The CHAIRMAN. Our next witness is Lynn Schafran, representing the Federation of Women Lawyers' Judicial Screening Panel.

Do you swear that the evidence you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. SCHAFRAN. I do.

The CHAIRMAN. Have a seat, Ms. Schafran.

I understand you are one of the most astute lawyers in New York, so we will be glad to hear from you.

TESTIMONY OF LYNN HECHT SCHAFRAN, ESQ., NATIONAL DIRECTOR, FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

Ms. SCHAFRAN. That is very kind.

I am a lawyer from New York, and I am here in my capacity as national director of the Federation of Women Lawyers' Judicial Screening Panel.

The Federation was organized in 1979 to evaluate the demonstrated commitment to equal justice under law of all individuals, women and men, under consideration for appointment to the Federal bench. It is not our task to duplicate the efforts of the ABA's Standing Committee on the Federal Judiciary. Rather, we are concerned that in addition to demonstrating ability, integrity, and judicial temperament, a nominee also have given tangible evidence of commitment to equal justice for those groups which historically have been legally disadvantaged. To date, this organization has provided the Senate Judiciary Committee with evaluations for more than 120 judicial nominees.

In evaluating Judge O'Connor, we were particularly impressed with her record as a legislator. Her practice on the bench was such that she was not dealing with civil rights and other issues which are usually taken to indicate a judge's position on equal justice matters. We note that as a legislator she took a strong leadership position in areas that addressed the questions of inequity under the law for women, minorities, the disabled, and the poor.

With respect to women's rights, she revised community property laws, labor laws, and many other statutes which were clearly discriminatory. She also took the leadership role in completely revising the Arizona mental health statutes to provide protection for individuals undergoing both voluntary and involuntary treatment for mental disorders, to protect their civil rights, and to bar discrimination against them in housing and employment. Because of her efforts, the Arizona mental health law is now looked on as a leading model for State commitment codes.

Judge O'Connor's concern for the problems of minorities and the poor were further demonstrated by her support for bilingual education and workers' compensation for migrant farm workers, a State supplement to Federal SSI, and the establishment of medicaid in Arizona. This is certainly an outstanding legislative record demonstrating commitment to equal justice.

We would like to note one area of strong concern to us, and that is the area that was addressed extensively by Senator Metzenbaum in the previous 2 days of hearings. It concerns the views expressed by Judge O'Connor in her now infamous and endlessly discussed

Law Review article pertaining to the litigation in Federal courts of civil rights suits brought against State officials under 42 U.S.C. 1983.

As you have all heard by now, Judge O'Connor has suggested that Congress cut back on this kind of litigation in the Federal courts by limiting or disallowing recovery of attorneys' fees. What has not received as much attention is the fact that she believes that there should be a requirement of exhaustion of State remedies as a prerequisite to bringing a Federal action under section 1983.

I would remind this committee that in its own report on the Civil Rights Attorneys' Fees Awards Act in 1976, as well as in the report of the House Judiciary Committee, there was a great stress on the fact that the vast majority of victims of civil rights violations cannot afford legal counsel, and that absent attorneys' fees these civil rights would become, I quote, "hollow pronouncements."

What Judge O'Connor proposes is that we have a massive shift of section 1983 litigation into the State courts by making it possible to recover attorneys' fees only in State courts. I would suggest, without wishing to cast any aspersions on the very many fine State court judges in this country, that this ignores litigants' historically valid reluctance to pursue their remedies in State courts, and that it ignores completely the history of the enactment of section 1983 which shows a clear policy preference for Federal enforcement of federally guaranteed rights.

Now this is an area that it is up to Congress to act in and, although I know that Congress will take Judge O'Connor's words and her suggestions very seriously, we are perhaps even more concerned with the question of exhaustion because as a Supreme Court Justice, if confirmed, she will have an opportunity to speak on exhaustion.

Exhaustion is a well-chosen word. If you have to work your way through State administrative and State court processes before you can get to the Federal courts, you will be exhausted. Requiring exhaustion will dissuade individuals from seeking the relief that section 1983 has promised.

However, we recognize that Judge O'Connor made these suggestions and wrote this article from the perspective of an extremely able and independent State court judge. We trust that as a Supreme Court Justice with a national perspective, she will realize that regrettably not all State court judges are as capable and independent as she, and that vindication of constitutional rights requires that section 1983 plaintiffs be able to choose their own forums and proceed to a swift resolution of their claims.

