

United States Senate

WASHINGTON, DC 20510-4305

September 17, 2003

Dear Colleague,

This morning, the Alliance for Marriage – a bipartisan and multicultural coalition of civil rights leaders, religious leaders, and legal scholars – held an important press conference to reiterate the Alliance's strong support for traditional marriage, and to ask Congress to take all legal steps necessary to protect and enforce the principles embodied in the federal Defense of Marriage Act of 1996. I want to thank all of the leaders and members of the Alliance for their dedication to the institution of marriage. I'd also like to take this opportunity to inform you about a hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights, which I chaired on Thursday, September 4, to address the question: "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?" I'd like to explain why I held that hearing, and what I believe the hearing accomplished.

I believe that the hearing was deeply informative. Unfortunately, the hearing demonstrated that courts may be poised to strike down traditional marriage laws, and to take the issue away from the states and the American people.

Americans instinctively, and laudably, support two fundamental truths: that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection. Throughout society, individuals form personal relationships of all kinds: relationships based on common professional goals and objectives, shared interests and hobbies; relationships based on friendship, intimacy, and love. But only one kind of relationship has received such historic and multicultural elevated status in law, culture, and morality: the traditional marital union of one man and one woman. That is not because other kinds of relationships are unimportant, but rather because stable unions of one man and one woman are the strongest foundation mankind has ever known for ensuring the healthy upbringing of children. A wealth of social science research and data attest to this fact.

It does not disparage other kinds of relationships for society to recognize that children are raised best when they are raised by their mother and father. Indeed, it is difficult to imagine an institution that has enjoyed such overwhelming consensus as traditional marriage. The traditional institution of marriage has existed as such throughout human history, across numerous and diverse cultures, countries, and civilizations as well as party lines, and in the laws, judicial precedents, traditions, and historical practices of all 50 states. It was thus for good reason that the Defense of Marriage Act, or DOMA, was enacted with the support of overwhelming bipartisan majorities in both the House (342-67) and the Senate (85-14), and signed into law by President Bill Clinton.

Given the fundamental importance of marriage, it is no surprise that the policy reinforced by DOMA has long been the law of the land. And to my knowledge, no one in the Senate is openly advocating its repeal. Yet the courts are poised to repeal traditional marriage laws, on the basis of constitutional theories that, in my view, ought to be quickly dismissed by courts, yet enjoy alarmingly strong support in the language of recent Supreme Court decisions. These court challenges even appear to enjoy the tacit support of at least some members of Congress who voted against DOMA back in 1996.

Members of the subcommittee heard testimony from distinguished U.S. Supreme Court practitioners and legal experts, who gave substantive confirmation and analytical support to what the press and commentators across the political spectrum have been reporting for months – that courts may be predisposed to strike down traditional marriage laws.

In 1996, a Hawaii court struck down that state's traditional marriage laws. An Alaska court took similar action in February, 1998. Voters in both states stopped the courts and protected traditional marriage by enacting state constitutional amendments in November, 1998. Voters also took preemptive action to prevent future lawsuits by enacting state constitutional amendments and statewide initiatives in Nevada, Nebraska, and California in 2000. And of course, Congress approved the federal Defense of Marriage Act by overwhelming margins. So, at least until recently, the American people have been led to believe that we are in the clear, and that traditional marriage laws will continue to be the law of the land, free from serious risk of judicial attack.

A recent decision by the U.S. Supreme Court dramatically changes the legal landscape, however. That decision presents a significant threat to traditional marriage laws – a threat that no state, on its own, can thwart. In his majority opinion for the Court in *Lawrence v. Texas*, Justice Anthony Kennedy asserted that “our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do” (emphasis added). Because of this quote and other passages in the *Lawrence* decision, Patricia Logue, a senior attorney at the Lambda Legal Defense and Education Fund who litigated the *Lawrence* case, has said that it is “inevitable now” that courts will strike down traditional marriage laws like DOMA. Similarly, Will Harrell, executive director of the American Civil Liberties Union in my home state of Texas, has reportedly expressed his belief that “the [*Lawrence*] decision opens to challenges the Defense of Marriage Act.” And of course, numerous groups on the left have already filed lawsuit after lawsuit, amicus brief after amicus brief, trying to take the issue of marriage away from the American people and the democratic process – including groups like Lambda Legal Defense, the ACLU, and the People for the American Way. These groups show no signs of stopping until they succeed in convincing courts to strike down traditional marriage laws.

