

OLIVER ELLSWORTH: ARCHITECT OF THE CONSTITUTION

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Now all but forgotten, Oliver Ellsworth was one of the principal architects of the 1787 Constitution. Of the Founding Fathers usually credited with this accomplishment, Franklin was too old to have played an effective role, Hamilton was absent from the Convention through most of its deliberations, Washington was hampered by his tasks as chairman of the Constitutional Convention, and of course Jefferson did not even participate, serving at that time as ambassador to France. Madison and Gouverneur Morris did play substantial roles, but not significantly more important than Ellsworth's. Of the less famous participants at the Convention, Sherman, Wilson, Rutledge, and Paterson were more useful than generally recognized, but in the end it was Ellsworth alone who completed and gave teeth to the Constitution by having instituted judicial review with the 1789 Judiciary Act.

With relatively modest credentials as a wealthy lawyer and judge from Connecticut, Ellsworth stayed out of debate at the Constitutional Convention for the first couple of weeks, overshadowed by Sherman, his mentor and fellow delegate from Connecticut. His first proposal was a brief amendment passed without dissent, which identified the political entity to be created as "the government of the United States." In one quick and seemingly unimportant decision both our nation and its government were given their names. Thomas Paine had already described the thirteen colonies opposed to George III with small letters as "united states," and Jefferson had picked up the wording in the Declaration of Independence with the title "The United States of America." But it was left to Ellsworth to propose retaining this name for the nation in the process of being created at the Convention. While copy editing the Constitution in its final version, Gouverneur Morris restored the words "of America," also from the Declaration of Independence, thus perpetuating the full name in use today.

Ellsworth's next contribution was his shared effort with Sherman and Johnson of Connecticut to reconcile the interests of the large and small states by proposing a bicameral legislature composed of a Senate and House of Representatives. The original idea for the "Connecticut Compromise" can be credited to Sherman, but its final formulation giving state legislatures the power to elect the Senate was based on Ellsworth's motion before the Convention. This arrangement was rejected much later by the Seventeenth Amendment, but it had already served its purpose at the Convention by having permitted large and small states to work together toward a version of the Constitution they could all accept. During debate, Wilson, Morris, Madison, and others who preferred a unicameral legislature principally argued against Ellsworth, and the final decision favorable to his plan for the most part resulted from his persuasiveness on the floor in support of his own motion. Unfortunately, this success put Ellsworth in a difficult role. Crucial to the acceptance of the Connecticut Compromise was the support of small southern states, particularly the Carolinas, and they were only willing to

cooperate if the northern small states would support the acceptance of slavery written into the Constitution. Significantly, Ellsworth alone of the small state delegates undertook the unpleasant task of defending slavery in two speeches before the Convention. As justification for these speeches, it may be speculated in retrospect that without them the Connecticut Compromise would not have been possible, and without the Connecticut Compromise the Constitution would not have been possible.

Once engaged in promoting this compromise, Ellsworth became one of the more vocal spokesmen of the small state faction. He was eventually elected along with Rutledge, Randolph, Gorham, and Wilson to the Committee of Detail (also described as "Committee of Five"), which was delegated to bring together in a preliminary rough draft of the Constitution all the resolutions and amendments that had been passed by the convention at large. The sense of compromise was implicit in the choice of delegates, Rutledge and Ellsworth representative of the small states, and Randolph, Gorham and Wilson representative of the large. Each was also less prominent than others in the delegation from his particular state--Wilson overshadowed by both Franklin and Gouverneur Morris in the Pennsylvania delegation, Randolph overshadowed by both Madison and Mason in the Virginia delegation, Gorham overshadowed by Rufus King in the Massachusetts delegation, Rutledge overshadowed by the vocal participation of Charles Pinckney in the South Carolina delegation, and, as already indicated, Ellsworth overshadowed by Sherman in the Connecticut delegation. Intentionally elected on this basis, this second tier of delegates was more ready to accept compromise, and, indeed, these five actually shaped and articulated the Constitution in its first draft. Afterwards, three of them--Wilson, Rutledge, and Ellsworth--vigorously defended their draft as well as possible in convention deliberations that followed. Throughout early August they dominated proceedings.

General sessions of the Convention were suspended for ten days of August while the Committee of Detail did its work. Since Madison did not attend these sessions, there is no record of what exactly transpired, but a number of changes were apparently made in both the substance and language of the Constitution. Once again Ellsworth's participation seems to have been important. Few of Rutledge's proposals before the Convention were incorporated into the Constitution, and Randolph later refused to sign the Constitution because he thought it gave too much power to the federal judiciary--something that was already implicit in the first draft as it stood. And Gorham seldom spoke out in defense of the first draft when Convention proceedings resumed. It may therefore be speculated that much of the deliberations over these ten days was spent in working out acceptable compromises between Ellsworth and Wilson--Ellsworth as a small-state federalist, Wilson as an ardent Jeffersonian. That Ellsworth mostly got his way would be indicated by his heavy role in the Convention at large once it reconvened. Wilson and Rutledge certainly made themselves heard, but it was Ellsworth who persistently spoke in defense of the choices incorporated into the first draft. His oral contributions listed by Madison on the floor of the Convention exceeded those of everybody else at the Convention except Gouverneur Morris and Madison himself. Ellsworth supported several new amendments but for the most part assumed the responsibility of explaining and defending the Committee of Detail's decisions. He later departed from the Convention for business reasons in Connecticut, so he cannot be included among those who signed the Convention. However, he was in the thick of debate until his departure on August 27, three weeks before the Constitution was signed.

A year later, Ellsworth totally dominated the 1788 Connecticut Ratifying Convention with arguments supportive of the Constitution. He answered almost all the objections himself, and well enough that two of his more extended speeches were published and given widespread circulation throughout the colonies. Daniel Webster is reported as having declared a half century later that these speeches were the "principal source" of his knowledge about the Constitution. Ellsworth was then elected to the U.S. Senate that first convened in 1789, where he assumed the as yet unofficial role of Senate Majority Leader. He lacked the title but had the authority and exerted it with singular aggressiveness. Ellsworth pushed through Congress the non-intercourse act that forced Rhode Island to join the union as well as Hamilton's economic program, and he took charge with much of the rest of the legislation that was necessary in the first years of our nation's history. The only changes in Hamilton's program during its passage into law were those that Ellsworth insisted upon, once again demonstrating his extraordinary authority as "Washington's man" in the Senate.

Ellsworth's most important contribution as Senator was in gaining the passage of the 1789 Judiciary Act, which gave the Constitution its ultimate authority over all state laws and judicial decisions. Omitted from the Constitution, Article 25 of the Judiciary Act bestowed on the Supreme Court the power to reverse state laws and state court decisions that was not otherwise possible. This omission had been the principal weakness of the Articles of Confederation, and it remained just as much a problem for the Constitution until it was specified and brought into play by the passage of the Judiciary Act. Once judicial review was established, any law passed by a state legislature and granted acceptance by its state supreme court could be challenged and referred to the Federal Supreme Court for a final dispensation. Laws passed by Congress could also be rejected by the Supreme Court based on their lack of constitutionality. This was a very substantial change, and it made the primary and most essential difference between Constitutional government and government under the Articles of Confederation.

When written in 1787, the Constitution was intentionally vague regarding the authority of the federal judiciary. The vertical integration of state and federal courts was postponed, and there was no reference to the power of review over congressional laws, the decisions of state and local courts, or laws passed by state legislatures. Madison had instead promoted on the floor of the Convention the final power of Congressional Review over state laws. This, he insisted, was absolutely essential to the success of the Constitution in providing federal sovereignty. However, his proposal was voted down four times before he gave up in his effort to impose it as the single "enabling" feature of the Constitution that would produce a single nation. Judicial review was also mentioned several times on the floor of the Convention, but it was kept from debate by Wilson and Ellsworth, among others, exactly the delegates who would later seek and obtain its passage. Why did they do this? Nowadays we can only speculate why, but if the issue had been put to a vote at the time of the Convention, judicial review would obviously have had the same fate as congressional review. The most prudent course was therefore to postpone its acceptance until the Constitution had been accepted by state ratifying conventions. Not surprisingly, when the issue was raised a year later at the Pennsylvania and Connecticut ratifying conventions, both Wilson and Ellsworth vigorously defended judicial review as being crucial to the final effectiveness of the Constitution. As two of the five principal authors of the Committee of Detail, they both knew exactly what they wanted.

