

## Boom! Lawyered 207: The Department of Justice Is Bullying ACLU Attorneys and It's a Big Deal

Imani: Hello, fellow law nerd. Welcome to another episode of Boom! Lawyered. A Rewire.News podcast, hosted by the legal journalism team that is really concerned that a lot of you are not taking ghosts seriously. Because I've been watching a lot of Supernatural, and I think ghosts are pretty murderous, and y'all just keep buying property in the woods, and then wonder why shit's rattling around.

I'm Imani Gandy.

Jess: 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 thank you so much for subscribing, and welcome to our new listeners.

Imani: Yes, welcome. And this just in. We have a rare clip of a training session at the Department of Justice under the Trump Administration. Let's take a listen.

Biff: So what are you looking at, Butthead?

Bully: Hey Biff, get a load of this guy's life preserver. Dork thinks he's going to drown.

Biff: So, how about my homework, McFly?

McFly: Uh, okay, Biff. Well, I'll finish that on up tonight, and then I'll bring it over first thing tomorrow morning.

Biff: Not too early. I sleep in Sundays. Oh, McFly, your shoe's untied! Don't be so gullible, McFly. I don't want to see you in here again.

McFly: Okay. All right. Bye bye.

Jess: You think we're kidding, but we're really not. Later this episode, we're going to talk about how the Department of Justice is trying to sanction attorneys from the ACLU for, get this, doing their damn jobs.

Imani: By now, you've probably heard of Jane Doe. She is an undocumented minor, who was trying fervently to get an abortion, and was being blocked from doing so by the Trump Administration. But, have you heard what the Department of Justice is trying to do to Jane Doe's lawyers?

Jess: That's what we're going to talk about in this episode. But first, let's give a little background to everybody on the case. So Jane Doe, as Imani said, is an undocumented minor. She fled her country coming to the United States, looking for safe haven. When she got here, she was taken into custody. And that's when she learned that she was pregnant.

She asked for an abortion, and during that process, was appointed a guardian ad litem.

That's a guardian, an attorney who's supposed to represent her interest. And she and her guardian went about and followed all of the onerous restrictions in Texas, to go ahead and get that abortion, including the judicial bypass process. So that means that a State Court judge had determined that Jane, and her representatives had her best interests at heart, and she was mature enough to make the decision of whether or not to terminate this pregnancy.

Well, the Federal Government, the Trump Administration, did not like that one bit. And the Office of Refugee Resettlement, the bad guys in this story, in particular Scott Lloyd, who is staunchly anti-abortion and has ties to some of our favorites, like the Alliance Defending Freedom, they went ahead and did basically everything in their power to block Jane's access to reproductive healthcare.

Imani: They went about blocking her access to abortion, but they really don't have a leg to stand on. As Jessica mentioned, she went through all of the onerous requirements of Texas. And that includes the mandatory waiting period. That includes the mandatory counseling session. And in Texas, the person, the physician, the provider, who counsels the person seeking the abortion, in this case Jane Doe, must be the same physician that actually provides the abortion.

And that's important to remember, because it's going to be very, very relevant later. But essentially, the Trump Administration isn't disputing that Jane is mature enough to determine her own best interest, with respect to whether or not to carry on a pregnancy. The Texas Court had already said that she was mature enough. And the Trump Administration couldn't identify any reason that it wouldn't be in Jane's best interest to exercise her own judgment.

The Trump Administration's only argument is that the ORR, the Office of Refugee Resettlement, shouldn't have to, quote unquote, facilitate abortion. The facilitation argument is ridiculous. And that's why it's even more ridiculous that in response, there was a whole bunch of litigation nonsense that went on. But the ultimate response is that the Trump Administration, the Department of Justice, filed a Petition for Writ of Certiorari with the Supreme Court. A bullshit petition. And in that Petition, they asked for sanctions against Jane Doe's lawyers. Sanctions, because her lawyers did what they were supposed to do. They helped her get an abortion.

Jess: So Imani and I are going to talk about that sanctions motion in this episode. And look, attorneys are required to represent their clients interest, and not help opposing counsel oppose those interests. But the DOJ here, seems bothered that Jane Doe's attorneys were able to do what their client wanted them to do: get her out of the clutches of ORR into a clinic so she could get an abortion.

And in retaliation, they're using the courts to bully attorneys like a bunch of mobsters. They're trying to get the courts to sanction Jane Doe's attorneys. And that's super serious. It can lead to things like the loss of an attorney's license, and the end of a career.

