

state of New Jersey, Ms. Hsu led over thirty trade missions to countries throughout the world.

Mr. President, Ms. Hsu has served on several U.S. Federal advisory committees, having been appointed by the President, the Secretary of Defense, the Secretary of Commerce and the U.S. Trade Representative. She is a recipient of numerous awards including the Medal of Freedom and the Eisenhower Award for Meritorious Service. She is listed in *Who's Who of America*. Ms. Hsu is a founding member and director of the Committee of 100, an organization of prominent Chinese Americans and is a member of the National Committee on United States-China Relations. She also serves on the National Advisory Forum to the U.S. Holocaust Memorial.

Ms. Hsu is a Summa Cum Laude graduate of George Washington University and member of Phi Beta Kappa. At New York University, she was a Penfield Fellow for International Law. Ms. Hsu was the recipient of the George Washington Alumni Achievement Award in 1983 and holds several honorary degrees.

Mr. President, I congratulate Ming Chen Hsu on her exemplary career at the Federal Maritime Commission and salute her contributions to the ocean transportation industry. I add my voice to those who say "thank you" for her service to the Nation. And finally, I wish her smooth sailing in her future endeavors.

IMPORTANCE OF PRIVATE PROSECUTIONS

Mrs. FEINSTEIN. Mr. President, last week, during the debate on a proposed constitutional amendment to protect the rights of crime victims, Senator LEAHY made several lengthy statements challenging some of the facts set forth by supporters of the amendment, including myself. We responded to many of those arguments at the time—and, I believe, refuted them. I do want not burden the record now by repeating all our contentions or making new ones.

However, there is one argument that the Senator from Vermont made during the waning hours of debate on the amendment that I find particularly troubling. It involves the role of victims in criminal proceedings at the time our Constitution was written. Because I believe the Senator's comments contradict the clear weight of American history, I feel compelled to respond.

Here is the argument Senator LEAHY disputes: At the time the Constitution was written, the bulk of prosecutions were by private individuals. Typically, a crime was committed and then the victim initiated and then pursued that criminal case. Because victims were parties to most criminal cases, they enjoyed the basic rights to notice, to be present, and to be heard under regular court rules. Given the fact that victims already had basic rights in criminal proceedings, it is perhaps un-

derstandable that the Framers of our Constitution did not think to provide victims with protection in our national charter.

The Senator from Vermont tried to rebut this argument. Citing an encyclopedia article and a couple of law review articles, he claimed that, by the time of the Constitutional Convention, public prosecution was "standard" and private prosecution had largely disappeared.

Because Senator LEAHY's comments suggest that some confusion about this issue lingers among my colleagues, I would now like to provide some additional evidence demonstrating that private prosecutions had not only not largely disappeared in the late 18th century but in fact were the norm.

First, it is important to concede one point: some public prosecutors did exist at the time of the framing of the Constitution. Certainly, by then, the office of public prosecutor had been established in some of the colonies—such as Connecticut, Vermont, and Virginia. But just because some public prosecutors existed in the late 18th century does not mean that they played a major role or that public prosecution had supplanted private prosecution. In fact, criminal prosecution in 18th century English and colonial courts consisted primarily of private suits by victims. Such prosecutions continued in many States throughout much of the 19th century.

Thus, contrary to Senator LEAHY's suggestion that a "system of public prosecutions" was "standard" at the time of the framing of the Constitution, the evidence is clear that private individuals—victims—initiated and pursued the bulk of prosecutions before, during, and for some time after the Constitution Convention.

Let's look, for example, at the research of one scholar, Professor Allen Steinberg, who spent a decade sifting through dusty criminal court records in Philadelphia and wrote a book about his findings. Based on a detailed review of court docket books and other evidence, Professor Steinberg determined that private prosecutions continued in that city through most of the 19th century.

In Professor Steinberg's words, by the mid-19th Century, "private prosecution had become central to the city's system of criminal law enforcement, so entrenched that it would prove difficult to dislodge. . . ."

Of course, Philadelphia was the city where the Constitution was debated, drafted, and adopted. And for decades it was our new nation's most populous city—and its cultural and legal capital as well.

