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TRUMP, LAWYER REGULATION, AND THE INSTITUTIONAL DOUBLE BIND

Benjamin H. Barton *

I. THE TRUMP AND BANNON ATTACKS ON THE LEGITIMACY OF INSTITUTIONS ARE STRATEGIC AND SEEM TO BE WORKING (AT LEAST FOR TRUE BELIEVERS)

On November 15, 2021, former Trump advisor Steve Bannon turned himself in to be arraigned for two misdemeanor counts of contempt of Congress. To many (and especially foes of the Trump administration), this was a long overdue triumph.¹ An op-ed cowritten by Harvard's Laurence Tribe claimed that the arrest showed "Attorney General Merrick Garland's commitment to restoring the rule of law" by "demonstrating that severe sanctions follow the flouting of subpoenas, whether from Congress or the courts."² *Mother Jones* called the indictments "a big boost for the Select Committee's investigation."³ And why not? Bannon is and was a central figure in Trump's orbit.⁴ Bannon, like Trump, has long thumbed his nose at

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1. Laurence H. Tribe et al., *Trump Advisor Steve Bannon's Indictment and Arrest Are a Win for the Rule of Law*, NBC NEWS (Nov. 15, 2021, 3:32 PM), <https://www.nbcnews.com/think/opinion/trump-adviser-steve-bannon-s-indictment-arrest-win-rule-law-ncna1283915> [<https://perma.cc/6QRR-W5WN>].

2. *Id.*

3. Abigail Weinberg & Dan Friedman, *Steve Bannon Was Just Indicted on Two Counts of Contempt of Congress*, MOTHER JONES (Nov. 12, 2021), <https://www.motherjones.com/politics/2021/11/steve-bannon-contempt-congress-charges-indictment-trump-jan-6/>. The "Select Committee to Investigate the January 6th Attack on the United States Capital" is the name of the House Committee at issue. See SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, <https://january6th.house.gov> [<https://perma.cc/B2UG-SNKZ>].

4. Brian Bennett, *'You Got to Be the Last Guy He Talks To.'* *The Rise and Fall of Trump Adviser Steve Bannon*, TIME (Aug. 21, 2020, 11:34 AM), <https://time.com/5882072/rise-and-fall-of-steve-bannon/> [<https://perma.cc/5XAL-FEFG>].

legal proceedings.⁵ Bannon's stated reason for ignoring the subpoena from the House Select Committee, that his communications were protected by executive privilege despite leaving employment at the White House years earlier in 2017, likewise struck many as frivolous and borderline disrespectful.⁶

So, Bannon's arrest must have been seen as a home run for Democrats and a PR disaster and shameful moment for Bannon, correct? After all, Bannon faces two different misdemeanor charges, and each carries a maximum sentence of a year in jail and up to \$1,000 in fines.⁷

That thinking is *so* pre-Trump era. To the contrary, Salon argued "Steve Bannon's criminal indictment is the best thing that's ever happened to him."⁸ Similarly, MSNBC fretted that "Steve Bannon's indictment is a gift to his movement."⁹ Bannon surely agreed. He arranged to have his arrest and subsequent unrepentant comments livestreamed on Gettr, a right-wing social media website.¹⁰ He also posted the video of his remarks to his website *War Room*, where he hosts a popular daily podcast.¹¹ On the same day he was arrested, Bannon argued with a "sly smile" that "we are taking down the Biden regime."¹² He asked his followers to "stay focused and stay

5. Cf. Jeremy Stahl, *Will Merrick Garland Put Steve Bannon in Jail?*, SLATE (Oct. 14, 2021, 3:44 PM), <https://slate.com/news-and-politics/2021/10/steve-bannon-prosecution-merrick-garland-crime.html> [<https://perma.cc/MLN2-DLDE>] ("On his last day in office, Donald Trump pardoned his adviser Steve Bannon for having committed the crime of fraud. . . . It took less than 10 months from the pardon for Bannon to be caught breaking the law again: The House select committee investigating the Jan. 6 insurrection announced on Thursday that Bannon has illegally defied its subpoena and will be referred to the Department of Justice for criminal contempt.").

6. Amy Davidson Sorkin, *Trump's Outrageous Reading of Executive Privilege Can't Save Steve Bannon*, NEW YORKER (Oct. 22, 2021), <https://www.newyorker.com/news/daily-comment/donald-trumps-outrageous-reading-of-executive-privilege-cant-save-steve-bannon> [<https://perma.cc/WER7-RR7X>].

7. Alexandra Hutzler, *Steve Bannon Vows 'We're Taking Down the Biden Regime' as He Surrenders to FBI*, NEWSWEEK (Nov. 15, 2021, 10:18 AM), <https://www.newsweek.com/steve-bannon-vows-were-taking-down-biden-regime-he-surrenders-fbi-1649264> [<https://perma.cc/YX94-KUN7>].

8. Heather Digby Parton, *Steve Bannon's Criminal Indictment is the Best Thing That's Ever Happened to Him*, SALON (Nov. 15, 2021, 10:39 AM), <https://www.salon.com/2021/11/15/steve-bannons-criminal-indictment-is-the-best-thing-thats-ever-happened-to-him/> [<https://perma.cc/FP48-9J5Q>].

