Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis

Henry J. Merry
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Although the judicial and legislative branches of our government are considered separate, Congress has certain powers over the Supreme Court. One of these is the power to regulate the Court’s appellate jurisdiction; this Article explores the derivation and extent of that power. After an analysis of the Constitutional Convention of 1787 and of the attitudes of its delegates, the author concludes that this power was intended to be limited to regulating the treatment of fact issues and not issues of law.

Henry J. Merry*

The power of Congress over the appellate jurisdiction of the Supreme Court is one element of constitutional law that would seem to have been settled early in the history of the two institutions but, actually, few constitutional problems are more fundamentally unsolved. Strangely enough, this lack of resolution is due to the long standing mutual indulgence of what have often been pictured as bitter enemies. On the one hand, beginning with the Judiciary Act of 1789, Congress has always recognized that the Supreme Court has substantial appellate power; on the other hand, since 1796 the Supreme Court has repeatedly gone beyond strict judicial needs to declare that its appellate jurisdiction depends upon statutory enactment. The limitations that Congress

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1. For example, Congress has always provided that the Supreme Court may re-examine and reverse or affirm the final judgment or decree of the highest court of a state when there is a question of repugnance of state law to the United States Constitution, and state law is upheld. Rev. Stat. §§ 690, 709 (1875); 28 U.S.C. § 1257 (1958).

2. See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796), discussed in text accompanying note 61 infra. In Colorado Cent. Consol. Mining Co. v. Tuck, 150 U.S. 138, 141 (1893), the Supreme Court declared that “an uninterrupted series of decisions” has held that “this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that
has imposed have not presented a real test of its power with respect to the Court's essential functions. But a disturbing factor is the thought implicit in the remarks of the Court that it is not substantially independent, as those who revere a government of laws believe that it should be. The danger is not simply hypothetical. Congress has often been urged to curb the Court by curtailing its appellate jurisdiction, and these attacks on the Court may have been caused in part by the uncertainties or overstatements of the scope of congressional authority.

The problem has both inherent and circumstantial difficulties. It is basically a matter of determining how much appellate jurisdiction is derived directly from the Constitution and how much is dependent upon congressional acknowledgment, and such indicia as are implicit in the constitutional language have long been reversed in the structure of congressional enactments as well as in the remarks of the Supreme Court. Even though the Constitution says that the Court shall have appellate jurisdiction and gives Congress only the secondary role of making exceptions and regulations, the Judiciary Act of 1789 and its successors have not set subject. In Stephan v. United States, 319 U.S. 423, 426 (1943), the Court said that its appellate jurisdiction is "defined by statute."

3. See notes 11 & 16 infra.
5. See Freund, Storm Over the American Supreme Court, 21 MODERN L. REV. 345 (1958).
6. U.S. CONST. art. III, § 2:
In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The authorization of Congress in this clause may be contrasted with that on the establishment of inferior courts. Congress has full discretion over whether inferior courts may even exist, but the Constitution provides that the Supreme Court shall exist and that it shall have appellate jurisdiction. With respect to inferior courts, congressional authority is full and precedent, whereas with respect to the jurisdiction of the Supreme Court, congressional power is limited in scope and subsequent or secondary in character. Chief Justice Marshall declared in one opinion that the appellate powers of the Supreme Court "are given by the constitution." Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810); accord, Ex parte McCordle, 74 U.S. (7 Wall.) 506, 512–13 (1868). The opinion in Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250 (1865), says that the Constitution defines the power to receive appellate jurisdiction, and that within this capacity, Congress may determine how far jurisdiction is to be given and exercised. This reverses the emphasis in the constitutional language, but the reversal of emphasis was not essential to the decision. The Daniels case involved a statute providing that if the circuit court justices are evenly divided, review is limited to issues of law. Such a statute is peripheral or procedural in
forth exceptions, but rather have defined the types of cases in which the Court may act.\textsuperscript{7} This may be interpreted as making exceptions by implication,\textsuperscript{8} but the impression is that Congress is the source of the Court's jurisdiction.\textsuperscript{9} This impression has been fortified by the repeated assertions of the Supreme Court that it can exercise appellate jurisdiction only in accordance with acts of Congress.\textsuperscript{10} These statements contain an element of obiter dictum,\textsuperscript{11} but removing the overstatement has only a neutralizing ef-

character and can appropriately be regarded as secondary or subordinate to the primary principle that the Supreme Court has substantial and essential appellate jurisdiction.