Notably, no Senator bothered to seriously question our legal experts on their analysis of the substantial judicial threat to traditional marriage laws like DOMA, either during the hearing or in written questions. That members were so ready to move beyond discussions about the existence and nature of the legal threat, and instead to move directly to a consideration of whether a constitutional amendment should or should not be adopted, perhaps reflects an emerging consensus view in the Congress that a legal threat does in fact exist. Indeed, some members who voted against DOMA appear to believe that courts *should* invalidate and refuse to enforce that law. During the hearing, Senator Russ Feingold suggested that traditional marriage laws like DOMA offend, in his view, “the Constitution’s equal protection guarantees.” In written testimony submitted to the subcommittee, Congressman Jerrold Nadler asserted that DOMA has no legal effect, because either it is “meaningless, or it is unconstitutional.” Senator Ted Kennedy, voting against DOMA in 1996, asserted his view that “this Federal bill is . . . unconstitutional.” One leading Democratic candidate for President, former Vermont governor Howard Dean, has repeatedly stated his view that “DOMA is unconstitutional.”

To be clear, I believe that there is nothing unconstitutional about traditional marriage laws. But we in Congress cannot ignore these dire predictions.

Some Senators may ask whether the issue of marriage rises to the standard of a constitutional amendment, perhaps out of a healthy skepticism about the need for constitutional amendments in general. The hearing confirmed, however, that marriage does meet the standard for a constitutional amendment. Senator Chuck Schumer suggested during the hearing that a constitutional amendment would not be appropriate “if a statute would do the same job.” Senator Schumer voted for DOMA, so it is certainly reasonable for him to wonder whether any further Congressional action is needed to protect traditional marriage. But given the constitutional threat that exists, Senator Feingold correctly noted at the hearing that “the only remedy for that . . . is a constitutional amendment.”

Senator Patrick Leahy articulated a different standard for constitutional amendments, stating that amendments are usually reserved for “matters of significant importance.” I hope that no one in this body would question that the institution of marriage is perhaps the most important societal institution mankind has ever established.

We should all agree that, especially in an area as important as marriage and family law, it is important that the law be clear. People need to know what the law is, so that they can conduct their lives, relationships, and legal arrangements accordingly. When lawyers and legal experts conclude that it is “inevitable,” or at least highly probable, that we can no longer count on the enforcement of the traditional marriage laws of all 50 states, because courts may try to rewrite those laws, we know that we have a problem worthy of attention and clarification.

Of course, there is certainly room to debate and discuss the actual content and text of a constitutional amendment. During the hearing, the Democrats’ own legal expert suggested that he might someday support a narrower amendment than the one introduced on the House side. Also during the hearing, Senator Dick Durbin reiterated that he is opposed to same-sex marriage, but that he also opposes any action that would deny states the opportunity to provide benefits “without assaulting the institution of marriage.”

This is a helpful discussion, and one that I hope will continue in earnest. The American people deserve at least that much.

What the American people do not deserve, however, is for their desire to protect and defend traditional marriage to be dismissed, disparaged, and disrespected by red herring arguments.

Take, for example, the contention that a constitutional amendment is contrary to states’ rights and democracy. It is rather extraordinary for some groups to suddenly assert the importance of states’ rights – the same groups who have opposed some of President Bush’s most exceptional judicial nominees precisely because of their support for states’ rights. More substantively: Legal experts, as well as current and former state law enforcement officials across the country, have reported to the subcommittee that the real threat to states’ rights in the area of marriage is judicial activism, not Congress. And of course, there is no more democratic process anywhere in the United States than the arduous process of amending the Constitution. Under the traditional mechanism, a constitutional amendment takes not only the approval of two-thirds of both Houses of Congress, but also the consent of three-fourths of the states. It is difficult to imagine a lawmaking process that involves more democracy, and the consent of more states of this great Union.

Another phony argument is the issue of religious freedom. Religious organizations overwhelmingly reported to the subcommittee their support for traditional marriage, and for any legal action necessary to protect traditional marriage. And of course, the Defense of Marriage Act does nothing whatsoever to violate religious freedom. That law focuses entirely on how *government* shall treat marriage, and not how *churches* shall treat marriage. Whatever government decides to do about marriage, churches can always make their own decisions, and vice versa. Nobody in Congress is talking about eliminating the right of churches to conduct marriage ceremonies and impose marriage rules of whatever kind they choose.

In conclusion, the hearing demonstrated beyond all doubt that judicial activism is indeed a serious threat to the institution of marriage. We in Congress, and especially those of us who voted for or support the Defense of Marriage Act, thus have a duty to closely monitor this situation. I close by acknowledging what Senator Kennedy pointed out in 1996: “There are strongly held religious, ethical, and moral beliefs that are different from mine with regard to the issue of same-sex marriage which I respect and which are no signs of intolerance.” We should all agree that the issue of marriage is something that belongs to the American people to decide, and should remain within the purview of the democratic process. It should not be taken over by the courts.

Sincerely,


John Cornyn