

TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

Special Prosecutors: Watch Dogs or Witch Hunts?—Air Date: 11/28/2005

Scholars, journalists and pundits across the political spectrum have called the special prosecutor law "politically corrosive" and "profoundly unwise." The uproar following President Clinton's impeachment reduced interest in Congress for extending the law beyond its 1999 expiration. But new allegations of abuse in government - from prison abuse to secret meetings with lobbyists to disclosure that the Department of Education is paying commentators to support their positions - raise important questions about how we handle allegations of governmental graft and overreaching. Do special prosecutors raise the potential for political witch hunts or are they necessary when conflicts of interest and partisan tampering with an investigation challenge the credibility of our justice system?

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MARGOT ADLER: From NPR, this is Justice Talking.

KEN STARR: The President of the United States might be involved in a – might be – in a plan to obstruct justice? This is staggering, this is astonishing. So you try to verify that. The last thing we want to do is to have some sort of official investigation into the sexual activity and the other private activity of the president of the United States. It's not the stuff of law.

JOHN DEAN: Ken has heard me talk about this in the past. One of the things that I never dreamed in going to the White House to become consul, at the tender age of 31, that what you needed to be was a criminal lawyer. It never occurred to me that I needed a background and experience. I know with that particular presidency it was essential you be a highly trained criminal lawyer.

MARGOT ADLER: I'm Margot Adler. From Watergate to Whitewater, who should safeguard the public trust when government goes bad? Stay with us.

MARGOT ADLER: This is NPR's Justice Talking. I'm Margot Adler. Earlier this year, we recorded a program in Malibu, California with two people who made history during presidential scandals. Kenneth Starr, dean of the Pepperdine University School of Law, served as independent counsel during the Clinton Administration. John Dean resigned as counsel to President Richard Nixon during the Watergate scandal. We decided to replay this program because of its relevance to the latest Washington independent investigation—the investigation into divulging the identity of CIA agent, Valerie Plame. Allegedly, two senior government officials leaked CIA operative Plame's name to reporters – a violation of federal law. On October 28th, Special Counsel Patrick Fitzgerald announced after a two-year investigation the indictment of Lewis Scooter Libby. Libby was chief of staff to Vice President Dick Cheney.

The indictment was for one count of obstruction of justice, two counts of perjury and two counts of making false statements. Libby subsequently resigned from his position in the White House. In this program, we talked with John Dean and prosecutor Ken Starr about whether we need government watchdogs and the role of special prosecutors.

But first, we get a history lesson on the country's often difficult relationship with special prosecutors from independent producer Marty Goldensohn.

MARTY GOLDENSOHN: Long before Watergate, Iran-Contra or Monica, American history gave us plenty of scandals that demanded special prosecutions. It goes back to the 1920s.

WILLIAM TRAINER: The first national special prosecutor occurs in the context of Teapot Dome.

MARTY GOLDENSOHN: William Michael Trainer, dean of the Fordham Law School, explains that the 1922 Teapot Dome scandal involved members of President Harding's cabinet, giving away the Navy's oil reserves in return for barrels of cash.

WILLIAM TRAINER: Congress suspects that the administration is not looking closely enough into it and puts pressure on President Coolidge who succeeded President Harding to appoint special prosecutors to look into it, and so he names two people, one of who's a democrat, one of who's a Republican, who then conduct the investigation and conduct the prosecutions that followed.

MARTY GOLDENSOHN: Teapot Dome, says Trainer, set the pattern for years to come. A President, whose inner circle is under suspicion, must let the opposing party do the investigating. That makes special prosecutors credible to Congress and the public. And

historically they've stayed credible, says trainer, because they're aggressive. They know it's the job of a lifetime.

WILLIAM TRAINER: Really, before Watergate, the most famous example is in New York State in the 1930s when there are allegations against Tammany Hall and Thomas Dewey, who at the time is a very young man, a former assistant U.S. attorney, is brought in to investigate and then prosecute. And that's really the basis of Dewey's political career. He then goes on to become the governor of New York and the presidential nominee of the Republican Party in 1944 and 1948. But the way in which he makes his name is through his work in New York City as a special prosecutor.

MARTY GOLDENSOHN: In 1973, another special prosecutor becomes a household name – Archibald Cox. With the Watergate scandal widening, President Nixon is forced to appoint the former solicitor general, a Democrat, to investigate the White House. Cox quietly goes about his work for five months until Saturday, October 20th, 1973 when Cox calls a press conference.

ARCHIBALD COX: Ladies and gentlemen, I'm sorry to have had to bring you in on such a lovely day...

