

Teri: Democracy draws its authority from rule of law, which relies on facts. So when a portion of the population lets go of facts, democracy is in danger.

Leigh: And that's where we are now.

Hello and welcome to the Politics Girl podcast . . . I'm your host, Leigh McCowan, let's get into it.

Today's episode is a candid conversation with return guest, author and lawyer, Teri Kanefield.

Teri has published over a dozen books, as well as articles, essays, stories, and legal briefs over the past 30 years. Her legal analysis has been included in the Washington Post, CNN, and most major outlets. She is one of my go-to lawyers because of her brilliant insight on legal and constitutional matters. Teri is a careful and thoughtful thinker who doesn't get caught up in drama of the moment. She always stood firm on the idea that even though we were chomping at the bit for justice, it was good news for the health of rule of law that the DOJ was being methodical and careful, not to rush the process or abandon the rules simply because we wanted certain results for certain people.

The Republican Party has made it very clear that they are ready to abandon democracy and the rule of law, and we shouldn't help them do that by abandoning the rule of law ourselves. No matter how hungry we are for justice, playing by the rules, no matter how irritating that feels sometimes, is the only way to move forward if we want to keep living in a country with rules.

I am having her on today to do an end-of-the-year wrap-up with where we are in the various Trump indictments and to discuss her recent series that she did on her blog about the panic-misinformation cycle that is making this country crazy.

Leigh: Without further ado, please welcome lawyer, author and one of my favorite legal experts, Teri Kanefield. Welcome Teri...

Teri: Thank you for having me back. It's nice to be here again.

Leigh: Well, it's great to have you. Your take on these indictments has been vindicated so many times that I hope you can give us some insight into where we are now and what we can expect moving forward.

Teri: Thank you.

Leigh: So, let's get right into it. Let's start with a quick update of the Trump criminal trials. There are 3 criminal cases in the works—4 if we count the New York civil fraud case, 5 if we add the E. Jean Carol sexual abuse case.

But the 3 criminal cases however are: The DOJ/Washington D.C. January 6 case, the DOJ/ Florida stolen documents case, and the Georgia RICO case.

So, where do we stand on these 3 cases?

Teri: All three cases are currently in the stage of pretrial motions. This is when the defense lawyers scrutinize the prosecutor's case, looking for weaknesses. The defense then files motions trying to chisel away at the prosecutor's case. The defendant will try to get the case dismissed or will try to suppress evidence, or will try to eliminate some of the charges.

The general rule is that the stronger the prosecutor's case, the less likely a pretrial motion will benefit the defendant.

The prosecution can file motions as well.

The theory is that the two parties work out as much as they can privately. (They are two parties, even if one party is the government with all the power. I'll add that in the negotiations, the government has all the power.)

They try to work it out, and they file motions when they need the judge will step in and make a decision. For example, if the defense thinks that the prosecution is wrong a matter of law, first they try to persuade the prosecutor to drop the case or whatever. If the prosecutor doesn't agree, they file a motion with the court.

Leigh: Are there any motions that the defense has filed that we should be worried about?

Teri: If by *worry* you mean "Are there any motions that might help Trump secure an acquittal or get the charges dropped" — no, I don't see any.

But there are a few *interesting* motions. By *interesting* I mean that they raise interesting legal issues, by which I mean that the law isn't completely clear, so we are not exactly sure what will happen.

Leigh: Ok, give me an example of an *interesting* motion.

Teri: One involves Trump's claim that he has absolute immunity from criminal liability—

Leigh: — But lost on that one, right? Didn't he make some crazy argument that basically made him sound like an omnipotent king?

Teri: Yes and yes. He argued that the impeachment Clause of the Constitution gives the president absolute immunity from criminal liability for any actions carried out within the outer perimeter of his duties if he wasn't first impeached and removed from office.

Leigh: Give me a break...

Teri: It was a *creative* argument. The impeachment clause basically says that if a president commits an impeachable act, *first* he is impeached by the House of Representatives, *then* he is tried in the Senate. If he is convicted, he is removed from office. After he is out of office, he is subject to indictment for any lawbreaking.

