

## Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent

In 1793 Congress enacted a statute prohibiting courts of the United States from granting writs of injunction to stay proceedings in any court of a state.<sup>1</sup> Until 1941, however, the Supreme Court consistently disregarded the broad language of the statute<sup>2</sup> and created a large number of judicial exceptions.<sup>3</sup> In that year the Court, in *Toucey v. New York Life Ins. Co.*,<sup>4</sup> reversed this trend and returned to a literal interpretation of the prohibition. This decision threatened to destroy most of the judicial exceptions and led to a congressional revision of the statute in 1948 to include three general exceptions.<sup>5</sup>

Since the 1948 revision the Supreme Court has struggled with questions of how broadly these exceptions should be interpreted.<sup>6</sup> The issues are difficult and the controversy evenly balanced. The interest of effective protection of rights guaranteed by the Constitution and

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<sup>1</sup> “. . . nor shall a writ of injunction be granted to stay proceedings in any court of a state.” Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.

<sup>2</sup> In 1875 Congress enacted a minor exception to the general prohibition, permitting injunctions to issue “where such injunction may be authorized by any law relating to proceedings in bankruptcy.” REV. STAT. § 720 (1875). This provision was later incorporated in the Judicial Code of 1911, Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162.

<sup>3</sup> *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (state proceedings removed to federal court); *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (federal statute provided for exclusive remedy); *Marshall v. Homes*, 141 U.S. 589 (1891) (state judgment obtained by fraud); *Julian v. Central Trust Co.*, 193 U.S. 93 (1904) (matter already litigated in federal court); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922) (action in rem where federal court first acquired jurisdiction of the subject matter).

<sup>4</sup> 314 U.S. 118 (1941).

<sup>5</sup> “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283 (1964) (enacted June 25, 1948, ch. 646, 62 Stat. 968).

<sup>6</sup> In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), the Court held the statute inapplicable and granted an injunction sought by the United States. The Court did not rely on any of the three general exceptions contained in the statute. In *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965), the Court suggested that the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), might constitute an express authorization to issue injunctions to state courts. The Court has also suggested that the Supreme Court, in aid of its appellate jurisdiction, might have the power to enjoin proceedings where lower federal courts are without this power. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 393 U.S. 281, 296 (1970).

laws of the United States pulls in one direction; the interest of preservation of the independence of state judiciaries pulls in the opposite direction.

In resolving a particular case in favor of one interest or the other, an understanding of the purposes of the original enactment is an important, perhaps decisive, factor in an otherwise evenly balanced case. This understanding is especially important since the anti-injunction statute was originally enacted only a short time after adoption of the Constitution; such statutes carry the aura of fundamental or constitutional principles of American government.

In a recent decision,<sup>7</sup> the Supreme Court recognized the importance of the purposes of the 1793 enactment in interpreting the present anti-injunction statute. In the Court's view, the original statute is a monument to the principle of independent state judicial systems.<sup>8</sup> Taking its bearing from this monument, the Court found that the present prohibition "in part rests on the fundamental constitutional independence of the States and their courts."<sup>9</sup> This finding led the Court to conclude that "the exceptions should not be enlarged by loose statutory construction."<sup>10</sup>

What the Court supposes to be a monument is actually a mirage. The Court's analysis is premised on the assumption that Congress in 1793 wished to prohibit federal courts from staying state court proceedings. Convincing historical evidence contradicts this assumption. It is the thesis of this comment that Congress in 1793 did not intend to prevent stays effected by writs other than injunction, and that Congress specifically approved the use of the writ of certiorari to stay state proceedings.

## I

Several authors,<sup>11</sup> including Justice Frankfurter and Charles Warren, have attempted to discover the historical forces behind the enactment of the original anti-injunction statute; all have failed to recognize that the statute prohibited stays of state court proceedings only by writ of injunction. Injunction was not the only writ used in American courts

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<sup>7</sup> *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

<sup>8</sup> *Id.* at 286.

<sup>9</sup> *Id.* at 287.

<sup>10</sup> *Id.* In *Younger v. Harris*, 91 S. Ct. 746 (1971) and companion cases the Court relied on the same historical view in carrying out this mandate.

<sup>11</sup> *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129-32 (1941) (Frankfurter, J.); Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1145-46 (1932); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1170-72 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-48 (1930).

in 1793 to effect a stay of proceedings; writs of certiorari,<sup>12</sup> super-sedeas,<sup>13</sup> habeas corpus,<sup>14</sup> and prohibition<sup>15</sup> also operated as stays. Certiorari, on which this comment focuses, was one of the most common of these writs. The Judiciary Act of 1789 authorized courts of the United States to issue "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions."<sup>16</sup> That Congress, in passing the prohibition of stays by injunction, did not intend also to prohibit all the other existing forms of effecting stays is suggested by five important considerations.<sup>17</sup>

First, injunction was an equitable remedy, available only to courts of chancery, whereas the other remedies were available to courts of common law.<sup>18</sup> During this period most of the states had separate courts of law and chancery,<sup>19</sup> and there were clear distinctions between remedies available in common law and equity. Many members of Congress, including Oliver Ellsworth, the probable draftsman of the anti-injunction statute,<sup>20</sup> were lawyers who would have been thoroughly

<sup>12</sup> See text and notes at notes 40-49 *infra*.

<sup>13</sup> See 4 M. BACON, ABRIDGMENT OF THE LAW 667 (6th ed. 1793); *Curry v. Lovell*, 6 F. Cas. 996 (No. 3496) (C.C.D.C. 1802); *Hodgson v. Mountz*, 12 F. Cas. 286 (No. 6569) (C.C.D.C. 1806); *Armistead v. Marks*, 1 Va. (1 Wash.) 325 (1794); *Cheshire v. Atkinson*, 11 Va. (1 Hen. & M.) 210 (1807).

<sup>14</sup> See 4 M. BACON, *supra* note 13, at 675; *Taylor v. Llewellyn*, 1 Md. 19 (1692); *Bickham v. Denny*, 1 N.J.L. 14 (1790); *Sharp v. Sinnickson*, 1 N.J.L. 56 (1791); *Smith v. Judges of the Court of Common Pleas*, 3 Cow. 27 (N.Y. 1824).

<sup>15</sup> See 4 M. BACON, *supra* note 13, at 24; 4 W. BLACKSTONE, COMMENTARIES 111 (St. George Tucker ed. 1803); *Zylstra v. Corporation of Charleston*, 1 Bay 382 (S.C. Ct. of C.P. 1794).

<sup>16</sup> Judiciary Act of 1789, § 14, 1 Stat. 81. There is no record of any debates over either the original all-writs statute, see 1 ANNALS OF CONG. (1789-1790), or the anti-injunction statute, see 3 *id.* (1791-1793). The modifications made in the drafting of the all-writs statute reveal nothing of congressional intent regarding writs to stay state proceedings. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 95 (1924).

<sup>17</sup> The analysis in the text contradicts a dictum by Justice Washington in *Ex parte Cabrera*, 4 F. Cas. 964 (No. 2278) (C.C.D. Pa. 1805), that federal courts were without any power to interfere with state court proceedings. This dictum was relied upon in commentary by Chancellor Kent, 2 J. KENT, COMMENTARIES ON AMERICAN LAW 412 (4th ed. 1840), and by Justice Story, 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1759 (3d ed. 1858). However, Justice Story, riding circuit, did enjoin state proceedings in *Ex parte Foster*, 9 F. Cas. 508 (No. 4960) (C.C.D. Mass. 1842). After the decision, he vehemently defended the injunction against attacks by state judges. See C.G. HAINES & F. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835-1864, at 200-04 (1957).

<sup>18</sup> It appears that courts of both common law and chancery traditionally could issue writs of certiorari. 1 M. BACON, *supra* note 13, at 349; 4 W. BLACKSTONE, *supra* note 15, at bk. 3, app. 20; 1 W. TIDD, PRACTICE OF THE COURT OF KING'S BENCH AND COMMON PLEAS 394 (6th ed. 1817). But certiorari appears from the reported cases to have been primarily a writ at law in early American courts.

<sup>19</sup> See Wilson, *Courts of Chancery in America—Colonial Period*, 18 AM. L.J. 226 (1884).

<sup>20</sup> Ellsworth drafted the Judiciary Act of 1789. Warren, *supra* note 16, at 50. Ellsworth

familiar with the separation. Given these facts, it is doubtful that Congress would have used the term "injunction" had it meant to include writs used by common law courts.

Second, it seems certain that in 1793 Congress already would have foreseen certain situations where it would be necessary for federal courts to stay state proceedings. For example, the Judiciary Act of 1789 provided for removal into federal circuit courts of certain diversity-of-citizenship cases initiated in the state courts. This provision presumably was enacted to prevent prejudicial judgments in state courts against defendants from other states or from foreign countries. The statute provided that, when the case is removed, "it shall then be the duty of the state court to . . . proceed no farther with the cause."<sup>21</sup> If the state court, contrary to this provision, elected to proceed after removal, and the federal court could not act to stay the proceedings, the protection which Congress intended in the removal provision would have been destroyed.

