

Boom! Lawyered 209: Pardon Me?

- 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 seriously sick of pollen. Why is it covering everything? Why is it in my face? Why is it making my eyes burn? Why is it making my nose runny? I'm Imani Gandy.
- Jess 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. And the team legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
- CNN: Is it legal for a president to pardon himself?
- CNN GUEST: Well, we don't know. No President's ever tried, so it hasn't gone to court, hasn't been decided, but you can certainly try.
- Imani Gandy: So everybody is talking about pardons, right? The questions are flying fast and furious in the media can Trump pardoned himself?
- Jess Pieklo: Can trump pardon Ivanka?
- Imani Gandy: Can trump pardoned Jared?
- Jess Pieklo: What about Michael Flynn, can he pardon him?
- Imani Gandy: What about Paul Manafort, can he pardon him?
- Jess Pieklo: Ooh Michael Cohen, how about him?
- Imani Gandy: Oh God, I hope he does not pardon Michael Cohen. we got to stop saying pardon because well, we're not going to stop saying pardon. We're actually going to say the word pardon a lot because that's what we're talking about today, is pardons, and what the hell is going to happen if any or all of these pardons happen?
- Jess Pieklo: This episode we're going to talk about the brief history of pardons and how we got into this mess to begin with. I'll give you a spoiler alert. It's all Gerald Ford's fault.
- Imani Gandy: Gerald Ford, did you say?
- Jess Pieklo: I did. We're also gonna talk about some of the worst case scenarios if and when Trump tries this nonsense and also some possible silver linings that might be out there because believe it or not, there are some, a couple, just a few.
- Imani Gandy: I don't believe it. I don't.
- Jess Pieklo: We do, we have just a few.

Imani Gandy: All right, I'll trust you Jess.

Jess Pieklo: Okay, Imani, so let's dive in with a brief history of pardons. What is the deal with pardons?

Imani Gandy: What is the deal with pardons? That'd be a great Seinfeld. So pardons are a vestige from the monarchy days, the olden days when the king could just overturn any person's sentence because he was the king and he goddamn well felt like it. The founders of this great nation, who are a bunch of racist slave holders, but we don't have to talk about that now...

George Washington and a bunch of all these other white dudes in wigs and hats, thought that it would be a ... wigs and hats, wigs and tights! Well, they also wore hats, but wigs and hats and tights. They thought that it would be a really good idea to use the pardon as an act of mercy. It was supposed to be something that was done that would benefit the public and the public welfare.

Jess Pieklo: So the idea was then from the beginning to sort of smooth over tensions with people like insurrectionists and folks who were hostile to the revolutionaries, not necessarily straight political pardons, right?

Imani Gandy: Exactly. You know, when this country was first founded, there was a lot of uprisings, rebellions, riots, if you will. And the government kind of didn't know what to do with these people because the country was in its nascence and they start tossing people in jail willy-nilly would have probably made the great American experiment, experiment a disaster before it even got started. Slavery aside. So guess what the first use of the pardon power was Jessica? It has to do with one of my favorite things.

Jess Pieklo: Oh, okay. So one of your favorite things. What do you like? You don't like people. But you do like Scotch.

Imani Gandy: I do. I don't like people and I do love Scotch and I oftentimes drink scotch because I don't like people. So the first use of the pardon was in connection with something called the whiskey rebellion. The whiskey rebellion. It's like the best rebellion I've ever heard of.

Jess Pieklo: Seriously. What's the whiskey rebellion? That sounds amazing.

Imani Gandy: Okay, so back in 1794, a bunch of whiskey producing farmers in Pennsylvania were a bit pissed off that there was a federal tax on distilled spirits. And so they did what angry white folks were wont to do at the time they rioted.

Jess Pieklo: Well, okay, not at the time. Angry White folks are still wont to riot.

