

Boom! Lawyered 301: Bye-Bye, Birth Control Benefit?

- Imani Gandy: Hello, fellow law nerds. Welcome to your first 2019 episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is pretty sure that 2019 is drunk already, if the news is any indication. I'm Imani Gandy.
- Jessica Pieklo: 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 a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: Welcome to our new listeners, and welcome to 2019. And Jess?
- Jessica Pieklo: Yeah?
- Imani Gandy: You and I have been friends for a while now.
- Jessica Pieklo: We have.
- Imani Gandy: Like seven years? Eight years?
- Jessica Pieklo: At least, yeah.
- Imani Gandy: We've been really ... At least. I mean I think you could probably say that our friendship was forged in the fires of the birth control benefit, also known as the contraception mandate, right?
- Jessica Pieklo: Oh, God, it's true. What, we've been writing and discussing the birth control benefit for something like going on seven years now? I mean remember those days when we used to be upset with the Obama administration because they were kowtowing to the religious right?
- Imani Gandy: I honestly would kill to go back to the time when I was annoyed with Obama for continuing to compromise with the religious right, because at least he gave a shit about the contraception mandate, aka the birth control benefit. As frustrating as it was to watch the Obama administration play footsie with the religious right, he was committed to providing co-pay free contraceptive coverage in private health insurance plans, right?
- Jessica Pieklo: Right, and unlike Trump, who is literally trying to blow up the birth control benefit beyond any kind of recognition.
- Imani Gandy: That's what we're going to talk about today. We're going to talk about the ways in which Trump is fucking with the birth control benefit, including by ignoring legal norms to do so.
- Jessica Pieklo: Trump ignoring legal norms? Get out! Get out! I don't believe it.

Imani Gandy: I'm shocked. I'm clutching my chest I'm so shocked. We're also going to talk about why Trump's efforts to take a sledge hammer to the birth control benefit will have devastating consequences for millions of people in this country, and by the time you're done listening to this episode, you're going to understand what the Administrative Procedures Act is.

Jessica Pieklo: Yes! That is my favorite. I love the APA. I love the APA. I love the APA.

Imani Gandy: Jess is singing her I Love the APA song. Settle down lady, we know you love the APA.

Jessica Pieklo: It's hard. I'm sorry. I just can't calm down when it comes to the APA, and this is so true. It totally hits me right in my wonky nerd bone. I love it.

Imani Gandy: I know you love the APA, Jess, and hopefully, by the end of this episode, our listeners will understand what the APA is and how it's a key part of the law making process that a lot of people don't know about, they don't understand necessarily, because it isn't sexy.

Jessica Pieklo: Dammit, it is sexy. Administrative law is sexy. I will die on this hill.

Imani Gandy: Only Jess would, like, come screaming out about how the APA is sexy. So not every woman has been ass deep in the birth control benefit for seven years like Jessica and I have, so we're going to talk about the birth control benefit, also known as the contraception mandate. We're going to talk about how it came into existence. We're going to talk about what the hell it is. Jess, what is the birth control benefit?

Jessica Pieklo: This is an excellent question, Imani. The birth control benefit is a rule that helps give meaning to part of the Affordable Care Act, and talking about the birth control benefit is the perfect chance for me to nerd out on administrative law and agency rule making, so let's do it.

Imani Gandy: Yes, let's do it. Let's talk about federal agencies and the birth control benefit. Federal agencies can only act in certain circumstances. One of those circumstances is when they are directed to, either by Congress or the president. In this instance, the statutory language of the Affordable Care Act, also known as Obamacare, says that the preventative services like contraception must be available at no additional cost and co-pay. That's a really great thing, right? The question is how do we make that statutory mandate happen, and that's where agencies come in.

Jessica Pieklo: Right, so the thinking is that agencies are staffed by experts and are in the best position to turn those statutory dreams, like contraception available at no additional cost and no co-pay, into reality. They do that by issuing rules. What are rules? Rules are like statues in that they can be enforced by the court, so they're kind of law-like. Agencies make rules and rules are like statutes, right,

but we have a checks and balances going here, because unlike members of Congress, who also write laws, we don't elect agency officials, right? They're appointed. At no point here has the public weighed in, right?

Imani Gandy: Right, so the question becomes how, in a representative democracy, can the public have a say in the rules that agencies make that affect their lives? Rules like the birth control benefit.

Jessica Pieklo: It turns out we've got a statute to answer that question, and it's called the Administrative Procedure Act, and it's what I've been shouting about all episode so far. It's the APA, and it makes my wonky heart go pitter patter. The APA sets out, in pretty clear terms, what federal agencies can and cannot do. The APA also tells federal agencies how to go about making rules, and the agencies are to include the public in that rule making process, and that's to keep checks and balances in place.