In cases of removal and in a number of other circumstances the Supreme Court found the necessity of effecting a stay in the state court proceedings so compelling that it allowed injunctions to issue to the state courts<sup>22</sup> in patent contradiction of the words of the statute.<sup>23</sup> The Congress which passed the original anti-injunction statute comprised many men who had framed the Constitution and the durable Judiciary Act of 1789. It is improbable that this Congress failed to foresee at least some of the circumstances which the Supreme Court later found so compelling or intended to prohibit stays in every one of these circumstances. More likely, Congress presumed that, in at least some of these circumstances, state proceedings would be stayed by common law writs.<sup>24</sup>

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was a member of the committee which drafted the 1793 Act. 3 ANNALS OF CONG. 616 (1792). He was later Chief Justice of the Supreme Court.

<sup>21</sup> Judiciary Act of 1789, § 12, 1 Stat. 79. This clause conceivably could be read as an implied authorization to federal courts to issue injunctions to stay state proceedings. Such a construction strains the words of the clause which imposes only a duty on state courts and contains no words conferring power on federal courts.

<sup>22</sup> See cases cited note 3 *supra*.

<sup>23</sup> With reference to the large number of exceptions to the statute, the A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Tent. Draft No. 6, at 220 (1968), concluded: "The reasoning on which the exceptions developed will not bear close scrutiny." For full exposition of the exceptions, see *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132-41 (1941) (Frankfurter, J.); *Durfee & Sloss*, *supra* note 11; *Taylor & Willis*, *supra* note 11; *Warren*, *supra* note 11; Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 546 (1947); Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961); Comment, *Anti-suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965).

<sup>24</sup> An alternative, or perhaps additional, explanation is that Congress intended to prevent only injunctions that issued directly to state courts, as contrasted with injunctions

Third, the reasoning of Attorney General Edmund Randolph in proposing a similarly worded provision<sup>25</sup> in December, 1790, indicates an interest in limiting only the equity powers of the federal courts. Randolph had proposed that "no injunction in equity shall be granted by a district court to a judgment at law of a State court."<sup>26</sup> In explaining his proposal, Randolph said:

It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the state courts, and the equity side into the federal courts.<sup>27</sup>

Randolph's proposal and explanation evidence an intent to prohibit

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issued to the parties litigant in the state court. The Court allowed an injunction to a party litigant on this ground in *Marshall v. Holmes*, 141 U.S. 589 (1891), but has not recognized the distinction since. Certainly, an injunction issued to a state court presents a more serious interference with the state judiciary than injunctions issued to parties litigant, and Congress reasonably could have intended to prevent only the more serious interference. *Durfee & Sloss*, *supra* note 11, at 1154, rejects this notion on the ground that "[t]he whole course of practice, ancient and modern, in cases of injunctions against legal proceedings, has been to address the writ to the party litigant not to the court." While it is true that the English rule was that injunctions to stay proceedings issued to parties litigant, R. HENLEY (EDEN), *A TREATISE ON THE LAW OF INJUNCTIONS* 4 (1821), it is not completely clear that this rule was established practice in courts of the United States in 1793. Language in *Georgia v. Brailsford*, 1 U.S. (3 Dall.) 400, 405 (1792), indicates that the Supreme Court may have issued an injunction directly to a circuit court rather than to the parties litigant.

Had the statute been intended to prohibit only injunctions issued to state courts, it would have been consistent with the sentiment expressed by Justice Johnson in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816), that, although the Supreme Court could exert no compulsory control over state tribunals, it was supreme over persons and cases to the extent of its powers. Such an intent would also align with the Court's position in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), interpreting the 11th amendment (which was proposed in Congress just two weeks before passage of the anti-injunction statute, 3 ANNALS OF CONG. 651-52) to prevent only suits directly against states, but not suits which reached states through process against individuals.

<sup>25</sup> Charles Warren concludes that the anti-injunction provision "was undoubtedly made in consequence of" Randolph's proposal. Warren, *supra* note 11, at 347.

<sup>26</sup> AM. STATE PAPERS, 1 Misc. No. 17, at 26 (report on the judiciary system, communicated to the House of Representatives, Dec. 31, 1790). Randolph made an identical proposal regarding circuit courts. *Id.* at 29.

