

## Sec. 1—Judicial Power, Courts, Judges

ment of such fees in that situation, but it remanded for consideration of sanctions under both a Federal Rule of Civil Procedure and the trial court's inherent powers, subject to a finding of bad faith.<sup>248</sup> But bad faith is not always required for the exercise of some inherent powers. Thus, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.<sup>249</sup>

**Power to Issue Writs: The Act of 1789**

From the beginning of government under the Constitution of 1789, Congress has assumed, under the Necessary and Proper Clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and its power to regulate the issuance of writs.<sup>250</sup> Section 13 of the Judiciary Act of 1789 authorized the Supreme Court “to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”<sup>251</sup> Section 14 provided that all “courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>252</sup>

Although the Act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.<sup>253</sup> Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for constitutional violations or whether such remedies must fit within congressionally authorized

<sup>248</sup> *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

<sup>249</sup> *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

<sup>250</sup> Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in ‘Inferior’ Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016–1023 (1924).

<sup>251</sup> 1 Stat. 73, 81. “Section 13 was a provision unique to the Court, granting the power of prohibition as to district courts in admiralty and maritime cases . . .” WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 4005, p. 98 (1996). See also R. FALLON, ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009), Ch. III, p. 268 (hereinafter *Hart & Wechsler* (6th ed.))

<sup>252</sup> 1 Stat. 73, 81–82. See also *United States v. Morgan*, 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis*.

<sup>253</sup> This proposition was recently reasserted in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes).