

Holding court: Connecticut's Oliver Ellsworth

Danbury News-Times 08/21/2009

By Lewis E. Lehrman

Sometimes, you need to know when to quit. Connecticut delegate Oliver Ellsworth left the Constitutional Convention in Philadelphia on Aug. 23, 1787 -- nearly a month before the Constitution itself was formalized. But Ellsworth had left his mark on the founding document before departing. During late July and early August, Ellsworth served on the five-man committee chaired by James Wilson that crafted the language of the U.S. Constitution.

During August, Ellsworth, together with fellow Nutmegger Roger Sherman, devised the Connecticut Compromise that called for a bicameral legislature -- with one house (the Senate) favoring small states and the large House of Representatives favoring more populous states. Ellsworth also helped develop the "three-fifths" compromise for counting slaves.

Although he was not in Philadelphia to sign the finished Constitution, Ellsworth pressed for ratification in Connecticut in early 1788. In one speech to the state's ratifying convention, Ellsworth argued: "The Constitution before us is a complete system of legislative, judicial and executive power. It was designed to supply the defects of the former system; and, I believed, upon full discussion, it will be found calculated to answer the purposes for which it was designed."

In 1789, Ellsworth became one of Connecticut's first representatives in the U.S. Senate. Shortly after the Senate met for its opening session in March, Ellsworth was named to head a committee

to draft the Judiciary Act of 1789 that created the federal court system. The Constitution had only provided the vaguest outline of the judiciary in Article III: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Ellsworth's job was to put flesh on those bare bones and to clearly establish the relationship between state courts and federal ones. Towards the end of his work on the legislation, Ellsworth wrote a friend: "I consider a proper arrangement of the Judiciary, however difficult to establish, among the best securities the Government will have; and question much if any will be found at once more economical, systematic, and efficient, than the one under consideration." Working from March until September, Ellsworth's committee filled in the blanks and provided for Supreme Court review of state laws as well as the creation of federal district and circuit courts. The work of Ellsworth, who had

served on Connecticut's Superior Court for four years, effectively made him the father of the federal judiciary.

In 1796, Ellsworth left the Senate to become the third chief justice of the U.S. Supreme Court, but his tenure there was overshadowed by the men who preceded and followed him in that office. New York's John Jay had become the first Chief Justice in 1789 and he served until he stepped down to become governor of New York in 1795. Jay was succeeded briefly by South Carolina's John Rutledge, who had three strikes against him: (1) He gave a speech lambasting the treaty with England that Chief Justice Jay had negotiated; (2) he was rumored to be mentally ill; and (3) he was reputed to suffer from alcoholism. The Senate refused to confirm him.

Into the breach stepped Ellsworth, who was speedily confirmed and served for five years until the end of John Adams' presidential term. Adams followed the precedent established by Washington, who sent Supreme Court Chief Justice Jay to England as a special envoy. In 1799 Ellsworth was dispatched to France to negotiate with Napoleon. The negotiations helped prevent war but they decimated Ellsworth's health and he resigned at the end of 1800. In response, President Adams first tried to reappoint Jay, who declined even after he had been confirmed by the Senate.

Adams was under intense pressure because his own term in office ended in early March 1801 and because new judicial legislation in Congress would reduce the number of Supreme Court justices from six to five. In his White House office, Adams asked Secretary of State John Marshall: "Who shall I nominate now?" Marshall confessed he did not have an obvious alternative, whereupon President Adams said, "I believe I must nominate you."

Had Ellsworth not resigned in time for Adams to have Marshall confirmed by a Federalist Senate, it is certain that Marshall would never have been appointed by incoming President Thomas Jefferson. Jefferson and Marshall were lifelong political enemies.

So with Ellsworth's resignation began Marshall's extraordinary 35 years as chief justice.

Lewis E. Lehrman, a Greenwich resident, is chairman of The Lincoln Institute and author of "Lincoln at Peoria: The Turning Point" (Stackpole Books, 2008).