<sup>27</sup> *Id.* at 34. Under equity practice, an injunction to stay proceedings in an action at law could be had in a court of chancery only if certain equitable elements, such as accident, mistake or fraud, were present. Theoretically, these elements could not be heard in a court of law. After the injunction issued, the action at law remained suspended until the chancery court decided on the question of equity and issued its decree. *See generally* R. HENLEY, *supra* note 24, at 3-45. The action at law and suit in equity were considered separate causes, since the equity suit contained the additional equitable element which was never in question in the common law court. *Arguments Proving the Antiquity, the Dignity, Power and Jurisdiction of the Court of Chancery*, 21 Eng. Rep. 576, 587 (1616) (report to the King by Attorney General Francis Bacon *et al.*).

only equitable forms of effecting stays,<sup>28</sup> leaving the common law writs unimpaired.

Fourth, an animosity to chancery had seethed in the colonies throughout the pre-revolutionary period.<sup>29</sup> These interests were well represented in Congress in the years closely following the ratification of the Constitution. In the first Congress, Senator Oliver Ellsworth, the probable draftsman of the 1793 Act, led the opposition to expansion of equity power in the Judiciary Act of 1789, and this position eventually dominated.<sup>30</sup> On the Senate floor, Ellsworth and other Senators expressed a fear that the boundary between equity and common law would be broken down and that the encroachment of equity upon common law would be increased.<sup>31</sup> Justice Frankfurter examined these same facts and concluded that this hostility to chancery was the primary motivation behind enactment of the anti-injunction statute.<sup>32</sup> If that were the case, the statute must not have been intended to inhibit common law forms of effecting stays.

Fifth, comparison of the anti-injunction provision with similar provisions in a comprehensive judicial code adopted earlier by the Virginia legislature<sup>33</sup> reveals the probable intention of Congress. The Virginia acts covered procedure in courts of both common law and chancery. In the chapter concerning the high court of chancery, one section provided:

No injunction shall be granted to stay proceedings in any suit at law, unless the matter in dispute be of value sufficient to admit original jurisdiction in said high court of chancery, etc.<sup>34</sup>

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<sup>28</sup> Randolph's proposal, unlike the eventual statute, covered only injunctions after judgment, as contrasted with injunctions to stay proceedings which could issue before or after judgment. In the sentence preceding the statement in text at note 27 *supra*, Randolph said: "This clause will debar the district court from interfering with judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as judgment, they ought to continue there as they have begun." AM. STATE PAPERS, 1 Misc. No. 17, at 34. Randolph's opposition to federal court interference with state courts apparently extended only to interference after judgment in the state court. Elsewhere in his report, *id.* at 23, Randolph expresses a preference for issuance of certiorari by federal courts to state courts before judgment, as compared with appeal to the Supreme Court after judgment, in cases in which state courts act in an area of exclusive federal jurisdiction.

<sup>29</sup> See Wilson, *supra* note 19, at 226-55.

<sup>30</sup> W.G. BROWN, LIFE OF OLIVER ELLSWORTH 194 (1905); W. MACLAY, SKETCHES OF DEBATES IN THE FIRST SENATE OF THE UNITED STATES 102-04 (1880). See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129, 131 (1941); Warren, *supra* note 16, at 96-100.

<sup>31</sup> W. MACLAY, *supra* note 30.

<sup>32</sup> *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 131 (1941).

<sup>33</sup> Law of Oct. 26, 1792, ch. 11; Law of Nov. 9, 1792, ch. 12; Law of Dec. 13, 1792, ch. 13; Law of Dec. 12, 1792, ch. 14; Law of Dec. 3, 1792, ch. 15, 13 Va. Stat. 405-67.

<sup>34</sup> Law of Nov. 29, 1792, ch. 12, § 54, 13 Va. Stat. 420.

The Virginia legislature passed separate provisions restricting the use of supersedeas<sup>35</sup> and certiorari<sup>36</sup> to certain courts of common law. Members of Congress were probably familiar with the Virginia acts, since James Monroe, from Virginia, was one of the members of the Senate committee which drafted the anti-injunction statute. The presence of restrictions on injunction, supersedeas and certiorari in the Virginia acts, contrasted with the presence of restrictions only on injunctions in the federal act, supports the view that Congress intended no restrictions on the other writs.