MARTY GOLDENSOHN: The special prosecutor had made a crucial decision – to go head-to-head with the President. Cox had asked for “the Smoking Gun” – tape recordings and documents that would show Nixon and his top aides involved in the Watergate break-in and the cover-up. Two courts voted Nixon to comply.

ARCHIBALD COX: Last night we were told that the court order would not be obeyed. The papers, memoranda and documents of that kind would not be provided at all.

MARTY GOLDENSOHN: Cox resolved to press on, to get the evidence despite the risks.

ARCHIBALD COX: I've worried a good deal through my life about the problems of imposing too much strain upon our constitutional institutions, and I'm certainly not out to get the president of the United States.

MARTY GOLDENSOHN: Richard Nixon saw it differently. That night he ordered his special prosecutor be fired, but Attorney General Elliott Richardson refused to do it and resigned in protest. Assistant Attorney General William Ruckelshaus also refused – he was sacked. Finally, Acting Attorney General Robert Borke fired Archibald Cox. It became known as "the Saturday Night Massacre" – the beginning of the end for Richard Nixon. He had fired one special prosecutor only to face another.

RICHARD NIXON: Next week, the acting attorney general, Mr. Borke, will appoint a new special prosecutor for what is called the Watergate matter. The special prosecutor will have independence, he will have total cooperation from the executive branch, and he will have as his primary responsibility to bring this matter which has so long concerned the American people, bring it to an expeditious conclusion.

MARTY GOLDENSOHN: Archibald Cox was replaced by another Democrat, Leon Jaworski. The tapes were handed over, the prosecutions went forward, Nixon resigned, his top aides went to jail. But the Saturday Night Massacre had shaken the public. For a moment, our system of government was gridlocked, felt close to collapse. As a result, in 1978, a new law was passed to strengthen the position of special prosecutor – the Ethics in Government Act. A three-judge panel – not the president or his attorney general – would now appoint special prosecutors who would have an unlimited budget and could not be easily fired by the Attorney General. In 1980, the very first such prosecutor investigated President Carter's chief of staff, Hamilton Jerden for alleged cocaine abuse. No indictments were handed down. Then aide investigations in the Reagan years, including six years of Iran-Contra.

OLIVER NORTH: I am admitting to you that I participated in the preparation of documents for the Congress that were erroneous, misleading, evasive and wrong.

MARTY GOLDENSOHN: Lt. Colonel Oliver North. He and ten others were charged by Special Prosecutor Lawrence Welsh for, in effect, making their own foreign policy – selling weapons to Iran and using the proceeds to fight Nicaraguan gorillas. To Republicans, Iran-Contra was time wasted, millions spent. To Democrats it was disappointing. Those at the highest levels escaped responsibility. Perhaps the most prophetic words in the long history of special prosecution came in 1988 during the Reagan Administration. After an assistant attorney general became a target, republicans decided to challenge the independent counsel law itself. The Supreme Court ruled that the statute was constitutional, but Justice Antonin Scalia wrote a memorable dissent. He argued that the law blatantly encouraged prosecutions that were outside the control of the executive – the only branch of government allowed to prosecute crime. University of Pennsylvania law professor Nate Persily.

NATE PERSILY: When Justice Scalia dissented from the decision that upheld the independent counsel statute, he said, you know, frequently an issue of this sort will come before the clad, so to speak, in sheep's clothing. It must be discerned by careful and perceptive analysis. But this wolf comes as a wolf. And a lot of people, after the Ken Starr investigation, thought that Justice Scalia might have been quite prescient in his dissent.

MARTY GOLDENSOHN: Prescient even more so because Scalia predicted a sitting administration could come under relentless political attack from a special prosecutor acting virtually on his own. But Scalia's 1988 warning was just a dissent. The Ethics in Government Act remained enforced until 1994, when it would have expired. But, ironically, with Congressional republicans expressing doubts, President Clinton signed legislation reauthorizing it – a fateful decision. Within five weeks, Kenneth Starr was appointed to investigate Clinton and his friends in the failed Arkansas land deal called Whitewater. I'm Marty Goldensohn for Justice Talking.

MARGOT ADLER: I'm Margot Adler. This is NPR's Justice Talking. You might notice that Marty Goldensohn's report ended in 1994. This was just before our guest Ken Starr took on President Bill Clinton in Whitewater, "Travelgate," "Monicagate," and other matters, and before the independent counsel law was allowed to expire in 1999. Ken Starr is here with us today to give us his perspective on the best way to hold the president and other government officials accountable. He's now dean of the Pepperdine University School of Law. He was U.S. Solicitor General from 1989 to 1993 and served as a judge of the U.S. Court of Appeals for the D.C. Circuit.

