Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I welcome you back again.

I bumped into you briefly a few moments ago over in the Senate building, and we are back in here again. It is a pleasure to be with you.

Time presses upon us. I would like, in the 15 minutes that I have, to commence by picking up a loose end we were talking about when time cut me off yesterday. If I might, please, I would just very briefly here review the bidding.

I had focused—it is true—upon this issue of abortion. It is of course an important public issue in its own right, but I think one could pick other issues dealing with race relations, rights of women, the death penalty, and so on and so forth, to allow us some way or other in microcosm to get at this question of judicial philosophy and basic personal values on fundamental issues of the day.

As I understood your position yesterday on this matter of abortion—you of course have repeated since then—you are personally opposed to it, except in extraordinary circumstances, as a general policy of birth control. You were negative on it, as I understood your position.

I then turned to the question of how one might approach it in dealing with it in the public arena as a matter of public policy. As I understood your position there, you said you thought it was very much a legislative type of function.

I do not wish to put words in your mouth. Please correct me if you think I am in error here. You thought it also might be looked on as a State function—at least historically it had been prior to *Roe* v. *Wade.*

I then turned to *Roe* v. *Wade* and asked you what you thought of this quotation from Justices White and Rehnquist in which they described the majority opinion as being an improvident and extravagant exercise of the power of judicial review.

On this matter of *Roe* v. *Wade* it is not only important because of the issue that it dealt with—namely, the abortion issue—but it is also probably the premier case that many offer in suggesting that the Supreme Court had gone way beyond any reasonable conception in its role as an interpreter and applier of the law. As is said here, it is just an improvident and extravagant exercise of the power of judicial review that is the legislative function.

In fact Justice Rehnquist in his own dissent said,

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose upon each one partakes more of judicial legislation than it does of the determination of the intent of the drafters of the fourteenth amendment

Just to put the question to you again, as I understand it you do not wish to comment upon Justice Rehnquist's observations on this case?

I think it is particularly intriguing because you and Justice Rehnquist of course were in law school together, as I understand it, and were classmates and I presume might even have had the same teachers for constitutional law. So it adds a bit of heightened interest to it.

Again if I might have your response to their observations on this case?

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Judge O'CONNOR. Senator East, with all respect, it does seem inappropriate to me to either endorse or criticize a specific case or a specific opinion in a case handed down by those judges now sitting and in a matter which may well be revisited in the Court in the not too distant future. I have great reluctance to do that.

I recall the late Justice Harlan who at his confirmation hearing was asked, much as you have asked, questions about *Roe* v. *Wade*. He was asked his comments and reactions to the then-recent steel seizure cases.

His response was that if he were to comment upon cases which might come before him it would, "raise the gravest kind of question as to whether I was qualified to sit on that Court."

More recently the Chief Justice was asked to comment on a Supreme Court redistricting decision which was subject then to a great deal of criticism by some Senators. The Chief Justice noted that:

> I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the Court on which I now sit or on any other Court on which I may sit.

These are things that have concerned others before me and concern me now.

Senator EAST. I was noting earlier though, for example, your willingness in response to a question from Senator Metzenbaum about *Baker* v. *Carr*. You said that you were concerned about that case at that time, which I gather meant you had reservations about it.

I might for example inquire: Were you concerned about *Roe* v. *Wade* at that time?

Is there a tendency here to be selective in terms of which cases or doctrines you will or will not comment on; or, I guess, quite specifically, is the reluctance particularly applicable to *Roe* v. *Wade* and the abortion issue?

Judge O'CONNOR. Senator East, I am trying not to be selective in those matters to which I am willing to react, if you will. Certain things have been rather well decided and are not likely to be coming back before the Court directly or in any closely related form on the merits, if you will. With that situation my observation in the prior transcripts is that there is not the same reluctance expressed.

I felt it was a little unlikely, I suppose, that the Court was going to retreat or reconsider the basic precepts behind *Baker* v. *Carr*.

ADVISE AND CONSENT

Senator EAST. Of course the reapportionment issue, as the death penalty issue, as the rights of minorities issue, as the rights of women's issue, as the question of abortion—these things—I am simply probing—do they not constantly recur?

Let me restate it. If you are arguing that a prospective Supreme Court nominee cannot indicate particular values or sentiments on prominent issues of the time—if I might shift the focus of this to the whole problem of the Constitution and separation of power—it seems to me the confirmation process becomes almost meaningless; it simply means it is reduced to ceremony and résumés.

I do not, for heavens' sakes, wish this to be understood in terms of any personal reflection upon you because you have done an outstanding job. I am concerned as a Senator, as I look at the concept of separation of power, where we are supposed to be a part of this process of appointment to the Supreme Court. The President nominates, and we are supposed to advise and consent.

If in our fulfilling that obligation which the framers gave to us we are forbidden to get real substantive comment on issues of consequence—for example, previous doctrines and cases—I dare say we set a precedent—potentially, do we not?—whereby we cannot really fulfill any meaningful constitutional obligation; hence, we might suspense with it.

It is frustrating, as a Senator, because the Senate and the Congress are trying, I feel, in so many ways to reassert their policy-making function which many feel has been eclipsed by the bureaucracy under the direction of the executive branch or frequently by the Supreme Court and the judiciary.

We are given a few tools in the Constitution to try to assert our check and balance in separation of power. One of those is to be a part of the confirmation process. We have clearly that check or balance under the Constitution, but if we are forbidden by our own practices or those insisted upon by nominees, I query whether that formal and fundamental check and balance—and probably the most fundamental one we have in the appointment process—is not negated and eliminated simply because questions cannot be asked in a fairly thorough and substantive way.

I can appreciate you cannot promise anything; I can appreciate you could not comment upon pending cases; but when we are told that there cannot be comment upon previous cases and previous doctrines of substance, I query as one lowly freshman Senator whether we are able really to get our teeth into anything.

We are setting a precedent here. It has been noted that half of us have never been in on this process before, and you are probably the first of a number we are going to have coming up down the road with President Reagan.

I would hope that the Senate and the Judiciary Committee would set the precedent for confirmations of substance and depth and meaning.

You have certainly been an outstanding witness; there is no question about that. I probe it not in a personal way; I probe it in a constitutional sense as to whether we the Senators are really going to be in a position to make a substantive judgment.

I appreciate your candor in *Roe* v. *Wade,* and I certainly respect your judgment and your unwillingness to pursue it in greater depth. I do not wish to belabor the obvious, and so I will let the issue of *Roe* v. *Wade* rest because you have clearly indicated your reluctance to get into the specifics of it.

If I might please, Mrs. O'Connor, let me shift to one other point—time moves on—a different area beyond *Roe* v. *Wade,* but it relates to the check and balance that the Congress has upon the Supreme Court and the Federal judiciary. This is the question that Senator Specter so properly raised this morning on the question of jurisdiction under article 3.

Under article 3 of the Constitution, as you are well aware, there is the language dealing with this question of the appellate jurisdiction of the U.S. Supreme Court.

We are told that, "the Supreme Court shall have appellate jurisdiction both as to law and to fact with such exceptions and under such regulations as the Congress shall make." That is very explicit language to me, indicating that we do have that check or balance to set the limits, great or small, of the Supreme Court's appellate jurisdiction. You were noting that article 3.

Then the question was: Do we have any Supreme Court precedent on it? You noted ex parte *McCardle.*

I was interested in your comment. You said, "This is all we have; we don't have much to look at."

I would query, Mrs. O'Connor. We have an express provision in the Constitution. We have a Supreme Court decision that expressly upholds it. I would say that is a great deal to look at. That is about as convincing as one might make the case if stare decisis, precedent, and express language mean anything.

