ANSWERS TO QUESTIONS FROM SENATOR DeCONCINI

1. You were quite critical several years ago on the portion of the Judicial Tenure Act dealing with the discipline of judges.

Now that this provision has been in effect for a few years, I would like to know if your feelings about it have changed at all, and whether you feel the independence of the judiciary has diminished?

I am pleased to have the opportunity to comment on my criticism of the original legislative proposal that led to enactment of the Judicial Tenure and Disability Act.

At the 1978 Ninth Circuit Conference, there was considerable concern about the bill in its original form. At the request of the judicial delegation of the Conference, I presented the opposition case in response to a presentation by Leonard Janofsky, then President of the American Bar Association, who spoke in favor of the bill.

In its original form, the bill would have established a national commission, ignoring existing lines of authority within the circuits. The commission would have had authority to remove a judge from office without the necessity of impeachment. My position was that the core of judicial independence would be subverted by either or both of these provisions. I adhere to that view.

As other judges voiced similar opposition and were prepared to testify against the bill, I took no part in any later discussions or hearings on the bill. The two principal features that I had criticized were eliminated from the enacted measure.

The Act in its present form was adopted in 1980. I have not had extensive contact with it. I did suggest that the Ninth Circuit should draft rules to implement the Act, and I participated in that project. Our rules were sent to other circuits for study and were considered by the Judicial Conference of the United States in its recommendations for uniform rules. I have received reports from time to time from our Chief Judge and from the Assistant Circuit Executive charged with administering the Act. We have had two serious cases, one involving a non-Article III judge and one involving an Article III judge. In both of these matters, I was either off the Circuit Council on rotation or recused.

Over the last decade, I have observed that federal judges are becoming more conscious of their responsibility to explain and clarify judicial procedures to the public and are becoming more conscious, too, that the perception of fairness, as

well as the fact of it, is essential in any judicial system. This growing sensitivity reflects several factors, including heightened awareness of the duty of all officials to be accountable to the public; effective use of the Circuit Conference to exchange views between the bench and the bar regarding attitude, temperament, and performance of judges; and the institution, through the Circuit Conference, of procedures for individual judges to take surveys and use other techniques for self-evaluation. These matters are difficult to measure, but I tend to think this change in attitude would have come about without passage of the Act. Nevertheless, the provisions of the Act fit well within this framework.

My own assessment is that in the Ninth Circuit the experience under the Act has been good. The Act provides an avenue for lawyers or litigants to express criticism or grievances. This has value in itself, both as a safety valve and as a basis for us to evaluate our performance. In this circuit, a copy of any complaint goes immediately to the judge concerned. Many of the complaints are frivolous, but, even so, the existence of a misunderstanding or dissatisfaction is significant for the judge involved.

2. Do you believe that there are any specific areas of the Act which require refinement? This is, of course, assuming that the Act will remain in force. If your answer is yes, what suggestions would you have for improving this Act?

I have not studied the Act at great length and have no specific suggestions for amendment or refinement. Question 2 is broad, so please note my failure to suggest amendments should not be understood as saying the Act is valid in its various potential applications.

3. Judge Kennedy, if your opinion of the Judicial Tenure Act has not changed in the last seven years, what alternatives would you offer in replacement of the Act?

Pending further study, I would not recommend repeal of the Act as it exists or an alternative to replace it.

4. In your opinion, do you believe the implementation of the Act has had any positive effect on the judiciary? Has there been any negative effect on the judiciary since adoption of the Act?

I drafted my answers to questions 1 and 2 to be responsive to this question as well. I have noted the positive effects, though it is difficult to measure how many are directly attributable to the Act. I see no negative effects, except that the Act should not be a precedent for interference with judicial independence in the guise of imposing further disciplinary procedures.

5. Judge Kennedy, I am curious as to how you feel this legislation would undermine the independence of the judiciary when it does not take any authority away from the judiciary. The legislation merely provides a process through which the judiciary may police itself.

You have stated that this legislation will pit judge against judge. Even if this occurs, how would this amount to an undermining of judicial independence?

Since the Act would promote the integrity and moral behavior of judges, wouldn't the independence of the judiciary viz-a-viz the legislative and executive branches actually be strengthened?

As indicated, my opposition to the legislation was in its original form, and not as it is now on the books.

I respectfully submit my 1978 comment that we must be careful not to pit judge against judge remains valid. A federal judge is independent not only from other branches of the government, but also from other judges within the judiciary, subject to review and correction of his or her judgments in the ordinary course and to routine administrative control. Legislation that puts disciplinary power in the hands of judges can be just as corrosive of judicial independence as legislation that puts disciplinary powers in the political branches. A decision in favor of an unpopular cause can make the judge unpopular with his or her colleagues, as well as with the public. That judge deserves protection. Judicial independence has an individual aspect, as well as an institutional one.

Finally, the suggestion that a statute enhances independence because it promotes integrity and moral behavior is unavailing, especially if offered as a blanket justification for proposals of the incursive kind I criticized in 1978. In that context, the argument proves too much. Separation of powers is an essential element of the constitutional design. The lesson of history is that structural integrity of the separate branches preserves the constitutional balance. A breach of the structure undermines that balance, whatever the motive. Judicial independence may be lost beyond restoration if it is compromised, even for the best of motives. It is my hope that Congress will continue to review the Act we are discussing in this series of

questions, and that it will give all deference to the proposition that structural independence of the judiciary is one of the surest protections of our constitutional freedoms.

6. Judge Kennedy, let us assume that your criticisms of the Judicial Tenure Act are right on target.

Do you feel that the impeachment process, the primary constitutional policing mechanism on the judiciary, can sufficiently redress all instances of judicial misconduct, given the time and other practical restraints which are inherent in the impeachment process?

If you respond in the negative, then how do you propose that we fill this void?

Recent events reaffirm that sufficiently serious misconduct by a federal judge may result in the judge's impeachment. Although impeachment is a somewhat cumbersome process, it retains its vitality.

In my view, judicial independence is best preserved if the impeachment process is the sole mechanism to remove federal judges. The Framers insisted on judicial independence as a necessary component of the elaborate and delicately-balanced constitutional system they devised, and impeachment was the device that the Framers provided to hold judges accountable for their misconduct. I urge this as a matter of policy and do not thereby intend to express an opinion on constitutional interpretation.