

Boom! Lawyered: This Case Could Define Transgender Rights for a Generation

- 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 still obsessed with the Women's World Cup. 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. The Team Legal podcast is part of that mission, so a big thank you to our subscribers and a welcome to our new listeners.
- Imani Gandy: On Friday, the Ninth Circuit Court of Appeals issued an important ruling for transgender rights. The decision came in the case of Karnoski v. Trump, one of four legal challenges to the Trump administration's ban on transgender people enlisting or serving in the military. In Karnoski, the Ninth Circuit ruled that policies that target transgender people are sex-based discrimination that must meet heightened scrutiny in order to be constitutional. Friday's decision is an important win for transgender rights, but it's a qualified win. Nevertheless, it is still important, and in this episode, we're going to talk about the Karnoski case and Friday's ruling. We'll talk about heightened scrutiny, and we'll explain what it all means for trans rights moving forward.
- [music]
- Hey, Jess.
- Jessica Pieklo: Hey, Imani.
- Imani Gandy: I've got to say, it's a little bit weird having good news to share with our listeners for once, but Friday's decision is actually good news, isn't it?
- Jessica Pieklo: It is good news, and I agree, it's totally a little bizarre, not going to lie, but especially because we're talking about trans rights and the Trump administration. Now the Karnoski case is kind of complicated, and it has been a while since we covered the Trump administration's transgender military service ban. Imani, why don't you give the listeners some background to start?
- Imani Gandy: I would be happy to.
- Jessica Pieklo: It's a lot.
- Imani Gandy: I take on this responsibility, and I take it seriously. In June 2017, President Trump announced through a series of tweets, as he often does, that he was banning transgender people from serving "in any capacity in the military." He tweeted that he had made this decision after "consulting various experts" and because of the "tremendous medical costs and disruption transgender troops pose to the military."

- Jessica Pieklo: Now, I mean, we've gotten accustomed to the president announcing policy via tweet, but can I just say that I'm really looking forward to that hopefully being a thing of the past because good Christ, like announcing significant policy decisions by, I don't know, a one or two-off on Twitter.
- Imani Gandy: Right, and then going back and trying to reverse engineer the reason that you tweeted those policies, which is-
- Jessica Pieklo: I mean.
- Imani Gandy: ... what's going on here, so let's get into that a little bit. Trump announcing this transgender military service ban was yet another reversal of an Obama era policy that had extended rights to transgender folks. Under Obama, transgender service members could serve openly under a policy that he had crafted with military leaders. Now, Trump and Pence naturally hate that policy, and so they decide to upend it. The claims about transgender troops costing the military a "tremendous amount in medical care," they're fucking baseless. They're absolutely baseless. Trump made up these claims without any evidence to back them up.
- Jessica Pieklo: We've got Trump tweeting off policy and making up evidence to back that up, and that is precisely why within a couple months, we have four federal courts blocking the ban, including the Karnoski case.
- Imani Gandy: What is this Karnoski case about?
- Jessica Pieklo: Karnoski involves a challenge to the military ban brought by a handful of transgender folks who are either currently serving or want to serve in the military, as well as some advocacy groups who also want to see the ban blocked. They all claim it's unconstitutional and that it violates equal protection and due process rights.
- Imani Gandy: Trump tweets out a ban targeting trans troops or trans folks who want to serve. He gets sued, and the district court blocks the ban. What happens next?
- Jessica Pieklo: All right, Imani, this story is going to start to sound a lot like the Muslim ban case. In response to the first round of injunctions, the Trump administration goes, "Hold up, hold up. We've got a revision we're going to make."
- Imani Gandy: This is precisely what they did in the Muslim case, right?
- Jessica Pieklo: Yup.
- Imani Gandy: They issued new orders in response to federal court injunctions to try and reverse engineer legality around their clearly unlawful actions.