\textsuperscript{7} For example, the Judiciary Act of 1789 provided that "the Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for . . . ." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 81 (1789). This method of enactment or style of presentation would be clearly proper on the jurisdiction of the inferior courts, and the same style may have been used throughout the act for purposes of uniformity. The act also specified in the same manner the types of cases within the original jurisdiction of the Court even though this jurisdiction is unquestionably derived directly from the Constitution.

\textsuperscript{8} Mr. Chief Justice Marshall, in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810), said:

They [Congress] have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

\textsuperscript{9} In fact, one leading authority even approves the statement that "the Constitution specifically grants to Congress the power to determine the Court's appellate jurisdiction." Pritchett, Congress Versus the Supreme Court, 1957-60, at 122 (1961). Some commentators make the nominal distinction that while "strictly speaking" the Constitution confers appellate jurisdiction, such jurisdiction is as a practical matter statutory. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States 2 (2d ed. 1951). See also Lenoir, Congressional Control Over the Appellate Jurisdiction of the Supreme Court, 5 Kan. L. Rev. 16 (1956). This article cites the limits imposed by United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), which held invalid a Congressional enactment laying down a "rule of decision" on proof of loyalty in certain post-Civil War situations. This, however, was less an attempt to deny jurisdiction than an effort to control substantive determination.

\textsuperscript{10} For instance, in Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796), the Court said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." This case and statement are discussed in note 59 infra and accompanying text. In St. Louis & I.M. Ry. v. Taylor, 210 U.S. 281 (1908), the Court declared that it exercises appellate jurisdiction only in accordance with acts of Congress. In The Francis Wright, 105 U.S. 381, 386 (1881), the opinion goes so far as to say that "authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction."

\textsuperscript{11} Many cases have dealt with statutory limitations upon the appellate
fect, and the question of the extent of Congress’ power remains open.

Some attention has been given to the problem, and while this has aided in clarifying the issue, it has not been particularly satisfactory in arriving at a solution. The position that Congress cannot completely deny appellate jurisdiction is not very helpful because it can be circumvented by a merely nominal grant. While the doctrine that Congress cannot deny the Court “essential functions” has a certain appeal, it seems to rest upon such indefinite factors as the necessity of a supreme independent judiciary in a federal union under law, the principle of balance of powers, and the question of the extent of Congress’ power remains open.

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jurisdiction of the Supreme Court. A few contain broad language referring to unlimited congressional control over that jurisdiction. But none unequivocally holds that Congress has power to impair the Court’s essential constitutional functions. In every case the Court either found no limitation on its jurisdiction or upheld a limitation which did not impair those functions.

Ratner, supra note 4, at 173. In defining “essential functions,” Professor Ratner points out that the Supreme Court has regarded its indispensable functions to be the establishment and maintenance of the uniformity and supremacy of federal law. Id. at 166.

12. The fundamental principle that statements of a court have no binding effect beyond the limits of the issue before the court at the time has been asserted many times. E.g., Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 103 (1937); Northern Bank v. Porter Township Trustees, 110 U.S. 608, 615 (1884); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821). But this limitation upon binding effect does not give the statements the contrary meaning that Congress lacks authority in this area; the limitation merely neutralizes the opinions to the extent of the overstatement.


15. HART & WECHSLER, op. cit. supra note 13, at 312.

16. “[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.” HART & WECHSLER, op. cit. supra note 13, at 312. The idea is further developed in Ratner, supra note 4. A somewhat similar thought is expressed in COUNTRYMAN, THE SUPREME COURT OF THE UNITED STATES 79-80 (1913), where it is contended that the Court “cannot constitutionally be deprived of its appellate jurisdiction in any novel or specially important branch of legal controversy.”