9. Zeeshan Aleem, *Steve Bannon's Indictment Is a Gift to His Movement*, MSNBC (Nov. 17, 2021, 4:30 AM), <https://www.msnbc.com/opinion/steve-bannon-s-indictment-gift-his-movement-n1284006> [<https://perma.cc/QE6G-3NDK>].

10. *Id.*

11. Hutzler, *supra* note 7.

12. Parton, *supra* note 8.

on message” and to focus on “signal not noise. This is all noise.”¹³ He called the charges “the misdemeanor from hell for Merrick Garland, Nancy Pelosi and Joe Biden.”¹⁴ “We’re going on the offense,” Bannon said, because “[n]ot just Trump people and not just conservatives—every progressive, every liberal in this country that likes freedom of speech and liberty should be fighting for this case. That’s why I’m here today: for everybody. I’m never going to back down.”¹⁵

Bannon has both political and personal interests in taking the offensive. Politically, Bannon obviously thinks it helps former President Trump and undermines the Biden administration for him to defy congressional subpoenas and face martyrdom via federal prosecution. As a matter of trial strategy, it’s probably not a bad idea to cast the entire process as a politically driven witch hunt—Bannon and his lawyers know the claim of executive privilege is unlikely to succeed and no one disputes Bannon has declined to honor Congress’s subpoena, so a frontal attack on the entire process is not the worst strategy.

Likewise, Bannon now makes a living hosting a podcast,¹⁶ so a massive dose of publicity likely means an uptick in listeners and thus advertising revenue. Bannon’s podcast did, in fact, rise up the Apple charts in the weeks after his arrest, rising thirty spots to become the sixty-seventh most popular podcast in America.¹⁷

But, most important of all for Bannon, and for this symposium on the lessons and legacy for the legal profession after the Trump era, is Bannon’s (and Trump’s) long-standing and general strategy of corroding faith in American institutions. For example, both Trump and Bannon have admitted that part of Trump’s war on the mainstream media was to convince his supporters to ignore any negative stories about him as biased or outright

13. *Id.*

14. Rebecca Beitsch, *Defiant Bannon Warns of ‘Misdemeanor from Hell’ for Biden*, THE HILL (Nov. 15, 2021, 3:11 PM), <https://thehill.com/policy/national-security/581608-defiant-bannon-warns-of-misdemeanor-from-hell-for-biden?rl=1> [<https://perma.cc/GA3Y-GF45>].

15. *Id.*

16. Adam Gabbatt, *Sounds About Right: Why Podcasting Works for Pence, Bannon and Giuliani*, GUARDIAN (Feb. 13, 2021, 3:00 PM), <https://www.theguardian.com/us-news/2021/feb/13/mike-pence-podcast-trump-bannon-giuliani>.

17. *Bannon’s War Room*, CHARTABLE, <https://chartable.com/podcasts/war-room-impeachment> (last visited Dec. 7, 2021).

false.¹⁸ Trump was well aware his campaign and presidency were sure to be dogged by negative press, including stories of scandals that would have sunk other politicians or administrations. Rather than apologize or try to explain, from the start Trump created a one-size fits all explanation for all of these stories: “Fake News!”¹⁹

Trump’s attacks on judges and the courts are similar. When he does not like a ruling, or fears a future adverse ruling, he goes ahead and discredits the judge or court as biased or unfair, softening any blow for his supporters.²⁰

This is in some ways the secret sauce of the Trump Presidency—scandals, news stories, and court setbacks that would have devastated other, more traditional Presidents have seemingly only made Trump’s bond with his supporters stronger. Trump and Bannon’s willingness to go on the offensive against any and every American institution, no matter how hallowed or respected, is exactly the thing their supporters love about them. Trump’s willingness to challenge the press and the courts (and what he calls political correctness) is not a side issue to Trump supporters, it is central to his appeal.²¹

Steve Bannon is an architect and adopter of this strategy.²² Bannon reportedly loves the original Star Wars trilogy, so he is likely familiar with

18. *Lesley Stahl: Trump Admitted Mission to “Discredit” Press*, CBS NEWS (May 23, 2018, 5:39 AM), <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/> (stating that when Trump was asked about why he attacks the press, he said “I do it to discredit you all and demean you all so when you write negative stories about me, no one will believe you.”); John Cassidy, *Steve Bannon’s War on the Press*, NEW YORKER (Jan. 27, 2017), <https://www.newyorker.com/news/john-cassidy/steve-bannons-war-on-the-press> [<https://perma.cc/C58L-YG8T>] (“[J]udging by Bannon’s remarks, the aim is to portray the media as a political adversary rather than an independent monitor, so that when damaging stories appear[,] the Administration can dismiss them.”).

19. Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster/> [<https://perma.cc/KMC8-NWL7>].

20. *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> [<https://perma.cc/J6SE-HHGZ>].