Also with us is another man who knows very well the power of a special prosecutor – John Dean. He served as counsel to President Richard Nixon from 1970 to 1973. He has written a number of books about his experience during Watergate including "Blind Ambition" and "Lost Honor." He is currently a visiting scholar at the Annenberg School of Communication at the University of Southern California and is also a private investment banker. Please join me in welcoming Ken Starr and John Dean to Justice Talking. [Applause]

Let me ask you, Ken, a specific question in regard to your own investigation. During Watergate when Special Prosecutor Leon Jaworski wrote his report, it was 55 pages. There was no commentary, there was no conclusion. In contrast, your final report was, I believe, 332 pages. I believe I can buy it on Amazon. And investigating the Clinton Administration, that investigation has been called by many "sprawling". So why the difference?

KEN STARR: The statute, a particular provision of law, Section 595C, said that the independent counsel will provide a complete report. I had thought, wrongly, that it was simply a focused investigation into a failed land deal in Arkansas where the president and first lady had lost money. I thought I was going to be out of Little Rock in six months. And then, in terms of the most controversial part of the investigation, the Lewinsky phase of the investigation, once again the statute said, if information comes to you there is no question. The matter had to be investigated under the law – the matter being the Lewinsky phase.

MARGOT ADLER: John, what were your thoughts during that investigation and do you think that we're simply talking about an investigation that became so large because of statutory requirement?

JOHN DEAN: I thought a couple things. First, I think Ken had an impossible job. I watched what had happened to Judge Walsh when he took the job and was investigating Iran-Contra, and I saw the same thing happening to Judge Starr where indeed it becomes very adversarial just even to take the role. The primary reason I was there is because there was an effort also to draw a comparison between Whitewater and Lewinsky to Watergate and they really were apples and oranges.

MARGOT ADLER: This is Justice Talking from NPR. I'm Margot Adler coming to you from Pepperdine Law School in Malibu, California. You've just been listening to Ken Starr and before that, John Dean. When we return we'll talk more with John Dean about his life after Watergate.

JOHN DEAN [previous recording]: I began by telling the president that there was a cancer growing on the presidency, and if the cancer was not removed, the president himself would be killed by it.

MARGOT ADLER: More on political malignancy when Justice Talking returns.

MARGOT ADLER: I'm Margot Adler, welcome back to NPR's Justice Talking. We're talking about what investigative tools are needed when criminal allegations reach the oval office. Ken Starr, former independent counsel during the Clinton Administration, is here to talk about this with John Dean, former counsel to President Richard Nixon during Watergate. Let me start by asking you both if an independent counsel can ever really be impartial when investigating a president and his cabinet, the most powerful political people in the country? Let's start with you, John.

JOHN DEAN: Well, let's back up a little bit and talk about why you need an independent counsel and why they really initially decided to have an independent counsel. There would become a time in the Nixon White House after trying internally to convince some of my colleagues that what we were doing was not only foolish but criminal, and not being able to carry the day, and indeed telling the president himself that there was a cancer on his presidency, I, at one point, finally told him that I was going to have to break rank, believing if I did so that that would force others to come forward.

So I talked to the initial U.S. attorneys, or assistant U.S. attorneys, who were investigating the case for the Department of Justice. I was very reluctant to do so because I knew what had happened in the past. Everything that was going to the U.S. attorneys was coming back through the Department of Justice to the White House. So I put a condition upon my talking to the prosecutors that they indeed not report back to the Justice Department what I would tell them. And they agreed to that. So I started the process of unraveling the mess that was going on, and I wasn't very far along when they said to my lawyer: we've got to break the agreement. And they did, and they then reported back to Justice. Today we know exactly what I predicted would happen, did happen. They indeed took it right back to the White House. So that showed how ineffective indeed the normal system could be.

MARGOT ADLER: We're going to go into the audience because we want other people to join this discussion, and we have someone right here.

JOHN ROTHMAN: My name's John Rothman and I'm from New York. This is a question for Judge Starr, and it pertains to the Monica Lewinsky matter. I participated in a reading of

the transcripts of the Monica Lewinsky trials before it was public, or before she spoke to the public. And I was quite shocked by her treatment when she was taken up to that hotel room and questioned and not allowed to speak to a lawyer. I mean, I found it mono-maniacal – was that the word you just used? – and shocking. And I just wonder if looking back on it you feel—I mean, I'm sure that it observed the letter of the law. I don't think anything happened there that was... but on the other hand, in a...

MARGOT ADLER: Just very briefly explain what happened in that moment.