## II

In addition to this evidence—that the anti-injunction statute did not prohibit issuance of common law writs—there is positive historical evidence showing that Congress specifically intended federal courts to have power to stay proceedings in state courts by writ of certiorari. Certiorari, a commonly used writ during this period,<sup>37</sup> technically was an order from a superior court to an inferior court to deliver a record;<sup>38</sup> it served to remove a case from the inferior to the superior court. Certiorari was undoubtedly one of the writs authorized by the all-writs provision of the Judiciary Act of 1789.<sup>39</sup>

The issuance of a writ of certiorari by the superior court and delivery of the writ to the inferior court operated to stay proceedings in the inferior court. This proposition has support in English treatises<sup>40</sup> and in early American cases. Although there appear to be no recorded American decisions which antedate 1789 holding that the writ stayed proceedings, there are enough cases which closely postdate this year to support an inference that when the original judiciary act was passed, certiorari effected a stay of proceedings.

In a 1792 case, the Supreme Court of Pennsylvania denied an appeal

<sup>35</sup> Law of Dec. 12, 1792, ch. 14, §§ 51, 52, 13 Va. Stat. 446.

<sup>36</sup> Law of Dec. 3, 1792, ch. 15, § 67, 3 Va. Stat. 465.

<sup>37</sup> 1 L.K. WROTH & H. ZOBEL, *LEGAL PAPERS OF JOHN ADAMS* 290, 301, 302 (1965), and 1 J. GOEBEL, *LAW PRACTICE OF ALEXANDER HAMILTON* 14, 16, 424 (1964), evidence frequent use of certiorari in Massachusetts and New York respectively.

<sup>38</sup> 1 M. BACON, *supra* note 13, at 549; 1 *BOUVIER'S LAW DICTIONARY* 443 (1914); A. FITZHERBERT, *NATURA BREVIVM* 548 (1755); 1 L.K. WROTH & H. ZOBEL, *supra* note 37, at 302.

<sup>39</sup> The Supreme Court has frequently issued common law writs of certiorari under the authority of the all-writs provision. *E.g.*, *In re* 620 Church St. Bldg. Corp., 299 U.S. 24 (1936); *House v. Mayo*, 324 U.S. 42 (1945); *DeBeers Consol. Mines v. United States*, 325 U.S. 212 (1945). *See* R. ROBERTSON & F. KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* § 309 (2d ed. R. Wolfson & P. Kurland 1951). Lower federal courts have also issued certiorari under this provision. *E.g.*, *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

<sup>40</sup> 1 M. BACON, *supra* note 13, at 356; 4 *id.* at 676; 1 W. TIDD, *supra* note 18, at 400-01.

on the grounds that no record had come up from below.<sup>41</sup> Justice Shippen said: "The regular method of bringing up the record is by certiorari, and nothing else can stay the proceedings below."<sup>42</sup> In 1808 the same court reversed a judgment that had been entered in a lower court after certiorari had been delivered.<sup>43</sup> The court said: "After the certiorari was read and allowed below, no further proceedings could be had in that court until the suit was regularly remanded."<sup>44</sup>

In 1800 the New York Supreme Court (at that time the highest court in the state) held a justice of the peace liable for trespass for trying a case after a certiorari had issued to the justice from a higher court.<sup>45</sup> The Supreme Court said that when the justice proceeded "after his power was taken away by the certiorari," he became a trespasser.<sup>46</sup>

In an 1819 case, the New Jersey Supreme Court held that certiorari is in nature and effect a supersedeas, and that to require a writ of supersedeas to stay further progress is error and productive of inconvenience.<sup>47</sup> One can also infer from two early North Carolina cases that certiorari served to stay proceedings in the courts of that state.<sup>48</sup>

A section of the Virginia judiciary acts of 1792 also demonstrates that certiorari effected a stay of proceedings. The section provided that, where certiorari is issued to inferior courts after issue is joined, such courts "may proceed in the said cause or causes as though no such writ had been sued forth."<sup>49</sup> The implication is that certiorari ordinarily prevented the inferior court from proceeding.

If one accepts that Congress intended that federal courts have the power to grant writs of certiorari and that it intended such writs to operate as stays, the hard question remains whether Congress intended that federal courts have the power to issue such writs to state courts.

An initial problem is raised by the fact that certiorari traditionally could be issued only from a superior to an inferior court.<sup>50</sup> Due to a paucity of historical evidence, the question whether the framers of the Constitution and the early Congresses considered state courts to be

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<sup>41</sup> Walker's Appeal, 2 U.S. (2 Dall.) 190 (Sup. Ct. Pa. 1792).

<sup>42</sup> *Id.*

<sup>43</sup> Gardiner v. Murray, 4 Yeates 559, 560 (Sup. Ct. Pa. 1808).

<sup>44</sup> *Id.* at 561.

<sup>45</sup> Case v. Shepard, 2 Johns. Cas. 26, 27 (Sup. Ct. N.Y. 1800).