Imani Gandy: That's true. But at least at the time it was like over taxes. Now it's because if like the Celtics lose. But George Washington wasn't really in the mood to deal with

an uprising, so he grabbed 13,000 of his best soldiers and marched his ass into western Pennsylvania where they quelled the rebellion, arrested a bunch of people.

Two people were convicted of treason and sent to death. Big thing, right? So in 1795, he decided to pardon the two people who were convicted of treason and sentenced to death, in order to avoid a bigger mess. In order to avoid more insurrection and to just sort of pave the way for peace and prosperity.

So that really was the point of the pardon. He was afraid that if he sentenced these people to death, people would riot some more, and he didn't want that. So in the interest of the public welfare, he pardoned them. It wasn't to protect his own personal interests and that's what the pardon was for back in the day, public welfare.

Jess Pieklo: So it's really interesting to me that we start with this vestige of the monarchy and it travels down through our time as colonies. And then we enshrined in the Constitution, right? Because that's where the president's pardon power comes from, and it's pretty absolute. I mean, there are very few limits on it. And in fact, the Supreme Court has even said that if you get a pardon, that usually means there's some sort of indicia or admission of guilt.

Imani Gandy: Right? So in 1833, in order to continue on with our brief history of the pardon, Chief Justice Marshall, John Marshall, he was essentially the granddaddy of the Supreme Court, the granddaddy of the Constitution. He's basically the guy that said, "You know what? The courts are going to have judicial review over all the shit that Congress does."

It was a big deal at the time because congress was like, "Say what? We don't want judicial review. We want to do what we want to do."

Jess Pieklo: It is a big deal and in fact, this is just a little sidebar, but because you brought it up, we gotta mention that conservatives today will still go after that decision, Marbury versus Madison and say, "Nope, no judicial review by the courts." But that's an aside, go on.

Imani Gandy: Yes. So-

Jess Pieklo: I geek out whenever we talk about that stuff, because the conservatives hold onto this stuff and like they don't let it go.

Imani Gandy: Yes, they really don't. They're not wanting to let shit go, that's for sure. So just as Chief Justice Marshall, would not have been happy with the way that pardons have been used over the last 40 years.

Jess Pieklo: Why not?

Imani Gandy: Well, he said the pardons were an act of grace, right? And that they were an act of grace that we're only valid when they were accepted. So as you said earlier, there was some sort of admission of guilt and by accepting the pardon, you were sort of saying, "Yes, I did this shit, probably shouldn't have done it. Excuse me, will you pardon me?" And they'll say, "Yeah, we're going to pardon you, not because I want to, and it's in my presidential interest -- because it's in the public welfare." It's an act of grace of mercy. It's godlike. Well, that's not how it is now.

Jess Pieklo: No. So think about something that is an act of god and full of grace and now being used in the public conversation about whether or not we're going to, I don't know, pardon somebody for paying hush money to a mistress or whatever we're talking about. I mean we've got a complete aberration of norms with pardon power, which, shocking with the Trump administration, is exactly how they do business with that, right?

Imani Gandy: That's exactly right. So now that we've given you this tight brief history of the pardon, we are going to move on and talk about one of the biggest pardon that is probably on your mind as we're talking about pardons -- Watergate.

Jess Pieklo: Imani, that was a lovely brief history of the pardon power. Thank you.

Imani Gandy: Well, thank you, thank you very much.

Jess Pieklo: So we have this snapshot, and it's like everything was going fine. Pardons, I mean we had the whiskey rebellion. That seemed to be a pretty appropriate use of the pardon power, keep the peace. But then we get Nixon and Gerald Ford and Watergate, and shit changes.

Imani Gandy: Shit really hit the fan. Let's listen to this clip.

FORD: Now therefore, I Gerald R Ford, the President of the United States-

Imani Gandy: Oh my God, I can't listen to this clip.

Jess Pieklo: Stop, stop the clip.

Imani Gandy: Why, Why? I think I fell asleep. I fell asleep and turned 45 and I'm only 43 right now. Like what is happening? Why is he talking so slow?

