

Boom! Lawyered 222: Kavanaugh Confirmed. Now What?

- Imani Gandy: Hello fellow Law Nerds. Welcome to our final special confirmation hearing episode of "Boom! Lawyered." A Rewire.News podcast hosted by the legal journalism team that's just like, "Why?! No! I can't!" I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Rewire.News-
- Imani Gandy: Wait Jess I'm not done screaming. I'm not done screaming. "Why? Why?" Okay you can carry on now.
- Jessica Pieklo: You sure? I'll give you one more second. I think-
- Imani Gandy: "Oh my god what is happening now?" Okay now I'm good. I'm good. Let's do this.
- Jessica Pieklo: Alright. It's okay everybody we all have to pull ourselves together a little bit right? I'm Jess Pieklo. Rewire.News is the leading nonprofit journalism outlet devoted to reporting on reproductive and sexual health rights and justice, and the team legal podcast is part of that mission.
- Imani Gandy: As a nonprofit, Rewire.News relies on your donations to fund "Boom! Lawyered" and all of our evidence-based journalism. If you like our show and you want to hear more of it, please donate online.
- Jessica Pieklo: You can support us at [Rewire.News/donation](https://www.rewire.news/donation).
- Imani Gandy: That's [Rewire.News/donation](https://www.rewire.news/donation).
- Jessica Pieklo: So a big thanks to our subscribers and a welcome to all our new listeners who may have found us as we slog through this Kavanaugh stuff. We are still at it.
- Imani Gandy: And we're going to be at it for a while apparently, because Justice Brett Kavanaugh has been confirmed as an associate justice to the United States Supreme Court. Thus ensuring that Jessica and I will probably never sleep again and we will be podcasting the downfall of our democracy from now until the end of time.
- So when that meteor hits don't touch that dial because Jessica and I will be here podcasting. The legal ramification of a meteor hitting Earth and blowing us all up.
- Jessica Pieklo: Imani, do you remember when Justice Kennedy retired like 400 centuries ago?
- Imani Gandy: God it was lo those many years. I feel like that lady in the Titanic. "It's been 84 years and I still remember when Anthony Kennedy decided he was gonna retire

and we started podcasting about it and we haven't stopped since." It's just ...
Jessica what happened? What happened?

Jessica Pieklo: Well today the senate voted 50 to 48 to confirm Judge Brad McBeer as one of our followers called him, to the Supreme Court. But we should talk a second about this 50 to 48 vote because it was weird, right? There was the Collins drama yesterday.

Imani Gandy: Oh for God's sake. Yeah, there was the Collins drama yesterday and then there was that Murkowski ... That came out of nowhere. First of all I want to say about Susan Collins, you're dead to me. I don't understand how it is that you have managed for so long to hold yourself out as someone who is pro-choice and as someone who cares about women's rights because, quite frankly, the speech that she gave yesterday was one of the most offensive things I've heard in a while, especially coming from someone who is purportedly on the side of women and supposedly ... I can't even speak. I'm so upset that I'm just making up words. Supposedly, supportably, synchronistically, I don't know. Someone who is supposedly on our side quite clearly is not on our side.

What she said yesterday, it was basically a giant fuck you to all of those women in Maine who sat, the Maine voters who sat with her in her offices and talked to her about how they were survivors and what it meant to them. She didn't care. Then Murkowski today, can you explain what happened with that?

Jessica Pieklo: Yeah, Collins is terrible, but Murkowski belongs in her own sort of special space right now. We were all very excited when she announced her no vote because this was a big deal and her statement was very thoughtful and it was clear that this was thing that she spent a lot of time thinking about and was very deliberate in her decision. That was a big deal.

Then we got that Senator Daines from Montana who was like, "Sorry fellas my daughter's getting married," getting wedding? I'm with you. I'm like, "I can't talk."

Imani Gandy: Yeah.