The Judiciary Act of 1789 was mostly written and bulldozed into passage by Ellsworth, who had already served both a State Supreme Court justice from Connecticut and an active member of the Committee of Detail. Ellsworth served as manager and principal defender of the Judiciary Act in Senate debate, and Madison, McClay and others are on record as having complained of his exclusive authorship. The original draft of the Judiciary Act exists today partly in Ellsworth's handwriting, as are two of the three amendments later passed by Congress, demonstrating Ellsworth's dominant hand while in the process of gaining its passage. Section 25, which defines judicial review in a single 307-word sentence, still exists in somebody else's handwriting--probably a clerk's--but its convoluted syntax was typical of Ellsworth. Only Ellsworth could have drafted it. The suspicion therefore seems justified that the Judiciary Act, which provided the "enabling" (or enforcement) features of the Constitution, had been set aside at the Convention so they could be enacted by Congress once the rest of the Constitution had been ratified. Of course there was no guarantee that Ellsworth would be elected to the Senate, but when he was, he found himself in the ideal position to give the Constitution its needed linchpin to guarantee federal sovereignty.

Whether originally intended or not, a two-stage strategy seems to have fallen into place with Ellsworth having played a central role. First Articles 3 and 6 of the Constitution mandated vague judicial authority, which did, however, whether by accident or not, fully anticipate the subsequent addition of judicial review. Two years later the Judiciary Act established both the principle of judicial review and a vertical integration of federal and state judiciaries to permit the Federal Supreme Court to reject state laws and state court decisions without the power to impose laws of its own. Earlier uses of judicial review were limited, simply enough, to the reversal of lower court decisions by higher courts. For the first time this vertical arrangement was expanded to put states under federal authority. The subordination of state to federal courts through the principle of judicial review made possible a truly "united" nation instead of a confederacy no better than the one it replaced. This was totally without precedent in the history of civilization. The anticipation of this outcome could well have contributed to Randolph's dissatisfaction resulting from his inside information from having served on the Committee of Detail. With the Constitution's authority granted by the Judiciary Act, the entire court system took on a singular importance that might have alarmed Randolph in advance. Nowhere else in the world did the courts play such a pivotal role in the conduct of government.

When Madison proposed the Bill of Rights in order to balance the additional federal authority granted by the Judiciary Act, Ellsworth took the responsibility of reporting the Bill of Rights to the Senate after its passage in the House of Representatives. Obviously, he did this as a gesture of unity and reconciliation despite his earlier opposition. At that point he was in a dominant position in the U.S. Senate, in fact one of the strongest leaders in its history, so his support was essential to its passage. His willingness to promote the Bill of Rights once again illustrates the spirit of accommodation when he had helped to put through the Connecticut Compromise and then the initial draft of the Constitution by the Committee of Detail. Ironically, the Judiciary Act has long since ceased to be controversial, while the Bill of Rights has gained in prestige, having become generally accepted as the cornerstone of American democracy. The powers given to federal courts by the Judiciary Act are now either taken for granted either as a tacit assumption imbedded in the Constitution or as a consequence of the 1803 *Marbury v. Madison* Supreme Court decision. However, neither is the case. Both the Judiciary Act and Bill

of Rights, were obviously imposed by the 1789 Congress to work in combination, since the measures guaranteed by the Bill of Rights are subject to continual reinterpretation by the Supreme Court justified by the Judiciary Act. As a result, our government possesses sufficient flexibility to survive for almost two centuries.