The implications of that are super scary. We're going to talk about all of that after the

break.

Imani: As Jess mentioned, attorneys are required to represent their client's interest. They're not supposed to be representing the interest of opposing counsel's clients, or doing anything that would really help opposing counsel. This is a very core, and basic standard when it comes to being an attorney. Both Jess and I were litigators in private practice for a while. And essentially, as lawyers, you're supposed to basically do anything you can within the ethical bounds, in order to get the result your client wants.

And here, the result that the client wanted was an abortion.

Jess: Right, and sometimes lawyers talk about these as competing interests, where you have a duty to your client, and a duty to the court and opposing counsel. But they're not really in competition. And that's how the Trump Administration has framed this.

So, for example, when I was in private practice, we would do things like file motions for restraining orders the Wednesday before Thanksgiving. Why? Because it was a really jerky thing to do that would make our opposing counsel work over a holiday. And we knew it. But it was also using the rules, and the timeframe strategically for our client's best interest.

In that process, we didn't call and say, "Oh hey, here's a heads up. By the way, we're going to file this motion for a TRO at 4:30 the Wednesday before Thanksgiving." Good lawyers knew that was coming.

Imani: We would do the same thing. We would have hearings on huge motions. Like, motions for summary judgment, which are really, really big motions on Christmas Eve. Purposefully screwing our own holidays, but also screwing with our opposing counsel's holiday. And that stuff is all fine. But as Jessica mentioned, you do have a duty to the court. You do have a duty to be honest. To not be unethical.

And in certain cases, like in certain instances, like in criminal cases for example. The prosecution has a duty to turn over exculpatory evidence. But here, we're dealing with a group of attorneys at the DOJ, who basically wanted Jane Doe's attorneys to do their own job for them. And it's ridiculous. It's like, I'm not really sure what the Department of Justice Attorneys really thought should happen. It seems to me, they wanted Jane Doe's attorneys to call them up, and say, "Hey. We're planning on driving Jane to the doctor to get this abortion at 4:30 in the morning. Is there anything you'd like to file before 4:30 in the morning to block it?"

Jess: Yeah, they might as well have said, "These are the legal arguments we'll make to advance that ahead of time, too. Here's a quick little preview of our brief." You just don't do that. We are talking about adversarial processes in an advocacy system. So, while we cooperate with each other as professionals, we don't do the other side's damn job for them.

Imani: Right. And we often use these sneaky tricks, as Jessica mentioned, in order to make the other person's job harder. But we're still not lying, or helping them do their job. Or

doing anything unethical. But in this case, everything went a little bit sideways. With the Department of Justice expecting Jane Doe's attorneys to alert them of information that they did not have any entitlement to.

So in this case, things got a little bit wacky with a lot of litigation strategy involving people filing temporary restraining orders, and people opposing them. But ultimately, at the end of the day, Jane Doe got permission from a Federal Court to get an abortion.

Now here's where it gets tricky. There were two doctors willing to perform the abortion. Doctor A, and Doctor B. Doctor A had already gone through the counseling stuff, so it was really better if Jane Doe could get the abortion from Doctor A. But Doctor A wasn't available.

Jess: So, Jane Doe's attorneys did what good attorneys do, and they found another way to solve their client's problem. Which they did with Doctor B. So what the Department of Justice gets all cheesed off about, is that in this process, they are not kept up to date, minute by minute of what Jane's attorneys are doing to help her get this abortion. That, by the way, I feel like we should let everybody know another reminder. A court had already said a couple different times, she was entitled to get.

So instead of doing what good lawyers would do, which is follow the proper procedure, and challenge that, the Department of Justice instead threw a temper tantrum, and went directly to the Supreme Court.

Imani: And when they went directly to the Supreme Court, they went to the Supreme Court with one of the most bullshit petitions for Writ of Cert that I've ever seen, that I think Jessica's ever seen. And I've read a lot of legal commentary on this. And most people have said that this is the most nonsense Cert Petition that they've ever seen.

Jess: So, what we have here with the ACLU is a case of some really good lawyering. Their client ran into a problem, they found an alternative way to fix it. They did everything that they were required to do within their ethical obligations to the court. And beat the Department of Justice.

The Department of Justice is pissed, they don't like it. They file this terrible petition, which we are going to break down for you after the break.

