

Boom! Lawyered: Meet the Official Who May Lead the Attack on Transgender Rights

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is just really super jazzed to not be doing a podcast about Brad/Brent/Troy/John McBeer Kavanaugh. I'm Imani Gandy.

Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. The Team Legal podcast is part of that mission. A big thank you to our subscribers and a welcome to our new listeners.

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Imani Gandy: That's [Rewire.News/Donation](https://rewire.news/donation).

Jessica Pieklo: Today, we're discussing the breaking New York Times report on the Trump administration's potential attack on transgender rights. In particular, we're going to introduce you to the person who's likely behind this effort, and someone you need to know about, Roger Severino.

Imani Gandy: On Sunday, the New York Times reported that the Trump administration is considering narrowly redefining gender as a biological immutable condition defined at birth. My question to you is, Jess, what the fuck is going on?

Jessica Pieklo: Oh, man. That is the question of the Trump administration, huh? What the fuck is going on? What we know from this New York Times report, and it's a doozy, is that the Department of Health and Human Services is spearheading this effort to redefine gender as, like you said, a biological immutable condition defined at birth. Particularly, they're looking at doing this under Title IX. That's the federal civil rights law that bans discrimination in education on the basis of sex, but really, should the proposal that the New York Times is reporting on take effect, it will have a far reach well beyond that of the Title IX.

Imani Gandy: One thing I think that's important to note in terms of far reach is that it doesn't just concern how the federal government views trans people and whether or not they're deserving of civil protection or anti-discrimination protection. It's also going to trickle down into the way society views trans people, right? If we have from the top that we're not going to recognize trans people as existing, and first I want to say that the New York Times headline about Trump erasing trans people from existence is absurd, because you can't erase an entire group of people from existence.

What you can do is make them so disfavored that they become a very vulnerable population. Trans people are already vulnerable, and so what we don't need are MAGA-heads taking their clue from Trump or their cue from Trump, I should say, and beginning to really sort of become more violent and just horrible to trans people. That's something that is a real danger, and a real effect that this policy could have, this proposed policy, or this leaked policy.

I want to address what the memo actually says, what Severino's memo actually says. Okay, so it says, "Sex means a person's status as male or female based on immutable biological traits identifiable by or before birth. The sex listed on a person's birth certificate as originally issued shall constitute definitive proof of a person's sex unless rebutted by a reliable genetic evidence."

My god, what does that mean, Jessica? Does that mean they're going to have a database of people's genitals? What is going on?

Jessica Pieklo: I mean, maybe, it's that bananas. What they're saying is that, first of all, any dispute about a person's sex would have to be clarified using genetic testing. Really, we're going to have, what? I don't know, the Department of Education conducting genetic tests for biological proofs, quote unquote, of a person's gender. It's absolutely bananas. I mean, real very specifically where the agency's proposing defining sex as either male or female, so there are only effectively two genders as far as the administration is concerned, so ignoring the fact that intersex people even exist, for example, in addition to the impact on trans folks. It's also saying that this is something that is unchangeable, so really looking at attacking the rights of transgender folks who have gone through a surgical transition. Determined by the genitals that a person is born with, so we're doing a crotch check.

Imani Gandy: Yeah. Why are Republicans so obsessed with people's genitals? I don't understand it. Just let people live. All right, I could go on and on about this, but let's talk a little bit about what we don't know, like what we don't know from that New York Times report.

Jessica Pieklo: Right, so I mean, there's a lot of reason to be concerned based on this New York Times reporting. The proposed leaked memo, if it's accurate, and we don't have any reason to think that it isn't, is really far reaching, but I do want to stress the fact that even if the Health and Human Services acted today or tomorrow, and dropped a new rule that proposed this, that it would not at all undo all of the federal and state court decisions that we already have that recognize transgender rights under the law, and have held specifically that existing civil rights laws, like Title IX, and Title VII protect transgender people from discrimination no matter what this administration thinks. That is very important.

In terms of what we don't know, though, we don't know when these changes would happen, and what exactly they look like, right? We're reporting off of a reported New York Times piece. We do know that the administration is currently considering two different rule changes related to transgender rights

with Health and Human Services. One is under Title IX in terms of how campuses investigate claims of campus sexual assault and harassment, and the other is with regard to 1557, and that's that provision that we mentioned earlier with the Affordable Care Act that protects against gender discrimination in healthcare.

