Testimony of

# The Honorable Orrin Hatch

May 6, 2003

Mr. Chairman, thank you for holding this important hearing today. This hearing marks the beginning of an important effort by this body to critically examine a judicial confirmation process that I and many of our colleagues, including Senator Schumer, agree is broken, and to propose solutions.

I want to emphasize why I believe that the judicial confirmation process is broken. It is all too easy to find recent examples of the rupture. In fact, one week ago, as I spoke in support of the nomination of Jeffrey Sutton to the Sixth Circuit, I learned that some Senate Democrats intend to proceed with an unprecedented simultaneous filibuster of yet another circuit nominee, Justice Priscilla Owen, who has been nominated for a seat on the Fifth Circuit. This, of course, is in addition to the initial and continuing filibuster against Miguel Estrada, the first Hispanic nominee for the prestigious D.C. Circuit, to which some of our Democratic colleagues have referred as the second most important court in the nation. Both nominations are about to reach their two year anniversary -- an anniversary that, quite frankly, the Senate ought to be ashamed to have reached without having confirmed these highly qualified nominees to the appellate bench.

Pursuant to Rule 22 of the Standing Rules of the Senate, a modern day filibuster prevents an up-or-down vote on a nomination unless cloture is invoked. Under the present application of the rule, a vote of 60 Senators is required to end debate by invoking cloture. What makes the filibusters of Miguel Estrada and Priscilla Owen so outrageous is that the Senators perpetuating this obstructionist ploy aren't demanding the opportunity for extended debate. There is no dispute that there has been plenty of debate on these nominations. Everyone has had an opportunity to be heard, and all the issues have been repeatedly scrutinized.

Instead, pro-filibuster Democrats are subjugating the will of the majority, which wants an up-or-down vote on these nominees, to the whims of the minority by demanding a supermajority vote for confirmation. Such a requirement is contrary to the plain text of the Constitution, which is unambiguous as to the five extraordinary situations in which our forefathers required a supermajority: To expel a member, to convict impeached officials, to override Presidential vetoes, to ratify treaties, and to propose Constitutional amendments. The Constitution clearly does not require a supermajority vote to confirm a judicial nominee. Indeed, I would like to know if any of my colleagues believe that a supermajority vote is needed to confirm a nominee? That is an important question.

Moreover, consistent with the tenor of this hearing, filibustering judicial nominees is simply poor public policy. It turns every judicial appointment into a partisan political war, and threatens to erode the respect in which we hold our third branch of government - the one branch of government intended to be above political influence.

This is not to say that the Senate should proceed to act on judicial nominations without careful scrutiny. Clearly there is an appropriate role for the Senate to engage in a learned and tempered, but genuine, deliberation. But the debates on the nominations of Miguel Estrada and Priscilla Owen have lasted for hours and hours, with no real progress. The accusations that the majority simply wishes to act as a rubber-stamp ring hollow, yet Senators are prevented from exercising their constitutional advice and consent responsibility by a determined minority that has thwarted an up or down vote on these nominations.

I am firmly convinced that this is not what the Framers envisioned when they drafted the Appointments Clause of Article II, Section 2 of our Constitution. The judicial confirmation process is in dire need of reform, and I look forward to hearing today about the proposals of the esteemed witnesses Senator Cornyn has assembled.

I would also like to take this opportunity to set the record straight on an allegation in the written testimony of one of the witnesses we will hear from today, Marcia Greenberger. Ms. Greenberger's testimony noted that I described the filibuster as "one of the few tools that the minority has to protect itself and those the minority represents." The citation

for this quote is to the 1994 floor debate on the nomination of Lee Sarokin to the United States Court of Appeals for the Third Circuit. Her testimony erroneously suggests both that there was a filibuster of Judge Sarokin's nomination, and that I supported it. Here is what I actually said, placed in its proper context:
Mr. President, one of the games that is being played around here is that whenever the majority leader wants to move something along, he files cloture, whether or not anybody has decided to use extended debate. I have heard the majority leader--who is a person I have great regard and respect for--say how beset we are with filibusters in this body.

Naturally, in the last week or so of a session, there is going to be the threat of some filibusters. It is one of the few tools that the minority has to protect itself and those the minority represents. But this is not a filibuster. I find it unseemly to have filed cloture on a judgeship nomination--where I have made it very clear that I would work to get a time agreement--and make it look like somebody is trying to filibuster a Federal court judgeship.

I think it is wrong, and I think it is wrong to suggest in the media that this is a filibuster situation, because it is not.

I personally do not want to filibuster Federal judges. The President won the election. He ought to have the right to appoint the judges he wants to.

For the record, then, there was in fact no filibuster of Judge Sarokin's nomination, and I specifically did not support a filibuster of that or any other federal judge's nomination.

Again, Mr. Chairman, I thank you for convening this important and timely hearing.