The “essential functions” idea is distinct from the idea advanced by Mr. Justice Story in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816), and not subsequently followed by the Court, that Congress is duty bound to vest in the federal courts the whole judicial power described in the Constitution. That theory related to the power of the inferior courts and not to the appellate jurisdiction of the Supreme Court.


18. Ratner, supra note 4, at 173.
and the general meaning of the terms “exceptions” and “regulations.” A more specific ascertainment of how much authority the Constitutional Convention intended to place in Congress is needed. This article undertakes to analyze not only the meager evidence in the available record of the Convention of 1787, but also the relevant circumstances and the attitudes of the delegates who were most concerned with the adoption of the constitutional provision. It is hoped that such an analysis will throw some light upon the purpose of the provision and in turn provide a means of measurement.

I. THE CONVENTION OF 1787

The idea of giving Congress power to make exceptions and regulations in respect to the appellate jurisdiction of the Supreme Court originated, officially at least, in the five member Committee of Detail, which met between July 26 and August 6, 1787, to draft a proposed constitution on the basis of resolutions which had been adopted during two months of debate on the original Randolph plan. The Committee was also to consider the Pinckney plan, which had been submitted at the start of the Convention. None of these resolutions or plans had suggested that Congress was to have any power over the jurisdiction of the Supreme Court. Why the Committee brought forth this authorization of congressional power must be ascertained largely from the circumstances and surrounding data because there is very little precise information available on the proceedings in the Committee itself.

There are fairly strong indications that the grant of congres-
sional power over the Supreme Court’s appellate jurisdiction was related to the problem of the extent of the Court’s review of issues of fact as distinguished from those of law. While the provision reported by the Committee of Detail did not expressly say that Congress was to have power to make exceptions and regulations both as to law and fact, substantial grounds exist for concluding that the Committee did struggle with the problem of fact issues. Although much of the evidence is indirect, there is at least one piece of rather direct support for this conclusion. When the provision reported by the Committee of Detail was being considered on the floor of the Convention, Gouverneur Morris of Pennsylvania asked whether the appellate jurisdiction was to extend to matters of fact as well as law and to cases of common law as well as civil law. James Wilson, a member of the Committee of Detail, an-

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23. The relevant provision in the report of the Committee of Detail, following the sentence specifying the cases in which the jurisdiction of the Supreme Court would be original, states: “In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make.” 5 ELLIOT’S DEBATES 380 (1866) [hereinafter cited as ELLIOT]. A floor amendment on August 28, 1781, provided that the Court was to “have appellate jurisdiction” rather than “be appellate.” Id. at 484. In addition to this and the other floor amendment described in the text, there were other language changes in the final draft. Id. at 563.

24. Id. at 483. The distinction between common law and civil law would also seem to involve the different treatment of fact issues by the courts. The reference to civil law in the Convention debates probably referred to the procedure in admiralty and equity cases, the civil law origin of which was then more openly recognized than it is now. See, for example, the remark of Alexander Hamilton about “the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery.” THE FEDERALIST, No. 81, at 531 (Mod. Lib. ed. 1941) (Hamilton). On the civil law origin of equity and admiralty procedure as reflected in American jurisprudence, see COCKE, A TREATISE ON THE COMMON AND CIVIL LAW, AS EMBRACED IN THE JURISPRUDENCE OF THE UNITED STATES 33, 34, 41, 43, 119, 120 (1871). The Judiciary Act of 1789 provided that “the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.” 1 Stat. 77 (1789).
answered Morris and stated that the Committee "meant facts as well as law and Common as well as Civil Law." Other members of the Committee did not object and presumably agreed. A motion to insert "both as to law and fact" was adopted without discussion or dissent as if it were a declaratory action. At this point the Convention rejected a motion that would have given Congress full precedent authority to define appellate jurisdiction.

