

Boom! Lawyered: Recapping the Wild Ride of 2018

Imani Gandy: Hello, fellow law nerds. Welcome to the final episode of Boom! Lawyered for 2018. Whoo! A Rewire.News podcast hosted by the legal journalism team that wishes you a Merry Christmas and a Happy New Year. May next year be better than the last ... I don't know ... two or three.

I'm Imani Gandy.

Jessica Pieklo: Seriously. 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.

A big thanks to our subscribers, and a welcome to our new listeners.

Imani Gandy: Jess, it's the end of the year. And do you know what that means?

Jessica Pieklo: Awkward family get-togethers.

Imani Gandy: Oh, yeah. Definitely that. But it's also the time of the year when people give thanks.

Jessica Pieklo: Well, I know that I am most definitely thankful for all of our listeners.

Imani Gandy: Me too. I love our listeners. And listeners, if you're thankful for this show ... and we know that you are ... and everything that goes in to making it, including our lovely producer, Marc Faletti, please consider supporting us by donating online.

Jessica Pieklo: Yes, please. Seriously. As a nonprofit journalism outlet, Rewire.News relies on your donations for all of our work. And that includes this show, Boom! Lawyered.

Imani Gandy: Seriously. Even five bucks goes a long way, you guys. It all adds up. So if that's something you're able to afford this holiday season, please donate at rewire.news/donate.

Jessica Pieklo: That's rewire.news/donate.

Imani Gandy: So today, we thought we'd close out the year with one of those year-end reviews that everyone's doing. Except ours will be exciting because it will be about the law. And if there's one thing that this podcast has taught you this year, dear listener, it's that the law can be exciting.

Jessica Pieklo: It can. It can also be terrifying.

So we're going to talk about the three best things that happened this year and the three worst things that happened this year, after the break.

Okay, Imani. Let's start with the bad things so that we don't end the show on a sour note.

Imani Gandy: That's a really good idea.

So one of the terrible things that happened this year is that Trump continued to take a giant dump on the federal court.

Jessica Pieklo: Oh, God.

Imani Gandy: It's been awful. We're talking tons of ABA-unqualified judges that have been installed ... I'm going to say "installed" ... in the lower courts.

Jessica Pieklo: "Installed"'s a good word.

Imani Gandy: As of today, Trump has 85 federal judges confirmed, Jess. 85.

Jessica Pieklo: That is so many.

Imani Gandy: 85. It's too many.

Jessica Pieklo: Oh, my God. We've got two more years to go.

Imani Gandy: No, I can't ...

Jessica Pieklo: No.

Imani Gandy: He's got two SCOTUS justices, 30 appellate justices, 53 district court judges, and of course there's Brett Kavanaugh, AKA Brad McBeer.

Jessica Pieklo: He is a whole sort of nightmare in and of itself. We dedicated a lot of episodes this year to Brad McBeer.

Imani Gandy: So many episodes. And we've yet to see just how terrible he's going to be.

Jessica Pieklo: No, no. The whole thing was like a national trauma episode, his confirmation hearing. And really, the cherry on top of the shit sundae that is the Trump administration and the federal courts.

Imani Gandy: Indeed.

Another terrible thing that happened is that the Supreme Court upheld Trump's Muslim ban, which is a decision that's going to go down in the annals of truly terrible decisions alongside the likes of Dred Scott, Korematsu, and Plessy versus Ferguson.

Jess, why don't you tell us a little bit what that ban was about in case folks have forgotten?

Jessica Pieklo: Sure. Let's talk about that decision because even though it came out in June, it feels like it was like four lifetimes ago.

So you might remember that right when President Trump took office, he enacted the Muslim ban. And then there were some legal hullabaloo, and they decided to enact a second Muslim ban in response to the legal hullabaloo. Well, there was more legal hullabaloo. That's what ultimately went up to the Supreme Court.

And when the administration was arguing about it, they said that this one wasn't really based on banning folks from Muslim countries. Hence, look, we took off one of the countries, like Iraq.

And, Imani, that was enough for John Roberts. He said, "You know what? Looks good to us." Even though the administration has gone on public record, on interviews, on Twitter, saying, "We are banning Muslims. This is a national security order," the Court said, "Okay."