We expect those to drop sometime this fall. When that happens, we'll trigger some legal protections or legal, at least, hurdles that the administration would have to clear if they care about those things before enacting them.

Imani Gandy: Yeah, and the problem is I don't really think the Trump administration cares about those things. I mean, these sorts of changes and regulations require a public notice and comment period, which means that the administrations sort of proposes what regulations they want to implement, and then we the people get an opportunity to comment on them. I'm not so sure Trump really cares about what we the people think, so I don't have any reason to believe that, unlike with Obama and his birth control benefit regulations, who he actually listened to people, and changed them, far too many times for my pleasure, but that's another topic for three years ago. You know, it's really important, I think, for people to make their voices heard even if Trump is unlikely to listen to them, because the more people that actually make comments in support of trans people, that tells your trans friends, your trans comrades, other trans people that you're standing in solidarity with them, but it also lets Trump know that you oppose this sort of bigotry.

Jessica Pieklo: Absolutely. We know a little bit about this proposed memo. We know what we don't know about the proposed memo to sort of paraphrase from Rummy, but we also have a pretty good idea about the person who is likely responsible for this titanic shift in administrative policy, and that's a dude by the name of Roger Severino.

Imani Gandy: Ugh, Roger Severino. Roger Severino is a noted trans- and homophobe. He is the head of the HHS, Health and Human Services, Civil Rights Office, so that's the office that's in charge of the enforcement of things like the birth control benefit in Affordable Care Act, or section 1557 of the Affordable Care Act, which is the provision, as Jess mentioned earlier, that prohibits discrimination in the delivery of healthcare as it pertains to trans people.

Before he joined the Trump administration, he was the director of the DeVos Center for Religion and Civil Society at the Heritage Foundation, which, you know, conservative think tank Heritage Foundation. They always have great ideas about how to help Americans. Don't you think, Jess?

Jessica Pieklo: Oh, absolutely. I mean, they are an expansive group aimed at bringing all folks into the federal constitutional protections. No, they're not. They're terrible.

Imani Gandy: They're terrible. It's also important to note that when he was at the Heritage Foundation, he wrote a report criticizing 1557, saying that it would penalize doctors and other healthcare providers who have religious objections to trans people. It's important to note how well or how much this new or proposed policy would dovetail with this religious freedom nonsense that we have going on, where we've got people who believe that it is their religious right to discriminate against gay people, lesbian people, trans people. I think it's really important to keep that in mind that, essentially, this is Mike Pence's wet dream, right?

Back when Trump tapped him for the vice presidency, people were like, "Why would Mike Pence want to do that?" This is why Mike Pence wanted to do that. This is the realization of all of his pro-gay conversion therapy, can't be in a room alone with anyone that's not my wife, calling my wife mother nonsense. It's just this creeping theocracy, and really, it's dangerous, and it should be alarming to everyone.

Jessica Pieklo: It is, and I think, you know, the Trump administration has certainly pushed this quote unquote religious objections as far as they can. I mean, we saw it way back in the Masterpiece Cake Shop case, when they sort of switched arguing, but I think it's important, too, to tease out that unlike the opposition to marriage equality, or the arguments that Severino's office, for example, was making in those cases, which is a religious objection to same sex couples getting married, the religious objection that they are raising here is to the very existence of transgender people, that according to their religion, transgender people cannot exist, so it really is ideologically in line with this attempt to erase the legal protections and definitions of a transgender status.

They go really hand in hand in this very insidious manipulation of religion, and it's not just like it was 1557. I mean, you remember that North Carolina bathroom bill, right? That horrible, horrible, right? Severino, good old Rog was out there saying, "Hey, everybody. Calm down. Your reaction is overblown, that this isn't really going to harm trans people. All of you businesses that say you're promoting equality, why don't you just cool out and come back? It's not that big of a deal." While we saw the opposite to be true, right?

Imani Gandy: Yeah. I mean, oh god. The North Carolina ... the bathroom panic bills, it's just let people use the bathroom that aligns with their gender identity. I mean, honestly, what are you going into the bathroom for and checking out people's genitals? Go pee, get out. I don't understand it. Another thing that's really sort of pernicious about Severino is that, I know you remember Trump's trans military ban, right? He called the policy to accept trans people in the military part of a quote, radical gender ideology, which, what does that even mean?