Imani Gandy: That was a lot of words, Jess, and our listeners may be starting to have their eyes glazed over a little bit, so why don't you give an example of what the APA does and how it operates?

Jessica Pieklo: Right. Now, this is a good idea, Imani. The APA requires agencies to have a certain amount of transparency when they start rule making. The agency can't just say, for example, hey, surprise, here's a new rule on the birth control benefit. It has to give a reason for why it's acting and then show that those reasons advance whatever the issue the rule is designed to address, like getting people access to contraception without the hurdles of co-pays and additional costs.

Imani Gandy: It's not just including the public, right? The APA has other really important requirements as well. For example, the regulations that are proffered by these agencies can't be, what's known in legal parlance, as arbitrary, capricious or contrary to established law. That's essentially legal jargon for federal agencies can't just do whatever the fuck they want or issue regulations that violate the law.

Jessica Pieklo: Right, exactly, so for example, if tomorrow the Environmental Protection Agency said it was issuing a rule promoting coal-fired automobiles, there would be a pretty good argument that rule was arbitrary and capricious, right, because coal-fired automobiles from the agency charged with protecting the environment.

Imani Gandy: Yeah, that doesn't make a whole lot of sense.

Jessica Pieklo: No. That's basically arbitrary and capricious, right? It's a what?

Imani Gandy: Exactly. It's a what? What does the APA say about rule making, and precisely how badly did the Trump administration fuck it up?

Jessica Pieklo: Oh, boy. To answer the second question first, they fucked it up real bad. To show how bad they fucked it up, we're going to go through the timeline of this fuckery, explaining what they did and how it violates the APA. By the end of it, listeners, you'll know a lot more about how this is supposed to work when someone who even remotely cares about the law is in office. We'll get to that after the break. All right, Imani, are you ready to go through this timeline of just how bad the Trump administration has screwed up in trying to issue new birth control rules?

Imani Gandy: Describe what you mean by ready.

Jessica Pieklo: Did you take a multivitamin?

Imani Gandy: I took a multivitamin, I took a Klonopin, I've had a full glass of water, so yeah, let's get into this. Talk to me about this, Jess.

Jessica Pieklo: All right. You're hydrated, you're hydrated. That's what's important.

Imani Gandy: Exactly.

Jessica Pieklo: Okay, so way back in May 2017, Trump announced via an executive order, that he was going to direct federal agencies to start including moral and religious objections to the birth control benefit. Now that pronouncement, that executive order, arguably triggered agencies like Health and Human Services and the Department of Labor, those agencies that implement the ACA, to begin drafting those new rules. At the time, Trump said the new rules were needed because of all the business owners being oppressed by having to provide non-discriminatory health benefits to their employees, and of course that's bullshit.

Imani Gandy: Suffer the poor employers who have to provide birth control benefit to their employees. Blah.

Jessica Pieklo: Right, I mean it's just garbage. Like we said earlier, agencies can't just start drafting rules based on bullshit and garbage. They need a verifiable reason to otherwise do that, or the rule is considered to be beyond the scope of their power and arbitrary and capricious.

Imani Gandy: That makes sense, right? I mean just think of the conservative law makers who are pushing all of these abortion restrictions. Before *Whole Woman's Health v. Hellerstedt*, for example, they were pulling restrictions out of their asses, just directly fucking all of these abortion restrictions out of their asses, and then claiming that those restrictions were constitutional because they, quote unquote, and imagine that I am doing severely sarcastic quotes, because they "advanced patient safety". It wasn't until the Supreme Court said nope, you need evidence to back up these claims about advancing patient safety. Why? Well, because there's no evidence that, for example, making an abortion clinic retrofit itself to meet the same architectural standards as a standalone surgical

center, there is absolutely no evidence that these types of regulations actually advance patient safety. The Supreme Court said you can't just straight up offer bullshit and then make that a basis of legislating.

Jessica Pieklo: Exactly, and that's a really good example because it's the same concept with agency action. Normally, once an agency has direction to act, like in this case the executive order, it then gets to work to doing a bunch of research and drafting what we call a proposed rule. A proposed rule is exactly what it sounds like.

Imani Gandy: Wait, wait, wait. Is a proposed rule proposed?

Jessica Pieklo: It is. I mean, you know, this is dry and boring, but also some of it is like ... the Trump administration is screwing stuff up that is as clear as like, hey, a proposed rule. It's a first draft. It's the agency's real first serious crack at what would eventually become a fully enforceable regulation. In doing that work, sometimes that includes soliciting comments from the public before the drafting begins, if it's like a really complex rule, right? Once the agency has the text of the proposed rule, regardless if they ask for public comment before or not, once they have that text, that's when the public for sure gets to weigh in.

Imani Gandy: Here's the thing about proposed rules. Ultimately they read a lot like legislation. I mean let's be honest. They often have a preamble just like legislation does, they often have something that describes the rule and what it's trying to achieve, just like legislation does, and then it will have a section where the federal agency basically has to show its work.