Despite this concern, I would reiterate that the Federation of Women Lawyers' Judicial Screening Panel believes that Judge O'Connor's legislative record and organizational activities clearly demonstrate her commitment to equal justice and her awareness of many of the problems confronting those segments of our society for whom the struggle for equal justice has been most difficult. These are attributes we seek in every judge but they are essential in a Justice of the Supreme Court, to whom we look for the ultimate protection and vindication of our constitutional rights.

The Federation of Women Lawyers' Judicial Screening Panel supports the confirmation of Judge O'Connor, and we trust that

she will continue to demonstrate this commitment and awareness during what we expect will be many long years of distinguished service as an Associate Justice of the U.S. Supreme Court.

Senator Thurmond, I thank you, and I would ask that the full text of my statement be inserted in the record.

The CHAIRMAN. We want to thank you, Ms. Schafran, for your appearance here and the testimony you have given on this occasion.

[Material follows:]

TESTIMONY OF LYNN HECHT SCHAFRAN, ESQ., NATIONAL DIRECTOR OF THE FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL, AT THE CONFIRMATION HEARING OF SANDRA DAY O'CONNOR AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

My name is Lynn Hecht Schafran. I am an attorney and National Director of the Federation of Women Lawyers' Judicial Screening Panel. The Federation was organized in 1979 to evaluate the demonstrated commitment to equal justice under law of individuals under consideration for appointment to the federal bench. The Federation does not seek to duplicate the efforts of the ABA Standing Committee on the Federal Judiciary which evaluates nominees' legal skills and temperament. Rather, we are concerned that in addition to demonstrating ability, integrity and judicial temperament, a nominee must also have demonstrated commitment to equal justice under law for those groups which have historically been legally disadvantaged. To date the Federation has conducted detailed investigations of, and has provided evaluations to this Committee for, more than one hundred and twenty judicial nominees.

It is a particular pleasure to participate in these historic confirmation hearings for the first woman nominated to become a Justice of the United States Supreme Court. As an organization concerned with equal justice, we are acutely aware that women are among those for whom equal justice has often been most elusive. Nothing could better illustrate that sad reality than the fact that it was just over one hundred years ago that the Court to which Judge O'Connor has been nominated denied a woman a license to practice law solely because of her sex[1], and that, if confirmed, Judge O'Connor will be the first woman to sit on the Supreme Court in its 191 year history.

Even as we celebrate the historic nature of these hearings, we are aware that women still constitute less than seven per cent of the federal judiciary, and that no woman other than Judge O'Connor has been nominated to the federal bench during the nine months the current administration has been in office. We look forward to the day when the appointment of women and minorities to the bench will be commonplace, reflecting a true merit selection process by which all those who are qualified are considered, not

just those who are qualified and are also white men.

The United States Supreme Court is our court of last resort, empowered to provide the ultimate interpretation of federal statutes and constitutional rights, and to nullify state and federal statutes which violate those rights. "Equal Justice Under Law" is the credo inscribed on the lintel above its entrance. It is thus fitting that we scrutinize with particular care the adherence to that credo of a nominee to the high court. To profess a commitment to equal justice is easy. But no one can predict with certainty what a judge will do on the bench, especially with life-time tenure and under the unique circumstances of the Supreme Court. To attempt to ascertain beforehand, therefore, whether a nominee is indeed committed to equal justice under law, we are obliged to examine his or her record for tangible evidence of sensitivity to those groups for which equal justice has been a scarce commodity-women, minorities, the handicapped and the poor-to determine whether the nominee in his or her professional or personal life has taken concrete action, in a legal setting or elsewhere, to advance the status of these groups.

Since 1975, Judge O'Connor has been both a trial and appellate level judge. She is known for her absolute impartiality and meticulous devotion to the law. Because the practice before Judge O'Connor was such that she has not established a record which one can examine in cases respecting civil rights, employment discrimination and other areas of the law which are frequently cited as revealing a judge's commitment to equal justice, the Federation of Women Lawyers' Judicial Screening Panel has directed its inquiry primarily to an examination of Judge O'Connor's life experience, her record as a state legislator and the organizations in which she is involved. Although our inquiry has revealed some areas of concern, on the whole it reveals considerable evidence that in both her professional and personal life Judge O'Connor has demonstrated a sensitivity to the pervasive inequities in our society and a commitment to equal justice under law.