- Jessica Pieklo: Precisely the same thing here. In response to those injunctions, Trump orders then Secretary of Defense, James Mattis, to commission a group of military leaders to issue a study on how to implement Trump's ban. Now, Vice President Mike Pence is super eager to help Mattis out here, so Pence gets together some of his buddies to craft a report that Mattis can use to base his recommendations to Trump on.
- Imani Gandy: I for one am shocked that Mike Pence somehow opposes the rights of transgender people to serve in the military because usually he's really so good on LGBTQ rights.
- Jessica Pieklo: I think you just see him like, "Put me in coach! I'm ready to play!"
- Imani Gandy: Exactly. "This is the moment I've been waiting for! I'm ready for my close up!"
- Jessica Pieklo: Totally. Pence and his anti-trans avengers include the noted military expert Tony Perkins of the Family Research Council.
- Imani Gandy: Tony Perkins? Tony Perkins! Oh, for God sakes.
- Jessica Pieklo: He's known for his military expertise. I mean, this is a real-
- Imani Gandy: Yeah, five-star general.
- Jessica Pieklo: ... strategic thinker, you know, really.
- Imani Gandy: Five-star general, yeah, yeah.
- Jessica Pieklo: Pence and General Perkins.
- Imani Gandy: I literally just did a spit take, listeners. Literally just spit water all over my computer.
- Jessica Pieklo: I'm like picturing him like, you know, when they had ... Oh, no, never mind. I'm like picturing him in like military blues, and it's like too much. It's too much-
- Imani Gandy: It is too much.
- Jessica Pieklo: Anyway, so Pence and Perkins issue this report. The report says that having transgender service members serving openly would "erode reasonable expectations of privacy" by "blurring the line that differentiates the standards and policies applicable to men and women."
- Imani Gandy: Can I just say at the outset this sounds almost exactly like the bathroom panic that was sweeping the nation a couple of years ago where you saw Republicans trying to ban trans people from using public facilities that align with their gender identity. I also want to say that I don't understand how they can feasibly say

that having trans people serve in the military would "erode expectations of privacy" and blah, blah, blah when trans people had already been serving in the military and there were no erosion of privacy or no blurring of lines that differentiate between men and women. I mean, give me a goddamn break.

Jessica Pieklo: Oh, give me a goddamn break is a pretty good summary of the report, but it gets worse even.

Imani Gandy: Oi.

Jessica Pieklo: This Pence report alleges that by allowing trans troops to serve openly, it's going to impose "disproportionate costs by creating a negative budgetary impact and that's because of the medical needs of transgender service members." I feel like this is a good moment for (fart noise).

Imani Gandy: Exactly. I was going to say, can we pause for our regularly scheduled fart noise? Naturally, the Pence report doesn't actually give a number for that cost, you know, these disproportionate costs that trans people serving openly are going to impose, but the New England Journal of Medicine actually gave a number. In 2015, they did a study and found that a transgender service member costs the military roughly, wait for it, wait for it, 22 cents per month.

Jessica Pieklo: What?

Imani Gandy: 22 cents! That's a two and a two! 22 cents per month! That is it.

Jessica Pieklo: That's not even a quarter.

Imani Gandy: That's not even a quarter.

Jessica Pieklo: That's not even a quarter.

Imani Gandy: Like 22 cents is barely even like money at this point, you know what I mean? It's like for God sakes, people.

Jessica Pieklo: That whopping 22 cents per month is going to break the military budget according to Pence and General Perkins.

Imani Gandy: General fucking Perkins.

Jessica Pieklo: Mattis takes this report, adopts it and says, "Yup, we should. We should totally ban trans troops, but we're just going to do it a little differently than we thought at first." Instead of this blanket ban that Trump tweeted out, the Pence report said that here's what we're going to do. We're going to ban openly transgender people from enlisting in the military. We're going to discharge any current members who come out as trans unless they agree not to transition, and they throw in this like 36-month marker for that and it's just hogwash, and oh,

though, we're going to allow those folks who came out under the Obama administration to remain enlisted and with full access to health care. That's the sort of humanity pledge in this ban for them.