21. Edward Lempinen, *Despite Drift Toward Authoritarianism, Trump Voters Stay Loyal. Why?*, BERKELEY NEWS (Dec. 7, 2020), <https://news.berkeley.edu/2020/12/07/despite-drift-toward-authoritarianism-trump-voters-stay-loyal-why/> [<https://perma.cc/5AA4-D773>].

22. Brian Stelter, *This Infamous Steve Bannon Quote Is Key to Understanding America’s Crazy Politics*, CNN (Nov. 16, 2021, 11:09 AM), <https://www.cnn.com/2021/11/16/media/steve-bannon-reliable-sources/index.html> [<https://perma.cc/W95U-WBZ2>].

the great Obi-Wan quote, “If you strike me down, I shall become more powerful than you can possibly imagine.”²³ Bannon’s approach to both the press and the courts suggest a clear jujitsu tactic of turning your opponent’s strengths into weaknesses. Here Bannon turns what seems to be a clear Biden win into a Bannon victory. As prosecutors strike at Bannon, he grows stronger and institutions grow weaker. Likewise, Bannon’s bond with hardcore Trump fans grows stronger, and (perhaps not coincidentally) Bannon grows wealthier as his podcast becomes more popular and his public standing rises.

This is the challenge faced by prosecutors in Bannon’s case specifically, but also generally when institutions try to punish anyone in Trump’s orbit—what I call the “institutional double bind.” If they choose not to prosecute, that lessens the left’s faith in institutions. Consider the various news stories and op-eds asking (and not in a favorable manner), “why hasn’t Trump been indicted?”²⁴ The same sorts of critical op-eds were written before the Bannon indictments were announced.²⁵ So inaction carries a significant risk—supporters of President Biden and opponents of President Trump will wonder why nothing is being done to curtail what they see as open criminal contempt.

If prosecutors do move forward, Trump or Bannon can say “Aha! See! I told you they were biased against us!” and Trump supporters lose further faith in what they view as a biased institution. Like “fake news,” Trump’s (and Bannon’s) continual attacks on elites and the “deep state” are also meant to discredit these institutions for Trump supporters and to attribute actions they take to bias rather than the rule of law.²⁶ Trump did exactly this when Bannon was arrested, stating, “This Country has perhaps never done

23. See James Grebey, *Trump’s Chief Strategist Steve Bannon Is an Evil Nerd*, INVERSE (Jan. 26, 2017, 3:27 PM), <https://www.inverse.com/article/26998-steve-bannon-trump-darth-vader-hobbit-geek> [<https://perma.cc/GC86-VNJW>] (discussing Bannon’s love of Star Wars).

24. Carol C. Lam, *Why Hasn’t Trump Been Criminally Charged with Something—Anything—Yet?*, NBC NEWS (May 25, 2021, 3:31 AM), <https://www.nbcnews.com/think/opinion/trump-trump-org-are-prosecutors-crosshairs-what-does-really-mean-ncna1268429> [<https://perma.cc/36ER-GG7L>]; Simon Tisdall, *Lock Him Up! Why Is Repeat Offender Donald Trump Still a Free Man?*, GUARDIAN (May 23, 2021, 3:00 AM), <https://www.theguardian.com/commentisfree/2021/may/23/lock-him-up-why-is-repeat-offender-donald-trump-still-a-free-man> [<https://perma.cc/MB6Q-HR7A>].

25. See, e.g., Bill Press, *No Excuse for Garland to Not Prosecute Bannon*, THE HILL (Oct. 26, 2021, 7:35 AM), <https://thehill.com/opinion/judiciary/578390-press-no-excuse-for-garland-to-not-prosecute-bannon> [<https://perma.cc/8ZAM-JNR5>].

26. See generally Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126 (2020).

to anyone what they have done to Steve Bannon and they are looking to do it to others, also.”²⁷ Bannon made the same points: it’s a political witch hunt against Trump and his supporters, not a legitimate prosecution.

And, in an irony endemic to the Trump era, there’s actually a decent argument that the prosecution of Bannon *is* unusual and politically motivated. Farnoush Amiri wrote an excellent history of contempt of Congress charges in the Los Angeles Times that offers much support for Republican criticism of the Bannon indictment.²⁸ Notably, between 2008 and 2021, the House voted five times to refer criminal contempt charges against executive branch officials, and in each case the Attorney General declined to prosecute.²⁹ In fact, Bannon’s indictment is the first for contempt of Congress since 1983, and that prosecution failed to produce a conviction.³⁰ You have to go back to the 1974 G. Gordon Liddy conviction to find a successful contempt of Congress prosecution.³¹

Nor has the law been evenly applied by both parties. According to former general counsel to the U.S. House of Representatives Stan Brand, while the contempt law “doesn’t differentiate in any way between a Republican or a Democratic president or Congress, it tends to break down along those lines” with Democrats bringing more of the recent cases.³² In a 2017 Congressional Research Service Report, Todd Garvey listed every instance of a finding of Congressional contempt from 1980 to May 2017.³³

27. Anwasha Majumdar, ‘US Is Radicalized Mess’: Donald Trump Reacts to Former Advisor Steve Bannon’s Indictment, REPUBLIC (Nov. 15, 2021), <https://www.republicworld.com/world-news/us-news/us-is-radicalised-mess-donald-trump-reacts-to-former-advisor-steve-bannons-indictment.html> [<https://perma.cc/CM3X-XSR3>].