Jessica Pieklo: Right.

Imani Gandy: Right? It has to cite the data and the information that they used to support the rule.

Jessica Pieklo: Right, and that's super important, again, because, you know, when Congress passes statutes, there's debate, there's hearings, there's all of this thing that is, you know, at least supposed to be transparent that gives us, as the public, an opportunity to weigh in. This is the process to try and make that equivalent for federal agencies. We get the preamble, we get all that stuff, and then we get the text of the rule. When that's published, the agency has to start taking comments from the public. This is called a notice and comment period, and it's really, really, really important. Agencies will leave these proposed rules open for a period of time. This can usually be like 30 or 60 days, but it can be even longer for really complex rules, and that time is when they start to collect comments from the public.

Imani Gandy: This is a really crucial period of time. This is the period of time during which the public literally gets to tell the agency what it thinks about these proposed rules. The agency isn't supposed to just sort of haphazardly ask for comments and

then ignore what the public thinks and go ahead and do whatever the hell it wants to anyway. The agency is supposed to take those comments, read each and every single one of them, and sometimes, we're talking about like 110,000 comments that the agencies need to rifle through, and they need to consider those comments and consider whether or not they need to change the proposed rule in response to those comments.

Jessica Pieklo: You'd be surprised to hear that that didn't happen with the Trump administration, though.

Imani Gandy: Oh! I am shocked. I cannot believe it.

Jessica Pieklo: Yeah. In October 2017, after that executive order, agencies responded to it by issuing what they called interim final rules.

Imani Gandy: Oh, okay Jess. What the hell's an interim final rule?

Jessica Pieklo: That's an excellent question, Imani. When an agency finds that it has good cause to issue the final draft, the final version of its rule without first publishing that proposed rule, that first draft we talked about, it often characterizes the rule as an interim final rule or an IFR for short. This type of rule becomes effective immediately upon publication, and so that means it's enforceable right away, but it's without first getting the public to weigh in. Now in most cases, the agency stipulates that it will alter this interim rule if, you know, when the public weighs in, it shows that it screwed up somehow. If the agency decides not to make changes to the interim rule, it will usually publish a brief final rule in the federal register, and that's the place where all of these rules exist and live and are published, confirming that decision. That's what the Trump administration has been doing here, and we have that final rule scheduled to happen, to publish, on Monday the 14th, unless it's blocked by a court.

Imani Gandy: Wait, so I want to just go back and sort of walk through this again. What you're saying here is generally an agency will issue interim final rules, it will wait for the public to comment on those rules, and then it will take into account the public's comments and it will edit the interim final rule, and then it will issue a final rule, and then that final rule will be scheduled to be issued and published and go into effect on a certain date. In this case, it's January 14th. Here you're saying the Trump administration essentially issued the final rule that was almost exactly the same as the interim final rule, and completely ignored the entire public notice and comment period, and decided fuck it, this is what we want to do. We don't care what the public thinks. We're destroying the birth control benefit. Come at me, bro.

Jessica Pieklo: Yeah. I mean I think that's a pretty fair synopsis.

Imani Gandy: Okay. I just wanted to check and make sure we all had that correct.

Jessica Pieklo: You know, and it's, I mean it's a problem because IFRs are a common rule making tool. You know, I mean it's important to have the public weigh in, but agencies do a lot of rulemaking, and IFRs are a process that makes sure that our rule making doesn't grind to a halt, so things actually get done. Like I said, they can be a way for agencies to edit rules that are in effect, which is what the administration's claiming here, but no.

Imani Gandy: Yeah, but no because the Trump rules were not a simple edit, right? The Trump rules regarding the birth control benefit dramatically re-wrote the exemptions to the contraception benefit and those are the kinds of changes that the public is supposed to have an opportunity to weigh in on, and that the agency is supposed to consider before doing anything.

Jessica Pieklo: We've talked a lot already about the public weighing in. We should probably explain for our listeners how folks can actually comment and weigh in when an agency is in rule making.

Imani Gandy: Well, usually there will be a government website set up where you can go and you can read the rule and you can just add your comment onto the website. You can send emails to the agency in question. There are oftentimes organizations that will coordinate to compile comments and send them to the agency in question. Those comments can actually make a real difference.

Jessica Pieklo: They really can.

Imani Gandy: If you have an administration that gives a shit, that is, right? During the Obama administration, for example, when they were considering changes to the birth control benefit, religious conservatives flooded the administration with comments to the point that the administration just threw up its hands and said, fuck it, we're at an impasse. They literally couldn't find a way to square the notion that employees should have access to contraceptive coverage with the religious right, who were screaming about how they didn't think that they should have to provide that coverage to their employees because they held a religious or a moral objection to doing so.

