

Statement of
The Honorable Orrin Hatch

United States Senator
United States Senate
July 20, 2011

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Hatch Before the Senate Judiciary Committee
Regarding the Defense of Marriage Act
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Mr. Chairman, in 1996 I joined 84 other Senators in voting to pass the Defense of Marriage Act. It received similarly broad bipartisan support in the House. More than 30 current Senators, including you and the Majority Leader, voted for DOMA in the Senate or in the House. President Bill Clinton, a Democrat, signed it into law.

I continue to support the Defense of Marriage act and, therefore, oppose the legislation before the committee today that would repeal it. The Defense of Marriage act was enacted to further the sound public policy of protecting traditional marriage, and to do so in a manner that is consistent with two features of our system of government. First, in a republic, the people and their elected representatives, not the courts, should make decisions about policy issues such as marriage. Second, DOMA respects our system of federalism.

As a statute, DOMA endorses the traditional definition of marriage for purposes of federal law and protects the states' ability to define marriage for purposes of state law. Each of these elements is as important today as it was when DOMA was enacted. I understand the impulse to achieve a political objective by any means necessary. I understand the frustration of limitations such as appealing to the American people or to legislatures rather than to a few unelected judges. But this is a republic based on the rule of law, and the freedom our system of government provides comes with some limitations.

I chaired this committee's hearing on DOMA in July 1996. I believe today what I said at that hearing, namely, that this legislation is necessary, it is valuable, and it is constitutional. In fact, the 15 years since that hearing have only reinforced those conclusions and strengthened the case for DOMA. In all 31 states where the issue has been put to a vote of the people, they have protected traditional marriage by statute or constitutional amendment, while a few state legislatures have recently changed the traditional definition of marriage.

The Defense of Marriage Act protects the right of states in both categories to make that decision for themselves. In 1996, the Clinton Justice Department wrote this committee to state: "The Department of Justice believes that the Defense of Marriage Act would be sustained as constitutional if challenged in court." Fifteen years later, the Obama Justice Department first made arguments in certain courts that DOMA is constitutional, then refused to make those

arguments in others courts, and then argued in a legal brief that it is unconstitutional. I submit that this change occurred because the Obama administration put politics ahead of the law.

There is no question that reasonable arguments can be made that DOMA is constitutional. At the hearing in 1996, such arguments were cogently presented by leading constitutional scholars such as Professor Michael McConnell. At that time, he was the William B. Graham Professor of Law at the University of Chicago, the Presidential Professor of Law at the University of Utah, and a judge on the U.S. Court of Appeals for the Tenth Circuit. He is today the Richard and Frances Mallory Professor of Law and Director of the Constitutional Law Center at Stanford University. Perhaps the most telling evidence that DOMA's constitutionality can be reasonably defended is, as I mentioned, that the Obama Justice Department has already done so. I know that if President Obama had his druthers, DOMA would not exist. But the Justice Department's duty is, thankfully, not defined by the President's druthers. Its duty is to make reasonable arguments in defense of a statute.

Having already made such arguments in some cases, all the Justice Department had to do was cite the same arguments in later cases. Instead, politics has again overwhelmed the Justice Department and political views are driving legal views. The Defense of Marriage Act was sound policy in 1996, and it remains sound policy today. The Defense of Marriage Act was constitutional in 1996, and it remains constitutional today. As such, I oppose this legislation to repeal it.