28. Farnoush Amiri, *Bannon’s Indictment for Contempt of Congress Swims Against the Historical Tide*, L.A. TIMES (Nov. 16, 2021, 12:51 AM), <https://www.latimes.com/world-nation/story/2021-11-16/bannon-indictment-defies-history-congress-contempt-power>.

29. *Id.*

30. *Id.*

31. *Id.*; see Marisa Sarnoff, *Steve Bannon’s Criminal Contempt Indictment Is First of Its Kind in Decades*, LAW & CRIME (Nov. 12, 2021, 6:49 PM), <https://lawandcrime.com/high-profile/steve-bannons-criminal-contempt-indictment-is-first-of-its-kind-in-decades/> [<https://perma.cc/4VAN-BNY2>] (referencing Liddy’s conviction).

32. Amiri, *supra* note 28.

33. Todd Garvey, Cong. Rsch. Serv., RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 74–76 (2017) (available at <https://sgp.fas.org/crs/misc/RL34097.pdf>).

Of the eight times Congress actually voted for contempt, six were under democratic congresses.³⁴

The source of most prosecutions of contempt of Congress is also worrisome. Prior to Watergate, “the majority of contempt of Congress cases were in connection with the House Un-American Activities Committee, which was formed in 1938 to investigate individuals and organizations for subversive activities, particularly those related to the Communist Party.”³⁵ Any time your historical comparison is to the activities of the infamous and despised HUAC, you are in trouble.

II. BE CAREFUL WHAT YOU WISH FOR—THE INSTITUTIONAL DOUBLE BIND APPLIES TO LAWYER REGULATORS AS WELL

The double bind applies equally to lawyer regulators considering disciplining or even disbaring Trump-aligned lawyers, especially the highest-profile lawyers like Rudy Giuliani, Sidney Powell, Lin Wood, and John Eastman. Lawyer regulators, like the Bannon prosecutors, face a familiar “damned if you do, damned if you don’t” double bind. Proponents of disbarment argue that these lawyers repeatedly lied to the public and basically tried to stage a *coup d’etat* by falsely claiming that Trump won, giving specious legal advice to Trump, or both. A Renee Knake Jefferson op-ed entitled “Don’t Just Let Lawyers Lie: Rudy Giuliani, Sidney Powell and Others Should be Disbarred for Good” makes the argument quite nicely.³⁶ Knake is a leading expert in the overlap of the First Amendment and legal ethics, so her opinion that these statements should be actionable is especially persuasive.³⁷ Other op-eds have made similar arguments, as do the excellent pieces in this symposium by Green & Roiphe, Joy, and

34. You can make this calculation by looking at the instances listed, *id.*, and then determining the party in control of Congress for each contempt finding here: *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited May 10, 2022).

35. Amiri, *supra* note 28.

36. Renee Knake Jefferson, *Don’t Just Let Lawyers Lie: Rudy Giuliani, Sidney Powell and Others Should Be Disbarred for Good*, N.Y. DAILY NEWS (Dec. 7, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-dont-let-lawyers-lie-20211207-jphgzst545gahjct4ebdszf7w4-story.html>.

37. *Id.*

McMunigal.³⁸ Given the malfeasance alleged and the tenor of these calls for disbarment, nothing less than actual disbarment is likely to satisfy some Trump opponents. This is half of the double bind: if lawyer regulators decide that trying to disbar these lawyers would be too political or would be hard to accomplish under existing law, many will be outraged and some will lose further faith in the institutions of lawyer discipline.

On the other hand, if lawyer regulators do go forward, they face cries of political hackery and play right into the hands of pro-Trump commentators who claim that the whole game is rigged against them. This has already proven to be the case for Rudy Giuliani. In January 2021, a “who’s-who of legal luminaries from New York and beyond” filed a formal complaint seeking the suspension of Giuliani’s law license for “conduct involving dishonesty, fraud, deceit or misrepresentation in or out of court.”³⁹ New York State suspended Giuliani’s law license on June 24, 2021, and disbarment is a looming possibility.⁴⁰

Like Bannon’s indictment, surely this taught Giuliani an important lesson? Again, no. Giuliani immediately claimed the move was politically motivated:

America is not America any longer. We do not live in a free state. We live in a state that’s controlled by the Democrat party, by Cuomo, de Blasio, and the Democrats. We have a double standard. There’s no doubt, if I was representing Hillary Clinton, I’d be their hero. I represented my client so effectively, that they’re trying to get me to shut up. They know what’s gonna happen—because they did it—they know what’s gonna happen in Arizona, and they know

38. For other op-eds, see, for example, Editorial, *Giuliani Should Be Disbarred, as Should All Lawyers Who Pushed Trump’s Big Lie*, ST. LOUIS POST-DISPATCH (June 26, 2021), https://www.stltoday.com/opinion/editorial/editorial-giuliani-should-be-disbarred-as-should-all-lawyers-who-pushed-trumps-big-lie/article_29e269b2-5061-5885-b370-530d104f4561.html [https://perma.cc/4HUD-J5QU], as well as the other articles in this volume.