Now, to be fair the president has a lot of power to direct immigration, and in some situations could enact an order restricting entry into the country, and has done so.

Imani Gandy: But he can't do that on the basis of religious animus, which is clearly what this was. If you look at his tweets, if you look at the things that his advisors and cronies have said, Rudy Giuliani, this was obviously an effort to reduce the number of Muslim immigrants that were coming into this country.

Jessica Pieklo: It really was.

Imani Gandy: So what gives? What happened?

Jessica Pieklo: Well, kind of like how Roberts went post-racial in Shelby County, we went sort of post-Muslim bias in this case. Looking back ... this is a year-end review ... looking back, Justice Kennedy wrote this weird concurring opinion, that he basically finger-waggled the administration for being so rude in public, for saying things like Muslims were a national security threat and should not be allowed entry into this country. But he didn't do anything about it. He just finger-waggled and then peaced out on the last day of the term.

Imani Gandy: Right. We need to say that again. He authored this bullshit concurring opinion, and then just up and retired without telling anyone, without giving anyone advanced notice, thus paving the way for Brad McBeer. So thanks a lot for that, Kennedy.

Jessica Pieklo: And the result is one of the decisions that stayed in place was this awful travel ban. And it's keeping folks out of the country and away from families now for no damn good reason. So pfft.

Imani Gandy: Exactly. Pfft.

The third thing that we need to talk about is the Trump regime's incessant attack on LGBTQ people, including rolling back some of the Obama-era protections, like the right to be free from discrimination in the workplace under Title VII, the right of trans students to use bathrooms that align with their gender identity under Title IX, or the provisions in Obamacare that block discrimination against trans people in the delivery of healthcare services.

Jessica Pieklo: And you know what blows my mind, Imani, is that that's like this parade of horrors, and it's just the tip of the iceberg of the policy stuff that's going on. And it's ... Yeah. It's ... ugh.

Imani Gandy: It's frightening, and it's scary. But let's talk about trans rights first.

So the Trump regime has essentially declared war on trans people. Back in 2017, for example, he decided to ban trans people from the military. Just on Twitter, up and decided one day, "Ah, no more trans people in the military."

A federal court blocked this ban. And then earlier this year, he signed a new trans ban that is just as bad and bigoted and transphobic as the old ban, but it gave the Pentagon and some of the other agencies, like the Department of Defense, a little bit more discretion in banning people based on their transgender nature or based on gender dysphoria.

So challenging this military ban, there were four cases that were filed. In each of those cases, the court issued a preliminary injunction blocking the ban from going forward so that the military could conduct its business as it had been, with trans people serving, until a court could rule on the merit of whether or not this ban was constitutional.

But then there's Donald Trump, who has no care whatsoever for institutional norms or the rule of law.

Jessica Pieklo: Not a fuck to give.

Imani Gandy: Or process. He left all of his fucks ... I don't know ... wherever he gets his spray tans, perhaps. And he decided that he was going to leapfrog all of the appellate court processes and go straight to the Supreme Court and ask the Court to lift those bans.

Jessica Pieklo: That's not how it works. This drives me crazy. You're right. The administration, particularly in the Department of Justice and Solicitor General's Office, has basically said, "Screw your norms. We're not abiding by them." And they're trying to get the Court to jump in now because they think it's favorable.

It's interesting to me, as you were describing the legal fight over the military ban, just how parallel and similar it is to the Muslim ban fight. It's really absolutely the same playbook and throwing a really terrible order out there and then seeing the Court's reaction and then backpedaling it a little bit to try and reverse-engineer to

what they think will work and get that to fit a formula they feel perhaps the Supreme Court will exist ... or accept. But it's maddening.

Imani Gandy: It's terrible.

Jessica Pieklo: Look. The law moves slow, but you can't just ignore and skip the appellate process. It exists for a reason, and that's to develop the legal arguments, and lawyers like to contemplate things and think about it. We need time, dammit.

Imani Gandy: We need time.

You're exactly right. That's not at all the way any of this works. But Trump doesn't give a shit about what works and what doesn't work, as evidenced by the fact that the administration released a memo that would erase legal protection for trans people across the board, and which essentially tried to erase them out of existence by defining sex according to biological sex. You can't just erase an entire group of people out of existence just because you think that their gender identity is icky. Help me, Jessica. Help me understand.