Jessica Pieklo: They've taken our brains and turned it to oatmeal but Senator Daines has his daughter's wedding in Montana and mazel tov. Congratulations all around to everybody but he was going to be out of town for the vote. That was a problem and if Murkowski had wanted to keep her vote no, she could have kept her vote no and that would have forced Daines to get on the plane, apparently the private jet of one of the congressional representatives. His name is escaping me at the minute but he was the one who assaulted the reporter and then was elected anyway. That guy was going to lend Daines his private plane so he could fly back to cast the vote.

Murkowski said, "Well that sounds like kind of a hassle. How about I withdraw my no vote, you don't have to come back and vote yes, it effectively cancels it out, I'll just vote present. Which is basically, "I showed up and here I am." That's it."

She had a moment to actually completely follow through on that no vote and she wilted and that sucks.

Imani Gandy: Yeah it does suck. But so much of this sucks and I-

Jessica Pieklo: It's really hard to find the place which is like, "This is *the* big suck on all of them."

Imani Gandy: Exactly. There's so many moments all along. I remember a month ago when we were talking about Dems walking out and how no one was going to remember why I was saying that Dems are walking out. Remember back when we were concerned that we'd only seen 90% or 10% of his documents, and that they were withholding 90% and that Bush lawyers were in charge ... Bush/Trump lawyers were in charge of deciding what the America public sees? That all was forgotten as soon as Dr. Ford stepped forward. Then after Dr. Ford stepped forward it just got even worse.

Now we're in a situation where an alleged sexual predator and a blatant fricking liar is now on the Supreme Court. One who is basically warned Dems during his hearing, during his opening statement at the Ford hearing that what goes around comes around and was talking about revenge of the Clintons. This is a partisan person who acted in an extremely belligerent and aggressive way, who clearly has no respect for women. What concerns me is what that temperament is going to look like when he starts ruling on cases.

Jessica Pieklo: Yeah the idea that he's the 9th justice and now makes Justice Sam Alito seem like chill by comparison is really something to think about. But let's talk about what Kavanaugh's confirmation means for the court. What's next?

Imani Gandy: Well I think what's next is now we have Chief Justice John Roberts taking the place of Kennedy as the swing vote, which is very very ungood.

Jessica Pieklo: It is not good at all.

Imani Gandy: So not good. That's one thing. One thing that I'm the most excited about and honestly the only thing that is keeping me from just hurling myself off a first floor balcony is that Sonia Sotomayor is about to become I think one of the most preeminent justices on the Supreme Court. I think with the confirmation of Brett Kavanaugh that she just continues in the trajectory that she's been on for the last couple of years, she's going to wind up being the Thurgood Marshall of our time. I truly believe that.

She has been writing dissents that really cut to the heart of issues, that cut to the heart of issues as they affect marginalized people, people of color, women, trans people, LGBT people. All of the people that are about to see a lot of their civil rights decimated, you can be sure that Sonia Sotomayor is going to be on the other side writing scathing dissents, calling all the bullshit out. I am very much looking forward to that.

Jessica Pieklo:

Yeah the chemistry on the bench is really different now. I agree with you Sonia Sotomayor is gonna do this absolute amazing job, blazing a trail for the left in terms of Juris Prudence and really developing robust dissents and pushback in the law. We've talked about why that's important right? Dissents can sometimes become majority opinions but also too they set the frame of the argument right? We've got that and you mentioned Roberts as a swing vote and I just want to spend a second on this because he's already from what I've seen getting the media treatment of like, "Oh well if any conservative judge was going to be the swing vote it's good that it's Roberts because he cares so much about the integrity of the institution."

This always makes me scratch my head because yes, Roberts is very conservative. He is all the conservative bona fide's. The idea of Roberts as this reasonable conservative who gives a hoot about the integrity of the Supreme Court just mystifies me because under Roberts we have had more five to four partisan decisions than we have in the history of the court. If you care about the integrity of the Court you are somebody who's looking to avoid those partisan splits and that's where I see Justice Elena Kagan.