Jess Pieklo: I Gerald R Ford-

Imani Gandy: No, it's more like, "Now Therefore, I Gerald R Ford, President of the United States, pursuant to the pardon power conferred upon me by article two, section two of the Constitution, have granted and by these presents, do grant a full free and the absolute pardon unto Richard Nixon for all offenses against the United States, which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20th, 1969 through August 9th, 1974.

Jess Pieklo: Oh my God. There's so much there, okay, aside from the fact that Ford sounds like he wrote in red this while on quaaludes because it was the 70s.

Imani Gandy: It was the 70s, everybody was on quaaludes then.

Jess Pieklo: If it was the 80s, it would have been like, "I Gerald Ford, President of the United States, pursuant to the pardon power conferred upon me by article two, section two ..."

Imani Gandy: Because everyone was doing cocaine. But all mocking aside, all mocking aside.

Jess Pieklo: There's so much to impact with this pardon, because it's really huge. So first of all, it's the first time we have in our history that we've got a president being pardoned during an active criminal investigation. When Ford issued this, Nixon had resigned and was under criminal investigation, potentially indicted, like, this was a big deal.

Imani Gandy: It was a huge deal and especially because he didn't consult with the attorney general, like not even a little bit. He wasn't even like, "Hey, you think is a good idea?" Nah, son? No, nothing. There was no consultation, which is very bizarre because seeing this it's like an issue of the law and you have an attorney general who is the lawyer for the United States seems to me you ought to check in.

Jess Pieklo: Especially on something that also has so much political backlash attached to it. I mean there was no way, in fact, they knew it was going to be a big deal. So why you would not get at least like thumbs up from your AG? I have no idea.

But I mean, look at the language, right? The language is so broad. It completely suggests that this was something that they were like, fuck it. We're just gonna do it and get it over with, right? Like what all is Nixon pardoned for? Basically everything he ever did. I don't know. Like where's the limit?

Imani Gandy: Yeah, I mean the pardon itself says anything he did between 1969 and 1974, but who knows what else he was doing during that time. I mean, obviously it seems like the pardon should have been tailored to the Watergate break in, but I don't know, maybe he was kidnapping babies and maybe he got pardoned for kidnapping a bunch of babies and we never know about it. Maybe Nixon is a baby kidnapper. We never found out because of Gerald Ford.

Jess Pieklo: I mean there may be a baby snatched that we will never know because it was shut down, the pardon shut down the investigation and also it blew the norm, because Nixon ever gave any admission of guilt or even a "whoops." He just said, "Okay, like some things I did during this time period. I get the green light for light it," like what?

Imani Gandy: Yes, it's nuts. And so the fact that this investigation was shut down should seem very familiar to me, to you, to all of us, because it actually sets the stage for what could play out with Trump, right? If there is some pardon action with respect to

Trump and the investigation is shut down as a result, we may never know the extent to which Russia was involved in our elections, the extent to which I don't know, prostitutes were peeing on him because that's really the one thing that I want to come out. I want to see the pee tape.

Jess Pieklo: Imani is very, very into this pee tape.

Imani Gandy: Pee tape, Pee tape, pee tape. I want to pee-lieve, I want to pee-lieve, but anyway, so let's get into some of the reasons that Ford decided to pardon Nixon.

Jess Pieklo: Okay, well, I mean, he gave a bunch of reasons, right? Like this Watergate investigation had gone on and it was ripping the country apart and it was time to move on, but then, he gave this gem.

FORD: I do believe, with all my heart and mind and spirit that I, not as president, but as a humble servant of God, will receive justice without mercy if I've failed to show mercy.

Jess Pieklo: Wait, wait, wait did he just say that he was pardoning Nixon so that he could get into heaven?

Imani Gandy: He sure did.

Jess Pieklo: What, what? That doesn't even make any sense.