KEN STARR: Well, we're delighted to have you here from New York. Famously, Linda Tripp came to us with information that she was being asked to file a perjurious affidavit so as to avoid having her deposition taken in the Paula Corbin Jones civil suit and that she was being offered certain blandishments to come to beautiful California, she was being offered certain financial awards, just to get out of the jurisdiction so that the discovery period would run. All this came to us, and moreover that the person who was making these offers and blandishments had herself filed – and I will be very careful in what I say – an untruthful declaration in that civil suit. When the information came to us, we determined that we should do that which a responsible law enforcement agency would do. We did, in fact, follow procedure. All this was litigated, while I think the tack of wiring individuals for consensual monitoring...it happens every day in law enforcement. But it was a very ugly kind of situation. I couldn't agree more. We were all aesthetically very displeased. Believe me I wanted to be at Pepperdine.

But we used those tools to make sure that this rather remarkable investigation, that the president of the United States might be involved in a – might be – involved in a plan to obstruct justice; this is staggering, this is astonishing. So you try to verify that. And that was the purpose of the taping. Once we had the benefit of the taping using standard FBI procedures, she was then taken to—and this was not exactly the most difficult place to be, the Ritz Carlton in Arlington—and there the record...I'm just going to have to respectfully disagree because of the nature of this being litigated. She was not forbidden to talk to her lawyer. She was not. She was explained what the circumstances were. I know that's a popular impression. That's exactly what we litigated before a United States district court judge and that resolution was in favor of the prosecution.

MARGOT ADLER: But briefly, your question was that it was to the letter of the law, but did he have regrets or...

JOHN ROTHMAN: In a moral universe, is that the way you would like your...

KEN STARR: Oh I wish to goodness the whole thing had just... this was sort of let-this-cup-pass-from-me. I was minding my own business, looking ahead to living on this beautiful campus, being part of this beautiful community at an American Bar Association meeting in Colorado when the call comes: Ken, some extremely sensitive information has just come to us. We can't discuss it over any phone. Get back to Washington.

MARGOT ADLER: Now while I don't want to spend a huge amount of time on this particular scandal, let me ask one question that does come out of it to both John and Ken. That is the question that there have been sex scandals throughout American history, and historically, politicians and the press have pretty much kept these shenanigans in private. We've all heard rumors of various mistresses of various presidents – you know, they've never come out – and yet, more recently sex has become fair game, from Gary Hart to New Jersey Governor Jim McGreevy. So you've both been public officials. Where should the line be between public and private life? Let's start with you John.

JOHN DEAN: Well first, let me just add that I was asked also during Watergate to wear a wire. I learned I didn't have to. And I had also refused to wear a wire. And, as I say, we would now all know that Nixon was running his own wire, so it wasn't necessary for me to have one. But in fact, there are some very humorous tapes where he's convinced I am wearing a wire and he is absolutely paranoid that I have recorded some of our conversations. They were very humorous.

Anyway, where is the line? Well, obviously, sex scandals go back, I think, probably the first high level federal official involved in a sex scandal is Alexander Hamilton, the secretary of the treasury. He became very open in public and had to defend himself and his behavior with Mrs. Calendar. Wasn't that her name? Yeah. And so they start right from the founding of the nation and they have probably been consistent—some of them have surfaced and some of them haven't.

Now should we be investigating them? I don't think there's anybody who would really start an independent counsel investigation or any kind of special counsel investigation on the private life of a president. It happened because of the circumstances the way the Lewinsky investigation unfolded. Again, the statute enforced the investigation to go forward. I think if you'd had prosecutorial discretion you might've passed on that one.

KEN STARR: Oh absolutely – or send it away, do something with it, but absolutely. But we did have an obligation professionally to bring it to the attention, as I say, of the attorney general. But, Margot, you are absolutely right and I could not agree more with John that the last thing we want to do is to have some sort of official investigation into the sexual activity and the other private activity of the president of the United States. It may enter the political arena but it's not the stuff of law—maybe civil law if there's an issue of domestic relations and the like, but not the criminal law.

MARGOT ADLER: You're listening to Justice Talking with Ken Starr, dean of the Pepperdine School of Law, and John Dean, who was involved in the Watergate scandal and is the author of "Blind Ambition," "Lost Honor" and many other books. We are coming to you from Pepperdine Law School. Before we take more questions from our audience, I have a few questions of my own. John, you've seen abuse of executive power up close. What was it about the Nixon White House that let things go so out of hand?

JOHN DEAN: Well, it's not something that happens where a lot of people sit around and plan how they can abuse power. It doesn't happen that way. It happens an increment at a

time. You can see it in the Nixon presidency slowly gathering its momentum. It starts first for Nixon with leaks; he's very concerned about leaks. And it really kind of comes to its first real defining moment in the summer of 1971 when Daniel Ellsberg leaked the so-called Pentagon Papers, the study of the origin of the war in Vietnam.