She plays a very interesting role here. When Kennedy was on the Court she was the part of the liberal wing that spoke most directly to him. Whether through questions or judicial opinions in-concurrences, she was always trying to get to a place, or get Kennedy to a place where he could feel comfortable. She will try to do that with Roberts. There's probably nobody that the left could have on the bench right now that is in a better position to do that than Elena Kagan. She is progressive but she's not very far to the left. She's definitely more conservative than Sonja Sotomayor and she also has an institutional background, right? She comes from Harvard Law School. She was a former solicitor general.

Imani Gandy:

Yeah Kagan was Solicitor General under Obama and she also has the "benefit" of being white -- which when you're talking to white dudes like Roberts is actually a benefit because I think if anyone is going to be able to open up and hear a left position, it's gonna be coming from Kagan and not from the "spicy wise Latina" Sonia Sotomayor.

Jessica Pieklo:

Exactly. Exactly. To the extent that there are silver linings in the Kavanaugh confirmation those are the places that I'm looking to right? We've got the women on the court are really going to have a moment to step into their leadership and that will affect the judiciary and the Supreme Court as much I think in some ways as the Kavanaugh confirmation.

Imani Gandy: Absolutely, so while we've now giving you the couple of few silver linings and really they are so few because we're about to enter an age of just utter catastrophe for civil right and that's just ... I wish I could be more cheerful about it than I am but that's-

Jessica Pieklo: It's like the bring out your dead moment of history-

Imani Gandy: Right. It really is. It's just fucking terrible.

Jessica Pieklo: It's the judicial plague of conservatism.

Imani Gandy: It really is. It really is. Why don't we talk a bit about how bad Troy McBeer writes his first decision or what sorts of rulings and opinions we can expect from him.

Jessica Pieklo: Oh God. The good news is the Court hasn't taken a bunch of cases yet. So far it's been a narrow calendar but the bad news is there are a lot of big ones that are lurking that will likely find their way up. We could very well see Judge Troy Kavanaugh, Justice Troy Kavanaugh, Brett Kavanaugh, Brent Kavanaugh, Justice Kavanaugh rule on for example whether Title Seven covers employment discrimination on the basis of sexual orientation or gender identity. We have a direct challenge to the Affordable Care Act. We heard the senators talk a lot about that in U.S. Vs. Texas. Both of these cases also we've covered extensively at Rewire.News. We have challenges to separation of church and state in a case that is fascinating to me and one we'll probably talk about in a future episode but the Court might take up this "coach can pray" case.

This football coach liked to have prayers after the games on the field and so it's a prayer case and they love those. So there's a couple of those so called religious freedom cases hanging out there.

Imani Gandy: There's also, they're coming after Whole Woman's Health v Hellerstedt because I think what's going to be interesting is -- as some of you may remember Justice Breyer really put on his nerd glasses in that case -- and it was a very data driven decision. That is to say that Texas had not proven that these regulations, these laws were actually for the benefit of women's health and safety and so screw you Texas.

Now what's happening in other states is that the challengers to those laws have to demonstrate that their burden is on women and their ability to get an abortion it is actually not helping any sort of women's health and safety. That's a very fact driven process. That means that a lot of the abortion cases that are gonna be in the Supreme Court are gonna be very fact specific, and that gives Bob Kavanaugh a lot of wiggle room to decimate repro rights because he can say, "Well you know in Texas the admitting privileges law didn't make a whole lot of sense because XYZ." But in Indiana for example or Wisconsin or any other states the rules are different. It's a smaller state. The clinics aren't as far apart.

There any number of ways that these cases can be parsed to ultimately say that the very same laws that were struck down in Texas are now fine in other states.