It is difficult to reconcile the assertion that a "system of public prosecutions" was "standard" at the time of the Constitution Convention with historical research showing that, in the same city where the Convention was held, private prosecutions—inherited from English common law—continued to be "standard" through the mid-19th century.

It is not surprising that the Senator from Vermont would conclude that public prosecution had replaced private prosecution by the late 18th century. A cursory exam of historical documents might lead to such a conclusion, for the simple reason that documents regarding public prosecutors and public prosecutions (what few there were) are easier to find than documents regarding private prosecutions. As Stephanie Dangel has explained in the *Yale Law Journal*:

[e]arly studies concentrating on legislation naturally over-emphasized the importance of the public prosecutor, since a private prosecution system inherited from the common law would not appear in legislation. Examinations of prosecutorial practice were cursory and thus skewed. The most readily accessible information relating to criminal prosecutions predictably concerned the exceptional, well publicized cases involving public prosecutors, not the vast majority of mundane cases, involving scant paperwork and handled through the simple procedures of private prosecution. . . .

Dangel has summed up recent historical research into the nature of prosecution in the decades leading up to the framing of the Constitution as follows:

First, private individuals, not government officials, conducted the bulk of prosecution. Second, the primary work of attorneys general and district attorneys consisted on non-prosecutorial duties, with their prosecutorial discretion limited to ending, rather than initiating or conducting, prosecutions.

Regarding the prevalence of private prosecution in the colonies, Dangel noted:

Seventeenth and eighteenth century English common law viewed a crime as a wrong inflicted upon the victims not as an act against the state. An aggrieved victim, or interested party, would initiate prosecution. After investigation and approval by a justice of the peace and grand jury, a private individual would conduct the prosecution, sometimes with the assistance of counsel. . . . Private parties retained ultimate control, often settling even after grand juries returned indictments. Contemporaneous sources confirm the relative insignificance of public prosecutions in the colonial criminal system. Only five of the first thirteen constitutions mention a state attorney general, and only Connecticut mentions the local prosecutor. Secondary references are similarly rare. Finally, the earliest judicial decision voicing disapproval of private prosecution did not appear until 1849. No decision affirming public prosecutors' virtually unreviewable discretion appeared before 1883.

The historical evidence is clear: Because victims were parties to most criminal prosecutions in the late 18th century, they had basic rights to notice, to be present, and to participate in the proceedings under regular court rules. Today, victims are not parties to criminal prosecutions, and they are often denied these basic rights. Thus, a constitutional victims' rights amendment would restore some of the rights that victims enjoyed at the time the Framers drafted the Constitution and Bill of Rights.

If this historical evidence about prosecutions in the colonies is not enough, I would repeat a point Senator LEAHY

made himself last week: that in England, any crime victim had the right to initiate and conduct criminal proceedings all the way up to the middle of the 19th century. As we know from Senator BYRD's enlightening remarks last week, many of the rights and liberties of our Constitution—such as those for criminal defendants—have their roots in English history and the English constitution.

Given the fact, then, that virtually all the protections for criminal defendants in the Bill of Rights have English antecedents—including habeas corpus, trial by jury, due process, prohibition against excessive fines, and so on—it is hardly a stretch to think that the lack of rights for crime victims in the Bill of Rights would reflect an English antecedent as well: the long-established right of victims to prosecute crimes themselves.

Let me be clear: I do not support a return to the old system of private prosecution. My only point is that we can cogently explain why the Framers did not include a single word on behalf of crime victims in the Constitution. And, given the relatively recent development in the United States of a system of 100% public prosecution, we can offer strong reasons to restore basic rights for victims in our criminal justice system.

Just so there is no more confusion on this point, let us return to Professor Allen Steinberg, a legal historian who researched and wrote a 326-page book on prosecutions in 19th century Philadelphia—the most in-depth study of private prosecution in the United States.

Did Professor Steinberg find that public prosecution was “standard” in Philadelphia even decades after the Constitution and Bill of Rights were adopted, as Senator LEAHY suggests? No. In fact, he found that victims directly prosecuted crimes in Philadelphia until at least 1875.

The fact that Professor Steinberg's research is on Philadelphia is undeniably important. Not only did the Framers live in Philadelphia while debating and drafting the Constitution, but many had resided there earlier as well.