Jessica Pieklo: What?

Imani Gandy: Like, what does that mean? Just by existing, you're some part of some gender ideology? I mean, it isn't like transgender people just made it up and decided it's

a thing. It's an actual medical thing. Gender dysphoria exists. It's a medical condition. This policy that Trump wants to implement is at odds with science and medicine, and human decency, but also science and medicine. Help me understand, Jess.

Jessica Pieklo: Well, I mean, it is. It's at odds with science and human decency, and that whole radical gender ideology is creeping toward that Margaret Atwood phrase of gender traitors in *The Handmaid's Tale*. I mean, it's really like, I don't want to go there, but I think we kind of have to go there. Not only is it totally antithetical to science and medicine, it is in conflict with federal law. Severino knows that, but he's also got a really interesting tie to the federal courts that I think makes this report from the New York Times all the more important to pay attention to, right? What's his tie there?

Imani Gandy: Right, so Roger Severino. There was a article in *The Atlantic* a while back about Roger Severino, and one of the key takeaways from that article is that Clarence Thomas is this man's hero. He has a Clarence Thomas bobblehead on his desk. Why you would have a Clarence Thomas bobblehead anywhere on Earth is beyond me, but certainly within your immediate personal space, I don't get it. The reason why is that he's married to a woman named Carrie Severino, who runs the Judicial Crisis Network. Why is judicial such a hard word to say? Always such a hard word to say. The JCN is a dark money group that spends 10s of millions of dollars in getting extreme right wing judges appointed to the federal bench, right? That's her main gig, is making sure that there are extremists, extreme ideologues that are being elevated to the bench. She's also a former Clarence Thomas clerk, so it kind of makes sense that her husband has this sort of fascination slash I don't know what you'd call it, obsession? An admiration for Clarence Thomas.

Jessica Pieklo: Yeah, it's really weird. That Atlantic profile also mentioned that in addition to the Clarence Thomas bobblehead, the only other personal effect in his office at HHS is a crucifix, so that's not creepy at all.

Imani Gandy: Not at all.

Jessica Pieklo: Not at all. You know, Judicial Crisis Network, we've talked about them when we've been talking about Brad Kavanaugh and all of the other judicial nominees, right? In addition to just pouring a bunch of money into the Supreme Court race, Judicial Crisis Network has spent a lot of money and a lot of time, even before Rog was at HHS, his wife Carrie was working really hard at getting all of these other very, very conservative folks appointed to and confirmed to the lower courts, district courts, and courts of appeals. That's important for a couple reasons.

One, in the New York Times reporting, Severino's memo mentions a decision out of the northern district of Texas by a judge named Reed O'Connor, and we've had words about him in the past, we'll have words about him in the future. He's a Trumpian ideologue for a good shorthand. He had ruled in a lawsuit that

conservatives brought challenging section 1557 that it could not be enforced. Severino looks to O'Connor's opinion and cites that as the legal authority for it, but ignores all of the other federal and state cause law that says, "Not so fast. Actually, transgender discrimination is covered by existing civil rights law, including Title VII and Title IX." Those are issues that the courts have been really pretty uniform on.

Imani Gandy: Can we just stop for a second and mention the Women for Kavanaugh bus, which the JCN paid for? I recall seeing pictures of this bus with Women for Kavanaugh emblazoned on it, with, I believe like 15 people photographed in front of it. I think only three of them were women, the rest were men.

Jessica Pieklo: Yeah, so Judicial Crisis Network, you know, they got the Women for Kavanaugh bus, they pumped a bunch of ads into North Dakota after Heidi Heitkamp said that she wasn't going to support Kavanaugh. You know, they are the big, big dollar group that won't disclose its donors, but is tasked with, effectively, the enforcement arm of the Federalist Society, right? The Federalist Society vets and nominates these folks, and it is the Judicial Crisis Network to shake down folks on the street and get them nominated, or get them confirmed once nominated.

