

THE *MARBURY* MYSTERY: WHY DID WILLIAM MARBURY SUE IN THE SUPREME COURT?

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In 1801, when William Marbury petitioned the Supreme Court to issue a writ of mandamus ordering Secretary of State James Madison to deliver his commission as justice of the peace, he initiated one of the most important cases in the Court's history. But why did Marbury choose the Supreme Court? Was there a lower federal court that could have granted the writ at the time? The short answer is "yes." Rather than making an unsuccessful attempt to invoke the original jurisdiction of the United States Supreme Court, I have learned that he could have brought his suit in the then newly-created Circuit Court of the District of Columbia. Did Marbury know of this possibility? Would the Circuit Court have granted the requested writ of mandamus? As this essay will show, the answer to both these questions is "probably yes." That being so, the intriguing—indeed, mysterious—questions surrounding Marbury's choice of forum warrant further examination.

First, a brief recap of the facts of *Marbury v. Madison*.¹ In the waning days of the Federalist Administration of President John Adams, the outgoing Federalist Congress enacted the "Act Concerning the District of Columbia," authorizing the president to appoint as many justices of the peace for D.C. as he thought "expedient." Each would serve for five-year terms.² President

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

2. "Act Concerning the District of Columbia," enacted on February 27, 1801, provided for "such number of discreet persons to be justices of the peace as the President of the United States shall from time to time think expedient, to continue in office five years." 2 Stat. 103, §11. Under the statute, the justices were to have, "in all matters, civil and criminal, and in whatever relates to the conservation of the peace . . . all the powers

Adams nominated forty-two justices—twenty-three for Washington County on the Maryland side of the Potomac River and nineteen for Alexandria County on the Virginia side.³ After the Senate confirmed and the President signed the commissions, it was the responsibility of the Secretary of State, John Marshall, to affix the Great Seal of the United States to the commissions and see to their delivery. The signing and sealing presented no problem, but time did not permit delivery of all forty-two commissions. Thomas Jefferson assumed the presidency on March 4, 1801. Appalled at Adams' last minute "court-packing," Jefferson ordered his Secretary of State to withhold the undelivered documents.⁴ Four of those so deprived, William Marbury, Dennis Ramsay, William Harper, and Robert Townsend Hooe,⁵ then

vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of [the] district, for which they shall have been respectively appointed; and they shall have cognizance in personal demands to the value of twenty dollars, exclusive of costs." *Id.* This was only one of several efforts by the outgoing Federalists to leave their mark on the judiciary. See note 27.

3. George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States, Vol. II, Foundations of Power: John Marshall, 1801-15* at 183 (Macmillan, 1981); Donald O. Dewey, *Marshall Versus Jefferson: The Political Background of Marbury v. Madison* 76 (Knopf, 1970); *National Intelligencer* (March 9, 1801); *Alexandria Advertiser* (March 9, 1801).

4. Dewey, at 80. At the time of this order, Levi Lincoln was serving as Acting Secretary of State as well as Attorney General. James Madison did not take office until May. James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, 174 (Simon & Schuster, 2002).

5. Marbury, originally from a well-known Maryland family, had moved to Washington to work as an aide to the first Secretary of the Navy, Benjamin Stoddert. Dewey, *Marshall Versus Jefferson* at 83 (cited in note 3); John A. Garraty, ed., *Quarrels That Have Shaped the Constitution* 7, 13 (Harper & Row, 1987). For an extensive description of Marbury's life, see David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 *Cath. U. L. Rev.* 349 (1996). The other three petitioners were from Alexandria. Hooe, also from a well-known family, had served as mayor of Alexandria, sheriff of Fairfax, and was one of the "boosters" advocating the advantages of Alexandria-Georgetown as the site of the new capital. Dewey, *Marshall Versus Jefferson* at 84-85 (cited in note 3). Ramsey had served under Washington in the Revolutionary War, had been a pallbearer at Washington's funeral, and had served several terms as mayor of Alexandria. Harper was a significant landholder in Alexandria, later elected alderman of the town. All four were involved in the Potomac Company, a venture led by George Washington which intended to link the Potomac and Ohio Rivers. *Id.* at 83-85. While these four were not the only ones deprived of their commissions, only these four "staunch Federalists" sued. *Id.* at 83-86. The other thirteen took no action, "perhaps because they regarded the positions as insufficiently important to make litigation worthwhile." Haskins and Johnson, *History of the Supreme Court* at 184 (cited in note 3). Jefferson said that Adams' total of forty-two justices was "too numerous," *Journal of the Executive Proceedings of the Senate of the United States of America* 402-04 (Jan. 6, 1802) ("*Senate Executive Journal*"). So, on March 18, 1801, Jefferson made recess appointments of thirty justices—fifteen for each county. *National Intelligencer*, March 18, 1801. In that total of thirty, he renamed twenty-five from Adams' list and added five new ones. Whether that twenty-five from Adams' list were the same

sued in December 1801 in the United States Supreme Court, seeking a writ of mandamus ordering Secretary of State James Madison to deliver their commissions.⁶

In a landmark decision establishing the tenets of judicial review of both legislative and executive actions, Chief Justice John Marshall,⁷ writing for a unanimous court, divided his analysis

twenty-five who actually received delivery of the commissions is not clear, but it seems likely to be the case. Why Jefferson thought it is necessary or appropriate to reappoint justices who were already serving is also not apparent. Obviously, Marbury and his three co-petitioners were not on Jefferson's list.