Imani Gandy: You can serve in the military. You can be trans and serve in the military as long as you're not trans and serving in the military is essentially what they're saying.

Jessica Pieklo: It's like four steps back from "Don't ask, don't tell."

Imani Gandy: Yeah, it really is. It really is. Trump takes this Mattis report, these Mattis recommendations, implements them, and then goes back to the federal court to say, "See, man, we're totally cool." I mean, it's like it's literally that's what we did. Like, "Sure, I tweeted out all this bigoted shit, but you know, then I had these generals, these five-star generals and Tony Perkins come up with the report, and now we're going to just implement this report, so it's fine. Why are we even here? We don't need to be in court." I mean, he essentially tells the court that the Pence report is the evidence to support the ban even though he had tweeted the ban long before the Pence report had even been commissioned. Okie dokie.

The administration also said that the fact that it was going to let those troops who came out in reliance of the policy during the Obama administration was proof that this wasn't a ban targeting transgender troops after all, right. "We grandfathered in all the trans people who came out during the Obama administration, so it's obvious that we're cool with trans people. There are clearly other forces at play here." (fart noise).

Jessica Pieklo: Yeah, (fart noise) is right. It's like thankfully though the courts basically gave the Trump administration a fart noise in response. They said, "Nice try," and they kept the injunctions in place that blocked the ban. The Trump administration did what the Trump administration has been doing this time and went directly to the Roberts' court and asked them to step in, which, hey, what do you know, Imani, the Roberts' court did.

Imani Gandy: Can I just take a moment and ask, what is the deal with Trump skipping normal appellate procedure and going crying directly to the Roberts' courts every time a district court does something that he doesn't like, right? Normally, you're supposed to go to there are these things called circuit courts of appeal that are in between district courts and the Supreme Court. The administration did the same thing in Garza, remember, that case where the government tried to prevent an undocumented minor from having an abortion. Why do they keep going crying to the Roberts' court instead of following proper procedure?

Jessica Pieklo: I think because he's a punk. I mean, I think that's basically the only. There's clearly no respect for the rule of law. We've seen that in the way they implement these things, the trans military ban being a perfect example of this, so ignore standard procedures in implementing things like this. Then when you

don't get the outcome that you want, you appeal to the people who you think are going to give it to you, in which case, that is a five to four majority on the Roberts' court. Hey, guess what happened here, Imani?

Imani Gandy: I'm going to go with the Roberts' court said, "Oh sure, why not? Let the bans go ahead."

Jessica Pieklo: Yeah, basically, the Roberts' court was like, "Meh, fuck it." In January, in a five to four decision, they issued a temporary ruling that allowed the ban to take effect while the litigation challenging it proceeds. That ruling wasn't on the merit, so the justices didn't say that that ban was constitutional or unconstitutional, just that it should be allowed to take effect while the courts sort this constitutionality of it out.

Imani Gandy: As a result of the court's order, the injunctions blocking the bans were lifted, right? That brings us back to the Karnoski case. Before we move on and talk more about the Karnoski case, we just dumped a ton of procedural background on you, and so I want to quickly recap what the procedural posture of this case is, right. Trump tweets that he wants to ban trans people from the military. A bunch of people sue him. In response, the administration did what it did in the Muslim ban and gave Trump's clearly bigoted tweets and the policy that resulted from them a very thin veneer of respectability by commissioning a report from the Secretary of Defense Mattis, who is actually not the Secretary of Defense anymore because we don't have a Secretary of Defense right now because everything is terrible.

That was an aside. Now this Mattis report is chock full of bullshit, but because the report was conducted in conjunction with the Department of Defense, Trump went ahead and skipped the normal rules that govern appellate procedure and went whining to the Supreme Court, asking the Supreme Court to accept the report as the reason for the trans ban and not his bigoted, half-drunk tweets and then begging the court to let that ban go into effect. The court says, "Eh, okay. We're not saying the ban is constitutional. We're not saying it's unconstitutional, but we're going to let it slide." All of the injunctions were lifted.