This was to Richard Nixon, in many ways, what 9/11 was to George Bush. It was a really defining moment of his presidency. Those of us who have gone back and sort of shared and talked about what happened—you know, how did this all just go so astray—we all come back to that very moment, as the time when everything changed in the Nixon White House. It wasn't fun anymore; it was kind of heavy. Nixon...what had happened is the papers had been published...

MARGOT ADLER: Did he get paranoid?

JOHN DEAN: I would say that's a mild statement of the condition. What happened is that his initial reaction to the papers—they were released the weekend his daughter Trisha was married, and he went to the Sunday paper in the middle of June of 1971, and he noticed this big story about this leak of these papers. And his first reading was it didn't concern him. He said this really hurts the Democrats much more than it does Republicans.

So it's not until Kissinger on Monday tells him, Mr. President, I can't operate if we can't keep our secrets. I'm having secret negotiations with the Chinese, I'm having secret negotiations with the North Vietnamese, and if you can't show how we can deal effectively with Dan Ellsberg, the world is going to consider you a weakling. And that hit his manhood button and from then on it changed.

MARGOT ADLER: Let me turn to Ken and ask about your role in Whitewater. It led many people to support you and it led a lot of others to treat you as a pariah. It's five years later. Is the feeling still as intense as it was then? Can you walk down the street without being noticed? Can you have a private life?

KEN STARR: No, yes, yes.

MARGOT ADLER: Explain.

KEN STARR: Yes, thank you. I think the intensity has subsided. It obviously was a horrible time for the country. 1998 was a perfectly wretched, miserable year for everyone. It seemed as if no other issue could find its way to the public's attention. Just night after night with John having to be a buddy of whatever anchor...

JOHN DEAN: Anchor buddy.

KEN STARR: ... was occupying the chair. And we were so eager to conclude it—and I say this not in rancor, I do say this in sorrow—that I do wish that all things considered there had been prompt and full disclosure. It's sort of Watergate all over again. Let's deal with it, and once we deal with it that whether something – and I'm not going to make any

accusation at all – but whether something was said truthfully or untruthfully at that civil deposition, under oath, with a federal judge presiding, get that out, get it over with once it's known that other things are known to investigators and so forth. It could've been over in a matter of days.

And indeed one of my many sorrows about this is that the Monica Lewinsky dimension that our friend from New York was asking about in terms of that original contact, was also complicated by the fact that she had a particular counsel and the 11th commandment is "do not criticize fellow lawyers," but she had a counsel at the time who was not steeped in matters of criminal law.

MARGOT ADLER: This is Ginsberg you're talking about.

KEN STARR: I don't use names [laughs], except to say if she had engaged Jake Stein and Plato Cacheris, well-known criminal defense lawyers of complete honor and integrity and vast experience in the Washington, D.C. area—within two weeks we had a deal.

JOHN DEAN: May I ask Ken a question on that issue? I've always wondered about whether you had second thoughts about your decision to testify before the House Judiciary Committee on the impeachment inquiry. Now, yes, the law does require and call for a referral. It's based on what happened back in Watergate when Jaworski goes to the judge and a decision is made to refer—there really is no final report from Jaworski. He makes a referral to the Congress of the material from the grand jury, and doesn't testify, just gives them the raw data, something they called a roadmap.

You literally went up and explained it to the committee and took an awful lot of heat for that decision, including from your own ethics advisor who quit over it—Sam Dash, who's no longer with us, who was very critical of you for that decision. Have you had reflection on that decision?

KEN STARR: Well, not only have I had reflection on that decision, I did not want to do it. It will not surprise you, John, that I suggested: look, my statutory obligation was to provide you with the information. It is a complete report; you have backup information which is in the bosom of the Ford Building – backup materials that have never made publicly available. Use that material. The report speaks for itself and is available on Amazon.com.

JOHN DEAN: So why did you testify?

KEN STARR: Because it was an official request from the Judiciary Committee to, in fact, testify.

JOHN DEAN: They didn't subpoena you though.

KEN STARR: But could I...

MARGOT ADLER: Very quickly.

KEN STARR: But on Sam—and I love Sam Dash and I revere his memory—we simply had a disagreement. He didn't disagree with my...

JOHN DEAN: I was asked to testify with that committee too and turned them down.

KEN STARR: Well, that's good. You...

JOHN DEAN: I didn't want to mix Watergate in that mess.

KEN STARR: You showed greater wisdom.

MARGOT ADLER: Last personal question before we go back to policy. Ken Starr, what's the one question you really wanted to ask Bill Clinton but couldn't ask, or didn't?

KEN STARR: I think we asked President Clinton more than we possibly...[audience laughter]. I guess the one question would be: Mr. President, why didn't you settle the case?