Imani: So the problem here, is that the DOJ is basically bothered that Jane Doe's attorneys were able to do what their client wanted them to do. And that's to, get her the abortion that she wanted, and that she needed. The DOJ screwed everything up by not filing the proper papers with the court, at the proper time. If they wanted to prevent her from getting this abortion, they could've filed what's called a Stay. And that would've halted all the proceedings.

And what's really screwed up about it, is the Government knows how to file a Stay, because they'd filed one in this very same case in order to prevent her from getting an abortion. So this is just a case of bad lawyering on the DOJ's part.

Jess: And they're trying to cover up their own bad lawyering, by going directly to the Supreme Court with this garbage government that the ACLU was not being candid with the court, and with opposing counsel as they're required to.

So it's doubly bad. It's really bad lawyering, and then it's looking for somebody else to clean up your own damn mess.

Imani: Yeah, I mean, while the DOJ was sitting around with their thumbs up their asses, Jane Doe's attorneys were doing everything that they could to get her the abortion. And they were able to get her an abortion a few hours earlier than they had originally thought. And while they told the DOJ originally, oh she's getting an abortion tomorrow at 7:30, the circumstances changed in between the time they told the DOJ that, and the time that they realized that they could get this abortion earlier. And there's nothing in any rule book, or any jurisprudence that says, "Jane Doe's attorneys need to call up the Department of Justice, so they can be informed about this change of circumstances, so that they can block Jane Doe from getting an abortion that had already been past due for weeks."

Jess: That would be like, if you're an employee, and you're leaving your job and you have a non-compete agreement. And your lawyer decides to give your former employer just a heads up to be nice. You know, just to say, hey we're going to do this. And it might potentially screw your entire situation.

But lawyers can't do that. If they had done that, the ACLU would be themselves, acting against Jane Doe's best interest.

Imani: And that's malpractice. They could've been sued for malpractice. So essentially, the DOJ filed a Cert Petition because Jane Doe's attorneys refused to commit malpractice. That's how stupid this is.

And what's concerning here, is that it seems as if the Trump Administration is trying to take its frustration with the ACLU out on the ACLU's attorneys. I mean, Jane Doe is being represented by the ACLU's best of the best. They're excellent lawyers, excellent litigators. And they basically out-lawyered the DOJ.

Jess: They sure did. And it's been the ACLU that's really kept the Trump Administration's worst policies in check so far. Without the ACLU, we wouldn't have court blocks on things like the travel ban, for example.

So really, while this is most definitely about abortion, I think that it's also important to say that it's probably no coincidence that they're pissed off about the ACLU. So I mean, the best case scenario, like you said, is they're just bitter about this and trying to hash this out, the worst case scenario though, is I think this falls in line with something else we've seen from the administration. And that is, their willingness to delegitimize the legal profession in the courts when they rule against them, or when they stand up to them.

Imani: Right. I mean, for example, Donald Trump has had serious beef with the Ninth Circuit,

which is well-known for being one of the more liberal circuits in the country. And he's been talking about breaking them up. And that's because the Ninth Circuit isn't falling for Donald Trump's "we shouldn't admit Muslims into the country" bullshit.

Jess: And it probably is no coincidence either, that the lead litigator in Jane Doe's case for the ACLU is Brigitte Amiri, a woman who has just told the Trump Administration's men that they cannot block this access to abortion rights for undocumented minors in their custody.

So I would have to imagine there's some good old-fashioned misogyny going on here, too.

Imani: Oh, that's delightful, isn't it. So here we have the Trump Administration trying to sanction one of the ACLU's top attorneys for no reason at all. And after the break, we're going to talk a little bit more about what sanctions entail.

Jess: Okay, so Imani and I have said a couple times now, that the Department of Justice is trying to sanction attorneys from the ACLU. We should probably talk a little bit about what sanctions are. What does this mean?

So at its most basic level, sanctions are punishments. And they can range from something from a stern talking-to from the court, to something very serious, like a violation on your license, a termination of your license. You can have a case get closed as a result of it.

Imani: It's a real serious thing. And I want to talk about having a case get closed, because I have an actual funny, amusing little story about that. So when a case gets closed because of bad actions on the attorney's part, it's called terminating sanctions. Sounds very serious, like the Terminator. It basically means, your case is over. Even if you had a good claim, even if it looked like you were about to win, the judge is going to say, "Nope, sorry. Your case is over."