As a state senator from 1969 to 1973 and senate majority

leader from 1973 to 1974, Judge O'Connor demonstrated this sensitivity and commitment by exerting leadership to address many of the problems confronting women, minorities, the disabled and the poor. With respect to women's equality under law, Judge O'Connor accomplished major revisions in the Arizona community property law[2], which had placed women at a great disadvantage. Prior to these revisions, women had no management rights to the assets of the marriage. Husbands had sole authority to manage the community's property, to bind the community through contracts for credit, etc. and to sell the community's personal property. Judge O'Connor was also responsible for revising discriminatory language in state statutues which, in their perpetuation of stereotyped views of women and the family, worked substantive harm to women[3]. She initiated repeal of so-called "protective" labor laws which, by limiting women to an eight hour work day also limited their opportunities for employment in high paying jobs and management, and supported full constitutional equality for women under the proposed federal Equal Rights Amendment.

While a senator, Judge O'Connor was acutely aware of employment discrimination against Arizona women. In a 1971 interview with Phoenix magazine she stated, "A woman with four years of college earns typically $6,694 a year while her male counterpart earns $11,795 for the same job. The more education a woman has, the wider gap between men's and women's earnings for the same work."[4] Judge O'Connor's ongoing concern with career opportunities for women and the need for women to join together to seek equality and appropriate recognition for their talents is demonstrated by her participation in the National Association of Women Judges and Arizona Women Lawyers, and her service on the Arizona panel of the American Council of Education's program to enhance opportunities for women college administrators.

Judge O'Connor's sensitivity to the real world experiences of women and equal justice issues are perhaps traceable to her personal experience with discrimination. After graduating from

Stanford Law School in 1952 near the top of her class and with every honor, Judge O'Connor was refused employment as an attorney by law firms in Los Angeles and San Francisco solely because of her sex. One firm, ironically that of Attorney General William French Smith,offered her a job as a legal secretary.

As we have noted, Judge O'Connor's demonstrated commitment to equal justice under law has not been limited to the rights of women. One of her major undertakings as a senator was a sweeping reform of the Arizona mental health statutes respecting individuals undergoing voluntary and involuntary treatment for mental disorders.[5] Spurred by a 1971 volume of the Arizona Law Review devoted to a year long study of Arizona's commitment laws[6] and her experiences with the state hospital system while an assistant attorney general, Judge O'Connor spearheaded the development and enactment of legislation which tightened the substantive requirements for commitment and required that mental patients be made aware of their rights, be reexamined every ninety days and have an independent evaluator present at their hearings. Other provisions of this lengthy statute protect the civil rights of individuals undergoing mental treatment and bar discrimination in housing and employment against a person who is being or has been treated for a mental disorder. The Arizona mental health law is now looked on as a leading model for state commitment codes.

Judge O'Connor's concern for the problems of minorities and the poor are demonstrated by her support for bilingual education and workers' compensation for migrant farm workers, her sponsorship and enactment of a state supplement to federal Supplemental Security Income payments and her efforts to establish a Medicaid program in Arizona.

In the face of this substantial evidence of concern for equal justice issues, we are troubled that through her participation as a family member, Judge O'Connor supports two Arizona private clubs that discriminate against women. The Paradise Valley Country Club does not permit women to hold membership in their own right or to retain their husbands' memberships after the

death or divorce of that spouse. Both the Paradise Valley and Arizona Clubs have restaurants segregated for men only.

Both clubs are practicing a form of invidious discrimination which is highly disadvantageous to women in their professional advancement and which, if practiced against a religious or minority group, would be immediately condemned. Recognizing the equal justice issues raised by these kinds of clubs, the United States Judicial Conference has endorsed the principle "that it is inappropriate for a judge to hold membership in any organization which practices invidious discrimination."[7] We assume that as a member of the Supreme Court Judge O'Connor will adhere to this standard and withdraw from participation in these clubs until they discontinue their discriminatory practices.