The order makes sense: A president has a job to do, which he can't do if he's fighting a criminal indictment or serving time in prison. So first remove him, then prosecute him.

Leigh: How does that clause give Trump absolute immunity though? If a president can be prosecuted after leaving office, doesn't it mean the opposite of what he's arguing?

Teri: It does. He argues that because the clause says first a president is impeached, then convicted, then removed from office, he says if you haven't been convicted by the Senate, you can be prosecuted after leaving office. It's silly for lots of reasons. Not lawbreaking is subject to indictment, which would mean a president can commit crimes in office and as long as he isn't tried for them in the Senate, he gets away with it.

The Court said um, no, and took the argument apart with scorching language. For example, the court said, "Whatever immunities the President may enjoy . . . that position does not confer a lifelong 'get-out-of-jail-free' pass."

Trump also claimed that he has absolute immunity from criminal prosecution for any actions within the ‘outer perimeter of his duties as president.’

His argument was basically that everything he did involved official discussions with official people, which (according to his theory) means everything he did was official.

Plotting to overturn an election is obviously not an official duty, so the court made mincemeat of his arguments.

The motion to dismiss the case based on a claim of absolute immunity from criminal prosecution is interesting, not because he will win on appeal—he won’t. It is interesting because he can bring the appeal now instead of later. Most appeals are taken after the trial. It’s also interesting because the procedures for how this works are not completely clear. We only have law from the 9th and 7th circuits, which the DC appeals court can follow, but isn’t bound by.

Because the procedures are unclear, Trump is hoping the appeal will derail the proceedings.

Leigh? He’s hoping this will delay his trial. Will it?

Teri: For that to happen, the appeals court would have to drag its feet and the Supreme Court would have to step in and halt the proceedings.

So far, in the Trump criminal matters, neither of these things have happened. The appellate courts have moved quickly.

And since November 3, 2020, the Supreme Court has consistently ruled against Trump. They ruled against him in his election fraud cases. They had the chance then to create delays past January 6 or help keep him in office, but they refused. They rejected his claims of executive privilege each time he raised that claim. The executive privilege claims he tried in the past are a watered-down version of what he is now claiming: Absolute immunity from criminal liability.

So there is no reason to believe, from what the Supreme Court and appellate courts have done over the past few years, that they would help him derail these criminal proceedings.

Leigh: You mentioned the gag order issue was also interesting. Why? Didn't the gag order just get reinstated?

Teri: The Manhattan gag order was just reinstated. There are two gag order proceedings in the works. One in the Manhattan civil fraud case, and one in the DOJ's D.C. January 6 case.

The Manhattan gag order is stronger. The D.C. gag order raises trickier First Amendment issues.

Here is one reason why: The DC gag order (among other things) prevents Trump from talking about the Special Counsel, who is a public figure holding government power.

The NY gag order, in contrast, prevented Trump from talking about the court clerk, who is not a public figure. (Trump argued that she is. That argument didn't fly.)

In a nutshell, one main point of the First Amendment is that citizens can criticize the government.

Issues arise when the government uses the power of the government to prevent a citizen from criticizing the government. Jack Smith (in what I think is the only thing he has done so far that is not entirely sound) wants the court to issue an order preventing Trump from criticizing him. Because both the Special Counsel and Court have government power, the gag order would be using government power to prevent a citizen from criticizing the government.

There are other potential issues as well.

The DC order says Trump cannot "make any public statements that target. . . ." (and then lists the people he can't target.)

The word "target" is vague. He can't mention them at all? Or only if his speech crosses a line?

This is a problem because there is a legal doctrine called the "vagueness doctrine," which says that laws or orders that create criminal liability have to state explicitly and definitely what conduct is punishable.

One more weakness: the D.C. order precluded Trump from targeting “any reasonably foreseeable witness or the substance of their testimony.”

One problem is that many of the potential witnesses are public figures. Special standards apply to public figures. Some of these potential witnesses may be running against him which means they’re out there in public with lots of media attention criticizing him.

The gag order keeps him from responding.