39. Daniel E. Slotnik, *Prominent Lawyers Want Giuliani’s Law License Suspended Over Trump Work*, N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/01/21/nyregion/giuliani-trump-law-license.html> [https://perma.cc/9RUZ-6ALP].

40. *In re Giuliani*, 146 N.Y.S.3d 266 (N.Y. App. Div. 2021) (per curiam); see Nicole Hong et al., *Court Suspends Giuliani’s Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html> [https://perma.cc/42YF-GGHD].

what's gonna happen in Georgia. And they want this mouth shut.⁴¹

Giuliani's son, New York gubernatorial candidate Andrew Giuliani, echoed his father's sentiments, claiming the suspension is a result of "politicization" and the loss of "an independent justice system" because Democrats are "going after one of President Trump's close allies."⁴² Note that Andrew Giuliani, a prominent political candidate, is not ashamed that his father is on the verge of being disbarred for allegedly repeatedly lying to courts and the public. To the contrary, Andrew Giuliani's statements make clear that the suspension is a significant assist to his campaign.

Nor was Trump much chagrined, as his characteristically bombastic statement on the suspension establishes:

Can you believe that New York wants to strip Rudy Giuliani, a great American Patriot, of his law license because he has been fighting what has already been proven to be a Fraudulent Election? The greatest Mayor in the history of New York City, the Eliot Ness of his generation, one of the greatest crime fighters our Country has ever known, and this is what the Radical Left does to him. All of New York is out of control, crime is at an all-time high—it's nothing but a Witch Hunt, and they should be ashamed of themselves. TAKE BACK AMERICA!⁴³

And, like Bannon, Giuliani has ample financial and political reasons to thumb his nose at the suspension. First, Giuliani and his allies have used the suspension to raise money for Giuliani's legal fees, creating and publicizing

41. Liz Dye, *Andy Giuliani Flips Sh*t in Parking Lot While Rudy Moans "America Is Not America,"* ABOVE THE L. (June 25, 2021, 3:01 PM), <https://abovethelaw.com/2021/06/andy-giuliani-flips-sht-in-parking-lot-while-rudy-moans-america-is-not-america/> [https://perma.cc/5YY5-THSF]. For similar comments in a different forum, see *Giuliani's Law License Suspended by NY Court*, YAHOO! (June 24, 2021), <https://www.yahoo.com/now/giulianis-law-license-suspended-ny-205236864.html> [https://perma.cc/96KA-FYB7] ("This is a one-sided decision. How can they say I lied if I haven't had a hearing? . . . Courts are not supposed to decide based on newspapers, unless they're Democrats in a Democrat city. . . . I mean, it's only Trump lawyers who have their offices raided. It's only Trump lawyers who get penalized without anybody hearing their side of the case.").

42. Dye, *supra* note 41.

43. *Statement by Donald J. Trump, 45th President of the United States of America*, SAVE AM. (June 24, 2021), <https://www.donaldjtrump.com/news/statement-by-donald-j-trump-45th-president-of-the-united-states-of-america-06.24.21-02> [https://perma.cc/5XM9-NFNN].

a “Freedom Fund.”⁴⁴ As of yet, the results are underwhelming, but they certainly will not improve if Giuliani suddenly turns on Trump.⁴⁵ Further, Giuliani (like several other high-profile Trump lawyers) has transitioned from traditional legal practice and to much more lucrative consulting, speaking, and generally selling access to Trump.⁴⁶ Giuliani has seemingly done much of his high-profile work for Trump for free.⁴⁷ In this regard, Giuliani’s legal practice is actually now just a loss leader for his other business: being Rudy Giuliani, Trump insider and loyalist *par excellence*.

Second, insofar as Rudy Giuliani wants to support his son Andrew’s bid for the Republican gubernatorial nomination in New York State, he needs to stay on the good side of the significant group of Republican voters who still love Donald Trump and believe Giuliani’s statements about the election (and Hunter Biden, and numerous other examples).⁴⁸

Last, and most importantly, Giuliani’s entire public persona and professional life is now completely intertwined with Donald Trump and his false claims about the 2020 election. If Giuliani were to bail now, he would gain nothing and lose everything. Disbarment is thus a small price to pay, and the Bannon example suggests a Giuliani disbarment might actually be run at a profit if done properly.

44. John L. Dorman, *Allies of Rudy Giuliani Have Created a “Freedom Fund” to Aid the Former Trump Lawyer with Legal Issues*, BUS. INSIDER (June 27, 2021, 10:27 AM), <https://www.businessinsider.com/rudy-giuliani-allies-legal-defense-fund-aid-investigation-lawsuits-2021-6>. Unfortunately for Giuliani, it appears the effort has not been as successful as he might have hoped. Bess Levin, *Rudy Giuliani’s Legal Defense Fund Has Raised \$9,590 (Just \$4,990,410 to Go!)*, VANITY FAIR (July 6, 2021), <https://www.vanityfair.com/news/2021/07/rudy-giuliani-legal-fees> [<https://perma.cc/W954-YC9Z>].