Jessica Pieklo: I wish I could. I feel like we need to do a whole Schoolhouse Rock, how-a-bill-becomes-a-law kind of episode for this administration because they literally took a ... effectively took an eraser to Title VII and the case law and said, "Nope. We're just going to change this here. Screw the legislative process. Doesn't matter." 2018 has very much been the year that the Trump administration ruled by executive fiat.

Imani Gandy: It really has. It also has been the year that LGBTQ rights have been starkly placed in danger. There are several Title VII cases that are in the pipeline, and that will determine whether or not LGBT people can be free from discrimination in the workplace, whether or not employers have the right to fire you just because you are gay or trans. The Court hasn't yet taken these cases, but they still might.

And then there's what I like to call the Masterpiece Cake-Shopping of America, where you have evangelicals who are weaponizing the First Amendment to discriminate against gay people and to try and convince society at large that it is their right to say, "I don't want to bake this gay person a cake because it's against my religion to be gay." This is unconscionable. But you remember all of that Masterpiece Cake Shop fun, don't you, Jess?

Jessica Pieklo: Oh, good grief. How could I forget? And like the Muslim ban and all of this other stuff, it feels like so many lifetimes ago.

But you're exactly right. That was the case where Jack Phillips said he didn't want to bake a cake for a same-sex couple because doing so would violate his religious belief that same-sex marriage is a sin. End of story.

Imani Gandy: Right. And apparently, him baking a cake was ... He was expressing himself. It was a First Amendment issue. It was a freedom of expression issue. And if he had to bake a cake for gay people, this was just an infringement on his First Amendment rights.

And it's absurd.

Jessica Pieklo: So one of the things about Masterpiece Cake Shop that really chaps my hide, Imani, is the fact that this case presented Kennedy, Justice Kennedy, long ago, Justice Kennedy with an opportunity to cement his legacy as some kind of moderate justice who advanced civil rights.

Imani Gandy: And yet, he punted. He just said, "Well, I got to go, guys. My time's up. I really got to go hop in my RV and travel the country."

Jessica Pieklo: Again, sort of looking through this with the end-of-year lens, knowing that he's leaving the Court, just being like "Peace out. I'm done," it's maddening. Yes, the decision said that civil rights protections do apply to LGBTQ people, but that in this particular case the state of Colorado had treated Jack Phillips, the baker, really, really mean. They were really mean to him, and they were really mean to him because they didn't like his religion. So the Court ordered the case back for review and ultimately left unresolved this issue of whether or not a person can claim a religious objection to recognizing the rights of LGBTQ people.

And what do you know, Imani? There is a nearly identical case out of Oregon that the Court could take up, and it's called Klein versus Oregon Bureau of Labor. It's another Alliance Defending Freedom case.

Imani Gandy: Uhh ...

Jessica Pieklo: I know, our buddies at Alliance Defending Freedom, who are really ... They are the driving force of this weaponizing the First Amendment. But this case is being briefed right now to the Roberts Court. Responses are due at the end of December. And really, the case wants to pick up where Masterpiece Cake Shop left off. And that's not great news.

Imani Gandy: No, that's really not. And whew boy, that was a lot of terrible stuff. It was just like a fire hose of fuckery that we just spewed at you at a high velocity.

Jessica Pieklo: We're sorry.

Imani Gandy: We apologize. Go ahead and wipe your face, maybe get some goggles and a hardhat.

But after the break, we're going to talk about the best things. So maybe you don't need goggles and a hardhat. Maybe just get a glass of wine, grab some chocolate, just chill out and listen to some of the actual good things that happened this year. There are some, not a lot. But there are some, and there are ... There's a little room for hope, in some places.

Jessica Pieklo: We'll talk about that hope after the break.

Imani Gandy: All right. Now that we got all that terrible shit out of the way, let's talk about the

good thing, Jess. Let's talk about some of the good things. Jess, name one good thing that happened this year. Please.

Jessica Pieklo: There were a lot of terrible abortion restrictions that the federal courts blocked and that remain blocked at least for now. But they're blocked. They're blocked. Whoo.

Imani Gandy: Whoo. All about blocking bad laws.