On January 6, 1802, with Congress back in session, Jefferson sought to make the recess appointments permanent and renominated the same thirty men he had appointed the prior year. Senate Executive Journal at 402-404 (January 6, 1802). Several months later, on April 5, 1802, Jefferson sent another message to the Senate, indicating that six of the Justices of the Peace had resigned and/or refused the appointment. He sought to replace them with six nominees. In addition, he noted that in his message of January 6th, 1802, he had mistakenly inserted the name of John Laird; it should, he said, have been Benjamin More: "In the ... message of January 6th, the name of John Laird was inserted by mistake, instead of that of Benjamin More, who, (and not John Laird,) had been commissioned and qualified as a Justice of the Peace. I therefore beg leave to correct the error, by restoring to its place the name of Benjamin More, and nominating him to be a Justice of the Peace ... and by withdrawing that of John Laird." Senate Executive Journal, at 417, April 5, 1802. But it is not clear whether there really had been a mistake. John Laird had been on Adams' original list of appointees, see Senate Executive Journal, March 2, 1801, at 388, and had been confirmed. Senate Executive Journal, March 3, 1801, at 390. But he had not been one of Jefferson's 1801 recess appointments. See National Intelligencer, March 18, 1801. Whether Laird was one of the seventeen of Adams' nominees whose commission was not delivered or whether Jefferson was actually ousting someone with a delivered commission cannot be ascertained, but Jefferson clearly was doing all he could to get his men in these positions.

Finally, on April 27, 1802, after numerous unexplained postponements, the Senate confirmed all these nominations. Senate Executive Journal, at 422-23, giving each county fifteen Justices of the Peace. Ten of those in Washington County and nine of those in Alexandria County were Adams' appointees; the other eleven were chosen by Jefferson.

6. They filed their suit during the December 1801 Term, and the Court issued a rule calling upon Madison to show cause at the Court's next term as to why a mandamus should not issue. 5 U.S. (1 Cranch) at 137. That next term was scheduled for June 1802, but in April 1802, Congress modified the Court's schedule, providing that the Court was to meet only once a year, with that session scheduled for the first Monday of February. Act of April 29, 1802, An Act to Amend the Judicial System of the United States, 7th Cong., Sess. I, ch. 31, §1, 1 Stat. 156-67. Since this Act was passed in April, 1802, Congress was in effect abolishing the June and December 1802 sittings (which had been established by the Judiciary Act of 1801, 6th Cong., Sess. II, ch. 4, §1) and thereby effectively recessing the Court for fourteen months. See Haskins and Johnson, *History of the Supreme Court* at 141 (cited in note 3). Congress's decision to abolish the 1802 terms was apparently motivated by a desire to delay the Court's consideration of both Marbury's petition and the repeal of the Judiciary Act of 1801, as discussed in notes 27 and 28. See Garraty, ed., *Quarrels That Have Shaped the Constitution* at 13-14 (cited in note 5).

7. This was one of the first major opinions by Chief Justice Marshall. He had been appointed by President Adams on January 20, 1801, after John Jay had refused the appointment. (Jay had been the first Chief Justice, but had resigned in 1795 to become Governor of New York. He declined the reappointment because, he said, the judiciary was so defectively designed that it lacked "energy, weight, and dignity." Dewey, *Marshall versus Jefferson* at 51 (cited in note 3).) Marshall was unanimously confirmed on January

into three parts. First, he held that the petitioners were entitled to their commissions. Second, he concluded that the Secretary of State could be the subject of judicial process, including a writ of mandamus. Finally, he held that a writ of mandamus was the appropriate remedy for the plaintiffs. But, said Marshall, the Supreme Court could not constitutionally be given *original* jurisdiction to issue a writ of mandamus in this type of case. Because this case was not within one of the two areas of original jurisdiction specified by Article III of the Constitution, the Court could act only as an appellate court in this matter.⁸ And because Section 13 of the Judiciary Act of 1789⁹ purportedly conferred on the Supreme Court original jurisdiction to issue writs of mandamus in this type of case, Section 13 was unconstitutional. Thereupon, the Court explained at length why it was justified in rendering ineffectual an Act of Congress that it found inconsistent with the Constitution. Finally, because it had no jurisdiction in this case, the Supreme Court denied the relief sought by Marbury and his colleagues.¹⁰ This was a masterful opinion. Only by asking the questions in the order he used, with jurisdiction last, and by creatively finding a conflict between Section 13 of the Judiciary Act and Article III of the Constitution,¹¹ could Marshall

27, 1801. See Albert Beveridge, 2 *The Life of John Marshall* 557 n.2 (Houghton Mifflin Co., 1916); Leonard Baker, *John Marshall: A Life in the Law* 353-54 (Macmillan, 1974). Adams signed Marshall's commission on January 31, 1801. See 6 Marshall Papers 61-62, Library of Congress; Beveridge, 2 *The Life of John Marshall* at 557-58. Marshall accepted the commission on Feb. 4, 1801 in a letter to President Adams. See 6 Marshall Papers at 73. For about a month, from February 4 until President Jefferson's inauguration on March 4, Marshall served as both Secretary of State and Chief Justice. In fact, at Jefferson's request, Marshall stayed on slightly longer as Secretary of State. Garraty, ed., *Quarrels That Have Shaped the Constitution* at 4 (cited in note 5); see text accompanying note 63.

8. *Marbury*, 5 U.S. (1 Cranch) at 137. Article III provides: "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." U.S. Const., Art. III, § 2, cl. 2.

9. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73.

10. The Court's ordering of these issues—merits first followed by jurisdiction—differed from the order Marbury's lawyer used, see 5 U.S. (1 Cranch) at 146, 154, and angered President Jefferson. See note 63.

11. To appreciate Marshall's creativity in finding a conflict between Section 12 of the Judiciary Act of 1789, one must remember that it was essentially the same men who wrote Article III in 1787, and then, only two years later, wrote the Judiciary Act of 1789. One would think they would have known what they meant in Article III and while Marshall neglected to mention this fact in his opinion in *Marbury*, it was a point that he emphasized in several later landmark cases where he found no constitutional conflict. Thus, in *Cohens v. Virginia*, where Marshall was addressing the constitutionality of another section of the same Judiciary Act, section 25, he noted:

assert the judicial power to review acts of both the legislative and the executive branches without ordering anyone to do anything—and thereby avoid the risk of defiance.¹² It was, by any standards, a monumental opinion, far more important than the issue that inspired it.¹³

All this is generally well known. But, as suggested above, the saga of *Marbury v. Madison* raises several intriguing questions.