Imani Gandy: Yeah, and I think it's important to not that, right now, almost all of the federal courts are in agreement that gender identity deserves civil rights protections, but thanks to the JCN, and their efforts in just elevating all of these right wing ideologues to the bench, the federal circuit courts of appeal, federal district courts, there are more anti-LGBTQ judges just in circulation. They're just out there. What happens when a trans person, you know, brings a lawsuit in one of these courts where these right wing ideological judges are presiding? I mean, we're looking at a situation where a lot of the case law that was developed during the Obama administration could become null and void if, for example, someone in the, I guess ... he flipped the seventh circuit, right? He flipped the seventh circuit from liberal to conservative.

Jessica Pieklo: Oh, he's flipped the seventh and the fourth.

Imani Gandy: The seventh, the sixth, and the eighth. Let's say a judge in the seventh circuit rules that it's perfectly okay to discriminate against trans people, and in fact, transgenderism doesn't exist. It's just a figment of your imagination. Then, what we have is a circuit split, right? We get a circuit split. The fourth circuit has said, in the Gavin Grimm case, that Title IX does offer these protections to trans people. Let's say this hypothetical decision in the seventh circuit says Title IX does not offer these protections, you have a circuit split, and a circuit split means ... The country is separated into various circuits. These circuits cover several states. The Supreme Court likes it when rules are similar. You don't want one rule in Illinois and another rule in Virginia, so if there are disparate rulings, the court will step in and resolve that split.

With this court, with Judge Brad McBeer providing that fifth vote, I don't have any confidence that we're going to see federal protections for trans people.

Jessica Pieklo: Yeah, and we could have an answer on that real soon. I mean, the administration right now is scheduled to weigh in as of Wednesday, potentially, in a transgender rights case that the Supreme Court is considering taking up. That involves a transgender funeral home worker. That case came out of the sixth circuit, Harris Funeral Homes. We've reported at Rewire.News pretty extensively on that, and briefing is due this week on that case, and the Department of Justice, the Trump administration could very easily weigh in and affirm, basically, what we've seen reported in this New York Times memo, that it's taken that legal position that these existing civil rights laws don't cover transgender discrimination, that it's taken a very narrow view under Title VII, and by then, extension, Title IX, of what discrimination on the basis of sex means, and in particular what sex means.

This is going to be a very live fight, I think, coming into 2019.

Imani Gandy: What I think is also really important to note, is that there are people who disagree with this sort of transphobia, right? I was on Twitter last night, and I was really moved to tears by reading the streams of trans people, reading about how they were fearful, but yet still hopeful, about how they were standing in solidarity with one another, reading the feeds of cisgender people, meaning people who are not trans, and watching them express solidarity with trans people. Even though this is a dark time, and I really do feel for all of the trans people who are struggling, and people who are uncertain, I just feel like it's important for me to say that there are people who are fighting for you, and who will be in solidarity with you.

Jessica Pieklo: No matter what happens right now, or in the future, federal law protects transgender rights. Don't let the administration tell you any different.

Imani Gandy: It does. It does. It does. That's really all I have to say. It does, and Trump can't take that away.

Hey, listeners. I wanted to tell you about an amazing new show we've been listening to called Women Belong in the House.

Jessica Pieklo: There are more women running for office this year than ever before, but, as we know, the idea of women in the highest echelons of government is still contentious.

Imani Gandy: Host Jenny Kaplan interviews incredible women candidates about their personal stories, their political perspectives, and their reasons for running. She also talks with experts to understand why there are so few women in office to begin with, and how congress would change if it looked more like the people it represents.

Jessica Pieklo: With midterms fast approaching, it's more important than ever to tell and share these women's stories so we can make real change in Washington.

Imani Gandy: Subscribe to Women Belong in the House wherever you get your podcasts.

That's going to wrap up our show. Please follow me on Twitter. I'm @AngryBlackLady. You can follow Jessica, @Hegemommy, H-E-G-E-M-O-M-M-Y. You can follow Rewire.News @Rewire_News, and please join our Facebook group. It's called Boom! Lawyered. Look it up on Facebook, answer the question, and we will let you right in.

Jessica Pieklo: We will.

Imani Gandy: Yeah, we will. Thanks a lot, and we will see you on the tubes.

Jessica Pieklo: See you on the tubes, folks.

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. The Rewire.News editor in chief is Jodi Jacobson.