Jessica Pieklo: You know what? The Roberts' court could have done the easy thing and just said, "We're just going to be quiet," right?

Imani Gandy: Right.

Jessica Pieklo: Like, you don't have to chime in. They can say, "No, follow the goddamn procedure." They didn't, and so it causes all of this chaos, which brings us back to Karnoski.

- Imani Gandy: In April 2018, the district court in Karnoski had ruled that the Mattis policy did not substantially change Trump's initial ban and ordered the litigation against the policy to proceed.
- Jessica Pieklo: You know Trump just hated this, right?
- Imani Gandy: Yes.
- Jessica Pieklo: Like the whole idea was that the Supreme Court was supposed to put an end to it. Let them just go about the business of banning trans folks from being trans in public and just get on with it, right?
- Imani Gandy: Ugh, yeah, absolutely. As part of the ruling, the district court ruled that transgender individuals constitute a suspect class and "that the ban must satisfy the most exacting level of scrutiny if it is to survive." Now, the most exacting level of scrutiny is strict scrutiny. The district court identified four relevant factors for determining whether a classification was suspect or quasi-suspect. One, whether as a historical matter the class was subject to discrimination. Two, whether the class has a defining characteristic that frequently bears a relationship to its ability to perform or its contribution to society. Three, whether the class exhibits obvious immutable or distinguishing characteristics that define it as a discrete group. Four, whether the class is a minority or is politically powerless.
- Jessica Pieklo: Listeners, that's going to sound like a test. Now you know our courts love tests.
- Imani Gandy: Exactly, and it's got four prongs. What do you know? Lawyers and their goddamn four-prong tests.
- Jessica Pieklo: We love prongs.
- Imani Gandy: The district court noted that while "courts have consistently found that transgender people constitute at minimum a quasi-suspect class" and applying the four factors I mentioned above, the district court decided that trans people constitute a suspect class, not a quasi-suspect class, a suspect class. We'll get into the difference a little bit later.
- Jessica Pieklo: The district court issues this ruling in April, and it's a big deal because it definitely tells the Trump administration that in this court their ban is on trouble. The parties go back and forth fighting about then what the Trump administration has to disclose in discovery related to the ban, right? They're going to have to show some evidence to justify this ban, and we all know they can't do it. While that fight is happening, we've got the Roberts' court that steps in and locks everything up by saying, "The ban can take effect while the litigation proceeds." The Trump administration is like, "Hot damn, this is our opportunity," and appeals that order directly to the Ninth Circuit, and that's the ruling we got to on Friday that we first opened the show with.

- Imani Gandy: These cases are so complicated, so hopefully you've stuck with us. If you have, maybe take a break. Put a cold compress on your head.
- Jessica Pieklo: Hydrate.
- Imani Gandy: Hydrate. We're going to keep going. At the beginning of the show, I said that the Ninth Circuit decision was a qualified win for trans rights. Now, here's why it's a qualified win. First, the Ninth Circuit reversed that April 2018 decision by the district court to keep the injunction in place.
- Jessica Pieklo: Now, I know that sounds like bad news, and it kind of is because after all, right, an injunction that blocks the ban is better than an injunction not blocking the ban. That part of the Ninth Circuit's decision was expected. It's kind of housekeeping after what the Roberts' court did back in January.
- Imani Gandy: The Ninth Circuit also reversed the district court's finding that transgender people are a suspect class deserving of strict constitutional scrutiny. This also sounds like bad news, but it isn't as bad as it sounds because in reversing the strict scrutiny determination, the Ninth Circuit said that the district court's analysis was actually reasonable in concluding that trans folks should be considered a suspect class, but unfortunately, Supreme Court precedent on sex-based discrimination dictated that they treat trans people as a quasi-suspect class and not a suspect class.
- Furthermore, any laws or policies targeting trans people would be subject to heightened scrutiny. It's not as bad as it sounds because although trans people aren't a suspect class, they are a quasi-suspect class, and that's way better than the fuck it, we'll do it live review, which is what rational basis review is, which is what the government wants.
- Jessica Pieklo: Imani, that was a lot of law, like that you pulled a Jess we could say and like-
- Imani Gandy: I did pull a Jess.
- Jessica Pieklo: ... just put it all out there. Let's unpack some of the constitutional talk here. We've got suspect classes and levels of scrutiny. Let's break that down for the listeners.
- Imani Gandy: Oh, definitely. This is my turn to be Jess. My turn to put my reading glasses up on my nose, straighten my tie a little bit. All right, let's do this. One of the major issues when it comes to trans rights is whether or not trans people are a suspect class for purposes of equal protection analysis.
- Jessica Pieklo: A suspect class is what exactly?
- Imani Gandy: A suspect class is a discreet and insular minority, Jess. Gosh, everybody knows that.