The idea that the authorization of Congress arose from the problem of reviewing fact issues is further supported by the nature of another creation of the Committee of Detail—the provision guaranteeing jury trial in criminal cases. This guarantee immediately followed the section on Supreme Court jurisdiction in the report of the Committee. Like the idea of authorizing Congress to make exceptions and regulations to appellate jurisdiction, the guarantee of jury trial in criminal cases was not proposed in any material officially submitted to the Committee and hence was a Committee creation. Both the fact that the Committee provision did not carry the jury trial guarantee beyond criminal cases and the fact that the Supreme Court was authorized to review fact issues were criticized by the delegates at the Convention and in the ratification debates, and the nature of the charges and the grounds for the defense on the two matters had much in common. Both provisions were attacked as not recognizing the traditional common law right to have facts determined by a jury, and both were defended on the ground that diversity of practice among the states, particularly in equity and maritime cases, made specific agreement on a broader provision virtually impossible at the Convention. The problem may have been accentuated by differences of opinion on the nature of admiralty jurisdiction, but the Convention seems to have been strangely hesitant to attempt a resolution of the differences.

The difficulties arising from the varying practices in the judicial treatment of fact issues were mentioned a number of times dur-

25. 5 Elliot 483. Wilson also pointed out that the jurisdiction of "the federal court of appeals had . . . been so construed." Ibid.
26. The motion was by Dickinson of Delaware. Ibid.
27. Ibid.
28. The Committee reported on August 6, 1787. Id. at 381.
29. The Convention undertook to resolve a number of other difficult problems, such as those referred to the Committee of Eleven on August 31, 1787. 5 Elliot 503, 506, 507, 510, 520. No attempt was made to agree definitely upon the scope of the appellate jurisdiction of the Supreme Court. The action of the Convention in this regard hardly suggests that they intended to grant Congress virtually full discretion over the Court's appellate power. Rather, the Convention seems to have acted as if they were referring to Congress a particular problem which the Committee of Detail had found highly controversial and which the delegates wished to avoid.
ing the closing days of the Convention in opposition to proposals that the jury trial guarantee should be broadened. For example, when a motion was put forth that jury trial be preserved as usual in civil cases (meaning noncriminal cases), Gorham of Massachusetts, who had been a member of the Committee of Detail, pointed out that the nature of juries and the type of cases in which jury trial was usual differed among the states; the proposal was defeated.30 Similar objections were interposed, with equal success, when suggestions were made for a committee to consider the jury trial problem and when a bill of rights was proposed.31 Again, in the debates on the ratification of the Constitution, delegates referred to the conflicting practice among the states.32 For example, Richard Spaight of North Carolina, in answer to objections, asserted that "the trial by jury was not forgotten in the Convention," but the delegates had found it "impossible to make any one uniform regulation for all the states."33 He specifically related the difficulty to equity and maritime cases:

There are a number of equity and maritime cases, in some of the states, in which jury trials are not used. Had the Convention said that all causes should be tried by a jury, equity and maritime cases would have been included. It was therefore left to the legislature [Congress] to say in what cases it should be used . . . .34

Thus, the difficulty with the jury trial guarantee centered upon the different practices in equity and maritime cases, and in this connection it is worthy of note that the subsequently adopted seventh amendment applies only to common law actions.35

30. On September 12, 1787, Williamson (North Carolina) urged a jury trial guarantee in civil cases, but Gorham (Massachusetts), who had been a member of the Committee of Detail, responded that it is not possible to "discriminate" equity cases from those in which juries are proper. On September 15, 1787, a motion was made to add a clause to the third paragraph of the judiciary article to provide that "a trial by jury shall be preserved as usual in civil cases." Gorham interposed that the nature of juries differs among the states and what is "usual" would not be the same in all the states. King (Massachusetts) made similar objections, and Gen. Pinckney said that such a clause would be "pregnant with embarrassments." The motion was disapproved without a record vote. 5 Elliot 538, 550.
31. Id. at 538.
32. George Washington, in a letter of April 28, 1788, to Lafayette, said with respect to trial by jury that "it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the convention to leave it, as a matter of future adjustment." 3 Farrand 297–98.
33. 4 Elliot 139–44.
34. Id. at 144.
35. The seventh amendment also requires that the re-examination by the federal courts of a fact tried by a jury be according to the rules of the
The Federalist contains definite indications that the problem encountered with the appellate jurisdiction of the Court involved issues of fact, not issues of law, and that the controversy over appellate review was connected with the problem of jury trial, which of course involved only fact issues. Alexander Hamilton, in discussing the provision on appellate jurisdiction, stated that "the propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact." He also acknowledged that persons deriving their notions from the court of New York have considered the provision on appellate jurisdiction to be "an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery." Hamilton then points out that the term "appellate" would not have the same meaning in New England as it would in New York. The various difficulties are evident in his explanation of the manner in which the Convention may have arrived at the express inclusion of appellate jurisdiction relating to fact issues:

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the reexamination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. This suggests that in common law areas, the Supreme Court would consider issues of law and in other areas, such as those using civil law procedures, the Court would review issues of fact. The reference to prize causes is noteworthy because it is another indication that the disturbing factor in the Convention was the appellate review of admiralty cases. Hamilton continues:

It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States common law. This would seem to limit to some extent the appellate power of the Supreme Court. In any event, it is a further manifestation of the difficulty presented by the diverse modes of procedures in the courts at the time.

36. THE FEDERALIST NO. 81, at 530 (Mod. Lib. ed. 1941) (Hamilton).
37. Id. at 532.
all causes are tried in this mode; and such an exception would preclude
the revision of matters of fact, as well where it might be proper, as
where it might be improper. To avoid all inconveniences, it will be
safest to declare generally, that the Supreme Court shall possess ap-
pellate jurisdiction both as to law and fact, and that this jurisdiction
shall be subject to such exceptions and regulations as the national leg-
islature may prescribe. This will enable the government to modify it
in such a manner as will best answer the ends of public justice and
security.35

Hamilton’s explanation is consistent with the idea that the prob-
lem facing the Committee of Detail and the Convention was the
review of fact issues. He brings together as common or related
problems the diversity of practice on the trial of fact issues, the
extent to which the Supreme Court should review issues of fact,
and the granting of authority to Congress to make exceptions and
regulations. Likewise, he did not regard the congressional au-
thorization as permitting Congress to exercise virtually unlimited
control over the appellate jurisdiction of the Court. In his mind
the Supreme Court was to be independent of Congress, and he went
to some pains to convince his fellow New Yorkers of the need
for such independence even though the highest court of New York
was a part of the legislature. There would have been no need
for such argument if the Court was to be at the mercy of Congress
for its appellate jurisdiction. But Hamilton did not calm the fears
of the New Yorkers by saying that Congress could control the
Court through its power to make exceptions and regulations: rath-
er, he pointed out that an independent judiciary was the establish-
ed practice in a number of states, and he argued for the necessity
of a supreme independent judiciary in the constitutional plan pre-

dented.39

Some further evidence that the Founding Fathers connected
the guarantee of jury trial and the scope of appellate review is
found in the seventh amendment, which provides, in part, that no
fact tried by a jury shall be re-examined by any court of the United
States other than according to the rules of the common law.

38. Id. at 532–33.
39. The Federalist No. 80, at 516 (Mod. Lib. ed. 1941) (Hamilton):
If there are such things as political axioms, the propriety of the judicial
power of a government being coextensive with its legislative, may be
ranked among the number. The mere necessity of uniformity in the
interpretation of the national laws decides the question. Thirteen in-
dependent courts of final jurisdiction over the same causes, arising upon
the same laws, is a hydra in government from which nothing but
contradiction and confusion can proceed.

It is noteworthy that the Convention agreed to establish the Supreme
Court on the day after it had rejected a proposal that Congress have power
to negative state laws.
The fact that the grant of authority to Congress concerning the appellate jurisdiction of the Supreme Court includes the power to make regulations as well as exceptions does not disturb the idea that the grant of authority was designed for the problem of how far the Court should review issues of fact. "Regulations" suggest that procedural methods and the choice of procedures (as between writ of error or appeal) may determine whether the appellate court will review merely issues of law or review issues of fact as well. There is little likelihood that the Constitutional Convention was thinking of regulations needed for efficient operation. Such rules could come within the scope of implied or inherent powers. When Congress passed the Judiciary Act of 1789, it undertook to control the Supreme Court's power to review issues of fact by regulating the modes of procedure as much as by excluding types of cases. For controversial types of cases, the act prescribed writ of error rather than appeal.