Also “potential witnesses” is probably too vague. An order needs to be more specific.

Leigh: What do you think the court will do?

Teri: Nobody can say for sure, but the most likely outcome is that the gag order will be reinstated with modifications to make it constitutional.

Leigh: None of this has anything to do with the merits of the case against him, but First Amendment geeks are eagerly watching to see what will come out of this.

So he’s just allowed to keep attacking Jack Smith even though he knows that this means Jack Smith is probably getting death threats from his crazed followers? Doesn’t it seem like he’s getting away with things that no other criminal defendant would ever get away with?

Teri: If Trump’s verbal attacks cross the line and become criminal incitement, the prosecutor can file charges. So far, the DOJ has not alleged that his verbal attacks rise the level of criminal incitement.

People say, “But Trump has millions of followers so when he attacks someone, it has a different effect,” but there is no special speech rule for people with a lot of followers.

If his language crosses the line, they can file charges.

Leigh: So they just have to wait until he crosses the line and say something like ‘go murder him’ which he won’t do because he’s very smart. He’s very good at talking in circles, like “boy wouldn’t it be too bad if something happened to him.” He talks like that. But they have to wait until he crosses the line.

Teri: Generally that's true. One of the other presumptions in First Amendment law is a presumption against prior restraints. A person can say what they want (or publish what they want) but if their words constitute a crime, they can be prosecuted.

Leigh: And you can't arrest and convict someone because they are likely to commit a crime. There is also a due process problem.

In this case it would be pre-trial detention, which also raises due process concerns because you have punishment before trial.

But I'm sure you can understand why people are justifiably frustrated. Because it feels like if any other defendant said the kind of things Trump is saying about the prosecutor or witnesses, they'd be thrown in jail. Does it not seem like he's getting special treatment.

Teri: (smiles) This is certainly what a lot of people are saying. I know because I get dozens of comments in just those words.

First, I'll respond to the substance of your comments. Then I want to talk about the comments themselves.

Let's start with, "If any other defendant said the kinds of things Trump is saying they'd be thrown in jail."

We don't know because no defendant has made an issue out of this so we have no appellate court cases on point.

Here's why: Most defendants follow the good advice of their lawyers and shut up. The last thing they do is go around attacking witnesses, the judge, or the prosecutor.

Most defendants are trying not to antagonize the judge or the prosecutor.

Prosecutors and courts have a lot of power. If you are a defendant or potential defendant on social media attacking a prosecutor, it's a little like spitting into the wind. Or pulling the mask off the old lone ranger.

It is even more insane to attack potential witnesses. Can you imagine if you will be tried for a crime and there are potential witnesses against you. Would you go out of your way to make them angry?

Leigh: No. That seems really dumb.

Teri: Because defendants don't normally behave that way, the people in the past who have received gag orders are the lawyers who are out there talking. Putting a gag order on lawyers or prosecutors is easy because lawyers a lawyer is an officer of the court so the judge has a particular kind of power over them.

One rationale for silencing the lawyers and prosecutors is that too much talking can undermine the fairness of the trial.

But what if the person who wants to talk is the defendant? Can you shut him up because he might undermine the fairness of his own trial?

In this case, the defendant wants to talk. Because the Supreme Court has never set out the standard for when a defendant can be gagged, we have a gap in the law.

Gaps in the law are interesting because we are all about to learn something new: What is the standard for putting a gag order on a defendant who wants to talk about his own case?

Again, I expect that the gag order will be reinstated with tweaks to make it Constitutional, but it raises interesting First Amendment issues.

Leigh: It certainly does. It's all news.

Teri: So, these comments like...

- If any other defendant said the kinds of things Trump is saying about the prosecutor or witnesses, they'd be thrown in jail.
- Trump gets away with things you or I can't get away with.
- He gets special treatment.

I've been calling phrases like those "rage-inducing simplifications" because they take a complex situation and simplify it into a short phrase that is inaccurate (because it is simplified) and induces rage.

They are common on social media. People see them and repeat them. Some people even make them into memes for easy sharing.