- Jessica Pieklo: I mean, Imani, you know goddamn well that people who had much better sense than you and I not to go to law school probably don't know what a discreet and insular minority means.
- Imani Gandy: I know, I was just being a pain in the ass. I like being a pain in the ass sometimes.
- Jessica Pieklo: It's good, it's good.
- Imani Gandy: Okay. The Supreme Court first articulated this concept of a suspect class back in the 1930s. The court developed these hallmark characteristics to determine which marginalized people, also known as "discreet and insular minorities," also too known as "suspect classes," the court developed hallmark characteristics to determine which of these groups require special constitutional protection against laws that discriminate against them.
- Jessica Pieklo: Is it fair to say that it's basically vulnerable people who require constitutional protection from tyrannical laws?
- Imani Gandy: It is absolutely fair to say that. These are groups that constitute a small percentage of the population and therefore lack the political power to oppose tyranny inflicted upon them by groups with larger numbers. These are groups that have been historically been subjected to discrimination. These are groups with immutable characteristics, which is a term that the court coined in order to describe traits like race and gender.
- Jessica Pieklo: What are some examples of suspect classes, and how does this whole issue of heightened scrutiny fit in, Imani?
- Imani Gandy: Black people for one are a suspect class. The Supreme Court has designated Black people a suspect class. Laws that discriminate against Black people rarely pass constitutional muster because they are subject to the highest level of scrutiny.
- Jessica Pieklo: Strict scrutiny, right?
- Imani Gandy: Precisely. That means that a particular law must be "narrowly tailored" to promote "a compelling government interest."
- Jessica Pieklo: That's a really difficult hurdle to pass.
- Imani Gandy: It's a very, very difficult hurdle to pass. If a government, state government, federal government, whatever passes a law that targets Black people for different treatment, then the government must have a damn good reason why. Even then, the court is going to start from the presumption that the government's reason is not good enough.
- Jessica Pieklo: The government's basically almost always going to lose in those scenarios, okay.

- Imani Gandy: Right.
- Jessica Pieklo: That's race. What about sex? What about like discrimination against women, for example?
- Imani Gandy: Women are considered a quasi-suspect class. Black people are a suspect class. Women are a quasi-suspect class. The court has determined that laws targeting women for unequal treatment may pass constitutional muster if the laws are substantially related to a "important government interest."
- Jessica Pieklo: ... a constitutional complaint near you.
- Imani Gandy: Pretty soon we're just going to be tweeting complaints. We're not even going to file them in court anymore. What I meant to say is that the court determined that laws targeting women for unequal treatment may pass constitutional muster if the laws are substantially related to a "important government interest."
- Jessica Pieklo: Those are the two biggies, race and sex. What about sexual orientation and gender identity though?
- Imani Gandy: The answer to that is who the fuck knows. Lesbian people, gay people, bisexual people are essentially in the same boat as trans people, and so we're going to focus on trans people in this episode so I don't end up going off on a rant about LGB folks because we've done that before. You should go back and either listen to those episodes or read the shit that we've written about it. I mean, it's not shit. It's actually good stuff, but you know. Shit in a colloquial sense.
- Jessica Pieklo: Right.
- Imani Gandy: When it comes to transgender people, most courts have refused to call them a suspect or a quasi-suspect class. This leaves transgender people twisting in the legal wind and permits laws that target them to be examined using rational basis review. That's the meh, fuck it, we'll do it live review, and that rarely results in legislation being struck down.
- Jessica Pieklo: Of course, trans people are a discreet and insular minority.
- Imani Gandy: Of course they are!
- Jessica Pieklo: This is, duh.
- Imani Gandy: Fucking ridiculous.