In general, the Judiciary Act of 1789 seems to have restricted the Supreme Court's authority over fact questions to perhaps an undesirable extent, and some modification was enacted in 1803. But the 1789 statute broadly and affirmatively recognized the Supreme Court's authority to review issues of law. Appeals were not recognized in criminal cases, but that was the general English practice at the time, and the specific authority to deal with writs of habeas corpus permitted consideration of at least the more important questions of law arising in criminal proceedings. Thus, the congressional action in 1789 does not refute the idea that the Convention merely intended that Congress was to settle the dispute over the review of fact issues, and it may even support such an interpretation.

II. ATTITUDES OF THE DELEGATES

The foregoing discussion indicates that the meetings of the Committee of Detail between July 26 and August 6, 1787, were the turning point in the Convention's decision to grant Congress certain authority over the appellate jurisdiction of the Supreme Court.
Court. Prior to that time there was no proposal of congressional authorization nor any recorded mention of appellate review of fact issues. Until then, the delegates, with perhaps little specific reflection on the matter, seem to have thought of a Supreme Court as dealing only with the determination of issues of law.46

In the Eighteenth Century appellate review was less concerned with fact issues than it is now. Among common law jurisdictions, appeals of fact questions were probably limited to equity cases in such states as had courts of Chancery,47 but such appeals existed in the federal courts in admiralty cases under acts of the Continental Congress and the Articles of Confederation.48 This is particularly relevant because of the various references by delegates to maritime cases and because one member of the Committee of Detail, James Wilson of Pennsylvania, had strong feelings about admiralty jurisdiction and the review of fact issues in such cases. What he did and said in the meetings of the Committee of Detail, if known, would probably be the best clues to why the Convention extended certain discretionary authority to Congress over the appellate jurisdiction of the Supreme Court.49 There is little record of what occurred within the Committee, but Wilson's statements and actions elsewhere clearly indicate that he was very anxious to have appellate review by the national judiciary of fact issues in admiralty cases. There seems to be a definite possibility that Wilson, in seeking recognition of this power in the Supreme Court, opened the whole question of how far fact issues could be reviewed. Because a broad scope of review threatened to undermine the value of jury trial, these problems may have become too complex or too controversial for either the Committee or the Convention to resolve.

Wilson's interest in admiralty cases and the national judiciary extended over most of the last quarter of the Eighteenth Century. In 1775 he was appointed to the committee established by the Continental Congress under the Articles of Confederation to make final determinations in capture cases,50 and he was a member of

46. There was very little discussion of the Court's jurisdiction prior to the meeting of the Committee of Detail. No plan submitted to the Convention nor resolution adopted by it had mentioned the review of fact issues.
47. One of the principal constitutional amendments proposed during the ratification debates would have confined appellate power to questions of law. See Warren, supra note 42, at 56.
49. Wilson seems to have been an active member of the Committee of Detail. The documents set forth in 2 FARRAND 129-75 under the heading "Committee of Detail" consist almost entirely of papers from the Wilson collection. One draft of the Constitution includes the provision on appellate jurisdiction as it emerged from the Committee of Detail. Id. at 173.
50. 1 JOURNALS OF CONG. 177 (Way & Gideon ed. 1823).
that group until 1777. In the following year he had an even closer experience regarding appellate review of capture cases. This involved a controversy in which he served as appeal attorney for General Benedict Arnold, then military governor of Philadelphia. Arnold had purchased the claim of one Gideon Olmstead to prize money from the capture of the British sloop Active. Olmstead, along with a number of other American sailors, had been captured and placed aboard the British vessel. He then led an attempt to seize the ship and was meeting with some success when an American brig, the Convention, under commission from the State of Pennsylvania, captured the British ship. At the time, the privateer Gerard was standing by. The prize money was claimed by all participants and, at a trial by jury in the Pennsylvania admiralty court, the prize money was awarded four ways: one fourth to the State of Pennsylvania, another to the crew of the Convention, another to the Gerard, and the last to Olmstead and his colleagues, although they seem to have taken the greatest risks. Wilson took the matter to the Congressional Court of Appeals, which awarded his client a larger judgment. However, the Pennsylvania court refused to accept the larger award on the ground that a state law prohibited appeals to a higher court on the findings of fact by a jury. This experience may have given Wilson a special reason for wanting the Constitution to recognize the power of the national judiciary to review admiralty cases as to both fact and law.