Imani Gandy: That literally doesn't make sense and I have a serious problem with that. So he's pardoning Nixon not to heal the nation, not as an act of public welfare, not even as an act of mercy or an act of grace directed towards Nixon. He is trying to play the Jesus lottery and hope that he's going to get into heaven by pardoning some dude who was involved in massive corruption. How does that make sense?

Jess Pieklo: I don't know. There's been some speculation that Ford, I almost said Pence, but you'll see where my head is, that Ford and Nixon had some sort of side agreement, right? That Nixon would resign. Ford would give him a pardon, all would be good. And given the language and the mealy-mouthed reasons, I think that there's probably some credence to that.

But also I'm just pissed that he really blew up this norm and we had this ongoing criminal investigation that was a really big deal. I mean, the break in was a huge deal. Everything that was going around about, the press as enemies of the state and wire-tapping your political enemies like this was all a really big deal. And the Republicans were just like, "Nope, all right, we're all done, moving on." And like, no, that's not how it works.

Imani Gandy: Certainly, what you just mentioned about the press being the enemy of the state, rings true right now considering Trump seems to be at war with the press and trying to convince all of his supporters that the press is illegitimate. But again, another topic for another time.

So why don't we talk about what actually happened after Ford used this pardon, and what other political, personal pardons this particular pardon started, fomented if you will.

Jess Pieklo: Right. So from this political pardon roll several others of ill repute.

I mean, that some of them are just amazing, you know, like George H. W Bush, pardoning Caspar Weinberger with regard to the Iran Contra affair. Because I mean, again, according to some critics, he didn't want to have to testify and implicate himself and it's super nice now that Oliver North is the president of the NRA also.

Imani Gandy: So for those of you who don't know who Caspar Weinberger is or even what Iran contra is, Google it.

You should really google it because it was quite the scandal. I remember being a kid and having my TV interrupted because of the Oliver North trials and once you read about it, you're going to be real irritated that he's now the president of the NRA. But, an even more salacious pardon was Bill Clinton who pardoned his brother Roger Clinton after Roger was busted for cocaine.

Jess Pieklo: I know, but I kind of love that pardon.

Imani Gandy: That's not the kind of pardon John Marshall had in mind when he talked about public welfare.

Jess Pieklo: No, no. Getting your brother off a coke charge, probably not what the founding fathers had in mind.

Imani Gandy: Exactly, exactly.

Jess Pieklo: God bless though. And then there was the other George Bush, George W. Bush, he commuted Scooter Libby's sentence. That's a little different than a pardon commuting a sentence is when you've already got a conviction and you're doing time and then you say, nope, you get out of jail now. But again, this is all getting your buddies out of jail, literally.

Imani Gandy: That was a pretty, I mean, for those of you who don't remember, Scooter Libby basically outed a CIA agent, Valerie Plame, and it was a huge scandal. And George Bush was like, "You're my buddy, I'm going to get you out of prison." That's not what the pardon power was supposed to be for, it's really not. But given this history that has occurred over the last 40 years, it really wouldn't be that uncommon for Trump to pardon Ivanka or Jared or Flynn or any of these other corrupt asshats. But what about pardoning himself?

Jess Pieklo: Well, now that would be like the worst case scenario. We've given you this history of how the pardon became a political tool. And so I guess we'll go

through that nightmare scenario of Trump pardoning himself and a couple others. And also the possibility that we do have a limit on the pardon power, maybe potentially, hopefully when we come back.

Imani Gandy: So we talked to you about how we got here, how we got to this point where we're actually wondering whether or not Trump can pardon himself and excuse himself from any consequences for all of the outrageous corruption that has been going on. Because let's face it, Donald J Trump has been involved in some seriously shady shit over the years. He's got, for example, suspected ties to the Russian mafia.

Jess Pieklo: Some global money laundering in his background.

Imani Gandy: Oh, that's fun. What about hush payments to women like Stormy Daniels?

Jess Pieklo: Some potential campaign finance violations right there.