45. Adam Rawnsley & Asawin Suebsaeng, *Rudy Giuliani’s Legal Fund Was a Bust. Now, Its Donation Page Has Disappeared*, DAILY BEAST (July 8, 2021, 6:43 PM), <https://www.thedailybeast.com/rudy-giulianis-legal-fund-was-a-bust-now-its-donation-page-has-disappeared> [<https://perma.cc/3YH4-ZTQY>].

46. Stephanie Baker, *Where Rudy Giuliani’s Money Comes From*, BLOOMBERG BUSINESSWEEK (Apr. 5, 2019, 3:00 AM), <https://www.bloomberg.com/news/features/2019-04-05/where-rudy-giulianis-money-comes-from> [<https://perma.cc/32TS-HQQQ>].

47. *Id.*

48. Cf. Zach Williams, *Andrew Giuliani Is Banking on Name Recognition in a Long Shot Run for Governor*, CITY & STATE N.Y. (Sept. 13, 2021), <https://www.cityandstateny.com/personality/2021/09/andrew-giuliani-banking-name-recognition-long-shot-run-governor/185308/> [<https://perma.cc/H4KL-244M>] (noting that Andrew Giuliani’s bid for governor is reliant on “name recognition” and that while “Rudy Giuliani might be a target of scorn on the political left nowadays because of his association with former President Donald Trump and their joint efforts to overturn the results of the 2020 presidential election, the former mayor had plenty of fans among” New York Republicans).

Further, like the Bannon prosecution, there is at least some support for the idea that disbaring Giuliani may be partially motivated by politics. Professor Jonathan Turley noted most of the case against Giuliani is based on statements outside of court, where lawyers likely have some First Amendment protections ranging even into false statements.⁴⁹ Turley also raises a number of other lawyer statements in past election controversies that turned out to be false and wonders whether those lawyers should also be subject to suspension.⁵⁰ Alan Dershowitz made similar arguments, and also tied the suspension of Giuliani to “selective suspensions and disbarments” of “radical left-wing lawyers—communists, former communists and ‘fellow travelers’—or, in the South, they were civil rights lawyers” in the 1950s.⁵¹

At this juncture, supporters of suspending Giuliani (and also other Trump-allied lawyers who falsely argued that the 2020 election was stolen) will roll their eyes at Turley’s and Dershowitz’s comments. Nevertheless, note even supporters of the decision to suspend Giuliani call the action “rare” or “unique,” because most disbarments or suspensions involve clearly demonstrable illegal conduct like stealing from a client.⁵² For example, Ronald Minkoff, a lawyer who filed an ethics complaint against Giuliani on behalf of prominent lawyers and academics in January 2021, called the Giuliani suspension a “once-in-a-generation decision.”⁵³ NYU Law Professor Stephen Gillers, who expressed support for suspending Giuliani’s license when the complaints were filed, said he was “surprised”

49. Jonathan Turley, *Politics by Other Means? Giuliani Suspension Should Worry All Lawyers*, THE HILL (June 26, 2021, 10:00 AM), <https://thehill.com/opinion/judiciary/560366-giuliani-suspension-should-worry-all-lawyers> [https://perma.cc/M4RN-L2P4].

50. *Id.*

51. Alan M. Dershowitz, *Giuliani’s Suspension from the Law Is Unconstitutional*, THE HILL (June 28, 2021, 2:50 PM), <https://thehill.com/opinion/judiciary/560563-giulianis-suspension-from-the-law-is-unconstitutional?rl=1> [https://perma.cc/JA2G-G67C].

52. On “rare” and “unique,” see Melissa Heelan, *Giuliani Suspension ‘Rare,’ Sends Message on Ethics, Honesty*, BLOOMBERG LAW (June 25, 2021, 11:41 AM), <https://news.bloomberglaw.com/us-law-week/giuliani-suspension-rare-sends-message-on-ethics-honesty> [https://perma.cc/F74L-Y6XA]. On misappropriation of client funds being “the most common cause of disbarment,” see Susan Humiston, *Public Discipline Summary for 2020*, BENCH & BAR MINN., Feb. 2021, at 6; Warren L. Mengis, *Professional Responsibility*, 52 LA. L. REV. 721, 731 (1992).

53. On Minkoff filing the complaint in January, see George Conk, *Lawyers – En Masse – Call for Giuliani to be Disciplined, Suspended*, PROF. RESP. CONT. APPROACH (Jan. 22, 2021), <https://contemporaryprofessionalresponsibility.com/2021/01/22/lawyers-en-masse-call-for-giuliani-to-be-disciplined-suspended/> [https://perma.cc/M3FW-533L]. The “once-in-generation” quote comes from Heelan, *supra* note 52.

by the decision because interim suspensions are “relatively rare” and the standard is “very high.”⁵⁴ Gillers also noted that suspensions are generally imposed on lawyers who are found to have cheated their clients, which makes Giuliani’s suspension “unique.”⁵⁵ Again, if you support the decision, “unique” and “once in a generation” is salutary. But if you disagree, it just makes the whole affair look politically motivated.