The records of the Convention disclose that Wilson had a continuing interest in this matter. Within a week after the session began, he asserted that "the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen." Later, when the provision reported by the Committee of Detail was being discussed and Gouverneur Morris inquired of the scope of the appellate jurisdiction, it was Wilson who answered that the Committee intended the authority to include questions of fact. Other members of the Committee seemed to avoid further consideration of the review of fact issue and the jury trial question, and when the latter problem was brought up, one member, Nathaniel Gorham of Massachusetts, argued that it was too difficult to be considered. In the debates of the Convention on ratification,

52. Id. at 125-27.
53. 5 Elliot 159; cf. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 324 (1796).
54. See note 30 supra.
Wilson defended the provisions on appellate review and jury trial more positively and more specifically than any other member of the Committee of Detail. In his speech before the Pennsylvania House of Delegates, he tended to regard the two provisions as related. As to jury trial he asserted that there was ample protection in the authority of the legislature to determine the mode of trial. On appellate jurisdiction he was even more definite:

The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures.

The matter of admiralty cases was uppermost in his mind, and he called attention to cases in which vessels had been captured during the Revolutionary War, remarking "what a poor chance" owners had before juries and "in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries." Thus, his intense interest in the review of admiralty cases seems to be a continuing preoccupation. The records disclose that two months before the Committee of Detail met, Wilson had advocated that the admiralty jurisdiction be exclusively national and that five months after the Committee reported, he defended appellate review of fact issues in his speech before the Pennsylvania House of Delegates. Most likely, it was Wilson who raised the problem which led the Committee and the Convention to authorize Congress to make exceptions and regulations of the appellate jurisdiction of the Supreme Court.

It is equally interesting that James Wilson was also the catalyst in the formation of the Supreme Court's position that appellate jurisdiction is dependent upon congressional action. In Wiscart v. Dauchy, when Wilson was a Justice of the Supreme Court and his one time associate on the Committee of Detail, Oliver Ellsworth, was the Chief Justice, the Court first asserted its dependence upon Congress for appellate jurisdiction. The Wiscart case was an equity proceeding in which the circuit court held that the execution of certain deeds had been fraudulent because they pre-

55. 3 FARRAND 167-68.
56. 2 ELLIOT 488 (2d ed. 1876).
57. Id. at 493.
58. Ibid. Wilson also said that attempts were made in some states to destroy this power of review, but that the power was confirmed in every instance. He noted that there were other cases in which review will be necessary but did not identify the types. Id. at 493-94.
59. 3 U.S. (3 Dall.) 321 (1796).
vented the complainant-creditor from obtaining satisfaction of his claim. The appeal before the Supreme Court turned principally on whether the circuit court had sufficiently stated the facts on which it decided the case in the pleadings and the decree, and the Court held that the facts were adequately set forth. In the opinion of the Court, Ellsworth said that where equity or admiralty cases are removed to the Court with a statement of facts but without evidence, the statement is conclusive. On this the Court was unanimous. But only the majority asserted that the statement of facts is conclusive even when the evidence is brought forward; Wilson and Patterson dissented.60