For example, James Madison—sometimes called the Father of our Constitution—was not only a delegate at the Philadelphia Convention, he served in the Continental Congress in Philadelphia from March 1780 through December 1783. I have little doubt that Madison knew that the bulk of criminal prosecutions in Philadelphia consisted of private prosecutions. Here is what Professor Steinberg writes about private prosecutions in Philadelphia:

[T]he criminal law did have a central place in the everyday social life of mid-nineteenth-century Philadelphia. Private prosecution—one citizen taking another to court without the intervention of the police—was the basis of law enforcement in Philadelphia and an anchor of its legal culture, and this had been so since colonial times . . . Well past mid-century, private prosecution remained popular among a broad spectrum of ordinary

Philadelphians. Familiar and frequent, it was rooted in a complex political and legal structure that linked political parties, courthouses, saloons and other centers of popular culture, real crime and dangerous disorder, and ordinary disputes and transgressions of everyday life . . . Through the process of private prosecution, the criminal courts of Philadelphia developed a distinctive set of practices and a culture that was remarkably resilient in the face of constant official hostility and massive social change. . . .

He continues:

Private prosecution refers to the system by which private citizens brought criminal cases to the attention of court officials, initiated the process of prosecution, and retained considerable control over the ultimate disposition of cases—especially when compared with the two main executive authorities of criminal justice, the police and the public prosecutor . . . Private prosecution . . . [was] firmly rooted in Philadelphia's colonial past. [It was an] example[] of the creative American adaptation of the English common law. By the seventeenth century, private prosecution was a fundamental part of English common law. Most criminal cases in England proceeded under the control of a private prosecutor, usually a relatively elite person, and often through a private society established for that purpose.

Professor Steinberg concludes that before the second half of the 19th Century, private prosecutions were the “dominant” mode of criminal justice in Philadelphia. He explains how this system worked:

When a person wanted to initiate a criminal prosecution, he or she went off to the nearest alderman's office, complained, and usually secured a warrant for the arrest of the accused. After the alderman's constable escorted the defendant to the office, the alderman conducted a formal hearing, and the process was underway. Most often, private prosecutors charged their adversaries with assault and battery, larceny, or some form of disorderly conduct. Well before 1850, aldermen and litigants established patterns of case disposition that would last through most of the century. Most criminal cases were fully disposed of by the alderman . . .

Professor Steinberg also notes that:

[m]uch of the time, people used the criminal law in their private affairs in order to combat a perceived injustice or to assert basic rights they felt were violated. There was no better example of this than battered wives. Women regularly brought charges against men for assault . . . Most often, . . . the batterer was punished in some manner . . .

And what of the public prosecutor? Contrary to Senator LEAHY's suggestion that public prosecutors had consolidated control over prosecutions by the late 18th century, Professor Steinberg found that—even by the mid-19th Century—the Philadelphia public prosecutor did little more than act as a clerk to victims who were pursuing private prosecutions. Here is what Professor Steinberg found:

One of the major reasons for the weakness of the court officials was the limited power of the public prosecutor. Most discretion was exercised by the magistrates and private parties, some by the grand and petit juries, and little by anyone else. As late as the mid-1860s, for example, jurists agreed that, despite their importance on the streets, the police had no role in ordinary criminal procedure. More importantly, the same was basi-

cally true for the district attorney. In an 1863 outline of criminal procedure, Judge Joseph Allison did not mention the police and gave no discretionary role to the district attorney in the “usual and ordinary mode of procedure.” . . . The discretion of the private parties in criminal cases was not checked by the public prosecutor. Instead, the public prosecutor in most cases adopted a stance of passive neutrality. He was essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries. Most of the time, he was either superseded by a private attorney or simply let the private prosecutor and his witnesses take the stand and state their case.

And the dominance of private prosecutions was certainly not unique to Philadelphia. Other legal historians who have sifted through court records have reached similar conclusions to Professor Steinberg.

In a 1995 article in the *American Journal of Legal History*, for example, Robert Ireland concluded that “By 1820 most states had established local public prosecutors. . . . Yet, because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century.”

In a 1967 article in the *New York University Law Review*, William E. Nelson found that private prosecution was commonplace in a typical Massachusetts county between 1760 and 1810. Criminal trials, he writes, were “in reality contests between subjects rather than contests between government and subject.”

