

I think it is appropriate for the Congress to air these possibilities and to hear from as many people as it can on the subject to determine whether there is any consensus that that would be a step in the right direction.

Senator LEAHY. Thank you, Judge. I appreciate your openness and candor before the committee today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator East?

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I greatly admire your fortitude here. This is an exquisite form of torture, I think. The Senators, you will note, come and go at their leisure; and we expect the witness to sit here and endure this. I was greatly impressed with your willingness to continue even when our distinguished chairman gave you the opportunity of opting out for a while.

I appreciate the great frustration that you feel in this; and I think Senators do, too—that we are never able to explore things in the depth that we would like to and to the extent that we would like to.

I guess it inheres to things human that you have time limitations, and so we all have 15 minutes and come back for another 15.

I would then like to have it understood that I am trying to get to the heart of what I think are some critical matters, not that these matters that I wish to raise are necessarily the sole litmus test for qualification, but because of the time limitations under which we all work we must single out a few things to make a point or two on and see, when we put it all together, if we have probed to some depth and substance. I would at least like in my own small way to try to contribute to that end.

#### SEPARATION OF POWERS

You have stated your general judicial philosophy as regards separation of power, which I think was well stated. You have certainly given us some indication of your conception of federalism, which I again think was well stated.

It does seem to me that it is appropriate to pursue certain substantive areas that would reflect upon your basic values on certain subjects because—to be candid—even though we talk about a rigid separation of policymaking and judicial interpretation of the law, we all know in the real world of the Supreme Court that, for good or for ill, the decisions of the Supreme Court have enormous policy implications. That has been true since *Marbury v. Madison*, and one could think of many classic cases illustrating the point you have discussed—*Brown v. The Board*, *Plessey v. Ferguson*, *Dred Scott*, ad infinitum—the enormous policy impact the Supreme Court has.

Hence, the basic fundamental values on certain crucial items that respective Justices have to me do become critical factors to consider because we are not working in a vacuum today; you will not work in a vacuum once you are appointed to the U.S. Supreme Court, assuming that things continue to move in that direction.

Let me cut through this gordian knot and get to the heart of one issue which has been alluded to before—there is no question about it; namely, this very difficult, hotly debated issue of abortion in the United States.

I wish to say again that I do not think it is the sole test for qualification. I do not think it is the only thing that ought to be pursued, nor has it been the only thing that has been pursued, but certainly it is fair game as a part of a whole panoply of items—concept cases—that we might pursue.

As I understand, Mrs. O'Connor, your basic personal position on this issue of abortion—just stating your personal values—is that abortion on demand as a form of birth control—you are personally opposed to that? Is that correct?

Judge O'CONNOR. Yes, Senator.

Senator EAST. Let me then follow up with this question: It has sometimes been said that most people personally oppose abortion as a form of birth control—that the real division is between those in the public arena who might wish to do something about it and those who would choose to do nothing about it.

As regards that particular division, what do you think would be an appropriate public policy position as far as dealing with the subject of abortion on demand as a form of birth control is concerned?

Judge O'CONNOR. Senator, I really do not know that I should be in the business of advising either this Congress or State legislators with regard to what their present posture should be in developing public policy.

I feel that it is a valid subject for legislative action and consideration, and certainly this Congress and your subcommittee have been deeply involved and engrossed in dealing with this precise area and determining to what extent this Congress should take certain action.

I appreciate that and appreciate that effort. It certainly is an appropriate role for the Congress. I just do not think that it is a proper function for me to be suggesting to you what you ought to be doing.

Senator EAST. Fine. I appreciate your concise and candid answer.

Let me pursue then this point: I gather what you are saying is that you do feel that it is fundamentally a legislative function to deal with the public policy question of how one copes with abortion on demand as a form of birth control. You would look upon that in a separation of power context, at the Federal level at least, as being in the domain of congressional action as opposed to the other two branches of the Government? Would that be correct?

Judge O'CONNOR. Senator, I would, subject only to any constitutional restraints which might exist. That is not to say that it should not also be the subject of State legislative consideration.

Senator EAST. I think, just parenthetically, on your latter point it is valid—that initially this was fundamentally a State function—to deal with the question of abortion. It was certainly so envisioned by the framers and certainly so envisioned by any reasonable interpretation of the Constitution. I appreciate your candor on that, Mrs. O'Connor.