Jessica Pieklo: So one, for example, is that terrible law out of Mississippi that bans abortion at 15 weeks. That's patently unconstitutional. That's a pre-viability abortion ban. That should be dead at arrival. And they've appealed, but that decision ... Let's talk about that decision.

Imani Gandy: It was so good. That decision was so good. I wanted to just put on something comfortable and just lay back in a bathtub and read it because he basically called out anti-choice-ers and told them he was sick of their bullshit. "This is a national campaign to reduce abortion access across the board. You're not fucking fooling anyone. Get this shit out of my court."

Jessica Pieklo: It was brilliant. And really tied it to the terrible racial legacy of reproductive justice in Mississippi specifically and was having none of it. So that was glorious. And I love this image of getting into your pajamas, a glass of wine, and maybe lighting a fire and getting cozy with a good abortion-right decision. That's my kind of night.

Imani Gandy: Exactly. Exactly.

And so another thing that we got just last week was the Planned Parenthood Medicaid cases that Supreme Court ... The Supreme Court declined to review two cases out of Kansas and Louisiana, which means that for now Medicaid beneficiaries do have the right to sue if, for example, states try to kick Planned Parenthood out of their Medicaid program. So that's good.

Jessica Pieklo: And it means that Medicaid beneficiaries in those states absolutely can still see Planned Parenthood if they want to. And it is a signal to other states that are trying similar shenanigans, hopefully, that this won't fly. So I say that is absolutely a bit of good news. As is all of those D and E bans that are blocked across the country. Whoo, boy.

Imani Gandy: Dilation and evacuation, by the way. That's the most common procedure for second-trimester abortions. And states across the country have been attacking them for a couple of years now. And they've been blocked in Arkansas, Kentucky, Texas. All good stuff.

Jessica Pieklo: That's just a couple. And those cases are lingering around in the appellate courts. But the decisions had been really strong. And that ... That's good. We just spent a lot of time talking about how bad the federal courts got under Trump.

But the point is, is there are some still really good judges on there. Many of these

bans have been blocked by Republican-appointed judges, so it's not just even a political, a straight up and down, politically.

But with all of the attacks on abortion rights that we are anticipating in 2019, I think it's really good to take a moment and just savor the victories that we got in 2018 there.

Imani Gandy: Absolutely. And one victory we were not able to savor was Stacey Abrams winning the governor's race in Georgia.

Jessica Pieklo: Oh, man.

Imani Gandy: She didn't win that one. But during that race, apparently she became the most Googled politician in 2018, which is surprising.

Jessica Pieklo: That's amazing. That's great.

Imani Gandy: That's amazing because I think it was down to her and Alexandria Ocasio-Cortez, both of whom I love. So that was amazing.

And although Stacey Abrams lost, she is not out. She has said that she definitely plans on running again. And her fight with Brian Kemp during that gubernatorial race really shone a light on the voter suppression and generally the voting rights fuckery that has been plaguing this nation, especially in the wake of the Court gutting Shelby v. ... gutting the Voting Right Acts in Shelby v. Holder.

You may recall some of the voter suppression shenanigans that went on in Georgia. I'm not going into grave detail. We did a couple of episodes on this issue. And please do go back and listen to those episodes. But essentially, they were stripping black and brown people of the right to vote. There's really no other way to put it.

Jessica Pieklo: They weren't even being subtle about it.

Imani Gandy: They weren't at all. They were just straight up closing DMVs in majority-black counties. The very fact that Brian Kemp, who was Secretary of State and overseeing the election, was also running in the election should tell you something about how corrupt this election was.

And in the wake of her loss ... she finally conceded. But what she has done with a new group called Fair Fight Action, a group of staff members from her campaign, they have filed a lawsuit arguing that Georgia electoral officials grossly mismanaged the midterm election. They have alleged constitutional, civil rights, and voting rights violations. They've alleged significant breaches of federal election laws.

And this case actually asks that the judge find the state's current election process to be violative of both Georgians' fundamental rights to vote and the federal ban on racial discrimination and they're asking for, essentially, judicial pre-clearance. They want the judge to take over the electoral system until Georgia can get its shit

together.

And that's essentially the same sort of mechanism that was in place for a lot of jurisdictions, like Georgia, that had had issues with race and voter suppression in the past. They were required to clear any changes to the laws with the Department of Justice until 2013 when *Shelby v. Holder* came and gutted the Voting Rights Act.