1. *Was there an alternative forum for Marbury's suit?*¹⁴

Having asked this question from the day I started teaching this case in Constitutional Law I, I am delighted finally to be able to answer it. The answer is: “Yes, without a doubt.” On February 27, 1801, in the same act in which Congress created the office of Justice of the Peace for the District of Columbia, it also created the Circuit Court of the District of Columbia, a three-

A contemporaneous exposition of the constitution ... is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution. Not a single individual, so far as is known, supposed the part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the cases therein specified, to be unauthorized by the constitution. *Cohens v. Virginia*, 19 U.S. 264, 420 (1821).

Similarly, in *McCulloch v. Maryland*, addressing the constitutionality of the Act of Congress creating a national bank, Marshall noted, in support of his conclusion that the Act was constitutional: “[T]his can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. ... The power now contested was exercised by the first Congress elected under the present constitution.” 17 U.S. 316, 401 (1819). Thus Marshall was clearly aware of the persuasiveness of these arguments – at least when they supported the constitutionality of a statute.

12. Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wisc. L. Rev. 301.

13. For more on the background of *Marbury v. Madison*, see William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (U. Press of Kansas, 2000); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (U. Press of Kansas, 1996); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (Yale U. Press, 1990); James M. O'Fallon, “Marbury,” 44 Stan. L. Rev. 219 (1992); Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wisc. L. Rev. 301.

14. This article will occasionally use Marbury's name as a shorthand for all four petitioners. The petition raises essentially the same issues for all four men. Their lawyer, Charles Lee, could establish that at least three of the commissions had been signed and sealed; the status of Ramsay's commission was less clear. Simon, *What Kind of Nation* at 180 (cited in note 4). *Marbury*, at 143 (testimony of Mr. Daniel Brent) (Marbury and Hooes commissions were signed, but Ramsay's was not); *Marbury*, at 146 (James Marshall's affidavit that Hooes' and Harper's commissions were signed and sealed, as discussed *infra* at note 60).

judge court with both original and appellate jurisdiction.¹⁵ President Adams immediately appointed three men to serve as judges: James Marshall, younger brother of John Marshall, the recently-appointed Chief Justice of the Supreme Court; William Cranch, nephew-in-law of President Adams, who would become Chief Judge in 1806 and would serve on the Circuit Court for 54 years until his retirement in 1855; and Thomas Johnson as Chief Judge.¹⁶ Johnson, however, declined the appointment. He had been one of the first Supreme Court Justices but had retired in 1793 because he found riding circuit too arduous.¹⁷ At his retirement, he vowed not to accept any further public office, and accordingly declined Adams's appointment to the D.C. Circuit Court. Unfortunately for President Adams and the Federalists, there was no time for Adams to choose another, so it was President Jefferson who appointed the first Chief Judge of the Circuit Court, William Kilty.¹⁸

15. The Organic Act of February 27, 1801, An Act Concerning the District of Columbia, ch. 15, 2 Stat. 105 (1801). The court was to meet four times per year, in each of the two counties that comprised the District of Columbia, Washington County and Alexandria County. *Id.* at § 4. The court was created three months after the federal government had moved to the District of Columbia from Philadelphia, a move that had been mandated in 1790 when Congress provided that the capital would be located in a district not more than ten miles square along the Potomac River, on land ceded to the United States by Maryland and Virginia. See "An Act establishing the temporary and permanent seat of the Government of the United States," Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130 (1790). Under the statute, the government would not actually move there until December 1800. *Id.* at § 5-6.

16. <http://air.fjc.gov/history/judges_frm.html>. Cranch was the son of Mary Smith Cranch, the sister of First Lady Abigail Smith Adams. In addition to his long service on the Circuit Court, Cranch is also well-known as one of the early reporters of Supreme Court decisions, a task he undertook on his own initiative. Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. Sup. Ct. Hist. 9, 15 (2001). Indeed, Cranch's notes in *Marbury* have been called "the most significant synopsis by a Reporter of Decisions in United States Reports." *Id.* at 17-18 (quoting Paul R. Baier and Henry Putzel, Jr., *A Report on the Reporter*, 1980 Sup Ct. Hist. Soc. Y. B. 10, 12).

17. Clare Cushman, ed., *The Supreme Court Justices: Illustrated Biographies 1789-1993* at 31-35 (Cong. Q., 2d ed. 1995) (Johnson's service on the Supreme Court was the shortest in the Court's history.)

18. Kilty received a recess appointment on March 23, 1801 <<http://air.fic.gov/servelet>>. National Intelligencer, March 23, 1801. He was then renominated and confirmed in 1802. Senate Executive Journal 400-401 (Jan. 26, 1802); *id.* at 405 (Jan. 26, 1802).

John Marshall said that he was "excessively mortified" by their not anticipating Johnson's refusal: "There was a negligence in that business arising from a confidence that Mr. Johnston [sic] would accept, which I lament excessively." Letter from John Marshall to James M. Marshall, March 18, 1801, Library of Congress: Marshall Papers, quoted in Dewey, *Marshall Versus Jefferson* at 80 (cited in note 3). Notwithstanding Marshall's lament, it is not clear the Adams' administration had time to check with Johnson. The Act creating the court was signed on February 27, Adams made the nomination on February 28 (only 3 days before he was to leave office), and the Senate confirmed on March 3 (the day before Adams left office). Senate Executive Journal 389 (March 3, 1801).

Significantly, the Circuit Court of the District of Columbia was up and running at least as early as March 23, 1801.¹⁹ Thus, there is no question the Circuit Court was in business when Marbury filed his suit during the United States Supreme Court's December 1801 term. Clearly, Marbury and his colleagues could have filed their action there.