These simplifications have two causes. First, the criminal justice system and our legal system have grown complex. Second, in the current media environment, people are not getting enough facts and explanations.

Leigh: There's no room for nuance and everyone is an armchair expert but doesn't often listen to or understand real experts. It reminds me of the conversations happening on line around the middle east right now. These are thousands of years old conflicts. These are deeply nuanced arguments that we need to be having, and we can't do that on social media.

Teri: Right. People want things simple without understanding that if we simplify things we lose the truth. It drives me insane when people who claim to be progressive or liberal want to simplify the criminal justice system. A hundred years ago, the criminal justice system was very simple. Justice was swift and crude. A person could go swiftly from being accused of a crime to hanging from a tree.

In the 19th and early 20th centuries, it didn't take long to gather evidence. Police could beat confessions out of people. The police could search your house without a warrant. (This is because before the 14th Amendment was added to the Constitution after the Civil War, the rights in the Bill of Rights applied only to the federal government. Local governments and law enforcement could do whatever they wanted. That's how we had slavery.)

The transition from the crude 19th century system to our complex modern system happened because of civil rights activists like Thurgood Marshall and Paulie Murray. They looked around and saw that the criminal justice system was like a conveyor belt. They knew the law fell more heavily on Black men. Their idea wasn't to make it easier to put white people in prison. Their idea was to create procedures to make it harder to put anyone in jail. Their goal was to turn a conveyor belt into an obstacle course with the idea that lots of procedures and safeguards would help achieve due process for everyone.

So, the complexity is to create fairness and ensure due process for everyone. It was put in place by civil rights leaders.

That's why it drives me a little nuts when liberals and progressives complain about how cumbersome the criminal justice system is. "Just throw him in jail

already,” takes us backward to the 19th century, which was far more authoritarian and much less democratic.

Leigh: It’s almost like we need it to be fair and just if we want due process and we don’t just want to be tossing people in jail, even if that person is someone we really, really wish would just go away.

You said these simplifications have two causes. First, the criminal justice system and our legal system have grown complex. Second, in the current media environment, people are not getting enough facts and explanations.

Talk to me about the second part: our current media environment.

Teri: We are currently in a major information disruption. In the old days, there were a few major networks. People got their news from a local newspaper and the evening news. It was mostly facts and it was boring.

Leigh: News should be boring, Teri! I’d take facts from someone reliable and trustworthy like Walter Cronkite any day. It’s the 24-hour news cycle that’s killing us. The news as entertainment that’s disrupting our whole society...

Teri: Yes, back when there were only a few networks, they went out of their way to present calm, neutral content to appeal to as large a segment of the population as possible. Because there were only a few networks, there wasn’t competition for clicks and viewers. Advertisements in newspapers and commercials on TV funded the media companies.

Then in the 1980s and 1990s, all that broke down. First, the major networks fragmented. Fox was formed in the late 1980s and MSNBC formed in 1999. Instead of being neutral, these media outlets played to their audiences.

Then the Internet happened fracturing media audiences into distinct bubbles. These bubbles are getting smaller and smaller.

Leigh: Losing the fairness doctrine probably didn’t help either. When the Reagan administration got rid of it that was the birth of right-wing radio and people like Rush Limbaugh spilling hate and disinformation for profit. We’ve fragmented into echo chambers. People look for news that confirms what they already believe.

Teri: Right! The fragmenting also changed how media is funded.

Media now is driven by clicks. Sensational rage-inducing material gets clicks and hooks readers and is aimed at smaller segments of the population.

Wonky and detailed explanations don't get clicks.

Basically, we are in a click-driven, 24-hour media environment where sensational content is competing for your attention.

Instead of being neutral and fact-based (and boring) news has become highly partisan and tries to keep viewers hooked. As Fox figured out a long time ago, the easiest way to do that is to keep people riled.

Because of the fragmented, 24-hour, click-driven, hyper-partisan news environment, droplets of facts get lost in a firehose of misunderstandings, speculation, and opinions.

Because the system is complex and *because* people are bombarded with rage-inducing simplifications that generate clicks and engagement, people get caught in a misinformation-outrage cycle.