This happened to me about 10 years ago. I was working on a case involving the woman who was the heir to the Winnie the Pooh fortune. And we were basically battling Disney, because the person who was ... His name was Stephen Slesinger. Stephen Slesinger bought the rights to Winnie the Pooh from AA Milne back in the day. So he was the one who basically circulated all the Pooh stuff in America.

When Disney bought all of that stuff from him, they entered into some contract so that the Slesingers would get money. Basically royalties for stuff. Selling books and movies and whatever. And they didn't account for new technologies, like DVDs, and VHS back in the 1980s and all that stuff. So this agreement was written in the 1960s. By 2000, there was 12 billion dollars worth of shit that Disney had sold and made money off of, that wasn't going in royalty form to the Slesingers.

So Stephen Slesinger's granddaughter, I think it was his granddaughter Pati Slesinger, sued. And when she sued, she was very, very angry as you can imagine. 12 billion ...

Jess: It's a lot of money.

Imani: It was a 12 billion dollar case.

Jess: I'd be pissed.

Imani: It was a lot of money.

I would be, too. But ultimately, she was so pissed that she actually didn't ... She did something that she wasn't supposed to do. She hired private investigators to go dumpster diving in Disney's dumpsters. And that's just not something you're allowed to do, because essentially you're getting information from Disney that they didn't know that you had, right. Disney sent over all the documents and crap they thought were relevant, threw out some stuff that probably wasn't relevant. You can't go dumpster diving. And so we went to court, and the court took a look at all this, and after about a week-long trial on the issue, ended the case. 12 billion dollars, out the window.

But when he ended the case, the judge made sure to talk about how great the attorneys were. How great that we were. Because he wanted people in the future to know, when they came across this case, this terminating case, that the attorneys involved weren't at fault.

So that's how important it is, that's how important sanctions are. So important, that a judge will write in an opinion, you can't fault these attorneys. You can't blame them, it wasn't their fault.

Jess: Unless of course, it was the attorneys fault, for doing something like showing up drunk to court all the time. Or, you know. Just not returning their client's possessions or phone calls. Or generally screwing up in the course of the representation. But Imani brings up a really good point here, which is that when there's a request for sanctions, the court takes a look at it. And it issues a ruling. And that ruling is then used by lawyers in future cases, to argue, "hey, his behavior is like this other case, and so you, court, should rule accordingly."

In the Department of Justice's motion for sanctions against the ACLU's attorneys in this case, there is not a single legal source cited to justify the request. So we have the Federal Government saying, "Hey, court, punish these attorneys." But then, not giving the court any legal grounds to do so.

Imani: And that's absurd. You don't file a court document with the Supreme Court with not legal citations. Essentially, and I can't remember who put it this way, but essentially, that Cert Petition was a press release. It was a way for the Trump Administration to announce their disdain for abortion, to announce their disdain for immigrants. Because a lot of the argument has been about whether immigrants have due process rights. Or have civil rights.

So it's basically been sitting at the intersection of immigration rights, and abortion rights. And if there's two things the Trump Administration doesn't like, it's abortion and

immigrants.

Jess: Absolutely. And so, yeah. The press release analogy is really on the money here. Because what this is, is them yelling about policy, and getting out-lawyered. But then again, to stay focused on this sanctions part of it, the request that they are asking that these lawyers be punished, is kind of a toss-off in the Cert Petition, too. It's at the very end of it, they're like, by the way, you should punish these guys for doing all these really bad things. And then offer no actual legal support to do so.

So again, it's like shaking their fist at the sky.

Imani: Right. And there's really nothing, again, there's nothing that the ACLU did that was wrong. So there's really nothing that the court can do to sanction, or to punish them. And it's not even something that the Supreme Court should be hearing. You know, the Supreme Court isn't supposed to hear just anything that lawyers want to file. But it really does seem like the DOJ was just like, "we're going to file this, and hopefully we can get our message out about how much we don't think undocumented minors deserve abortion rights. Or how much we don't think immigrants don't have due process rights."

Jess: And so, the implications for the request, regardless of what the Supreme Court does, and I don't have any reason to believe that they're going to buy the Trump Administration's argument and sanction these lawyers. They haven't acted on it yet, which is weird. But they also ... I still have a little bit of faith.

The most immediate implication is, the very act of filing this request and the sanctions request, shows that the Trump administration, specifically the Department of Justice, is willing to use the full weight of its authority to push around lawyers it disagrees with. And that's the mobster thing, right. That's you represent someone that we disagree with, or that we think is undesirable, and it would be a shame what could happen to your career.