2. *Why didn't Marbury file his suit in the Circuit Court?*

The question is difficult to answer because it seems not to have been discussed by anyone, either then or now. But it is virtually impossible to believe that Marbury was unaware of the Circuit Court's existence. The Act creating that court, the Organic Act of February 27, 1801, was the same one that established Marbury's justice of the peace office.²⁰ The newspapers at the time printed the full text of the Act, including a description of both the Circuit Court and the office of justice of the peace.²¹ Moreover, the same newspaper story that announced the appointment of Marbury and his forty-one brethren also heralded the appointments of the three judges for the Circuit Court of the District of Columbia.²² In addition, Marbury's lawyer, Charles Lee, had been the Attorney General under Adams when the offices of justice of the peace and the Circuit Court were created and when these appointments were made. Thus, Marbury and his lawyer simply could not have been unaware of the creation and staffing of the Circuit Court of D.C.²³

Perhaps Marbury and his lawyer questioned whether the Circuit Court could lawfully issue a writ of mandamus to the Secretary of State. They may have thought Marbury needed to go to the highest court of the land. But there was no basis for such a conclusion. Indeed, as subsequent case law revealed, if they had such a concern they were doubly wrong: the Supreme Court could *not* issue the writ; the Circuit Court could.

19. National Intelligencer (March 23, 1801); F. Regis Noel, *The Court-House of the District of Columbia* 10 (The Law Reporter Printing Co., 1939). See, e.g., *United States v. Hammond*, 1 D.C. (1 Cranch) 15 (1801) (court has jurisdiction to try someone for a theft that occurred on February 26, 1801, one day before Congress created the court).

20. See note 2.

21. See Washington Federalist, (March 10, 1801); Alexandria Advertiser, (March 11, 1801).

22. See Washington Federalist, (March 7, 1801).

23. Interestingly, Charles Lee, Marbury's lawyer, had been appointed by Adams to one of the circuit courts created by Congress in the Judiciary Act of February 1801, but Lee had declined the appointment. Haskins and Johnson, *History of the Supreme Court* at 132 (cited in note 3). Lee was also a close friend of Marshall, with no fondness for Jefferson. Garraty, ed., *Quarrels That Have Shaped the Constitution* at 24 (cited in note 5).

In 1837, the Circuit Court of the District of Columbia held in *United States ex rel. Stokes et al. v. Kendall* that it had the power to issue a writ of mandamus against an executive officer—and ordered Postmaster General Kendall to comply with his statutory duty to pay a government contractor, William Stokes, money owed him by the United States.²⁴ Stokes and his partners had contracted with the government; Congress had authorized the Solicitor of the Treasury to pay them, but the Postmaster General had paid only a portion of the amount Congress had authorized. The Circuit Court, in an opinion by Chief Judge Cranch—the same Judge Cranch who had been on the bench since its creation in 1801—issued a writ of mandamus ordering the Postmaster General to pay Stokes the remainder.²⁵

In concluding that it had the power to issue this order, the Circuit Court relied on the Act of February 27, 1801, the Act that had created the Circuit Court of the District and had given it “cognizance of *all cases in law and equity*, whether arising under the constitution or laws of the United States, or under the adopted laws of Virginia and Maryland, with the only condition that one of the parties shall be resident, or found within the district.”²⁶ Cranch noted that, in creating *this* Circuit Court of the District of Columbia, Congress had given it “all the powers vested in the circuit courts, and the judges of the circuit courts,” and that at the time of its creation, February 27, 1801, all the circuit courts did have these broad powers because the Judiciary Act of 1801, enacted two weeks earlier, had so provided.²⁷ Chief

24. *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702 (1837).

25. On the bench with Cranch in 1837 was James Stewart Morsell. Thruston was absent. *Id.* at 754.

26. 26 F. Cas. at 706 (emphasis added) (referring to the the fifth section of the act of February 27 which provides: “[The circuit court of the District of Columbia] shall have cognizance of all crimes and offences committed within the said district, and of all cases in law and equity between parties, both or either of which shall be resident, or shall be found within the said district.”)

27. Two weeks before creating the Circuit Court of the District of Columbia, Congress, on February 13, 1801, enacted the “Judiciary Act of 1801,” 2 Stat. 90, a bill that significantly modified the judicial structure created by the Judiciary Act of 1789. Under the 1789 structure, the judicial districts of the United States had been grouped into three circuits—Eastern, Middle, and Southern. Each circuit court was held by two justices of the Supreme Court (after 1793, by one justice) and the district judge of the district in which the court was sitting. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 74-75, as modified by Act of March 2, 1793, ch. 22, sec 1, 1 Stat. 333. The new Judiciary Act of 1801 grouped the districts into six circuits, expanded their jurisdiction, freed the Justices from circuit duty, and created sixteen new circuit court judgeships to replace the now liberated Justices. 2 Stat. 89, ch. 4, § 6, 7. See Kathryn Turner Preyer’s study of the Judiciary Act of 1801 in Kathryn Turner, *The Midnight Judges*, 109 U. Pa. L. Rev. 494 (1961). The 1801 Act also provided that when the next vacancy on the Supreme Court occurred, it should

Judge Cranch concluded that even though Congress had the Judiciary Act of 1801 repealed in 1802, and had reinstated the prior, more restricted, jurisdiction of the circuit courts,²⁸ the repeal did not affect the powers of the Circuit Court of the District of Columbia because it had been established on February 27, 1801 and was unaffected by the 1802 repeal.²⁹ Cranch concluded that the Circuit Court of the District of Columbia was different

not be filled, thereby prospectively reducing the Court from six justices to five. See Judiciary Act of February 13, 1801, ch. 4, § 3, 2 Stat. 89. (This reduction was apparently an attempt to limit newly-elected President Jefferson's ability to appoint a Supreme Court judge. Garraty, ed., *Quarrels That Have Shaped the Constitution* at 8 (cited in note 5).) President Adams quickly filled these sixteen new judgeships with the "midnight judges;" Republicans threatened to repeal the law as soon as they could, Dewey, *Marshall Versus Jefferson* at 62 (cited in note 3), and, as noted in note 28, they did so in 1802, by a strictly partisan vote: 59 Republicans favor; 32 Federalists against. Haskins and Johnson, *History of the Supreme Court* at 164 (cited in note 3).