The cycle goes like this: People get bad information which enrages them, and then they repeat the bad information, and it spreads, and pretty soon you have an entire portion of the population losing its grip on facts.

This is a problem when the information ecosystem being riled with rage-inducing simplifications is the pro-democracy side.

That is a problem because democracy draws its authority from rule of law, which relies on facts.

Leigh: That's where we are now. And if we're not dealing with facts, what are we doing? That's why we keep saying democracy requires an educated population, right? A population that understands how the government works, which is why we should have civics back in high school so people can properly analyze the the implications of government policies.

Democracy requires voters to look beyond their own interests and consider the interests of society as a whole. It requires people who are aware of the appeal of a demagogue and can withstand that appeal which is sort of what we're seeing now, right?

Teri: The criminal justice system is very complicated. Most people haven't been to law school so they don't know how this all works.

And just as democracy is based on truth, authoritarianism is based on lies.

The problem with the outrage-misinformation cycle is that it spreads misinformation and activates authoritarian impulses.

Leigh: That feels like a good segway to your new Misinformation-Outrage Cycle blog post, but before we move on to that, what are your take on how you think January 6 case, the Florida stolen documents case, and the Georgia RICO case are going to play out after the move on from pre-trial motions. What should people be looking for moving forward? I feel like January 6th and Georgia Rico (*that's what you meant, right? The Florida case is cannon*) are done deal convictions and the documents case is going to be a mess with that in the bag judge Aileen Cannon?

Teri: An interesting thing is happening with the Florida case. Of the judges Trump drew in all of his cases, Cannon is the most sympathetic and only one likely to try to put her thumb on the scale for him. Right now, he's trying to delay the trials—and she's the only one letting him.

This means that he will go to trial first in the cases where the judges are not putting their thumbs on the scale for him. By the time we get to a case with Cannon presiding, we will likely already have the results of the DOJ / January 6 case, where he is very likely to be convicted. It could be that by the time we get to Cannon's case, it won't matter as much. The first will be the most watched.

Now for a quick look at the Georgia RICO case. It appears that the strategy in charging so many co-defendants was to get the bulk of them to flip against the head honchos, which would be Guiliani and Trump.

Trump's trial in Georgia will not happen any time soon. I think now they're talking about next August, but we'll see if that holds. The reason is that the RICO statutes are very complicated, and charging lots of people creates more complication. The RICO statute may end up raising some interesting Constitutional issues.

The DOJ, in the DC case, took the opposite approach: Streamline the indictment by naming unindicted co-conspirators. They obviously have the goods on the

unindicted co-conspirators but settled on the strategy of streamlining the case. Without co-defendants, there is fewer procedural hurdles to slow things down.

Leigh: Now the Georgia case had named co-conspirators many of whom have already flipped on Trump and made a deal with the prosecution. I'm thinking of Ken Chesbro, Sydney Powell, Jenna Ellis. What does that mean for Trump? And do these people who also lied and would have been fine overturning the government and destroying democracy for their own power position in the new order just get to walk?

Teri: Powell and Ellis took plea deals. They're getting probation and a small fine.

Most criminal prosecutions end with plea deals. The American Bar Association just announced that 98% of criminal prosecutions this past year ended in plea deals, which is the number I expect.

By the way, the high percentage of plea deals is one reason defendants don't generally attack prosecutors. They're hoping for a sweet deal. They stay quiet while their lawyers try to persuade the prosecutor that they got the wrong guy, or whatever.

Because these were sweet deals for Trump's co-defendants, one of two things happened: Either the prosecution realizes its case isn't very strong, or the Defendants have valuable testimony, or some combination.

I'd be careful with the word "flipped." Cooperation has degrees to it. We don't know exactly what these witnesses will say or how reliable they will be as witnesses. The prosecution has a good idea, but we don't. However, I do think it's safe to assume that they gave up something valuable for a sweet deal.

Leigh: Yes, let's just assume that they gave up something valuable.