III. IF YOU SUPPORT THE GIULIANI SUSPENSION, DO YOU ALSO SUPPORT THE SUSPENSION OF BILL CLINTON?

As a comparison point, consider the suspension of Bill Clinton’s law license by the Supreme Court of Arkansas in 2000. On January 17, 1994, Paula Jones, a former Arkansas state clerk sued Bill Clinton for sexual harassment in a federal district court in Arkansas.⁵⁶ The suit was derided as politically motivated from the start.⁵⁷ In the course of this litigation, Jones’s lawyers deposed President Clinton, and Clinton answered questions misleadingly or flatly perjured himself when asked about his relationship with Monica Lewinsky.⁵⁸ This eventually led Judge Susan Webber Wright to hold President Clinton in contempt of court for giving “intentionally false” testimony in the case.⁵⁹ Wright ordered Clinton to pay “any reasonable expenses, including attorneys’ fees, caused by his willful failure to obey this court’s discovery orders” and referred the matter to state judicial authorities in Arkansas for an investigation and possible discipline, including disbarment, for Clinton’s violations of the Arkansas Rules of

54. For Gillers’s support of suspension, see Slotnik, *supra* note 39. For the quotes about the suspension itself, see Heelan, *supra* note 52.

55. Heelan, *supra* note 52.

56. *This Day in History: Paula Jones Accuses Bill Clinton of Sexual Harassment*, HISTORY.COM (Jan. 14, 2021), <https://www.history.com/this-day-in-history/paula-jones-accuses-bill-clinton-of-sexual-harassment> [https://perma.cc/N5JD-THVZ].

57. See Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1 (2001).

58. Solomon L. Wisenberg, *Sins of Omission*, 9 TEX. REV. L. & POL. 389 (2005) (reviewing BILL CLINTON, MY LIFE (2004)).

59. Robert Suro & Joan Biskupic, *Judge Finds Clinton in Contempt of Court*, WASH. POST (Apr. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/contempt041399.htm> [https://perma.cc/94J4-BCYT].

Professional Conduct.⁶⁰ Clinton ended up paying \$90,000 to cover the expenses of Jones's lawyers.⁶¹

The conservative Southeastern Legal Foundation also filed a disbarment recommendation with the Arkansas Supreme Court (similar to those filed against Giuliani).⁶² At first, Clinton pushed back against the disbarment action, arguing that “[o]n the basis of the relevant facts, the governing law and the applicable decisions of the Arkansas courts . . . a sanction of disbarment would be excessively harsh, impermissibly punitive and unprecedented in the circumstances of this case.”⁶³ Clinton argued that “in Arkansas disbarment is typically reserved for far worse crimes, like stealing from a client” and that “some other lawyers caught lying under oath in Arkansas have received reprimands rather than being disbarred.”⁶⁴

As part of a global settlement of the Whitewater investigation, Clinton eventually agreed to a five-year suspension of his law license in Arkansas, a fine of \$25,000, and to admit he gave false testimony to a grand jury.⁶⁵ He was also eventually disbarred from practicing before the U.S. Supreme Court.⁶⁶ Supporters of Bill Clinton were hardly mollified and considered the entire matter a politically motivated effort to embarrass the President.⁶⁷ Clinton's White House Counsel Jack Quinn argued on CBS's *Face the Nation* that “the only handful of remotely comparable cases have resulted

60. *Id.*

61. Julian Borger, *Clinton Fined \$90,000 for Court Sex Lie*, *GUARDIAN* (July 29, 1999), <https://www.theguardian.com/world/1999/jul/30/clinton.usa>.

62. Raju Chebium, *Who Is Behind the Clinton Disbarment Effort?*, *CNN* (May 24, 2000, 7:30 AM), <https://www.cnn.com/2000/LAW/05/23/clinton.disbarment/index.html> [<https://perma.cc/Y49E-6SNE>].

63. *Clinton Fights Disbarment*, *ABC NEWS* (Aug. 29, 2000), <https://abcnews.go.com/Politics/story?id=123018&page=1> [<https://perma.cc/LC2K-USQK>].

64. Editorial, *Mr. Clinton's Disbarment Case*, *N.Y. TIMES* (May 25, 2000), <https://www.nytimes.com/2000/05/25/opinion/mr-clinton-s-disbarment-case.html> [<https://perma.cc/G9NH-RCPQ>].

65. Editorial, *Bill Clinton's Messy Exit*, *HARTFORD COURANT* (Jan. 21, 2001), <https://www.courant.com/news/connecticut/hc-xpm-2001-01-21-0101210978-story.html> [<https://perma.cc/K8S9-4C5Y>]; David A. Graham & Cullen Murphy, *The Clinton Impeachment, as Told by The People Who Lived It*, *ATLANTIC* (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/clinton-impeachment/573940/> [<https://perma.cc/ZU9Y-EL9T>].

66. Duncan Campbell, *Lewinsky Scandal Ends as Clinton Is Disbarred*, *GUARDIAN* (Oct. 1, 2001), <https://www.theguardian.com/world/2001/oct/02/duncancampbell>.