<sup>46</sup> *Id.* at 28.

<sup>47</sup> Mairs v. Sparks, 5 N.J.L. 606, 609-10 (1819).

<sup>48</sup> Dawsey v. Davis, 2 N.C. 280 (1795); Anonymous, 2 N.C. 420 (1796). Orders to recommence proceedings in the inferior courts were issued in these two cases, because proceedings were not had in the superior courts after cases were removed there by certiorari.

<sup>49</sup> Law of Dec. 13, 1792, ch. 15, § 67, 13 Va. Stat. 465.

<sup>50</sup> See text and note at note 38 *supra*.

inferior to lower federal courts has never been satisfactorily answered. Neither the Constitution nor the Judiciary Act of 1789 provides a relative ranking of superiority. Hamilton argued in *The Federalist* that under the Constitution lower federal courts could be given power to review decisions of state courts.<sup>51</sup> Although Hamilton's argument implies a superiority in the federal courts, in the absence of supporting evidence the general question of superiority remains unanswered. Nevertheless, the early existence of a power in federal courts to issue certiorari to state courts is established by definitive evidence.

There are two sources of such evidence. The first is the position taken by Attorney General Edmund Randolph in his report on the judiciary system, communicated to the House of Representatives, December 31, 1790.<sup>52</sup> In introducing his resolutions, Randolph listed instances which he felt should be in the realm of exclusive jurisdiction of courts of the United States. He continued:

That the avenue to the federal courts ought, in these instances to be unobstructed, is manifest. But in what state, and by what form, shall their interposition be prayed? There are, perhaps, but two modes: one of which is to convert the Supreme Court of the United States into an appellate tribunal over the Supreme Courts of the several States; the other to permit a removal by *certiorari* before trial.<sup>53</sup>

By the words "before trial" Randolph apparently meant "before a full trial in the state courts," because later in his statement Randolph speaks of the privilege of certiorari as being available to a defendant "through the whole length of the State courts."<sup>54</sup>

Randolph proposed that "the said circuit courts . . . may issue . . . writs of *certiorari* to the district or State courts, according to the rules hereinafter prescribed."<sup>55</sup> This proposal should not be taken to indicate that Randolph believed the circuit courts did not have the power to issue writs of certiorari to state courts under the all-writs provision of the Judiciary Act of 1789. Randolph's proposed bill was extremely comprehensive. Some of his proposals were already enacted in the 1789 Act.<sup>56</sup> For example, elsewhere in his bill Randolph proposed that district courts have the power to issue writs of *elegit*, *capias ad satisfaci-*

<sup>51</sup> THE FEDERALIST No. 82, at 517, 518 (B. Wright ed. 1970).

<sup>52</sup> AM. STATE PAPERS, 1 Misc. No. 17.

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 29. The "rules hereinafter prescribed" by Randolph concerned only matters of procedure, such as amount at issue, venue, etc.

<sup>56</sup> *E.g.*, the appellate jurisdiction of circuit courts over district courts. Compare *id.* with Judiciary Act of 1789, §§ 11, 22, 1 Stat. 78, 85.

*dum, fieri facias* and *levari facias*,<sup>57</sup> four writs of execution so common<sup>58</sup> that they already must have been encompassed in the all-writs section of the 1789 Act. Randolph, in his certiorari proposal, was undoubtedly doing no more than particularizing, as he did with these four common writs, a power already given in general terms by the 1789 Act. Accordingly, it cannot be supposed that Congress, by not specifically enacting Randolph's proposal, demonstrated any intent that federal courts should have no power to issue writs of certiorari to state courts. But Randolph's statement and proposal do evidence an atmosphere of approval of the issuance of certiorari from federal to state courts.

The second piece of evidence that the Judiciary Act of 1789 authorized lower federal courts to issue writs of certiorari to state courts is the fact that, in the period immediately after 1789, United States circuit courts on at least two occasions did issue such writs. The first was issued in 1790. Fisher Ames, in a letter dated January 6, 1791,<sup>59</sup> described the circumstances of its issuance.