Let me proceed with this question if I might: I would like to get your reaction to this particular statement by Justice White as a dissenter in *Roe v. Wade* in which Justice Rehnquist joined him. This is what they had to say about the majority opinion in that case *Roe v. Wade*—of 1973, which candidly is considered by many, even those who have differing views on the abortion issue, as probably the most glaring and flagrant example we have of judicial usurpation of congressional or—as you rightly put it—State policy-making function.

I would appreciate your reaction to this statement. Again, I am quoting directly from Justices White and Rehnquist. They say: "As an exercise of raw judicial power the Court perhaps has authority to do what it does today, but in my view"—Justice White, Rehnquist agreeing—"its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court."

Does that sound to you like a good statement of your judicial philosophy and a pertinent one as regards—yes, candidly—the specific issue of dealing with abortion on demand in the public arena?

Judge O'CONNOR. Senator East, I have read, of course, the dissent in *Roe v. Wade*, and I have read at least several scholarly articles criticizing that decision and have attempted to do a good deal of reading on the subject.

I am well aware of the criticisms that are leveled in those dissenting opinions of Justices Rehnquist and White, as I am of the other criticisms that have been raised.

For me to join in that criticism would be perhaps perceived as an improper exercise of my function right now, as a nominee to the Court, for the simple reason that I suspect we have not seen the last of that doctrine, or holding, or case, and that indeed we are very likely to have the matter come back before the Court in one form or another.

At least many who are dissatisfied with the opinion have expressed that one of the things that should be done is that the Court should be asked to reconsider that very holding, in which case consideration of the views expressed in the dissent as well as the majority and the other criticisms that have been raised and the comments pro and con would be very important and would become a part and parcel of the arguments to be considered when that case is reconsidered.

Senator EAST. I can certainly appreciate your desire not to speculate on hypothetical cases in the future, let alone certainly any existing pending case; but in terms of getting a feel for your fundamental judicial philosophy beyond generality, certainly to comment upon already decided cases and doctrines emanating out of them would be very appropriate in the confirmation hearing process.

This is not of course to be interpreted—and I would so publicly state—that you are promising to vote a certain way on a given speculated set of facts or a hypothetical case in the future.

I am asking really simply whether you think that specific statement is a reasonably valid one in terms of your understanding of this very significant and very profound case that not only deals with a very important issue but deals with the very fundamental

question that we are after this whole hearing—namely, the judicial philosophy of you as the nominee.

Judge O'CONNOR. I appreciate that. My concern is simply that which was felt, I suppose, by Justice Harlan when he was asked about the steel seizure cases which had been recently handed down and other nominees who have been asked about their views on the merits or lack thereof of recent decisions before their nomination and their similar reluctance to directly respond.

I understand your concern, and I appreciate it; I think it is appropriate. It is just that I feel that it is improper for me to endorse or criticize that decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts.

I do not think we have seen the end of that issue or that holding, and that is the concern I have about expressing an endorsement or criticism of the holding.

With respect to my judicial philosophy, I certainly feel comfortable in discussing that with you and in indicating how I would be inclined to approach a problem or a case.

I have tried to indicate today that I have attempted to view the role of the judge as appropriately one of judicial restraint in deciding those cases that come before the court on appropriately narrow grounds and resolving issues based on my understanding of the constitutional doctrines which are being invoked.

Senator EAST. Again, I appreciate your candor and your forthrightness. I suppose the frustration—maybe it is somewhat unique, though not at all for a moment reflecting adversely in terms of your qualification or potential service on the bench—is that frequently with nominees there would be, let us say, an extensive record in terms of their background on major substantive questions whereby we would not have to perhaps probe as deeply in a confirmation hearing because we would have a rather extensive written record.

It seems to me if we get a nominee where that is not necessarily so, because of your great work at the State level, we have somewhat of a heightened responsibility to pursue your attitudes.

For example, I would if time would allow—and it has run out on me—one might inquire as to your general feelings on the rights of women and how that might be reflected in the public policy arena; or the rights of minorities—blacks, for example—and how that might be reflected in the public policy arena; or your attitude on the death penalty and how that might be reflected in the public policy arena.

So it is in that spirit that I inquire about it and do agree that I pressed the point to that extent simply because of the dearth of information on the record. Perhaps in my next 15 minutes I can pursue this issue a bit further.

Thank you, Mr. Chairman. I appreciate that my time has run out.

The CHAIRMAN. Thank you.

Senator Baucus?