Jessica Pieklo: Yeah, so when we talk about the threat to Roe, it doesn't matter if there's not a direct challenge in the works (which by the way there is) but we also have all of these ways to chip away. Finally, one other thing I'd point out is there are petitions the Court is considering about whether or not you can defund Planned Parenthood -- kick Planned Parenthood out of Medicaid -- and the Court has been thinking about that for a little bit. Hasn't taken them up yet but with Kavanaugh's confirmation he might be the vote that pushes them over the edge. We could very well see a defund Planned Parenthood Supreme Court case this term too. Fun times.

Imani Gandy: Oh great. Yeah. I have a question for you. Now that this is a done deal, what about this court packing business? There's a lot of talk about court packing. I personally am not sure that Democrats have the stomach for it. Whoever's going to lead the charge on court packing is going to have to have a will of steel, and honestly, I'm not sure that there is a Democrat around that A) has the steel will to do it or B) could do it. I mean, Kamala Harris I think would have the will but she's a black woman, you know what I mean? It's like she's going to have to deal with all the misogynist noir and all the shit that goes along with that. The same way people would say, "well, Barack Obama wasn't going to be the first president to legalize weed," I think that we're going to see a lot of limitations that candidates of color have to work within on court packing.

Jessica Pieklo: I'm of two minds of this. In part I think it depends on what we're talking about when we're talking about court packing. If it's just simply like, "fuck it we're going to add two more Supreme Court justices. One to make up for Kavanaugh and one to make up for the Merrick Garland seat," then I don't think that that's sufficient. That to me is reactionary, but I do think that it is a good opportunity, and I actually wrote a little bit about this for Democrats and folks who just care about the integrity of the institution of the judiciary to take a look at revamping some of it.

Our federal courts are underfunded and they're understaffed. Trump has been really successful in jamming through a bunch of nominees but we could expand the lower courts. Expand the number of circuit court of appeals justices and put more people on the Supreme Court if we wanted to. My point it is, it doesn't make any sense to deal with just the Supreme Court if we're not dealing with the lower courts as well.

Imani Gandy: Also it makes it a little bit more politically palpable because certainly if by some miracle we find ourselves in 2020 or 2021 with a Democratic congress and a Democratic president thn it's gonna look like sour grapes right? It's gonna look like, "well we're just getting back at you for Kavanaugh and Garland," and while that may be appealing to Democrats, it's not really gonna fly with Republicans and it's just going to continue this really nasty partisanship that's going on. So I don't know.

Jessica Pieklo: Yeah, I do have one more thought about what senators and folks in Congress can do if they are sincere about their statements that they believed Dr. Ford and Debra Ramirez and Julie Swetnick, that they believe the allegations that sex assault and harassment and sexualized violence is an epidemic in this country. Did you know that federal courts employees have very limited protections against sexual harassment in the work place?

Imani Gandy: I did not know that.

Jessica Pieklo: They do! Do Title Seven doesn't protect them. They are exempt. Federal courts are exempt and there's a difference statute that governs employment matters for federal courts employees. They have employment agreements but they don't have a private right of action to sue if they're being harassed by, say, Judge Alex Kozinski. That's bananas!

Imani Gandy: That is bananas.

Jessica Pieklo: Congress could pass legislation that creates an avenue and a pathway for the thousands, the tens of thousands, of people who work in the federal court system to provide them protection from work place harassment. And while it wouldn't impact millions and millions and millions of people it could be a very important step forward and not just a symbolic step but an actual, "here's protection," and when we protect federal employees that trickles further into the private sector. That's my little soap box on that.

Imani Gandy: Finally, I think people are probably going to want to get our opinions on impeachment. The likelihood of whether that could happen. I'm of the mind as I said in the prior episode, the last time a Supreme Court justice was impeached was 1805, Samuel Chase. He was acquitted. Abe Fortas resigned at some point. I think it was Abe Fortas a while ago. Yesteryear. That's when he resigned. The days of yore. I know I was very strident a couple of episodes saying there's no way in hell that Brett Kavanaugh is gonna be impeached. That was prior to the Blasey Ford allegations. I think that if by some stroke of luck Democrats can retake the senate or the house they can open up investigations.