28. The Judiciary Act of 1801 had been an irritant to the Republicans from the outset. While many thought the improvements were necessary and desirable, they resented Adams' ability to appoint sixteen new Federalist judges in the waning hours of his presidency. On December 8, 1801, in his first annual message to Congress, President Jefferson urged Congress to repeal the 1801 Act. From January to March 1802, Congress debated whether it could abolish these courts and, if it could, what would become of the judges whose terms were to be held, according to the Act "during good Behaviour." Dewey, *Marshall Versus Jefferson* at 64 (cited in note 3). Eventually, Congress decided that repeal was constitutional, that the "midnight judges" could lose their positions, and it promptly repealed the entire Judiciary Act of 1801, "revived" the former judicial system, and provided that all actions pending in the now repealed courts "shall be continued over to the prior courts they would have been heard in before the Judiciary Act of 1801 was enacted." Act of March 8, 1802, 7th Cong., Sess. I, Ch. 8, 1 Stat. 132 (1802), entitled "An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States." On April 29, 1802, Congress modified the Supreme Court's schedule so that it would meet once a year commencing on the first Monday of February, 1803. See note 6. As indicated, that meant no Supreme Court sessions in all of 1802.

The constitutionality of the repeal was immediately challenged by a party in one of the transferred cases and was upheld by the Supreme Court in *Stuart v. Laird* in 1803. 5 U.S. (1 Cranch) 299 (1803). See Haskins and Johnson, *History of the Supreme Court* at 180-81 (cited in note 3). In an opinion by Justice William Paterson, (Marshall had recused himself because, according to Cranch, 5 U.S. (1 Cranch) at 308, Marshall had tried the case below), the Court held that Congress has discretion to "establish from time to time such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another." 5 U.S. at 309 (1803). Further, the Court upheld the practice of Supreme Court justices' riding circuit, rejecting the argument that it was unconstitutional to give Supreme Court justices original jurisdiction on the Circuit Courts. The Court relied on past practice and acquiescence: "practice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." 5 U.S. at 309. For the relationship between *Marbury* and *Stuart v. Laird*, which came down one week after *Marbury*, see Dean Alfange, Jr., *Marbury v. Madison, and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329; O'Fallon, *Marbury*, 44 Stan. L. Rev. at 219 (cited in note 13); Nelson, *Marbury v. Madison* at 67-70 (cited in note 13).

29. *Kendall*, 26 F. Cas. at 707.

from the other circuit courts. Cranch thus distinguished *McIntire v. Wood*,³⁰ in which the Supreme Court had found that, because of the repeal of the Judiciary Act of 1801, circuit courts generally did not have power to mandamus a government official. Said Judge Cranch for the D.C. court in *Kendall*:

Here is a case in which a ministerial act is necessary to the completion of an individual right under the laws of the United States. The right of the relators, and the obligation of the postmaster-general are clear and absolute. It is a case in law; and the only appropriate remedy is a writ of mandamus. This is the only judicial tribunal which can take original cognizance of the case and apply the proper remedy. How, then, can this court refuse it? To refuse it would be a denial of justice. . . . The proceeding by mandamus is a remedy given by that common law which was in force in Maryland and Virginia on the 27th of February, 1801, and continued in force in this district by the act of congress of that date, and which is still in force here. If a case is made out, in which, according to that law, the proceeding by mandamus is the proper remedy, this court is bound to grant it.³¹

The following year, the Supreme Court agreed. Writing for the Court in *Kendall v. United States ex rel. Stokes*,³² Justice Smith Thompson held that Congress, in creating the D.C. Circuit Court in February 27, 1801, clearly gave that court jurisdiction of "all cases in law or equity, arising under the constitution and laws of the United States, [and] the power to issue a writ of mandamus in all such cases warranting such relief."³³ The Supreme Court concluded that mandamus was appropriate in this case, relying on sections 1, 3, and 5 of the February 27th Act and reasoning along the same lines as Chief Judge Cranch. Section 1 provided that the Circuit Court was to apply the laws of the state of Maryland because it was sitting in that part of the District when it was considering the mandamus petition. Section 3 pro-

30. 11 U.S. (7 Cranch) 504 (1813).

31. 26 F. Cas. 702.

32. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838). It is interesting to note that the Supreme Court, in affirming the Circuit Court, asked first whether the relators were entitled to a writ of mandamus, and second whether the circuit court had jurisdiction of the case and the authority to issue the writ. *Id.* at 609. This is, of course, the same sequence that Marshall used in *Marbury*, a sequence that we find unusual today and that so angered Jefferson. See note 59.

33. *Kendall*, 37 U.S. at 625 (Thompson, joined by Story, Baldwin, McLean, Wayne, and McKinley). Three justices, Taney, Barbour, and Catron dissented, because, in their view, Congress had not given the D.C. Circuit Court the power to issue a writ of mandamus to an executive officer. *Id.* at 627, 642.

vided that the D.C. Circuit Court was to “have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States.”³⁴ At the time of this enactment, February 27, 1801, the Judiciary Act of 1801 was in effect, giving the circuit courts of the whole country “cognizance of all cases in law or equity, arising under the constitution and laws of the United States;” that is, “the whole judicial power, in cases arising under the constitution and laws.”³⁵ That Congress later repealed the Judiciary Act of 1801 did not retroactively affect the jurisdiction of the Circuit Court of the District:

[The repeal of the Act of February 13, 1801,] fifteen months afterwards, and after the court in this district had been organized and gone into operation, under the act of 27th of February, 1801, could not, in any manner, affect that law, any further than was provided by the repealing act. To what law was the circuit court of this district to look for the powers vested in the circuit courts of the United States, by which the court was to be governed, during the time the act of the 13th of February was in force? Certainly to none other than that act. And whether the time was longer or shorter before that law was repealed, could make no difference. . . . [S]uch adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law.³⁶

Thus, while we don't know whether or not Marbury and his lawyer questioned the powers of the Circuit Court, we do know, with the benefit of hindsight offered by *Marbury and Kendall*, that the Circuit Court of the District of Columbia could have issued a writ of mandamus against an executive officer including the Secretary of State.