Imani Gandy: There are some rape and sexual assault charges that are out there. There was a lawsuit brought by a teenager that was dropped, ultimately, but what happened there, we may never know.

Jess Pieklo: Those emoluments cases too, right? All that bribery?

Imani Gandy: Yes, all the bribery, all the foreign dignitaries that are staying at the Trump hotel properties. This is all some seriously shady shit and-

Jess Pieklo: A little light treason comes to mind.

Imani Gandy: I think I may have committed a little like treason. I like Trump as the George Bluth of Presidents of the United States. But here's the thing, if Trump pardons himself, then he gets away with all of that, right? I mean he could possibly get away with all of that. And what will happen then? What will happen then, Jessica?

Jess Pieklo: Well, chaos, basically. So right now it's an open question it's to whether or not Trump has the power to pardon himself. All the legal scholars say, "We don't have any idea if he does or not." And what we do know is that Trump is willing to push any boundaries. So he would be really quite okay, I think, giving us a test case.

So what would that look like? Well, God, I don't know, who could sue under that, right? Who would have standing to sue?

Imani Gandy: I don't even know. I don't know who it's to have standing to sue. Maybe Democrats, Senate Democrats, Congressional Democrats. I can't imagine that a private citizen would have standing to sue.

Jess Pieklo: I mean, I don't know, so if we figure out that there's an avenue to challenge that, then we have to contend with the fact that we have a bunch of crony judges on the bench now and forever thanks to Republicans and Trump, and Democrats not being able to stop them. And so then we have to deal with the Supreme Court and oh my God, Imani, what if they were to say, this is totally cool?

Imani Gandy: Then we're all totally fucked. I mean if they say it's totally cool. First of all, if they say it's totally cool, and the originalists on the Court go along with it, I'm going to have to call up the Zombie Judge Marshall and be like, "Are you serious? Because this is not what Chief Justice Marshall would have wanted the pardon to be used for."

So I mean the courts could just say, "Eh, whatever." Trump gets away with everything. Maybe Pence becomes president because he's now the vice president and that's the line of succession, and that's it. We just never know what happened. And all of the shit, all the money that he's made, all the kleptocracy will have been a stamp of approval by the Supreme Court.

Jess Pieklo: And that really is the worst case scenario, and that requires a breakdown of a whole bunch of institutional norms to get there. So hopefully we're not there. It's an open question though. All right. So then what if Pence offers to pardon Trump? If he resigns, kind of like our Watergate scenario. What happens then?

Imani Gandy: Same thing, really. I mean Pence probably ... you know, they make a side handshake deal. Pence says, "You step down, I'll step up. I'll pardon you of everything. You could go off and live in one of your Trump hotels in the Philippines and never be seen or heard from again," like that would ever happen. Trump would never shut up about it.

But the point is that there are machinations that could go on, that could end up with Trump being completely absolved of everything that he's done. And then we've got this Christian nut job in Mike Pence, this anti-gay, anti-human person in the White House. And is that a better situation than where we are now? Not really.

Jess Pieklo: Right. And I mean, one of the things that comes to mind for me is what would the scope of that pardon look like? Right? We saw Ford's pardon of Nixon was super broad. The only thing that they were hemmed in by were some dates, like what if Trump or what if Trump. What if Pence just didn't put any dates there. What if he just said, "Yo, you're good. We're cool." Then I mean at what point are we talking about Pence's power to just change the pardon and even more so?

Imani Gandy: Right. And I would imagine that Trump would actually push for that. You know, he's like, "If I were to resign then you're going to have to pardon me for all of the shit I've done, like up until now because, technically, a lot of the allegations of money laundering and ties to the mafia, they extend back several years.

But to talk to people who are in the know about this thing, it may be that this push to have Trump be president, started back then with those random Russian mafia ties in the 80s and whatever. So who knows?

Jess Pieklo: Right. And depending on what that scope looks like and depending on how that's written, you know, then it might be a way for the Trump-Pence administration to avoid the courts. Right. You don't get a legal challenge then. You're not worried about the judges stepping in. You just need your number two to do their job as a number two.