MARGOT ADLER: You're listening to NPR's Justice Talking. I'm Margot Adler. Here's President Bill Clinton in 2004 reflecting on his impeachment.

BILL CLINTON: I believe fighting Newt Gingrich and Tom Delay and Kenneth Starr and all those guys, when they tried to take our Constitution away and invalidate the election of 1996, was a worthy and noble cause. I'm glad I did it, and I was happy to do it. I did not in any way, shape or form try to excuse any mistake I made.

MARGOT ADLER: More on witch hunts and watchdogs in government when we come back. Stay with us.

MARGOT ADLER: This is NPR's Justice Talking. I'm Margot Adler. We're talking about how to investigate wrongdoings in politics with Ken Starr and John Dean. Ken Starr became a household name as the Whitewater special prosecutor. He's now glad the independent counsel law has expired. John Dean's career changed as a result of Watergate. He resigned as counsel to President Nixon and was sentenced to four months in prison for his role in the scandal. He now is equivocal about the independent counsel law and says the Bush Administration has committed impeachable offenses. Do you really... have you said that?

JOHN DEAN: I really do believe that.

MARGOT ADLER: You do believe that.

JOHN DEAN: I've never made the charge. What I did in my book "Worse Than Watergate" is went through and really based it on what happened during the Nixon years when they looked at the issue of whether Nixon had committed an offense by secretly bombing Cambodia. And they decided it wasn't an offense because he indeed had informed Congress, just not all of Congress – only the ranking members of the committees with jurisdiction and the leadership. And when I looked at what was called a finding that was requested by the Congress in the formal resolution that granted authority to go into Iraq, the finding itself is a bad joke. I've never seen a document quite like it. It's something that just got blushed over and rushed over in the aftermath.

MARGOT ADLER: Should there be a special prosecutor to investigate...

JOHN DEAN: Well, no. Understand this: impeachment is a totally political proceeding. What I'm saying is that there is basis for a high crime and misdemeanor. In this instance, it happens to be a misdemeanor because it is a misdemeanor under the understanding of the founders to make a material misrepresentation to the Congress, and I think Mr. Bush did that. Now understand: impeachment and conviction are miles apart, too. A lot of people, when they hear the term impeachment...

MARGOT ADLER: They assume that it means convict, right?

JOHN DEAN: ... convict. The House impeaches, and traditionally they say you can impeach a ham sandwich, but they don't do this irresponsibly. But I'm saying there is certainly a prima facie case in which they could initiate an investigation – an inquiry into this. Will they? No, because the Republicans control it and this doesn't happen without a divided government.

MARGOT ADLER: So do you believe that if there is a new law and if we revive the independent counsel law, is there a way that it could be good and different from the one that we previously had?

JOHN DEAN: It's tinkering at this point. It's so structurally flawed, I don't think it could be corrected. We've seen it in practice. It is now sufficiently gored everybody to realize that it's not going to be good for anybody. It doesn't create confidence in the American people that high-level officials are getting fair treatment. Much more important would be if the Department of Justice stayed with its own internal regulations in selecting special counsel, which they've not done with the Fitzpatrick selection. That's a violation of their own internal regulation.

MARGOT ADLER: Ken, do you agree? Do you really think that you can't tinker with it? If you put time limits in and budget limits in and you made sure that the independent counsel didn't have to essentially recommend grounds for impeachment and that was separated...

KEN STARR: That was part of the law too.

MARGOT ADLER: Yes, I mean, if you didn't have to do that and you sort of changed the law in various ways, could it work?

KEN STARR: It could work, perhaps, but it still would be structurally flawed, including, as the opening indicated, I think the Justice Scalia attack was fundamentally structurally correct. That is, there's something wrong with ordaining by law and giving that person quote "independence from the executive branch," the authority to investigate one particular matter. And then to, of course, command the person be thorough and do a report. It just builds in the seeds of mischief that even if the prosecutor is conducting himself or herself in a way that he and his staff believe are completely honorable, completely consistent with professional norms, completely consistent with the command to be thorough, will nonetheless likely be perceived as political, as monomaniacal in nature, enough already, why don't you go away.

MARGOT ADLER: Here is President Bill Clinton in the summer of 2004 reflecting on his impeachment.