3. *What would the Circuit Court of the District of Columbia have done had Marbury and his co-petitioners filed suit there?*

There is good reason to believe Marbury and his colleagues would have prevailed in the Circuit Court. As just observed, the

34. *Id.* at 624.

35. *Id.* at 625; see § 11 of the Judiciary Act of 1801.

36. *Kendall*, 37 U.S. at 625. Interestingly, Attorney General Butler, arguing that the Circuit Court did not have jurisdiction in the *Kendall* case, said that if it had such jurisdiction, surely William Marbury would have brought his mandamus action there instead of in the Supreme Court. *Kendall*, 26 F. Cas. at 724 (letter of Attorney General as part of the answer of Postmaster-General Kendall).

D.C. Circuit had the authority to mandamus executive officials. Moreover precedent reveals that the Circuit Court never questioned its authority to issue a writ of mandamus when warranted. Thus, for example, when an insurance company asked the D.C. Circuit Court in 1801 to mandamus the Bank of Alexandria to order it to issue stock, the Circuit Court refused because, the majority concluded, the insurance company had an available legal remedy: namely, sue the bank for damages, use the moneys awarded to purchase the stock claimed, and sue for additional damages if the bank continued to refuse to "open its books."³⁷ But, significantly, the Court did not question its authority to issue a writ if there were no remedy at law. In fact, Chief Judge Kilty dissented and would have issued the writ, because he questioned whether there really was an adequate remedy at law.³⁸ Further, in *United States v. Washington*,³⁹ when the treasurer of Washington County sought a writ of mandamus in 1819 ordering the mayor of Washington to pay one-half the cost of rebuilding a bridge over Rock Creek, pursuant to an act of Congress,⁴⁰ the Court issued the writ because there was no adequate remedy at law.⁴¹

Moreover, Chief Judge Cranch's opinion in the *Kendall* case in 1837 implicitly suggests that, had William Marbury applied 26 years earlier, the Circuit Court would have been inclined to grant the writ. In his opinion for the Circuit Court in *Kendall*, Cranch emphasized the importance of having some court that could remedy all legal wrongs, including wrongs by federal officers. In particular, he was adamant as to the Circuit Court's power to issue a writ of mandamus in this type of case to remedy an otherwise irreparable injury:

If a case is made out, in which, according to that law, the proceeding by mandamus is the proper remedy, this court is bound to grant it. . . . If this court has not jurisdiction of the case, no court has; and an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined upon him by law, will be entirely without

37. *United States v. Bank of Alexandria*, 24 F. Cas. 982 (1801).

38. *Id.* at 984.

39. *United States v. Washington*, 28 F. Cas. 414 (1819).

40. Act of 1st of July, 1812, § 12, 2 Stat. 773

41. *Washington*, 28 F. Cas. at 414. See also *Kennedy v. Washington*, 14 F. Cas. 330 (1829) (declining to issue a writ because the defendants had discretion; thus, there was no ministerial duty for the court to command).

redress.⁴²

To be sure, Cranch wrote this in 1837 with the benefit of Chief Justice John Marshall's views in *Marbury*. In fact, Cranch quoted liberally from that opinion, emphasizing the importance of having some court with power to remedy a wrong and noting the difference between political actions of an executive official, with which the judiciary should not interfere, and ministerial actions, which the courts may review.⁴³ The Circuit Court might have been more timid in the early 1800's, possibly concluding it did not have the power to mandamus the Secretary of State. Admittedly, for the Circuit Court to decide after *Marbury* that it can mandamus a Postmaster General does not clearly tell us what it would have done with an 1801 request to mandamus the Secretary of State. Cranch and his colleagues might have considered ordering a Secretary of State to do his duty as different from ordering a Postmaster General to do his. Indeed, Cranch notes in the *Kendall* case:

The suggestion that the president and heads of departments are not responsible, except by impeachment, for the exercise of their ministerial functions, seems to imply that the postmaster-general, like the heads of departments, may shelter himself under the authority or command of the president. But if they can do it, in a case like the present, where the duty is expressly enjoined by an act of congress, this officer cannot do it; for his relation to the president is very different from theirs. They, in the very terms by which their offices were created and their duties defined, are to perform such duties and execute such orders as they shall be required to perform and execute by the president of the United States. . . . The postmaster-general, however, clearly bears no such relation to the president. . . . The postmaster-general, in the exercise of the duties of his office, appears to be legally as independent of the president as the president is of him. There can, therefore, be no pretence for avoiding responsibility under any order of the president, nor for showing the irresponsibility which may be supposed to belong to that high officer.⁴⁴

42. *Kendall*, 26 F. Cas. at 707, 714.

43. *Id.* at 707-10, quoting Marshall in *Marbury*, 5 U.S. (1 Cranch) at 163-73.

44. *Id.* at 713-14. Justice Thompson, writing for the Supreme Court in *Kendall*, was in accord:

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and re-

Summarizing, then, if we cannot be certain how the 1801 Circuit Court would have responded to a petition by Marbury and his co-petitioners; we can nevertheless make several observations with confidence:

a. When Marbury and his co-petitioners tried to invoke the original jurisdiction of the Supreme Court during the December 1801 term, they could have filed their petition instead in the Circuit Court of the District of Columbia. That court was created, fully staffed, and functioning well before December 1801.⁴⁵

b. We know from *Marbury v. Madison* that, in a federal court with appropriate jurisdiction, a writ of mandamus ordering the Secretary of State to perform a ministerial duty was appropriate.⁴⁶

c. We also know from *Marbury* that delivery of these commissions was a ministerial act and that William Marbury and his colleagues were entitled to a writ of mandamus ordering the Secretary of State to deliver their commissions.⁴⁷

d. Finally, we know from the *Kendall* cases, both in the Circuit Court and in the Supreme Court, that the Circuit Court had jurisdiction to hear a case like Marbury's and to issue a writ of mandamus against a federal officer.⁴⁸ And we know from *United States v. Washington*,⁴⁹ as well as *Kendall*, that the Circuit Court was willing and able to issue writs of mandamus when the facts warranted such a remedy. We cannot conclude, with the same degree of confidence, that it would have actually issued the writ requested by Marbury, but there is no evidence suggesting otherwise. On the contrary, as discussed above, the Circuit Court showed no reluctance to issue such writs in the absence of an adequate remedy at law.