Jessica Pieklo: Right. I mean that's rulemaking in good faith.

Imani Gandy: Right. That's what you're supposed to do. Provide a rule, listen to comments, and be like, all right, we'll take into effect your comments, and then make a final rule, but that's not what the Trump administration did.

Jessica Pieklo: Nope.

Imani Gandy: What they did is they issued this IFR in October 2017, and they say it's effective immediately, but you know, if you want to comment, feel free to comment. We may take into account your comment, you know, just for funzies.

Jessica Pieklo: This is just so clearly not a good faith effort. I mean, you know, it's like incredulous to say that, but it's not a good faith effort. What happens when we have agencies kind of going rogue and doing this rule making that is not based in good faith? What remedy do we have? What agency when agencies are over-reaching? What are we supposed to do?

Imani Gandy: You've got to sue the bastards. That's exactly what some of the state attorneys generals, led by California and Pennsylvania, successfully did. They sued to block the IFRs from going into effect, in part based on the argument that the administration had violated the APA, the Administrative Procedure Act by not allowing for this crucial notice and comment period. Then, in November 2018, while that litigation over those IFRs was still proceeding, the administration essentially pulled a final rule out of its ass and decided, you know what, these final rules are going to go into effect on January 14th, and these final rules say that employers, whether they're religiously affiliated or not, whether they're for profit or not, are entitled to exempt themselves from the birth control benefit not based just on religious conviction, but on moral objections as well.

Imani Gandy: Now these final rules, these final rules which the Trump administration issued, completely ignoring the notice and comment period, are supposed to supersede the IFRs that California and Pennsylvania were successful in blocking. They are supposed to supersede those IFRs when they take effect on the 14th. Now the problem is the new final rules are slightly different and slightly worse than the interim final rules, but California and Pennsylvania and the states that are involved in that litigation sued to block the interim final rules, so now they are rushing to amend their complaints and go back to court so that they can sue to block the final rules as well, while the litigation over the interim final rules is still on-going.

Jessica Pieklo: This is chaos.

Imani Gandy: It's absolute fucking chaos.

Jessica Pieklo: What is happening?

Imani Gandy: Trying to explain it is making my brain ache, and I sort of feel bad for the listeners. I feel like we need to send them all bottles of whiskey just for making it this far into the episode, because that's how chaotic the Trump administration has made this process, and that's the zeal with which they are trying to strip people of contraceptive coverage. I mean these final rules basically maintain the provisions from the interim final rules, with relatively few changes whatsoever, despite the fact that there were 110,000 comments regarding the IFRs.

Jessica Pieklo: 110,000 comments?

Imani Gandy: 110,000 comments.

Jessica Pieklo: Holy crap. For context, listeners, that's a lot of comments on an agency rule.

Imani Gandy: I love that you said that. For context, that's a shit ton of comments.

Jessica Pieklo: Also, it's so completely confirmation that the administration was never interested in the public's comment in support of the benefit, and that these new rules are arbitrary and capricious, right?

Imani Gandy: That's exactly right. The question now is what are the courts going to do about it? What they've said so far is that the IFRs are blocked. Hopefully when California and Pennsylvania and the states that are suing in concert with them go to court again, the courts will block the final rules as well, otherwise these new final rules will go into effect and birth control coverage will be essentially decimated for everyone not living in a state that has state laws requiring contraceptive coverage.

Jessica Pieklo: We are in January, 2019, and the Trump administration may or may not successfully blow up the birth control benefit, and this is something that you and I have been talking about and yelling about and writing about and agitating about for seven damn years now, Imani. Time is a flat circle.

Imani Gandy: It's a flat circle, man, and do you know what? I really do long for the days when I was just angry with the Obama administration for kowtowing to the religious right. I yearn for those days, because at least the Obama administration was willing to listen and they were dedicated to the idea that people are entitled to contraceptive coverage. The Trump administration doesn't give a shit, and so I guess we're just going to have to wait and find out and see what the court does.

Jessica Pieklo: Listeners, you now know more about the Administrative Procedure Act than I'm guessing the entirety of the Trump administration.

Imani Gandy: So pat yourself on the back and have yourself a nice cup of coffee because you've earned it. Thank you for listening. That's going to wrap up our show for today. You can follow me on Twitter @angryblacklady. You can follow Jess on Twitter @hegemommy. You can join our Facebook group, Boom! Lawyered, and if you have further questions, want to continue the conversation, please hit us up on the tubes.

Jessica Pieklo: Please do, and Imani also, I just want to say, wrote a really great explainer of the litigation that we mentioned in this podcast, so be sure and pop over to Rewire.News for her ABLC explainer on that is really just solid. Thank you all. We will see you on the tubes.

Announcer: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer. The Rewire.News editor in chief is Jodi Jacobson.