Ellsworth's mention of admiralty cases apparently stirred Wilson into action because he presented a separate opinion that dealt mainly with the question of Supreme Court review of fact issues in admiralty cases. Although this seems to have been outside the scope of the case, Wilson explained that admiralty jurisdiction was important because it affected the rights of foreigners, a point he had also made before the Constitutional Convention in 1787.61 His most pertinent contention in the Wiscart opinion was that an appeal (which would permit review of fact issues) was the proper mode of removing an admiralty case. He also argued that a denial of such review in admiralty cases would be unconstitutional. Moreover, he interpreted the Judiciary Act of 1789 as excluding admiralty cases from the general provision that civil cases were to be removed by writ of error; admiralty cases were not intended to come within the category of civil cases, and since Congress had thus not dealt with such cases, the Court had jurisdiction by virtue of its constitutional powers.62

Wilson's contentions caused Ellsworth to enter a rebuttal opinion—the practice being to have seriatim opinions by the Justices in the nature of a dialogue—and it is in this second, rebuttal opinion that Ellsworth made the famous assertion that "if Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."63 The first part of this statement is historically the more important, but it was unnecessary because Ellsworth maintained that Congress had prescribed the mode of review.64 Ellsworth's statement would probably not have been

60. That Patterson was the fellow dissenter is indicated in Jennings v. The Brig Perseverance, 3 U.S. (3 Dall.) 336 (1797), which held that the review of admiralty cases does not extend to fact questions.
61. 3 U.S. at 324.
62. Id. at 325–27.
63. Id. at 327.
64. Ratner, supra note 4, at 174.
made if Wilson had not been so determined to plead again the cause which had disturbed him since his experience in the Olmstead case 18 years before—the power of the national judiciary to review the facts in admiralty cases as well as the law. Because Wilson went out of his way to maintain that the Supreme Court had such power, Ellsworth went out of his way to say that the Court lacked it. They were both a bit afield, perhaps continuing arguments begun in the Committee of Detail ten years earlier. But what Ellsworth said at the time of the Wiscart case has been virtually gospel for the Supreme Court from that year to this. Thus, both the constitutional provision empowering Congress to make exceptions and regulations with respect to the appellate jurisdiction of the Supreme Court and the broad interpretation that the Court has given to this provision seem to have originated because of Wilson’s determined efforts to establish review of fact issues in admiralty cases.

CONCLUSION

The constitutional grant of authority to Congress over the appellate jurisdiction of the Supreme Court appears to have originated because of a particularly limited problem—the extent to which the Supreme Court should have jurisdiction to review fact issues in those cases in which practice differed among the states. There is a definite possibility that the grant of authority to Congress was devised in the Committee of Detail of the Constitutional Convention in order to avoid further controversy when James Wilson of Pennsylvania insisted that the Constitution recognize the power of the national judiciary to review fact issues in admiralty cases. Later, when the controversy was reopened and the issue was re-argued by Ellsworth and Wilson in the Wiscart opinions, the Supreme Court was started on a long path of overstatement of Congress’ power.

What actually happened in the Committee of Detail may always remain largely unverified, but there is considerable evidence that delegates to the Convention associated the grant of power to Congress with the divergent practice among the states on the review of fact questions. If the intent of the Constitutional Convention is deemed to be controlling, then there would seem to be substantial grounds for saying that the authority of Congress to make exceptions and regulations with respect to the appellate jurisdiction of the Supreme Court is limited to the treatment of fact issues. The effect of such a limited interpretation would be principally to exclude power that Congress has not exercised. As in-
dicated previously, the restrictions that Congress has imposed upon the review of issues of law have been no more than those that seem necessary for the efficient operation of the Court. Such restrictions can be made either by Congress, under a limited implied power to provide for the operation of the Court, or by the Court itself, under an inherent power to maintain its existence in an efficient manner.

Nevertheless, there would be substantial benefits resulting from recognition of the principle that the power of Congress over the appellate jurisdiction of the Supreme Court is limited to the treatment of fact issues. This principle would tend to reconcile the action of the Constitutional Convention in granting this power to Congress with the Convention's general purpose of establishing a substantially independent national judiciary. On this assumption, the comparatively little attention which the delegates gave to this provision is better understood. This interpretation of the power to make exceptions and regulations would tend to calm any fears that might arise from the prospect that the dicta in Supreme Court opinions would actually be applied if Congress would attempt to deny the Court any of its important authority.