Senator LEAHY. Judge Kennedy, on *Miranda*—aside from whether you would have written in the opinion "here are the four warnings to give," do you agree that defendants should be warned of their right to counsel and their right to free counsel if they cannot afford it?

Judge KENNEDY. That, of course, is the law and I know of no strong argument for overruling the law that is now in place.

Senator LEAHY. And you agree with that right?

Judge KENNEDY. Well, I don't want to commit myself that I wouldn't re-examine it, but I think it would take a strong argument to require me to change it.

Senator LEAHY. Thank you.

Thank you very much, Senator Heflin.

The CHAIRMAN. The Senator from Alabama, Senator Heflin?

Senator HEFLIN. Judge Kennedy, you were a witness in a criminal prosecution against Judge Harry Claiborne, as I understand it.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. Would you give us the circumstances pertaining to your appearance as a witness, how you were called and basically, in a thumbnail sketch, the facts?

Judge KENNEDY. Judge Claiborne was a U.S. District Judge in the District of Nevada. He was indicted and tried for various charges, one of which was the solicitation of a bribe from a former client of his. The former client of his was one Conforte who operated a brothel in Nevada known as The Mustang Ranch.

Claiborne had been Conforte's attorney when Conforte was charged by the U.S. Government for tax evasion. Conforte was convicted. Claiborne was not his attorney on the appeal because between the time of the ending of the trial and the taking of the appeal Claiborne became a judge.

Conforte's case was appealed to the ninth circuit. There was a three-judge panel consisting of Judge Tang, a United States Circuit Judge from Arizona; Judge Palmieri, U.S. District Judge from the Southern District of New York, sitting with us by designation; and me, and I was the presiding member of the panel.

During the oral argument of the case, the panel was quite vigorous in questioning the government, and it might have appeared to someone who was in the audience that the panel was quite concerned about the conviction and might be disposed to overturning Conforte's conviction.

The ninth circuit, because of its workload, historically has assigned district judges to sit with us on the circuit, and Claiborne himself, now a judge, had been assigned to our circuit and had sat with me a week earlier, and he subsequently sat with me a month later.

At the time he sat with me earlier, a week or so before, I was not aware that the *Conforte* case would come up and I had no idea that he was connected with it. When I sat with him a month later I suppose I was aware of it, but we certainly did not discuss it.

The allegation was that Claiborne solicited a bribe from his client of $50,000—I never did read the indictment—of a certain amount of money in order to influence the panel in its decision. Each of the judges on the panel, including me, testified to the fact

that Claiborne had not contacted us to influence the result of the case.

I did not hear the testimony. I was careful not to hear the testimony or read the newspaper accounts or even read the indictment. So my information on the case may not be even as good as someone who read the newspapers. But, as I understand it, the testimony was that Claiborne, the judge, had told Conforte, his former client, that Claiborne had met with Judge Palmieri in Judge Palmieri's apartment in New York. Judge Palmieri had never met the man, and so testified. All of us testified that there had been no attempts to influence us in the case.

I did say that Judge Claiborne, in a telephone conversation, with my clerk a party to the conversation, had asked when are you coming out with the *Conforte* case and I had said the case is under submission, which was a polite way of saying I am not talking about the case.

My testimony and the testimony of the other judges before the U.S. district court, which was now trying Claiborne for the bribery charge and for the tax evasion charges, was to outline the circumstances, to explain how the court of appeals works, to give background, and to give in a capsule—and to say what I have just told you in a capsule form.

The jury did not convict on any of the counts. It was a hung jury. Subsequently, Judge Claiborne was retried just for some tax evasion counts. They did not retry on this matter. And he was convicted in court and subsequently was impeached by the House of Representatives and convicted and removed by the U.S. Senate.

Senator HEFLIN. Well, you were called in by the government to testify largely as to how it worked, to deny this matter pertaining to approaches being made to the three-judge panel, and I suppose as to the inquiry as to when the *Conforte* case would come down. Is that basically correct?

Judge KENNEDY. Yes.

Senator HEFLIN. And you testified as a government witness?

Judge KENNEDY. Yes, I testified as a government witness in the case.

Senator HEFLIN. All right, sir. Now this brings up the issue of impeachment proceedings and the independence of the judiciary.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. I know that Senator DeConcini will probably submit written questions to you pertaining to the Judicial Conduct and Disability Act of 1980, as I believe it was called, which was known as the DeConcini-Nunn bill, which deals with the activity of judicial councils and the circuits and the Judicial Conference I believe, and ultimately perhaps Congress' role relative to the impeachment procedure.