The investigations into the allegations don't just stop because Billy Ray Kavanaugh has been put on the Supreme Court. If it turns out if there's an FBI investigation that is ongoing, if there are more allegations that come out, yes there is a likelihood that he could be impeached. There's a likelihood. Is it "probably?" No.

Jessica Pieklo: Hey Democrats should just investigate. Yeah.

Imani Gandy: It can't hurt. Investigate and at a minimum let's show the American people who this fucking guy is.

Jessica Pieklo: Absolutely. There were concerns before these allegations that Kavanaugh was misleading and not truthful and his Senate testimony Leahy and Durbin went over that time and time again. They're real pissed because he's lied to them several times now under oath. Yeah, should Democrats be successful in the midterm elections and find themselves in the majority party? Then use the investigatory tools at your disposal.

Imani Gandy: Yes. Please do. God. Well I dunno. It's been a real-

Jessica Pieklo: We should get a drink, Imani.

Imani Gandy: I'm gonna. I'm going to drink rum and Cokes. I'm going to drink some rum and Cokes and I-

Jessica Pieklo: I just gotta say I love beer and one of the things I'm real pissed about this is the slander of beer in the Kavanaugh nominations.

Imani Gandy: Yeah for those of you who don't know Jessica, Jessica really is an avid beer drinker. I would almost say it's heroic and so I do feel badly for you sensible honest beer drinkers out there who have now been besmirched by Barnaby Kavanaugh and his fricking, I dunno, alcoholism or just ridiculous love affair with beer, that he just seemingly can't ever stop talking about it.

Jessica Pieklo: I'm sure he drinks terrible beer too.

Imani Gandy: I'm sure he drinks shitty beer. Probably drinks just crap. At any rate, do whatever you need to do over the next couple of days to take care of yourself. It's been rough. It's certainly been rough for survivors. It's not going to get any easier. We just have to be kind to one another and take care of one another.

Jessica Pieklo: And like Senator Hirono said today on her floor speech before voting no on Kavanaugh, "Stay mad." I think that's okay.

Imani Gandy: Stay mad. I am so all about that. That's it. That's going to wrap it up for us. That's going to wrap up our episodes on the confirmation hearing. Of course we will be back with more episodes. We will be here to explain all of the ins and outs of whatever fuckery arises but in the meantime you can find me on Twitter @angryblacklady. you can find Jessica on Twitter @hegemommy H-E-G-E-M-O-M-M-Y. I just want to give a special shout out to a particular Twitter user. I don't know who it is but who addressed a question about the law to me and hedgemom as in like a hedgehog's mom. I loved that so hard. I immediately texted it to Jessica. I was like, "Look! Your a hedgemom!" So yeah she's hegemommy H-E-G-E-M-O-M-M-Y and you can find Rewire.News @rewire_news.

Jessica Pieklo: Yep, and don't forget to jump on over to Facebook and find us in our "Boom! Lawyered" group where we keep the conversation going -- and post pet pics when necessary.

Imani Gandy: Yeah and right now we just have an infinite screaming thread. If you want to get in on that just answer the question. Please answer the question. If you've tried to get in and you haven't gotten in maybe go back and try again but answer the questions. They're easy questions.

Jessica Pieklo: If you answer the question you're already ahead of Supreme Court Justice Barney Kavanaugh.

Imani Gandy: Ain't that the truth. That's gonna wrap it up for us. Take care of each other and we'll see you on the tubes.

Jessica Pieklo: Cheers y'all.

Jess: "Boom Lawyered" is created and hosted by Jessica Mason Pieklo and Imani Gandy. Our producer is Nora Hurley. This episode was produced by Marc Faletti who is also our executive producer. And the Rewire.News editor in chief is Jodi Jacobson.