Before the Constitution was adopted by North Carolina, Robert Morris was sued there, his attorney ordered to trial without delay, and of course, judgment for ten thousand pounds against poor Bobby, as the New York boys used to call him. He filed in their State Chancery Court, a bill, and obtained an injunction to stay the execution. In this stage of it, the Constitution was agreed to and Mr. Morris obtained from the federal Circuit Court a *certiorari* to remove the cause from the State Court. This the supreme judges of the State refused to obey, and the marshall did not execute his precept. The State judges, knowing the angry state of the assembly, wrote a letter of complaint, representing the affair.<sup>60</sup>

The issuance of the writ was also documented in the correspondence of James Iredell, Associate Justice of the United States Supreme Court.<sup>61</sup> In a letter to Chief Justice Jay dated February 11, 1791, he wrote:

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<sup>57</sup> AM. STATE PAPERS, 1 Misc. No. 17, at 28.

<sup>58</sup> Randolph said of these writs: "These four forms of execution are intimately known to every lawyer in the United States, being among the elements of his science, and having their essence settled by adjudications." *Id.* at 35.

<sup>59</sup> 1 F. AMES, WORKS 91, 92 (S. Ames ed. 1854) (letter to Thomas Dwight, Jan. 6, 1791). See 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 63-64 (1922), for further discussion of this controversy.

<sup>60</sup> Ames added: "Whether the United States judges have kept within legal bounds is doubted." It is uncertain whether Ames is referring to his own doubt or that of the North Carolina court. F. AMES, *supra* note 59.

<sup>61</sup> 2 G. McREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 322-25 (1949) (letter to John Jay, Feb. 11, 1791); *id.* at 333-34 (letter to James Iredell from Jno. Sitgreaves, Aug. 2, 1791); *id.* at 337-38 (letter to John Jay, Jan. 17, 1792).

A writ of *certiorari* issued from the Circuit Court of North Carolina, by the direction of Mr. Wilson, Mr. Blair, and Mr. Rutledge, directed to the Judges of the Court of Equity in North Carolina, for bringing up a cause which (as an Executor) I am one of the Defendants. The State Judges have refused obedience to the Writ, expressly denying its authority in that instance.<sup>62</sup>

In a letter dated January 17, 1792, Justice Iredell informed Chief Justice Jay that the certiorari suit was still pending<sup>63</sup> and added:

To be sure the honor of the United States is deeply concerned in their courts deciding solemnly whether the writ issued erroneously, or ought to be enforced. It is of more importance that it should not go off by an act of defiance of the State Court, because the General Assembly of North Carolina in their session last Winter *thanked the State Judges for their conduct in disobeying the writ.*<sup>64</sup>

The second instance in which a United States circuit court issued a writ of certiorari to a state court occurred between 1792 and June, 1794, and is reported in the case of *Washington & Beresford v. Huger*.<sup>65</sup> A Mr. Hamilton, the British consul at Norfolk, had purchased a plantation subject to a mortgage while a suit to foreclose the equity of redemption on the mortgage was pending in a South Carolina court. Hamilton petitioned the state court to allow him to enter the foreclosure suit to protect his rights, and he was allowed to come in as a party to the proceedings. Afterwards, and before the trial of the case, he obtained a certiorari from the circuit court of the United States to remove the cause into that court. The writ was served to the South Carolina court, which refused to obey it.<sup>66</sup>

As far as can be told, neither of these two circuit court decisions was subsequently reversed on the grounds that federal circuit courts were without power to issue certiorari to state courts.<sup>67</sup> These circuit court

<sup>62</sup> *Id.* at 324-25.

<sup>63</sup> *Id.* at 337-38.

<sup>64</sup> *Id.* at 338.

<sup>65</sup> 1 Desau. Eq. 360, 361-62 (S.C. Ch. 1794).

<sup>66</sup> It was argued in the South Carolina chancery court that the all-writs section of the Judiciary Act of 1789 authorized such action by the circuit court. The South Carolina court rejected this argument, stating, first, that it was not an inferior court to the circuit court, and second, that the provisions for removal contained in the 1789 Act (the conditions of which had not been present in this case, *see note 72 infra*) excluded removal by any means or under any conditions other than those specified therein. 1 Desau. Eq. at 361-62.

<sup>67</sup> It is difficult to see how either case would have been appealed. The party who had obtained certiorari could have no complaint, while the party against whom the certiorari was issued was able to continue his cause in the state court, so would seem to have no

cases are important for two reasons. First, the decisions are seminal interpretations by federal courts that the all-writs statute in the Judiciary Act of 1789 authorized writs of certiorari to state courts. Because the decisions occur so close in time to the passage of the Judiciary Act of 1789, they should be given heavy weight in interpreting the meaning and intent of that act.