I think that's a really chilling message to lawyers. And it's an abuse of process of the courts. Like, this is really an attack on the legitimacy of the institution itself.

Imani: Right, and again, I think we need to come back to the point that this was all to cover up the Department of Justice's own incompetence. They were the ones who thought that they were entitled to some information, some specific information from Jane Doe's attorneys. They were not entitled to that information. Jane Doe's attorneys got the result that they wanted for her. She was able to terminate the pregnancy. And now, after the fact, as Jessica pointed out, the DOJ is just shaking its fist aimlessly at the sky.

Jess: And I mean, Imani and I obviously have emotions and feelings about this request. But there's also facts on our side to show how thin it really is. For example, not a single career attorney at the Department of Justice signed on to this request. And that's a really big deal. That means that people, attorneys who have made their livelihood working for the Federal Government, and arguing with the Federal Government as its client, did not believe, and do not support the legal position that their bosses take. So

much so, that they were not willing to put their name on the pleadings. That's a big deal. When lawyers sign pleadings, when we sign court documents, it is an attestation of the validity, the veracity of what is in there.

Imani: Right, I mean, you're basically saying, "I understand, and I believe in all these arguments." There have been times in my career when I was in private practice, when I thought a brief was poorly written, and I asked for my name to be taken off of it. Because I don't ... you don't want your name out there on pleadings that are nonsense, or that are bullshit, or that are poorly written.

Jess: And, just to sort of beat the ethical drum on this point again, the main argument that the Department of Justice is making here, is that the ACLU attorneys violated their duty of candor to the court. That is their duty to be clear, and forthcoming to opposing counsel and to the court by helping Jane Doe get the abortion that she had been ordered she was entitled to.

The fact that no DOJ career attorneys are willing to sign on, shows that those attorneys don't believe their bosses are being candid with the court. We get in that feedback loop here. So this duty of candor is a really big one. And the Department of Justice is trying to have it both ways here.

Imani: So, ultimately, the DOJ are running around acting like Tony Soprano, or a bunch of Mafia bosses. Incompetent mafia bosses, at that. They're basically like the Fredo of the Mafia family. You know, threatening the careers and livelihoods of civil rights attorneys, who are basically just looking out for you and me. They're looking out for the best interests of their clients. And in a lot of cases, you and I are clients. When it comes to some of the cases that the ACLU takes, the implications of the rulings that come out in those cases affect a lot of Americans.

So this is something that not only lawyers should be mad about. But that you, a non-lawyer, a very smart non-lawyer who didn't go to Law School, bless you, should also be angry about.

Jess: And it's pretty clear that the reason they're behaving this way, is to both cover up their own incompetence, and bully the ACLU attorneys who have been a thorn in their side since the very beginning of the administration. I mean, they advertise that they were going to sue them, sue the Trump Administration on everything they did. And so far they have, with some pretty good success.

Imani: So again, the implications here are really serious. The ACLU takes cases, civil rights cases, that are important to a lot of Americans. And the fact that the Trump DOJ is willing to put the full force of the government behind bullying these attorneys, because these attorneys have been filing lawsuits that the Trump Administration doesn't like, is a really serious and scary thing.

And what's even more serious and scary, is if it works. If the Supreme Court actually takes up this Cert Petition, and rules against the ACLU attorneys and sanctions them in some way, then that's going to give a signal to all other attorneys who may be inclined

to represent someone that Trump doesn't like, that their careers could be on the line. And that's something very serious that we should all be concerned about.

Jess: That's our show for today on the Department of Justice and sanctions. Hopefully the Supreme Court does the right thing, and stays the hell out of this case. Be sure and go to [Rewire.News](#) for more on the Jane Doe case. Tina Vasquez, our immigration reporter, has been doing some amazing reporting on this. Imani has been all over the legal arguments. And you can expect team legal will be on it, depending on what the Supreme Court does. Hopefully they stay the hell out of it.

In the meantime, pop on over to our Facebook group, Boom! Lawyered. Keep the conversation going, and we will see you all on the tubes. Thanks for listening.

Imani: Boom! Lawyered is created and hosted by Imani Gandy, and Jessica Mason Pieklo. The show is produced by Nora Hurley. Our Executive Producer is Marc Faletti. And Rewire's Editor in Chief is Jodi Jacobson.