BILL CLINTON: So the Republican position is: If we impeached him, even if our reasons were invalid, no matter how illegitimate it was, it's still a black mark on him. We did it and might makes right. So what I try to do is to draw a distinction between my personal mistakes, which I very much regretted, and my willingness – indeed eagerness – to fight impeachment, which I am proud of. I do not consider it legitimate. I think, by the way, 135 years later we know that the impeachment of Andrew Johnson wasn't legitimate. It didn't have anything to do with anything illegal Andrew Johnson had done, he was trying to be faithful to Abraham Lincoln's vision of reconstruction. And they tried to run him out of office – the radicals in Congress – because he wouldn't do just what they wanted. So I don't consider that Andrew Johnson was dishonored by having been impeached because the impeachment was illicit, and that's the way I feel about this. But I never said that I wore the mistakes I had made as a badge of honor. I believe fighting Newt Gingrich and Tom Delay and Kenneth Starr and all those guys, when they tried to take our Constitution away and invalidate the election of 1996 was a worthy and noble cause. I'm glad I did it and I was happy to do it. I did not in any way, shape or form try to excuse any mistake I made.

MARGOT ADLER: Now this gives us a glimpse of what President Clinton thinks about his impeachment. Ken, in your heart of hearts was the fact that Clinton was not convicted a personal failure?

KEN STARR: Not at all. In fact, throughout that very long day in November of 1998—and in my testimony for the House Judiciary Committee, I thought I made it clear—that this was a matter of ultimate judgment for the House of Representatives, beginning with the Judiciary Committee. They could take that referral, the report, and could throw it in the trash. And I think a lot of people in the American public felt that that's exactly what the House of Representatives should've done with it—that it never should've been created to begin with. It was an ultimate political decision. I hope I didn't advocate in favor of impeachment, but it was their judgment. My view was—and I viewed this very

structurally—that it was my responsibility to give them the information. But what they did with it—and I would've been just as happy for them to say we're not going to convene a hearing—it was completely up to him.

MARGOT ADLER: John, would you have done anything differently if you look back on what you did during Watergate? It certainly propelled you into a different world, didn't it?

JOHN DEAN: Well, indeed. Ken has heard me talk about this in the past. One of the things that I never dreamed in going to the White House to become consul at the tender age of 31 was that you needed to be was a criminal lawyer. It never occurred to me I needed a background and experience. I know with that particular presidency it was essential you be a highly trained criminal lawyer – probably the first requisite and it was the one I did not have. Maybe my antenna would've gone up much sooner and must faster had I had that training. But, as I say, it became very clear to me as time passed that we were obstructing justice. I remember the first time I told John Ehrlichman, my predecessor as counsel who was the head of domestic affairs, I said, John, this is all obstruction of justice. He said, John, is there something putrid in your water you're drinking out there in Alexandria? And I said, no, I said, open the statute for yourself. He said, well I'll just leave that to you. I said, well I'm telling you the result. In other words, they wanted to argue with me and debate it. They just couldn't believe, because their motives were good, that they might be obstructing justice.

MARGOT ADLER: I'd like both of you to just give one sentence of what piece of advice you would give the next few presidents to not get themselves into the kind of situations that some of their predecessors have gotten into. Ken?

KEN STARR: Both Watergate and Whitewater demonstrate the importance of once the justice system is invoked, do not trifle with it, do not do anything other than to be honest and upright with respect to our system of justice.

JOHN DEAN: I think that's very good advice. Very interestingly, I had talked over the years, in my days in justice with Henry Peterson, an experienced prosecutor and head of the criminal division, about that very thing, and he said, you know, they're leaning on me over here to do this and do that. They don't understand the way this place works. Hopefully, when you get over there you'll tell them how it works because it doesn't work the way. Anyway, the advice I would give is that I would remind people that we happen to write the book on what not to do, and maybe they should take a look at that book.

MARGOT ADLER: We've come to the close of Justice Talking. Ken Starr, thanks to you and thanks to Pepperdine School of Law here in Malibu for hosting us.

KEN STARR: You're very welcome. Please come back.

MARGOT ADLER: John Dean, thank you so much for being on our show.

JOHN DEAN: Pleasure.

MARGOT ADLER: I'd like to leave you with a quote. This is from the playwright Oscar Wilde. "One should never make one's debut with a scandal. One should reserve that to give an interest to one's old age." I'm Margot Adler. Thanks for listening to NPR's Justice Talking.

MARGOT ADLER: In our continuing look at the record of Supreme Court nominee Samuel Alito, I called Doug Berman, the William B. Saxbe Designated Professor of Law at Ohio State University. He is the creator and author of a weblog called Sentencing Law and Policy. Thanks for joining me, Doug.

DOUG BERMAN: Thank you for having me.

MARGOT ADLER: I'm interested in learning about how Judge Samuel Alito has ruled on criminal law issues in the past. He spent a fair amount of time as a prosecutor, six years at the U.S. Attorney's Office in New Jersey and six years in the Justice Department. What can we learn about his view of criminal justice from looking at his past record?