- Jessica Pieklo: Duh. Trans people are a discreet, insular minority. It is so ordered.
- Imani Gandy: It is known.
- Jessica Pieklo: I mean, sincerely though, we've got the suicide attempt rate for transgender or gender nonconforming people in the United States is 41%, Imani. That's compared to 4.6% of the overall population. The unemployment rate in the trans community is double what it is for the country as a whole. Violence against trans people, particularly trans women of color, is staggering, as are poverty levels.
- A 2011 report issued by the National Center for Transgender Equality found that 78% of students, 78% of students surveyed who identified as transgender or gender nonconforming report being harassed while in grades kindergarten through 12. These same students reported high rates of assault too. 35% of them reported physical assault, and 12% reported sexual assault. Meanwhile, 15% of the transgender and gender nonconforming students surveyed dropped out of school. Ugh.
- Imani Gandy: These statistics are terrible. They are alarming.
- Jessica Pieklo: It breaks my heart.
- Imani Gandy: Really, it's horrifying. It's sad, and it is clear that trans people are a target for discrimination. I mean, just look at what the Trump administration is doing with this ban, this trans troop ban that we're talking about. We've got Republican-led legislatures across the country introducing and enacting laws that target trans people, like the bathroom discrimination laws that we talked about earlier. I mean, it is irrefutable that trans people require some sort of heightened scrutiny when it comes to analyzing laws that target them. They deserve the same constitutional protection that is afforded to groups that the Supreme Court has already designated suspect or quasi-suspect classes.
- Jessica Pieklo: They sure as hell do, so it's a big deal, a real big deal that the Ninth Circuit held that the discrimination on the basis of transgender status is sex-based discrimination and therefore subject to heightened scrutiny.
- Imani Gandy: The Ninth Circuit Court of Appeals basically just became the first federal appeals court in the country to say that trans people are actually a quasi-suspect class. The court didn't say it outright, but that's the logical conclusion, isn't is, Jess?
- Jessica Pieklo: It is, and it's a conclusion that's not just limited to the trans military ban case either, which is also why it's such a big deal. The Ninth Circuit decision on heightened scrutiny applies to all of the states covered by the Ninth Circuit and any anti-trans laws they may have.