Am I correct in understanding your position that this is a very open, clouded issue whether the Congress has the power to deal with the question of the appellate jurisdiction of the U.S. Supreme Court? Do you think that is very much an up-in-the-air question?

Judge O'CONNOR. Senator East, only in the sense that we do not have experience as yet in the area of the Congress having actually passed legislation which becomes law and which says, for instance, the U.S. Supreme Court shall have no further jurisdiction over any question relating to, let us say, busing of schoolchildren. We have not had that kind of legislation enacted, and therefore no test, if you will, of the validity of that.

When I said that it was an open question I think I referred to the fact that a number of constitutional scholars have written articles on that very question simply because there are so many proposals now pending in the Congress to limit the appellate jurisdiction of the Supreme Court and also jurisdiction of the lower Federal courts in a variety of areas. So the subject has become one of interest.

I did point out that some believe that ex parte *McCardle* was perhaps not the complete answer to all questions which might potentially arise without power to be exercised in some fashion by the Congress. So I suppose in that sense we would logically expect that such an enactment could be questioned.

Ex parte *McCardle* is the case which was decided on a specific enactment of Congress repealing appellate court jurisdiction of the Supreme Court in that instance of any habeas corpus holdings of the lower courts. That simply is all that we have on that area.

If I might go back to your previous question for one moment to make one comment I would appreciate it. That is, in trying to draw the line on past cases where you feel comfortable in making comments as a nominee and those which you do not, I am simply aware in this instance that there are a number of people who have urged and continue to urge that the *Roe* v. *Wade* case—those who believe it was incorrectly decided who urge that the matter should be brought back before the Court at the earlier date and the Court

should be asked to consider again that question or questions related closely to it.

I think that it does fall in a category for that reason of concern as opposed to those cases where we are not hearing that kind of an approach.

Senator EAST. Mrs. O'Connor, on that point, every fundamental constitutional question is never fully resolved; it is always recurring, in whatever field it is. I see what you are saying, and I respect your judgment on it. I just respectfully disagree in that questions are always recurring, being reexamined, and redefined.

I do not see anything that is unique about this one as opposed to the others because they too shall be coming back, and I suspect this one will be coming back for an indefinite period of time.

But, again, I thank you for your courtesy and responsiveness.

Mr. Chairman, I have run out my time.

The CHAIRMAN. The distinguished Senator from Montana, Mr. Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I think it would be helpful if we pursued the same issue a little further.

It is my understanding that subsequent to the *McCardle* case the *Kline* case was decided which held that the Congress cannot limit Supreme Court jurisdiction in order to achieve a certain result.

Not only are there various constitutional scholars who come down on different sides, but the case law here is a bit confused, too. Is that not the case?

Judge O'CONNOR. Senator Baucus, you are correct. I think approximately 4 years after ex parte *McCardle* we had the case in 1872 of *United States* v. *Kline.*

I believe—I am not certain—that case involved a removal of jurisdiction at a lower Federal court level and was not directly related to the appellate jurisdiction of the U.S. Supreme Court. I could be wrong, but that is my recollection.

The case involved a matter which was then pending involving a litigant in the lower Federal court who had obtained a Presidential pardon for disloyalty in the Civil War, and he had a claim which was being made which he was entitled to make based on the Presidential pardon.

The Congress passed a law which in effect directed the court to dismiss the lawsuit of any person who had obtained a Presidential pardon for disloyalty in the Civil War. It was directed of course at that precise lawsuit, and the Supreme Court did hold that that action by Congress, which was directed toward resolving a particular case, was invalid.

Senator BAUCUS. Yesterday when we discussed this same issue I asked you as a matter of public policy how far you felt Congress should go in limiting Supreme Court review of constitutional questions. You appropriately did not give a definitive answer to that question.

Nevertheless, I was left with the impression that you had certain problems with limiting Supreme Court jurisdiction because you cited a vote that you had cast in the Arizona Senate on a related issue.