DOUG BERMAN: Well it seems as though we can be confident that his history as a prosecutor influenced his perspective on a range of criminal justice issues. And so one thing we can be confident about is he will come to the court, if he is confirmed, with as robust a background on criminal justice topics as any of the justices currently serving there. And what tends to be my perspective on these issues is that extra information and insight will be very important for him to understand how different ruling by the court impact those actors working on the ground. And I do think both his history and his rulings suggest that he is particularly sensitive to the concern that courts can unduly impede the work of police officers or prosecutors trying to do their jobs as well as they can to protect society from crime. So my instinct is he will be sort of a prosecutor's judge and justice when he gets to the court, because certainly his history on the 3rd Circuit suggests that he tends to be more pro-government.

MARGOT ADLER: Yes, so he will be more pro-prosecutor than pro-defendant.

DOUG BERMAN: Absolutely.

MARGOT ADLER: Is there anyone else on the court that has a similar background in criminal justice and who might rule in a similar way?

DOUG BERMAN: There really isn't. In fact, one of the notable aspects of the current court is that there really hasn't been for quite some time anyone with real on-the-ground experience in the criminal justice arena. Justice Bryer did spend some time working at the U.S. Sentencing Commission and through his time as a lower court judge probably had the most exposure to a range of criminal justice issues. But realistically, Alito comes to the court with more background and experience than really any of the current justices

or really any justice reaching back all the way to perhaps Earl Warren who was the last justice to spend some time as a prosecutor.

MARGOT ADLER: How does Judge Alito view the death penalty?

DOUG BERMAN: Interesting question. It seems as though he's more favorably inclined to the death penalty than some of the current justices. Although, I wonder to what extent that reflects the perspective he's had on it through his time now on the 3rd Circuit. I don't believe he had any death penalty cases – there really wasn't a chance for death penalty cases back when he was a federal prosecutor, and so his entire exposure comes as a 3rd Circuit judge. And in that context he's reviewing death sentences after they've been reviewed by a number of other judges earlier. Now that's the same perspective he'll get as a Supreme Court Justice, but he'll see cases coming from other parts of the country, cases that may seem a lot shakier than the ones he perhaps has seen as a 3rd Circuit judge.

MARGOT ADLER: Samuel Alito is also a member of a group that's looking at sentencing guidelines. Tell us about this.

DOUG BERMAN: There's a project that was developed by the Constitution Project called the Sentencing Initiative, and what the goal was there was to bring together a bipartisan group from across the political spectrum to think about sentencing reform issues. This follows from a number of very important Supreme Court decisions over the last year and a half. *Blakely vs. Washington* and *United States vs. Booker*...

MARGOT ADLER: They basically threw out the sentencing guidelines.

DOUG BERMAN: Yeah, it's quite nuanced, in fact. It suggested that the procedures being used in federal sentencing, in some state sentencing, were constitutionally problematic, but left open a range of possibilities for reconstructing the system. And Judge Alito joined a group of judges and practitioners and academics working on this project to think about what should be the basic foundation for a reformed system.

MARGOT ADLER: Do we know what his own views are in sentencing in regard to his appearance and being a member of this group?

DOUG BERMAN: It's clear – and again this reaches back to his criminal justice experience – that he's engaged with these issues in a way that perhaps few other lower court judges are on a regular basis. And I think it is telling that he was willing to join this project, to be among that group, and to be thinking dynamically about what are good practices and that, you know, to the extent that we're hopeful that he is going to bring a balanced and thoughtful perspective to these issues, his involvement in this group suggests that he is inclined to do that.

One of the many things I'll be looking for if and when he joins the court is how he will participate in the set of cases that are going to follow these *Blakely* and *Booker* cases. There are literally dozens of unsettled issues that the lower courts are now struggling with

that he hasn't yet had a chance to speak to as a 3rd Circuit judge, and I think he's likely to play a very integral role in how the court may approach these issues going forward.

MARGOT ADLER: If you were in the Senate, what question would you ask Judge Alito when the hearings commence, particularly one that reflects on criminal justice issues?

DOUG BERMAN: I think I'd focus my attention on whether and how much he appreciates the importance of judges playing an independent role in the operation and development of the criminal justice system. I think it's an area of the criminal justice in general where the other branches, for a range of both appropriate and perhaps inappropriate political reasons, are disinclined to put high on their agenda respecting defendant's rights and insuring the system is being run fairly.

MARGOT ADLER: Thank you so much, Doug, for talking with me.

DOUG BERMAN: Sure thing; my pleasure. Thanks for having me.

MARGOT ADLER: Doug Berman is the William B. Saxbe Designated Professor of Law at Ohio State University and is the creator and author of a web log called Sentencing Law and Policy. We'll continue to look at the record of Supreme Court nominee Samuel Alito in the coming weeks. Thanks for listening to Justice Talking. I'm Margot Adler.