And the list goes on: other scholars who have acknowledged the prevalence of private prosecution in the American colonies and fledgling United States include Richard Gasjins (Connecticut), Michael S. Hindus (Massachusetts and South Carolina), William M. Lloyd, Jr. (Pennsylvania), and Edwin Surrency (Philadelphia). Indeed, William F. McDonald notes in the *American Criminal Law Review* that a system of private prosecution was preferred by many around the time of the American Revolution because of a fear of tyranny associated with government prosecutors and because it was less expensive.

In the face of this overwhelming historical evidence that the bulk of prosecutions at the time of the Constitutional Convention were private, the Senator from Vermont suggested instead that public prosecutions were “standard.” He relied on several sources for that conclusion: a four-page article in a legal encyclopedia and a few law review article quotes, one lacking citation and the rest citing the same four-page encyclopedia article.

Of particular importance seems to be a quotation from an article in the *Rutgers Law Review* that asserted that “[b]y the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone.” But reading closer, one finds that the support for this statement was none other than a statement in the oft-cited four-page encyclopedia

article that "by the time of the American Revolution, each colony had established some form of public prosecution. . . ."

Again, however, we have seen that the mere existence of "some form of public prosecution" at the time of the American Revolution does not mean that public prosecution was "standard." And it certainly does not mean that public prosecutors handled the bulk of prosecutions or had much of a prosecutorial role. They did not. Rather, the weight of historical evidence on this subject—a subject which has been extensively researched and reviewed by some of our country's most distinguished legal historians and other scholars—suggests that private prosecutions were dominant.

Mr. President, I am glad to have the chance to correct the historical record on this point. I have the utmost respect for my distinguished colleague from Vermont and I thank him for his thoughtful remarks on the history of prosecution in this country. However, I believe that my main point stands: we need to restore rights that crime victims enjoyed at the time the Framers drafted the Constitution and Bill of Rights.

IN RECOGNITION OF NATIONAL NEUROFIBROMATOSIS MONTH

Mr. ASHCROFT. Mr. President, I rise today to recognize May as the National Neurofibromatosis month. Neurofibromatosis (NF) is a genetic disorder that causes tumors to grow along nerves throughout the body. These tumors can lead to a number of physical challenges including blindness, hearing impairment, or skeletal problems such as scoliosis or bone deformities. In addition to these physical challenges, over 60 percent of those diagnosed with neurofibromatosis are also faced with learning disabilities ranging from mild dyslexia and ADD to severe retardation.

Anyone's child or grandchild can have NF. This disease affects one in 4,000 children, making it more prevalent than cystic fibrosis and hereditary muscular dystrophy combined. NF equally affects both sexes and all racial and ethnic backgrounds. Although 50 percent of the cases are inherited, half are spontaneous with no family history.

It is an honor to stand before this body and recognize May as National Neurofibromatosis month. I would also like to take this opportunity to recognize the Missouri Chapter of The National Neurofibromatosis Foundation, Inc. and their efforts to provide support to those who suffer from NF as they strive towards a cure.

VICTIMS' RIGHTS AMENDMENT OPPOSITION

Mr. LEAHY. Mr. President, during the debate last week on the proposed constitutional amendment on victims'

rights, a number of editorials and thoughtful essays were printed in the RECORD. Because of the way in which the Senate ended its consideration of S.J. Res. 3, I did not have an opportunity to include in the RECORD all such materials. Accordingly, I included additional materials yesterday and do so again today, in order to help complete the historical record of the debate. I ask unanimous consent to have printed in the RECORD editorials from a number of sources around the country in opposition to the proposed amendment.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Philadelphia Inquirer, Apr. 22, 2000]

MISGUIDED BILL

Crime victims need justice and compassion, not the ability to usurp the rights of others.

If ever there was a likely booster for the cause of empowering crime victims, it's Bud Welch of Oklahoma City.

After his 23-year-old daughter, Julie, perished in the 1995 federal building bombing there, Mr. Welch recalls wanting to see the co-conspirators "fried" rather than tried in court.

But the latest push in Congress to enshrine a victims' bill of rights in the U.S. Constitution does not enjoy Bud Welch's support. Nor does it have the backing of numerous groups equally as concerned as Mr. Welch with seeking justice for victims.