67. Susan Low Bloch, *Assessing the Impeachment of President Bill Clinton From a Post-9/11 Perspective*, in *THE CLINTON PRESIDENCY AND THE CONSTITUTIONAL SYSTEM* 190, 190 (Rosanna Perotti ed., 2012).

in a reprimand, not disbarment” and that “politics just has to be about something more noble than destroying one’s enemies.”⁶⁸ Likewise, Georgetown Legal Ethics expert Paul Rothstein argued the disbarment, like the impeachment effort itself, was all about politics: “This recommendation is out of keeping in the sense it is among the most severe that I have seen for comparable cases.”⁶⁹

If you pause for a second, you can see some of the individuals most excited about the disbarment of Rudy Giuliani were likely somewhat more moved by arguments that the disciplinary actions against Bill Clinton were unusually harsh and politically motivated. After all, Bill Clinton was unlikely to spend much of his post-presidency practicing law in Arkansas or before the U.S. Supreme Court.

Any time a lawyer disciplinary action is taken against a high-profile lawyer in a manner that is atypical (and really any serious sanction for behavior outside of stealing from a client is pretty unusual), some will claim politics are involved. I raise the Clinton suspension to show that these sorts of claims do not always come from the right or the left, although as noted above, they do seem to be accelerating in the Trump era, and not by mistake. Clinton at least seemed chagrined.

IV. IS THERE ANY WAY OUT OF THE DOUBLE BIND?

So, is there any solution for these institutions stuck in the double bind? What could lawyer regulators do or not do in these high-profile cases to regain the public trust?

The short answer in any individual case like Giuliani’s is nothing. No matter how comprehensive the explanation of the sanctions against a lawyer like Rudy Giuliani, large swaths of the public will believe Giuliani and Trump when they say the charges are false and politically motivated. As a comparison point, consider whether supporters of Bill Clinton were mollified when the Arkansas Supreme Court explained that Clinton had, in fact, been sanctioned by a federal judge for lying under oath and that Clinton had admitted to doing exactly that as part of the global settlement of the impeachment inquiry. Dubious. And just to be frank, the Clinton case

68. *Is Disbarment Too Much?*, CBS NEWS (May 22, 2000, 6:11 PM), <https://www.cbsnews.com/news/is-disbarment-too-much/> [https://perma.cc/Z4E3-PTCE].

69. *Id.*

(politically motivated or not) was an easier and stronger case because Clinton admitted the behavior.

The bottom line is in a case like Giuliani's, it is likely too late to convince the invincible. Trump supporters who believe the whole thing is a witch hunt will not be satisfied no matter how transparent the process or how lengthy and detailed the findings. Longer and fancier briefs from judges will certainly not do the trick. Nor can lawyer regulators sit on their hands and ignore the behavior, because that would threaten legitimacy on the left, and possibly allow Giuliani and other lawyers to (at least according to the most aggressive allegations) actively undermine democracy and possibly even encourage a *coup d'etat*.

Sadly, on this sort of individualized basis, there is little to be done. The die is cast. This is not to say that the situation is hopeless, however. One of the reasons why these decisions are so fraught with various parties losing faith in American institutions is exactly because of the underlying fragility of these institutions, lawyer disciplinary bodies included. As the late, great Deborah Rhode repeatedly reminded us, lawyer discipline is shamefully deficient, typically to the advantage of lawyers:

Over 90 percent of complaints are dismissed, only about 2 percent result in public sanctions, and many complainants never even learn the basis of the dismissal, let alone receive an opportunity to challenge it. "Too slow, too secret, too soft, and too self-regulated" is how the public views the system.⁷⁰

The ABA itself, among others, has determined that attorney discipline is and always has been a neglected area.⁷¹ Attorney discipline is underfunded.⁷² There are backlogs for investigations.⁷³ In most states the

70. Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002).

71. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 158-65 (2000).

72. Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1121 (1996).

73. See Lisa J. Frisella et al., *State Bar of California*, 17 CAL. REG. L. REP. 203, 205 (2000) ("In his initial February 1999 report, Justice Lui reported that the Bar's discipline system faces an unprecedented backlog of over 7,000 open complaints and reports against attorneys from consumers and courts.").

process is secret.⁷⁴ A majority of complaints are summarily dismissed, partially because many complaints are over fee disputes or “mere negligence” that is not generally covered by the rules.⁷⁵

One modest suggestion is for these institutions to do better. Portions of the public would be less likely to cry “politics” or “witch hunt” if the institution itself was better run and better respected. Basically, sturdier institutions have proven more resistant to the Trump/Bannon approach. Trump’s attacks on the military and the courts, for example, have had less traction than his attacks on the press.⁷⁶ Of course such an approach is easier said than done, but still, stronger institutions are more resistant to attack, and as a side benefit, they are also better than weak, secretive institutions, which sadly lawyer discipline has been for decades.

74. John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio’s Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 108 (1999).

75. RHODE, *supra* note 71, at 159–60.

76. Gallup polls American trust in institutions every year. The Press fell even lower under Trump. The Supreme Court and the military, less so. See *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/55QY-Z5Z5>].