4. *What if Marbury and his co-petitioners had filed their suit initially in the Circuit Court and it had issued the writ and ordered Secretary of State Madison to deliver the commissions?*

Several scenarios are possible:

sponsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. 37 U.S. at 610.

45. Susan Low Bloch and Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the District of Columbia Circuit*, 90 Geo. L.J. 549, 550-52 (2002).

46. *Marbury*, 5 U.S. (1 Cranch) at 171-73.

47. 5 U.S. (1 Cranch) at 173.

48. *Kendall*, 37 U.S. at 618.

49. *Washington*, 28 F. Cas. at 414. See note 41.

Secretary of State Madison might have complied with the judicial mandate and delivered the commissions; Marbury and his co-petitioners would have become justices of the peace for the remainder of their five-year term. But this alternative is not only unlikely, it also would have fallen short of what *Marbury* achieved. We would have learned that the judiciary can mandamus the executive branch, but we would have learned nothing about judicial review of legislative action.

Alternatively, Secretary of State Madison might have appealed the Circuit Court's decision to the United States Supreme Court.⁵⁰ Judging from what the Court said in *Marbury*, and later in *Kendall*, it seems likely that it would have affirmed the Circuit Court's decision. This would have confirmed the power of the judiciary to review the legality of acts of the executive branch and to mandamus the Secretary of State. But the case would have provided no obvious opportunity for the Supreme Court to establish the power to review the constitutionality of acts of Congress, because no constitutionally questionable legislation would have been involved. It also would have presented the risk of presidential defiance.

The risk of defiance by Jefferson and Madison, as well as congressional impeachment, was real. Jefferson never hid his disdain for Marshall's decision in *Marbury* or for Marshall generally.⁵¹ Impeachment was also in the air.⁵² Congress, by a

50. The Supreme Court had appellate jurisdiction to review such actions by the Circuit Court. See Act of February 27, 1801, 2 Stat. 103, Ch. 15, §8 ("Be it further enacted, that any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the supreme court of the United States. . . .").

51. In a letter to Albert Gallatin in 1810, Jefferson wrote about Marshall: "The judge's inveteracy is profound, and his mind of that gloomy malignity which will never let him forego the opportunity of satiating it on a victim." T. Jefferson to A. Gallatin, Sept. 27, 1810 in H. Adams, ed., 1 *The Writings of Albert Gallatin* 492 (Philadelphia, 1879).

See also Jefferson's complaint about Marshall years after *Marbury*. In *Cohens v. Virginia*, 19 U.S. 264 (1821), Marshall used a similar tactic of establishing strong powers for the Court to review state court judgments, but then affirming the state court judgment so that, again, no one could defy anything. In a letter to Judge Johnson complaining about this tactic, Jefferson wrote:

This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly, perhaps, because it in some measure bore on myself. Among the midnight appointments of peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the department of State, on my entrance into the office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a Mandamus to the Secretary of State (Mr. Madison), to deliver the commission intended for him. The Court determined at once, that being an original process, they had no cognizance of it; and there the question

strictly partisan vote, had just repealed the Judiciary Act of 1801 and eliminated the Supreme Court's 1802 Sessions.⁵³ The possibility of presidential defiance and impeachment was averted by the actual *Marbury* decision because the Court found it had no jurisdiction and therefore did not order the executive branch to do anything. Marshall might have found a similarly clever way to avoid a confrontation with the President even if *Marbury* had initially sued in the Circuit Court and the Circuit Court had issued the writ.

Thus, if Marshall were concerned with the possibility that Jefferson and Madison might defy the courts and thereby weaken the judiciary, he might have endeavored to avoid affirming the lower court opinion. And, if he wanted the opportunity to establish the power to review the constitutionality of federal legislation, we know from his *Marbury* decision that he was clever enough to find a constitutional conflict. Given Marshall's ability to discover the constitutional problem with section 13 of the Judiciary Act of 1789 in the actual *Marbury* case,⁵⁴ he might

before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case; to wit, that they should command the delivery. The object was clearly to instruct any other court having the jurisdiction, what they should do, if *Marbury* should apply to them. Besides the impropriety of the gratuitous interference, could any thing exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed. Although signed and sealed, yet as long as it remains in the hands of the party himself, it is in *feri* only, it is not a deed, and can be made so only by its delivery. In the hands of the third person it may be made an escrow. But whatever is in the executive offices is certainly deemed to be in the hands of the President; and in this case, was actually in my hands, because, when I countermanded them, there was as yet no Secretary of State. Yet this case of *Marbury* and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an *obiter* dissertation of the Chief Justice.

Thomas Jefferson Randolph, ed., *Memoir, Correspondence, and Miscellanies, From the Papers of Thomas Jefferson* (Gray and Bowen, 2d ed 1830).

52. The House of Representatives had impeached District Judge John Pickering at the beginning of the 1803 session and was talking about impeaching Supreme Court Justice Samuel Chase. There were also threats to impeach Marshall if he were to decide in favor of *Marbury*. Haskins and Johnson, *History of the Supreme Court* at 185 (cited in note 3).