So essentially, it's like a little test case. They're trying to see if they can get this one judge to take over Georgia's election system. Perhaps that'll light a fire under Congress's ass and let them know, "Hey, man. We need a new coverage formula for the Voting Rights Act--"

Jessica Pieklo: Hey, man.

Imani Gandy: "... so that maybe in the future, black and brown people might be able to ... I don't know ... vote" because this situation is untenable.

Jessica Pieklo: This lawsuit gets every little wonky fiber of my brain just going. The idea of it as a test case, the idea of really pushing back on all of the post-racial garbage from the *Shelby v. Holder* decision. And the fact that Stacey Abrams just isn't going away quietly. She's just not going to be quiet.

You know who else isn't going to be quiet? The women on the Supreme Court.

Imani Gandy: Hell, yeah.

Jessica Pieklo: Whoa, man.

Imani Gandy: Give it up for the women on the Supreme Court.

Jessica Pieklo: Oh, man. They have their work cut out for them. But they are absolutely showing themselves to be the force of dissent and power from that position in 2018. And I'm excited to see what that means in 2019, too. If "excited" is the right word. I realize that assumes that there's a shitty decision. But you know what I mean.

Imani Gandy: But there are going to be shitty decisions. We know there are going to be shitty decisions, so the one thing that we can hope for and look forward to is reading dissents. And I tell you, every shitty decision that comes down next year, I'm reading the dissents first just to get me in the right head space. Because every Sotomayor dissent that I've read this year that has anything to do with racial justice or criminal justice reform has just made me so happy that she's on the Court, has made me very happy that she's there to push back on all this conservative bullshit, all of this racist bullshit.

I'm looking forward to seeing what Kagan does. I'm not as familiar with Kagan's jurisprudence as you are. So maybe you can talk about why you're excited to see Kagan in the dissenting role.

Jessica Pieklo: To talk about Sotomayor just for a second, you're absolutely right. She has crushed it on criminal justice. And listeners, if you haven't had a chance to check out our Sonia Sotomayor podcast, please do, because it will make you feel good.

But it's also important because the Court and the law isn't going to stay this way forever. And so one of the things that the dissents are doing is really framing the legal jurisprudence, the legal framework of the resistance, and pushing back in the law against what the Republicans are doing now. So that's really important.

And Justice Kagan, I think, is going to be an effective tool in that she's definitely more of a centrist and you can see her in arguments now trying to pull Roberts along with her this term. Will she be successful? I don't know. But I will say that she is brilliant and shrewd and well respected among her colleagues, so if anyone has the capacity to pull Roberts and Gorsuch along, it's her.

Imani Gandy: Right. And of course, we can't forget to shout out RBG. RBG, she's just a longtime favorite. She broke a couple of ribs, got right back up-

Jessica Pieklo: Back at it.

Imani Gandy: ... and got back to work. She's at it. She says she's not going anywhere. And Ruth, trust me. We've got an entire organ and blood bank for you. So if you ever need anything, I've got a kidney I'm not using. I'm pretty sure the spleen doesn't do anything. If you need one of those, you can have mine.

Jessica Pieklo: Bubble wrap for days.

Imani Gandy: Bubble wrap for days. Just put her in a little cocoon of love.

Jessica Pieklo: Yes.

Imani Gandy: So that's going to end our show for today. That's going to end the podcast for this year. We will be back next year. But in the meantime, please have yourself a happy holidays. Please join the War on Christmas if you're in the mood to do so. But if you're not, maybe just enjoy yourself. Sit under the tree. Have some egg nog. Drink a hot toddy, what have you.

If you want to continue the conversation with us, please do so on Twitter. You can follow me @AngryBlackLady. You can follow Jess @Hegemommy, H-E-G-E-M-O-M-M-Y. And our Facebook group will be popping over the holidays, so if you want to join our Facebook group, Boom! Lawyered, search for it, answer the question, and we will let you right in.

Jessica Pieklo: So thanks for listening. Godspeed at awkward family gatherings if you have them. And we will see you on the tubes and in the new year.

Imani Gandy: See you in the new year.

Speaker 3: 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.