The amendment's opponents include advocates for battered women, the families of murder victims—plus the nation's top state judges, civil-rights groups and veteran prosecutors.

All of them, whether knowingly or not, are heeding James Madison's wise directive that the Constitution be amended only on "great and extraordinary occasions."

This isn't one of those occasions.

These groups understand that the proposals before Congress would completely restructure federal and state criminal justice systems. As such, the victims' rights measure is dangerous to fundamental rights that protect all Americans. In the Oklahoma case that Mr. Welch knows so well, he cites the plea bargain that led to key testimony by an accomplice of Timothy McVeigh and Terry Nichols.

Had victims been able to contest that plea—as provided by the rights proposals in Congress—the case might have been more difficult to prosecute or might even have unraveled.

That's just a hint of the practical problems in according crime victims such rights as court-appointed counsel, a say in prosecution decisions, and the like. How could anyone think things are working so well in the nation's clogged criminal courts that they could handle this wrench tossed into the works?

There's a more fundamental problem, through, with giving crime victims a virtual place at the prosecutors' table.

It presumes the guilt of a person charged with a crime before the courts have spoken. With that, out the courtroom window goes a fair trial—and in comes a threat to all Americans' rights.

What crime victims are owed is compassion, the chance to seek compensation, consideration of the demands a trial places on their time and psyche, and a full measure of justice. That's the intent of victims' rights provisions already enshrined in law or state constitutions by all 50 states.

For instance, the Pennsylvania statute provides for notifying victims of court proceedings, allowing them to comment on—but not to veto—plea bargains, the right to seek restitution, and notification of post-conviction appeals and even convicts' escapes. These are good ideas that don't deprive rights.

Shame on Congress if it seriously considers a measure that could jeopardize the right to a fair trial. Ditto if the victims' rights cause is turned into just another cynical vehicle to make political hay—like the flag-burning nonsense.

The region's senators should not be party to that—no matter what their party.

[From the Providence Journal, Apr. 27, 2000]

THE QUALITY OF JUSTICE

Bud Welch, whose daughter Julie was one of the 168 victims of the bombing of the Murrah Federal Building in Oklahoma City five years ago, testified before the U.S. Senate Judiciary Committee against the proposed Victims' Rights Amendment to the Constitution. "I was angry after she was killed that I wanted McVeigh and Nichols killed without a trial. I probably would have done it myself if I could have. I consider that I was in a state of temporary insanity immediately after her death. It is because I was so crazy with grief that I oppose the Victims' Rights Amendment."

Mr. Welch is right. Giving the victims of crime the constitutional right to influence bail decisions and plea agreements would turn the principle of innocent until proven guilty, the foundation of the American system of justice embodied in our Bill of Rights, on its head. Other countries, notably France, are still striving to incorporate this principle into their legal codes. It would come as a shock to see the United States move away from it, a move that would be rightly perceived as a step backward into law's dark, despotic past—the days of an eye for an eye and a tooth for a tooth.

If that seems a hard indictment of an amendment that sounds so eminently reasonable and fair, consider the provision granting victims the right to a trial "free of unreasonable delay." The very phrase should send chills down the spine. One person's "expedited" trial is another's "legal lynching," to borrow Supreme Court Justice Clarence Thomas' phrase. And, like most amendments to the Constitution, there is no telling where this amendment would lead. Would an assault against a Ku Klux Klan member marching with thousands of co-bigots mean that the state has to notify and consult with every racist marcher "victim" in prosecuting the criminal?

The United States is a country that abhors the miscarriage of justice. It is, or should be, the key element of our national character. No one would contend that it is good that victims sometimes suffer further in the administration of justice, and proponents of this amendment, such as Mothers Against Drunk Driving, fight a noble cause in trying to protect the rights of victims in the justice system. But amendment the Constitution is not the way to do it. Victims' rights laws are on the books in 35 states, including Rhode Island. Strengthen and enforce these laws. That is the way to ensure all Americans, victims and accused, have a fair trial.

[From the Richmond Times-Dispatch, Apr. 16, 2000]

DIFFERENTLY SITUATED

Complaints about partisan rancor in Congress are commonplace. But sometimes it's even worse when Republicans and Democrats agree.

Take the resolution sponsored by Republican Senator John Kyl and Democrat