Second, at least one and perhaps both of these federal decisions had come down prior to the passage of the 1793 Judiciary Act. The whole Congress was surely aware of the first case, as it involved a United States Senator and a Supreme Court Justice. Fisher Ames, who had described the case in a letter,<sup>68</sup> was a member of the House of Representatives. Because of the hot blood the decision had stirred in the North Carolina legislature, the certiorari issue must have been a bone of contention in deliberations on the 1793 Judiciary Act. The fact that the act contained no prohibition or restriction on the issuance of writs of certiorari from federal courts to state courts leads to the conclusion that Congress specifically approved the issuance of such writs. The conclusion seems especially firm in light of the prohibition of stays effected by injunction which was included in the 1793 Act.

The circumstances in which Congress contemplated certiorari would issue from federal to state courts are uncertain. The requirements for certiorari varied from state to state. In Pennsylvania, for example, certiorari appears to have been an ordinary means of bringing up proceedings from below.<sup>69</sup> In North Carolina, on the other hand, certiorari was available only where appeal was not adequate to remedy an injustice done in the inferior court, or where the inferior court had assumed a jurisdiction which did not belong to it.<sup>70</sup> The only certiorari requirements contained in any early Supreme Court case appear in a 1799 opinion by Justice Washington:

*A certiorari . . . can only issue, as original process, to remove a cause, and change the venue, when the superior court is*

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motive for appeal. However, the South Carolina decision was apparently appealed or reheard in some form. The following statement appears in the notation of the South Carolina case: "It appears, by a note of chancellor Mathews, on his brief, that in some shape this question discussed before the federal court, and that the 'federal court on the appeal to them determined that Hamilton, having appeared in this court, by his petition (to be heard) has made his election into what court he would go: and having acknowledged the jurisdiction of this court, that (the federal court) would not take cognizance of the cause.'" 1 Desau. Eq. at 362. This decision by "the federal court" is apparently unreported elsewhere. It is significant that this federal decision was not based on the grounds that the federal circuit courts were without power to issue certiorari to state courts.

<sup>68</sup> Note 59 *supra*.

<sup>69</sup> See *Steiner v. Fell*, 1 U.S. (1 Dall.) 22 (Sup. Ct. Pa. 1776); *Walker's Appeal*, 2 U.S. (2 Dall.) 190 (Sup. Ct. Pa. 1792).

<sup>70</sup> *Street v. Clark*, 1 N.C. 109 (Super. Ct. 1799).

satisfied, that a fair and impartial trial will not otherwise be obtained; and it is sometimes used, as auxiliary process, where, for instance, diminution of the record is alleged, on a writ of error; but in such cases, the superior court must have jurisdiction of the controversy.<sup>71</sup>

Our knowledge of the factual situations involved in the two early federal circuit court cases in which certiorari issued to state courts is sketchy at best. Neither of these cases involved a situation where removal was authorized under the removal provision of the Judiciary Act of 1789.<sup>72</sup> Neither was a case in which federal courts had exclusive jurisdiction. However, it is unknown whether the petitioner for certiorari in either case was asserting a federal right. Nor is it known whether either petitioner alleged that the state proceeding was unfair or biased or that no adequate remedy of appeal existed.

#### CONCLUSION

Resistance by state courts and legislatures apparently discouraged the use of certiorari or other common law writs for a sufficient period of time that these writs were lost as methods of staying state proceedings.<sup>73</sup> But knowledge that these methods existed in 1793 provides important understanding of the anti-injunction statute. The original statute does not stand, as the Supreme Court has assumed, for a fundamental or constitutional principle of state court independence. On the contrary, it reflects a fundamental approval by Congress of stays of state proceedings by federal courts by means other than injunction, and an intention to let the federal courts themselves work out the situations in which such stays would issue. Insofar as the Supreme Court and other federal courts rely on the background and policy of the 1793 statute to aid them in interpreting present law, these facts should be considered.

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<sup>71</sup> *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 413 (1799).

<sup>72</sup> § 12 of the Judiciary Act of 1789, 1 Stat. 79, allowed removal only by the defendant in the state court. In the North Carolina case, certiorari was sought by the plaintiff in equity. In the South Carolina case, the party seeking certiorari had petitioned to be allowed to enter the state court proceedings, so was not technically a defendant. Also, he had not posted surety, as required by the removal section of the Judiciary Act.

<sup>73</sup> In *Superior Court v. United States Dist. Court*, 256 F.2d 844 (9th Cir. 1958), the Ninth Circuit overturned the issuance of certiorari from a federal district court to a state court on the grounds that the district court's action was unprecedented, and that it was improper because the district court was not superior to the state court. The Supreme Court has never passed on the power of federal courts to issue common law writs of certiorari to state courts.