You opposed pretty vigorously in a 1978 speech to the ninth circuit judges the Judicial Conduct and Disability Act.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. And I know that Senator DeConcini has told me that he appeared there with you and had quite a debate pertaining to that matter. You and I are on the same side. I voted against it and made a speech questioning its constitutionality when it was on the floor of the Senate.

But basically, I think you felt like it had some constitutional imperfections. Do you want to explain your opposition to that bill?

Judge KENNEDY. Yes, Senator. The bill, incidentally, in the form that it was initially proposed, the Nunn-DeConcini bill, and the form that we were concerned with in the Arizona debate was much more far-reaching than the bill that eventually was adopted. And that bill would have permitted a national committee of judges to inquire into the fitness and the behavior of any sitting U.S. judge, and I took, as did a number of my colleagues, the position that this was a serious threat to the independence of the judiciary.

The judges of the United States must be in a position where they can agree with each other and also disagree with each other very vigorously. And, if you are in a collegial body, and as you well know in the Senate, and you must constantly disagree and debate your colleagues, you need to rely on every bit of decorum, every bit of tradition, every bit of courtesy, every bit of etiquette that you can summon in order to maintain your professional friendship with each other. And we felt that this was one of the serious defects of Nunn-DeConcini. That it would set judge against judge in an arena where previously the Constitution had committed that responsibility solely to the U.S. Senate, and those were some of the grounds of our opposition to the bill.

Senator HEFLIN. Well, does testifying against a judge pit one against another?

Judge KENNEDY. Well, I suppose it does, although there, in the context where we were called as witnesses for the government, it was not as if we, the judges, were bringing the case.

Senator HEFLIN. After the Claiborne matter was heard by the Senate and he was impeached, a number of Senators felt that the procedure was cumbersome and perhaps may even lack some due process, in effect, the jurors being the members of the Senate, hearing evidence, hearing arguments, absences, and many of them having to do just like we are doing now, where people have to be at conferences. Very important issues are up on the legislative basis. They have their staff there but in some of the proceedings in the Senate, some of the arguments were done in secret, in closed session, and none of the staff was present.

Do you have any thoughts on whether or not the impeachment procedure that is followed under the Constitution needs changing or needs some fine tuning, or a different method, perhaps looking at what some of the States have done relative to the issue of discipline and removal of judges?

Judge KENNEDY. The framers were very deliberate about this decision, as you well know, Senator, and what have there been? Something like, I am tempted to say nine impeachments before Claiborne. There have been ten impeachments and five convictions, or something like that, in the history of the United States. There have been about 10 or 12 other instances where the Senate was about to convict and the judge resigned.

I adhere to my view that the existing constitutional system should be maintained. I am a little cautious about commenting at length on your impeachment procedures for two reasons: one, because I haven't given the matter much thought; two, because there

is a case in the courts now involving a judge and it is likely to come before the Supreme Court.

I think we can say that most of the commentary in the literature has been that the design of the impeachment trial process and its conduct is for the Senate to decide, guided by the managers in the House, and that it is not judicially reviewable.

Senator HEFLIN. You, in regard to the DeConcini-Nunn bill, or the Judicial Conduct and Disability Act, have taken a pretty strong position. Now, if you are confirmed and sitting on the Supreme Court, what standard would you use in determining whether or not to recuse yourself from cases that would come before you as a judge on the Supreme Court if the issue of its constitutionality were to be raised?

Do you feel like there are certain standards that you would use or follow on the issue of recusals pertaining to this issue and any other issue in which you have firmly stated a position, in effect, in a nonjudicial capacity.

Judge KENNEDY. As you know, Senator, there are two methods of recusal. One is automatic recusal. Automatic recusal is required under the statute whenever a judge has a financial interest, even the ownership of one share of stock in a corporation that is a party to a given case.

So the first thing you do is you look at the statute—it is 18 USC Section 455—to determine whether or not recusal is required.

Then there is a more flexible standard in which the judge in his discretion must recuse himself if his impartiality can reasonably be perceived as being affected in the case.

In the instance you give, I do not think the fact that I gave one speech, even though it was a rather hard-hitting speech as I recall, would disqualify me, because I think I could keep a fair and open mind on the issue.

Senator HEFLIN. Well, following that same line of reasoning, relative to issues like privacy or abortion, if you made a statement on the issues here before this committee, in a similar manner that you may have made in a discussion before the ninth circuit court of appeals judges on the disability and the conduct matter, do you feel like that that would in effect cause you to have to recuse yourself under the perception ground?

Judge KENNEDY. I realize that some Supreme Court nominees have taken the position before this committee that the reason they cannot answer the questions is they have to recuse.

I have some trouble with that. I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is something quite different.

I think the reason is that the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.

The press is designed to keep politics and the judicial function separate. It is not because we would be compelled to recuse ourselves in cases.

Senator HEFLIN. You have made speeches pertaining to victims' rights, including a speech in March of this year to the Sixth South Pacific Judicial Conference.

And you came up with a number of suggestions in effect how to ease the problems that confront victims as they come before the court.

Would you comment on the role that victim rights have played in the decisions you have written pertaining to criminal law.

Judge KENNEDY. Yes. I cannot say at this time that I have given any specific consideration to the new provisions which involve restitution and so forth.

I misspoke. I sat on one case on whether or not restitution could be required as a condition of parole.

And I can't now recall if I authored the opinion or not. But we held that the judge was within his discretion in insisting that as a condition of parole, the offender make restitution to the victim. That is an important part of the criminal process. The whole point of awareness about the victims—is because we can expand our horizon somewhat.

Sometimes the best way to impress upon the criminal defendant, especially if he is a first time offender in a domestic violence type of case, the best way to impress on him, on the defendant, the moral wrong that he has committed, the best way to encourage him to ask for the forgiveness of the victim, is to confront him or her with the victim in the proceeding.

And that has worked in lower courts. In the State courts, they are doing this more than we are in the federal courts.

Senator HEFLIN. I remember reading somewhere, maybe in one of your speeches where you mentioned the *Bernard Goetz* case, I believe, relative to the fact that he had been mugged previously before this subway incident.

That just comes to my mind. Do you recall what you had stated on that in the past?

Judge KENNEDY. I think it was in the New Zealand speech, in which I indicated that the *Goetz* case had been a celebrated case, and simply speculated on whether or not this particular person felt abused by the system, not in anyway intending to excuse the act, but just attempting to point out that victims are a real party in interest in the crime.

They have a certain standing in the proceeding. In many cases, the ordeal the victim faces requires him or her to relive the circumstances of the crime.

It is very, very difficult. And courts can do so much just by the way of attitude, simple mechanical arrangements for the convenience and the comfort of the victim, to make it known that the law has an interest in the victim.

Senator HEFLIN. You have been on the television cameras here. There have been some feelings that the proceedings of the Supreme Court of the United States should be televised.

Some of the State courts have televised their proceedings. Some make a distinction between appellate courts and trial courts.

Do you have any initial reaction about TV in the courts?

Judge KENNEDY. My initial reaction is that I think it might make me and my colleagues behave differently than we would otherwise.

Perhaps we would become accustomed to it after awhile. The press is a part of our environment. We cannot really excise it from the environment.

But in the courtroom, I think that the tradition has been that we not have that outside distraction, and I am inclined to say that I would not want them in appellate court chambers.

I once had a case—it was a very celebrated case—in the City of Seattle. The courtroom was packed. We were at a critical point in the argument. I was presiding.

A person came in with all kinds of equipment and began setting it up. He disturbed me. He disturbed the attorneys. He disturbed everybody in the room.

He was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.

So the standard doesn't always work.

Senator HEFLIN. Well, there are certain courts that have given a lot of study to this issue. And they impose certain restrictions such as certain locations, certain places, no flash bulbs, etc.

My observation has been that it can be done without interfering with the court.

It does cause a few of the justices to wear blue shirts and red ties and dark suits. But that is not uncommon among judges anyway.

I think there is one other question that I think should be asked with Senator Kennedy here. You are not kin to Ted Kennedy in any way are you?

Judge KENNEDY. Well, my father once announced that we probably were. And my mother came back the next evening and said, you know, we are related. And she began to smile, and she said, on the Fitzgerald side. So [Laugher.]

So I'm not sure.

The CHAIRMAN. You would both be lucky if you were.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, when my first round expired, I was asking you about the comment in your speech concerning the distinction between essential rights for a just system, or essential rights in our constitutional system.

And I am going to try to boil this question down, because I have quite a few questions to ask, and there is not a great deal of time remaining. And I know that Chairman Biden wants to finish up this evening.

The CHAIRMAN. Take as much time as you want. No Senator will be cut off.

Senator SPECTER. Well, in that event, I will take it slow and easy.

The CHAIRMAN. Seriously. We are going to stay with the rounds. Just like we did in every hearing I have ever conducted.

That is, you have your half an hour. And if you have more questions, we will go to the next round, and narrow it down until there are only one or two left.

You can ask questions until you exhaust questions. And I have never known you or anyone else in this committee to go on and ask questions that were not warranted.

So take all the time you need.