- Imani Gandy: I want to get back to explaining why it's a logical conclusion. It's a logical conclusion because courts only apply heightened scrutiny to quasi-suspect classes or suspect classes. The very fact that the Ninth Circuit said that heightened scrutiny should be applicable to trans people means that the Ninth Circuit believes that these groups, transgender people, are either quasi-suspect or suspect. We're not just sure which of the two.
- Jessica Pieklo: Lower courts are going to have to apply that decision, right?
- Imani Gandy: Absolutely, absolutely. For example, the ACLU is challenging an Arizona policy that blocks transition-related care from state employee health insurance coverage. Now, this Karnoski decision definitely helps that case. Other states in the Ninth Circuit, Washington, Oregon, California, Idaho, Nevada, Montana, these are all the states that comprise the Ninth Circuit, trans people in those states have a real good decision that makes it clear lawmakers cannot just target them and then think the courts are going to look the other way.
- Jessica Pieklo: Right, it's wonderful. It is like scream it from the mountaintops wonderful.
- Imani Gandy: Absolutely it is.
- Jessica Pieklo: The Ninth Circuit sends the Karnoski case back to the lower court on Friday and says, "Take another look, and use this heightened scrutiny standard," which means now that the Trump administration is going to have to show this exceedingly persuasive justification for the ban, and that justification can't rely on stereotypes or unsupported assumptions about trans troops. That basically tosses out the entire Pence report. I'm also pretty confident that when the district court takes another look, it'll issue another injunction and declare the ban unconstitutional because it is.
- Imani Gandy: That means the Trump administration is going to appeal, and we're probably looking at another Supreme Court fight, don't you think?
- Jessica Pieklo: I do, but we've got a long time before that happens at least, which I think is good news. However, I have to do it.
- Imani Gandy: There's always a however.
- Jessica Pieklo: This is Jess. This is why I'm super fun at parties. It's great, however.
- Imani Gandy: Dun, dun, duh.
- Jessica Pieklo: We know the Roberts' court already has one transgender case on the calendar for next term, right? Imani, that's the Harris Funeral Homes case where the court is going to determine whether or not your boss can fire you for being trans. If the Roberts' court were to rule that discriminating against somebody

for being trans isn't sex-based discrimination, then the Karnoski ruling would be undermined.

Imani Gandy: That hasn't happened yet.

Jessica Pieklo: Hasn't happened yet.

Imani Gandy: It might never happen. As pessimistic as we can be about the Roberts' court, the truth is, public opinion favors trans rights.

Jessica Pieklo: It does.

Imani Gandy: Just this week for example, Massachusetts Governor Charlie Baker, who is a Republican, announced his opposition to the ban, and polling released last week shows an increasing number of Republicans oppose Trump's transgender military ban. That also includes Secretary of the Army, Mark Esper. He's going to become acting Defense Secretary now that Pat Shanahan dropped out of the confirmation process. Unlike Pat Shanahan, Mark Esper is on the record stating that transgender troops have no impact on unit cohesion, and that's one of the reasons that the Trump administration has used to justify the ban.

This is good news. It's kind of bad news, but it's mostly good news because public opinion favors trans rights. There are Republicans out there who oppose this ban, and once again, we're looking to Roberts to determine whether or not he gives a shit about his legacy, he gives a shit about the sort of legitimacy of the court. Is Roberts going to be that guy? We really hope that Roberts isn't going to be that guy. Excuse me, Mr. Chief Justice, please don't be that guy.

Jessica Pieklo: Paging Mr. Chief Justice, don't be that guy. Seriously though, I mean, there are elements of the fight that feel very much like the fight over Prop 8 and also the fight over health care reform, so it could really go either way. It's in Roberts' hands, which means the fight at the Supreme Court ain't over till it's over, and until then, and we've got a ways then, we still have this great decision from the Ninth Circuit that makes it clear that laws that target transgender folks must survive heightened constitutional scrutiny. That decision is going to reach beyond the transgender military service ban and is a real big deal, a real big deal for trans rights.

Imani Gandy: It's a huge deal. We're in a moment where trans rights are under siege, but there is a light at the end of the tunnel. We are going to end this episode by saying keep your eye on that light. There's some positivity, positivity and light. On that note, we're going to end the episode. We're going to end the episode on positivity and light.

Jessica Pieklo: Let's close before we fuck it up.

Imani Gandy: Okay, yeah, I'm going to close, I'm going to close okay. I'm on Twitter. You can follow me @angryblacklady. Jess is also on Twitter. She's @hegemommy, H-E-G-E-M-O-M-M-Y. Follow Rewire.News @rewire_news. Join us on Facebook, Boom! Lawyered. Answer the questions. We'll let you write in. See you on the tubes.

Jessica Pieklo: Whew, we did it.

Imani Gandy: We did it!

Jessica Pieklo: We stayed positive! See you on the tubes!

Imani Gandy: Whew!

Jessica Pieklo: 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, and the Rewire.News editor-in-chief is Jodi Jacobson.