The Federation of Women Lawyers' Judicial Screening Panel is also concerned about the implications for equal justice of the positions advocated by Judge O'Connor in her recent article, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," respecting civil rights challenges to the acts of state officials pursuant to 42 USC §1983.[8] Judge O'Connor suggests that Congress cut back on section 1983 litigation in federal courts "by limiting or disallowing recovery of attorneys' fees"[9] and urges "a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under section 1983."[10]

The Reports from the Senate and House Judiciary Committees on the Civil Rights Attorney's Fees Awards Act of 1976 stress that "a vast majority of the victims of civil rights violations cannot afford legal counsel,"[11] and that absent attorney's fees awards "our civil rights laws [will] become mere hollow pronouncements which the average citizen cannot afford to enforce..."[12] Curtailing these awards in federal courts would deny equal access to justice to section 1983 litigants because rich plaintiffs will have their choice of forums while poor plaintiffs will be forced to litigate in state courts or not at all.[13]

Suggesting a massive shift of section 1983 litigation into state courts ignores litigants' historically valid reluctance to pursue their remedies in courts established, staffed, operated and funded by the state whose officials' acts are being challenged. Moreover, the history behind the enactment of section 1983 reveals a policy preference for federal enforcement of federally guaranteed rights. Shifting section 1983 cases into state forums would deny litigants the consistency of interpretation that follows from reliance on nationwide precedents and serves as a disincentive to protracted and unrealistic litigation.

With respect to exhuastion, requiring a section 1983 plaintiff seeking vindication of fundamental constitutional rights to work her way through a state administrative process and then through a state court proceeding before allowing her into federal court is a hideous burden. Forced subjection of such litigants to the time consuming, often ineffective and inadequate procedures afforded by varying jurisdictions can only dissuade them from seeking the relief section 1983 promised. It is a truism that justice delayed is justice denied.

We recognize that Judge O'Connor made these suggestions from the perspective of an extremely able and independent state court judge. We trust that as a Supreme Court Justice with a national perspective, she will realize that not all state court judges are as capable as she, and that vindication of constitutional rights requires that section 1983 plaintiffs be able to choose their own forums and proceed to a swift resolution of their claims.

Despite the concerns raised in this testimony, the Federation of Women Lawyers' Judicial Screening Panel believes that Judge O'Connor's legislative record and organizational activities clearly demonstrate her commitment to equal justice and her awareness of many of the problems confronting those segments of our society for whom the struggle for equal justice has been most difficult. These are attributes we seek in every judge, but they are essential in a Justice of the Supreme Court to whom we look for the ultimate protection and vindication of our constitutional rights. We trust

that Judge O'Connor will continue to demonstrate this commitment and awareness during what we expect will be many long years of service as an Associate Justice of the United States Supreme Court.

FOOTNOTES

1. Bradwell v. Illinois, 16 Wall. 30 (1873).
2. Arizona Revised Statutes Sec. 25-214.
3. For example, Arizona Revised Statutes Secs. 12-612 and 12-641 which had given fathers only the right to maintain an action for the death or injury of a child.
4. Hartwell,"Sandra", Phoenix , February 1971 at 37.
5. Arizona Revised Statues Sec. 36-504 et seq.
6. 13 Arizona Law Review 1971.
7. Commentary to Canon Two of the United States Code of Judicial Conduct adopted March 1981, incorporating principle endorsed in March 1980. The Senate Judiciary Committee heard extensive testimony respecting judges' memberships in discriminatory clubs and organizations in 1979.
8. 22 William and Mary Law Review 801 (1981).
9. Id. at 810.
10. Id. at 815.
11. H.R.Rep. No. 1558, 94th Congress, 2nd Sess. 1 (1976).
12. S.Rep. No. 1011, 94th Congress, 2nd Sess. 6 (1976).
13. State courts may award attorney's fees in section 1983 actions. See, Maine v. Thiboutot, 488 U.S. 1 (1980.

The CHAIRMAN. Now our last witness is Ms. Rita Warren. Ms. Warren, come around.

Ms. Warren, hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WARREN. I do.

The CHAIRMAN. You may proceed, Ms. Warren.

TESTIMONY OF MS. RITA WARREN OF WASHINGTON, D.C.

Ms. WARREN. Senator, I want to thank you very much—I will not even try to take the 5 minutes—for having me testify. I do fully support the appointment of the Justice for the Supreme Court, Mrs. O'Connor.

I do share with Senator Metzenbaum the feeling that all of the groups that have been here speaking in regard to the unborn child are very serious, but I am more concerned about the child that is here already, and that is starving to death. Living under the Nazi regime in Italy, I know the suffering of hunger, and I would rather die than see a child suffering of hunger. We have many children