Imani Gandy: Yes. Yes. It's all rather depressing.

Jess Pieklo: Oh God, that's depressing. Let's give some hope. We do have some hope. Let's give in to that because this is going to make me drink.

Imani Gandy: Whiskey hopefully. We could rebel about it. So if there is some hope, SCOTUS might do the right thing and draw a line. They might say, "You know what? We're not going to do this." They could nullify the pardon. They could finally set some constitutional standards on the limit of the pardon. That could happen.

Jess Pieklo: It really could. And I mean, I'm usually pretty cynical on the Supreme Court, but even someone like Chief Justice Roberts here, I'd have to think that with his legacy on the line, he wouldn't want to go down in the history books as the guy who gave Trump the green light and brought an end to our democracy. That's a pretty damning headline.

Imani Gandy: Yes, it's pretty bad. "Roberts kills democracy." I don't think he wants that. No, he really doesn't. Also, Robert Mueller is a pretty smart guy, and I would suspect that if he's got Trump on the ropes, he probably also has Pence on the ropes. Right? So I'm going to put a little bit of faith in Bob Mueller, because he seems like he knows what the fuck he's doing.

Jess Pieklo: Yes, he's really ... I mean, he's got this long history of going after crime syndicates and really that's all this administration is, is a crime syndicate and that's how he's treated much of this investigation. You know, one of the things I love is that he's got a guy on his side, a preemptive pardon guy. So there's an attorney that his whole job on the Muller investigation team is to figure out how to get around any pardon shenanigans that the Trump administration might pull. And I love that.

Imani Gandy: Exactly. And, finally, the final point is that there are state crimes that Trump could be charged with. So even if he does pardon himself, the state of New York for example, could bring charges with respect to whatever and who knows what's going to happen now with Schneiderman turning out to be a rapey asshole. But there is that. And so don't lose hope.

Maybe there's a bunch of crimes that he's committed, in a bunch of states and they'll all sue them all at once. And he'll end up having to like travel from state to

state prison. And I don't think state prisons are as nice as federal prison. So maybe he'll go into one of the nasty prisons.

Jess Pieklo: Oh my gosh. I just had an image of Trump in an orange jumpsuit and handcuffs, like in one of those white jail vans, not even the nice prison vans, but like the real rickety white ones with the chicken wire on it. That would be a little too much to ask for.

Imani Gandy: Too much to ask for.

Jess Pieklo: But if you bring up a really good point that the presidential pardon power only extends to federal crimes. So while Schneiderman man, was that a face plant. I have faith in the office though. I am sure that there are a bunch of dedicated, solid civil servants in there who are not going to let this go.

Imani Gandy: Absolutely.

Jess Pieklo: So it's only kind of terrible, right? Like there's a lot that could go wrong, but there is some possibility that it could kind of go right, too.

Imani Gandy: It's the Princess Bride. "He's not all the way dead, it's just dead." It's not all the way terrible. It's just mostly terrible. So we've talked about the worst case scenarios in this section and yes, Trump has been involved in a lot of shady shit and yes, we pretty much all of us would love to see him perp-walked into a courtroom and then probably into a jail. That may not happen.

It depends on SCOTUS, it depends on what kinds of crimes he's charged with, but keep the faith. There may be a way for us to get him out of the office, one, and into a prison, two.

Jess Pieklo: Thank you all so much for listening. This is our only episode for the month of May. Life is a little bananas. We're traveling, we're on the road and we're gearing up for Supreme Court decisions coming in June, where you're going to hear a lot from us.

Imani Gandy: Thank you for listening, and tell your friends.

Boom! Lawyered is created and hosted by Imani Gandy and Jessica Mason Pieklo. The show is produced by Nora Hurley, our executive producer is Marc Faletti, and Rewire's editor-in-chief is Jodi Jacobson.