(both laugh)

Leigh: And what about the unnamed co-conspirators in the January 6th Trial? I'm thinking those people are unnamed but not unnoticed. Jack Smith simply wanted the trial to move quickly and one person stalling is still faster than 7 people stalling. My hope is that case is concluded before the election and then the other 6 people are charged. What do you think is going to happen there?

Teri: That's my best guess as well

Leigh: Ok, now before you go, let's get back to that new 6-part blog post called the Misinformation-Outrage Cycle. Can you give us a little insight on that? Though I do think people should go to terikanefield.com and read it for themselves.

Teri: I wrote the series because I realized that I spent so much of my time tamping down misinformation. We know there are conspiracy theories in the right-wing information ecosystem.

There are also conspiracy theories and misinformation in what we might call the CNN-MSNBC-left-leaning social media ecosystem.

Conspiracy theories are just allegations that remain unsubstantiated.

Leigh: Can you repeat that again?

Teri: Conspiracy theories are just allegations that remain unsubstantiated. What makes them conspiracy theories instead of just insane ideas is that they attempt to explain the ultimate causes of significant social and political events and circumstances with claims of secret plots by two or more powerful actors.

They also assume that powerful people operating in the shadows are bad actors deliberately keeping the public in the dark.

A conspiracy theory doesn't have to be unhinged. It doesn't have to involve presidents returning from the dead or microchips planted in vaccines. It simply needs to assign blame for a confusing situation.

Leigh: What is an example of a conspiracy theory you've seen by people in the left-leaning social media? Because we know the right wing ones.

- Nancy Pelosi is refusing to impeach Trump because she is in partnership with Russian oligarchs.

This was real in the months before the first impeachment. An influential person who regularly appeared on news shows advanced this theory. It arises the way conspiracy theories always arise.

- (1) People face a situation that they don't understand, in that case, "Why hasn't Pelosi impeached Trump? (Scholars of impeachment know exactly why she hadn't, but people didn't get it.
- (2) So they look for a way to assign blame.
- (3) They believe that unseen dark forces are at work.

Another one: in the lead-up to the election, there were large influential left-wing accounts insisting that the voting machines in Georgia could be easily hacked and the election was in danger of bad actors who were planning to exploit the weakness in the voting machines.

I had very reasonable people coming to me with this.

This one drove me nuts because at the time I was doing voter protection work in Georgia. As part of my legal volunteer work, I rewrote the voter manual for the Democratic Party in Georgia. I knew it wasn't true, but if I tried to explain that the machines were secure, people told me I was naïve and wrong.

One more, my favorite. I think we talked about this one last time I was here. Merrick Garland initially refused to investigate Trump because he was afraid of angering powerful people.

If any of viewers out there are thinking, Wait! That's true! Go to my website, find the pinned post that is called "There are no Yankees here," and start reading.

If you know these things *aren't* true, you might want to read my series anyway because I think it will shed light on what we have to do to counter this to maintain a democracy.

Any kind of misinformation is dangerous.

Leigh: I guess you know a few things about that. Don't you have a book coming out soon about Disinformation?

Teri: I did! It's a graphic book. I wrote text and a brilliant graphic artist illustrated it.

Leigh: Cool!

Teri: Did you just say cool? It might be the first book I ever wrote that might be cool. It's a graphic novel and the illustrator was brilliant. (You can find information about that on my website.)

It's called a Firehose of Falsehood, and the premise is that lies destroy and disinformation tears at the fabric of democracy. In a Firehose of Falsehood, I break down disinformation tactics and offer tools for restoring truth.

I try to do that in the series on my blog as well.

Leigh: You're so good at it, Teri. If you're not listening to Teri and reading her stuff, please go to her website and start reading it, because she puts things so simply. She puts things together in a way we can understand.

Leigh: Thank you so much for joining us today Teri. Your insight into this *necessarily* complicated world of law is fundamental right now.

We can't keep living in this firehose of disinformation.

Thank you so much for your insight on this necessarily complicated legal system, which we want to be complex and not a straight shot to jail because it serves all of us.

Teri: I always have a great time talking to you, so thank you.