However, there was a paradox involved in this arrangement. Only because of the Bill of Rights does the Constitution apply to matters unanticipated in the late eighteenth century, and only because of the Judiciary Act can the Supreme Court impose its interpretation of the Bill of Rights. But as already indicated, Madison had promoted the Bill of Rights to protect American states and the American public from excessive authority granted by the Judiciary Act to federal courts and the Supreme Court. Every right guaranteed by the Bill of Rights was presumably immune to the authority of these courts. In practice, however, the Fourteenth Amendment adopted in 1868, many decades later, gave the Supreme Court the power to interpret and impose the Bill of Rights at all levels of government, including state and local governments as well as the federal government. As a result, the Judiciary Act and Bill of Rights have become interdependent rather than antagonistic, and, most paradoxical of all, the final interpretation of the Bill of Rights is entirely in the hands of the Federal Supreme Court. So it was Ellsworth's unique distinction (hardly his intention at the time) to have played an important role in obtaining the passage of both the Judiciary Act and Bill of Rights as well as the Constitution they extended and implemented. The harmonious interaction among all three of these documents came much later and under circumstances Ellsworth could not have anticipated.

Ellsworth's later career was distinguished but less important. He became the second Chief Justice of the Supreme Court in 1796 but was relieved of this task to be sent in 1799 to negotiate with Napoleon in order to avert war with France. His health was destroyed on the trip, and his political reputation was badly tarnished because of the unfavorable terms he accepted from Napoleon. However, his protracted negotiations in France might have helped, if ever so slightly, to set the stage for the Louisiana Purchase three years later, when Napoleon's minister Tallyrand unexpectedly offered a later American delegation to sell the Louisiana Territory for \$15 million dollars.

Ellsworth's principal contribution to American history remains the work he did on and for the Constitution: first to guarantee its passage, then to give it its power, and finally to grant the concessions necessary to make it a permanent accomplishment. His success in this task would be indicated by the tribute of John Calhoun in a speech he delivered before the Senate in 1847:

It is owing mainly to the states of Connecticut and New Jersey that we have a federal instead of a national government--the best government instead of the worst and most intolerable on the earth. Who are the men of these states to whom we are indebted for this excellent form of government? I will name them. Their names ought to be written on brass, and live forever. They were Chief Justice Ellsworth and Roger Sherman of Connecticut, and Judge Paterson of New Jersey. The other states further south were blind; they did not see the future. But to the coolness and sagacity of these three men, aided by others not so prominent, do we owe our present Constitution.

Paterson, Sherman, and Ellsworth--all three of these worked together in formulating the Connecticut Compromise and the agreements and accommodations it necessitated. But it was only Ellsworth who went on to help draft the Constitution in the Committee of Detail, then put through the Judiciary Act, and finally extend the original spirit of compromise by obtaining the passage of the Bill of Rights in the first U.S. Senate. Of the many remarkable statesmen who helped to frame the American Constitution, Ellsworth more than anybody else can be singled out as its architect, though his name can hardly be said, "to be written on brass, and live forever." For, as already indicated, his historic contribution has been almost totally forgotten. Nevertheless, the rediscovery of his pivotal seems essential in order to understand how our government was formed and why it has had such remarkable flexibility.

The explanation for this success is simple enough: for two hundred years our nation's judiciary system has exercised more power than in any other country at any other time in world history. Unlike early monarchy, which restricted final authority in the interpretation of laws to the king alone, and unlike the Articles of Confederation, which sought to shift this authority to the legislature, our constitutional government puts final authority in the hands of a judicial hierarchy with the Supreme Court at the top. It was Ellsworth as much as anybody who brought this about, producing a full triangulation of responsibility that gives courts at least as much power as the executive and legislative branches. Absurdities elsewhere in our state and national governments can be ameliorated as long as our judicial appointees at every level, but especially the Supreme Court, possess the intelligence, wisdom and knowledge of the law to impose Constitutional constraints on their excesses.

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The principal source for this article is *The Life of Oliver Ellsworth*, by William Garrott Brown, first published in 1905 and reprinted in 1970 by the Da Capo Press. *Madison's Journals* are also essential, especially in the text that combines them with all other contemporary sources, *The Records of the Federal Convention of 1787*, ed. by Max Farrand, in 4 vols. (Yale, 1937). Also relevant is my own monograph article that has appeared since this piece was first published, "An Accidental Conspiracy: The Early History of Judicial Review from the Constitutional Convention to the 1789 Judiciary Act and *Marbury v. Madison*," in *The American Constitution at the End of the Twentieth Century* (New Issues Press, 1996), pp. 159-251. This article is also available next in sequence on this website.

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