home Depot, you're not singing and spitting all over each other in the name of the Lord.

Jessica Pieklo: Right. Supreme Court after dark has gotten really wild in the time of COVID.

Imani Gandy: Oh, my God. It's like there's a special online place that you have to go to, to watch the outtakes of what's going on in the Supreme Court.

Jessica Pieklo: Well, because what they're doing is they're dropping these orders for things. So states are, and local governments are trying to get their arms around this pandemic by passing public health and safety restrictions like limiting sizes of public gatherings and things like that. And the Supreme Court isn't actually considering the merits of these challenges. They're just dropping emergency orders in the dead of night, like Friday night at 8:30 PM, which for me, an old person, is the dead of night.

But there's not actually a substantive argument going on, so we call this a shadow docket for a reason, and that's because it's literally existing in the shadows. Right? There's no daylight into the claims that people are making, other than this is an infringement on my liberties, with a lot of Zs.

Imani Gandy: Can you explain what ... What is a shadow docket? Why is it called a shadow docket? Because that's something I think we're going to be hearing a lot about in the future. And I think it'd be good for our listeners to know when they hear the word shadow docket, that they're not talking about, I don't know, some Dungeons and Dragons game or something.

Jessica Pieklo: Shadow docket is not the phrase that I use to describe my Sunday night Stanley Tucci touring Italy viewing, although it fits.

Imani Gandy: Stanley Tucci.

Jessica Pieklo: No. Shadow docket, so the cases that the Court has on its calendar is called a docket. That's where the public can go and see. What are the fights at the Court? Who's arguing? When are they going to argue? All of the nuts and bolts about how the Court does its business just in terms of hearing cases, that's called a docket. And that's true for all of the courts. Lawyers call it the docket. What's on the docket today? That's the cases that are being argued.

The shadow docket is this thing that has emerged, and it really sort of took off in the Trump administration, go figure, with this Court, where the Court is handing down what are effectively substantive rulings, rulings on the merits of legal arguments, but without the benefit of briefing, which is when lawyers write those long papers and file them with the court that outlines their arguments, and then oral arguments, which is when lawyers then show up to the Court and argue off of those briefs. None of that's happening. They're just submitting their emergency applications that says, "We don't like this order," and the Supreme Court justices are getting together in their private conference, which the public has no insight or visibility into, and then releasing these orders. And that's why we call it a shadow docket because it exists in the shadows.

Imani Gandy: In the shadows, yeah.

Jessica Pieklo: And so the good news is that as Democrats and progressives are talking about Court reform, the idea of the shadow docket has come up. And there's already

been at least on Congressional hearing on this as a practice because it's just not good. It's not good for the law. It's not good for the legal profession in general. And it's certainly not good for democracy when the court is making big rulings like: Can California limit the size of public gatherings as a way to try and stem the spread of COVID? And issuing a ruling being like, "Nah," but not really explaining why. That's no good.

Imani Gandy: Right. It undermines transparency. Right?

Jessica Pieklo: Yeah.

Imani Gandy: The Court is supposed to be ... All courts are supposed to be transparent unless you file shit under seal. Right?

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: Unless you specifically ask the court, we don't want this stuff to be public because it's very sensitive information. It contains people's bank information, or medical information, but this isn't that.

Jessica Pieklo: No.

Imani Gandy: This is just these federalist society judges deciding that religious freedom is so important, more important than the public health and safety of people. And therefore, sure, go into a church and lick each other's faces. You can do that.

Jessica Pieklo: Yeah. And so thinking about this at the up front of the show, that we were talking about the ways in which so much has changed in this last year. And really, the shadow docket is a great example of the lack of transparency in the time of COVID with the Court. And it's such a juxtaposition with the fact that because of COVID, the Court has had to livestream oral arguments for the first time in its history, so now normies can listen in to voting rights cases, abortion rights cases, boring patent law cases. No offense to my patent law practitioners out there, but that shit is boring.

Imani Gandy: That shit's boring. Yeah.

Jessica Pieklo: And there's a lot of patent law cases at the Court. But people can listen in, just regular folks now. And that can't change. If the Court tries to take that away, it is very bad because everybody in this country deserves to know how the highest court in the land functions, what it's like. It should not be the kind of thing that's reserved for journalists like me and you, that are deemed to be acceptable enough by the Public Information Office to go in and cover arguments, or other lawyers who have been accepted to the bar. This is a public institution. The public deserves access to it.

Imani Gandy: Do you think that the shadow docket has become more prevalent because of the more transparent nature of the hearings generally? Or do you think it's just coincidental?

Jessica Pieklo: I think the shadow docket really took off with the Bill Barr Department of Justice. They really just made it a habit of running to the Supreme Court asking for emergency relief, so bypassing the normal procedures that cases usually go through. That's emergency relief. So they really kind of normalized that practice. And I think the real test is not going to be what the Biden Harris Department of Justice does, because I don't anticipate it will behave the same way, but what a future Republican Department of Justice, how they behave.

If this kind of practice is normalized within the ranks of conservative lawyers, it's really bad for are profession. And I'm not one to be like, "The profession is awesome," but this is really bad.

Imani Gandy: Yeah. I mean, the profession is exclusive. It's conservative. It's racist in a lot of sense, classist in a lot of sense. But the one thing we should be able to rely on is that even if you're not a lawyer, even if you're not in court arguing these cases, you should be able to figure out with very little effort what the cases are about, what the arguments are. And if we're doing shadow dockets, then it's just a further slide into fascism. You know what I mean? Where there's these nine people who are just doing things and deciding things, and making rules for all of us, and we don't know how those rules are made, what the Constitutional basis is, what the statutory basis is, we're just supposed to follow these random ass rules that they're dropping in the middle of the night. And I for one refuse to do that, so if I have to become a vigilante, I assume that you're with me.

Jessica Pieklo: I just thumbed my nose and gave a fart face.

Imani Gandy: We'll just take you and your kids and your husband, we'll just hit the road. It'll be fantastic.

Jessica Pieklo: I'll get the trailer.

Imani Gandy: Get the trailer. I'll get the genny, I've always wanted to have a generator and just call it a genny because that's just what people do. Get a shotgun and a rocking chair. It's going to be fantastic. All right. We're going off the rails here, so we're going to shut this shit down. But if you would like to talk about any of this, or reminisce about the year of COVID with us, you can talk to me on Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy, H-E-G-E-M-O-M-M-Y. You can follow Rewire News Group on Twitter and Instagram @rewirenewsgroup. And join our Facebook group. It's happening.

Jessica Pieklo: It is.

Imani Gandy: Pop it off.

Jessica Pieklo: And donate.

Imani Gandy: Donate. Right?

Jessica Pieklo: Oh, yeah.

Imani Gandy: You want to donate, [rewirenewsgroup.com/boomgive](http://rewirenewsgroup.com/boomgive), I believe is the link.

Jessica Pieklo: It is.

Imani Gandy: [Rewirenewsgroup.com/boomgive](http://rewirenewsgroup.com/boomgive). Give us all your money, or at least some of it, just a little bit. Anyway, what are we going to do, Jess, before I keep yammering on?

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

Imani Gandy: See you on the tubes, folks. Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.