53. See notes 6, 28.

54. The cleverness—some say “audacity”—of Marshall's approach to *Marbury*'s petition has been widely noted and discussed. See, e.g., Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393 (1996) (viewing the mandamus power of section 13 as best read to apply only to cases over which the Court already has acquired jurisdiction); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329, 366 (same); Akil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443 (1989); William Winslow Crosskey and Leonard W. Levy, *Original Intent and the Framers' Constitution* 75 (Macmillan, 1988) (*Marbury* is “one of the most flagrant specimens of judicial activism

have been able to find some minor constitutional infirmity with the Act creating the Circuit Court of D.C.

It is possible, therefore, that, even if Marbury and his colleagues had sued initially in the Circuit Court, we would have reached the same outcome. But getting there would have been, at the least, more difficult and maybe impossible. It would have required the "right" moves by more people, including a decision by Jefferson and Madison to appeal an adverse ruling by the Circuit Court, not just to ignore it. Judging from the fact that defendant Madison never even appeared in the Supreme Court when Marbury sued him there,⁵⁵ and from indications that Jefferson and Madison were, in fact, prepared to ignore an order from the Supreme Court,⁵⁶ the likelihood of their either complying with a Circuit Court order or appealing from the Circuit Court to the Supreme Court seems remote.

In truth, the only realistic way to arrive at the results achieved in *Marbury v. Madison* was for Marbury and his colleagues to sue originally in the Supreme Court, not the Circuit Court, to seek relief from Justice John Marshall, not Judge James Marshall. Because they did so, the Supreme Court was able to establish the power of judicial review of both executive and legislative actions without ordering anyone to do anything and without providing any opportunity for turmoil, resistance, or defiance. Moreover, the Supreme Court could do so economically, without having to rely on procedural "assistance" by any Jeffersonians. So tidy and elegantly wrapped was this package as to inspire one final question.

5. *Was the result reached in Marbury v. Madison contemplated, foreseen, or orchestrated by any of the participants in this drama?*

and . . . one of the worst opinions ever delivered by the Supreme Court"); Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wisc. L. Rev. 301; Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373, 389 & n.60 (1982) (Marshall's interpretation of section 13 is "intellectually dishonest"); William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1. Beveridge applauded the decision: "[B]y a coup as bold in design and as daring in execution as that by which the constitution had been framed, John Marshall set up a landmark in American history." Beveridge, 3 *The Life of John Marshall* at 142 (cited in note 7).

55. Madison never appeared in the Supreme Court, but Attorney General Levi Lincoln, who had been Acting Secretary of State before Madison arrived in town, did answer the Court's inquiries concerning what he knew of the non-delivery of the commissions. *Marbury*, 5 U.S. (1 Cranch) at 143-145. Haskins and Johnson, *History of the Supreme Court* at 191-92 (cited in note 3).

56. *Id.* at 185.

In theory, there are two interrelated ways in which the participants might have foreseen and arguably manipulated events to enable John Marshall to achieve the results reached in *Marbury v. Madison*. First, John, and possibly his brother, might have deliberately failed to deliver some of the commissions before John left the office of Secretary of State. Second, whether or not the failure to deliver was deliberate, John Marshall might have recognized the opportunity for the Supreme Court to rule on the big issues and encouraged Marbury and his colleagues to sue in the United States Supreme Court instead of the Circuit Court of the District. Is there any evidence to support either possibility? Several facts are, while not dispositive, at least intriguing.

As noted earlier, responsibility for delivering the freshly-signed commissions fell to the then-Secretary of State—and newly-installed Chief Justice of the Supreme Court—John Marshall who, apparently, ran out of time.⁵⁷ But brother James, newly-appointed judge on the newly-created Circuit Court of the District of Columbia, also played a role in the delivery—and nondelivery. Specifically, on March 4, 1801, the day of Thomas Jefferson's inauguration, Judge James Marshall was informed that there was "reason to apprehend riotous proceedings" in Alexandria and wanted to ensure that there would be justices of the peace available to deal with any troublemakers.⁵⁸ He went to the Secretary of State's office and signed a receipt for several commissions, intending to deliver them.⁵⁹ However, "finding that he could not conveniently carry the whole," he returned several commissions undelivered and crossed out those names from his receipt.⁶⁰ Among the undelivered commissions James Marshall returned were those of Robert Townsend Hooe and William Harper,⁶¹ who would soon unite with their colleagues, William

57. See Letter from John Marshall to James Marshall (cited in note 18 and quoted in note 18), noting that he should have delivered the commissions "bur for the extreme hurry of the time & the absence of Mr. Wapner [clerk in the Office of Secretary of State.]. Dewey, *Marshall Versus Jefferson* at 79-80 (cited in note 3).

58. This information comes from the affidavit filed by James Marshall which Marbury's attorney, Charles Lee, read to the Court. 5 U.S. (1 Cranch) at 145-46.

59. James Marshall's affidavit stated that on March 4, 1801, he went to the office of the Secretary of State to pick up the commissions of the justices of the peace. He believed he picked up twelve of the nineteen Alexandria commissions. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 145-46 (1803). See also, Dewey, *Marshall Versus Jefferson* at 79 (cited in note 3).

60. *Marbury*, 5 U.S. (1 Cranch) at 146; Dewey, *Marshall Versus Jefferson* at 79 (cited in note 3). Lee used James Marshall's affidavit to confirm that the commissions had in fact been signed and sealed.

61. *Marbury*, 5 U.S. (1 Cranch) at 146 (affidavit of James Marshall); Garraty, ed.,

Marbury and Dennis Ramsay, to seek help from the Supreme Court.⁶²

Moreover, it is interesting to note that John Marshall had somewhat more time to deliver these commissions than is commonly believed. The usual assumption is that time was prohibitively short because the justices of the peace were confirmed on March 3, Adams' last day in office. But President Jefferson asked Marshall to remain as Secretary of State for one more day.⁶³ Marshall, therefore, had a little extra time to deliver the remaining commissions.

John Marshall was clearly aware of the fact that some commissions had not been delivered. He says, in hindsight, that he thought the lack of delivery was not that big a deal. In a letter to his brother James, written March 18, 1801, two weeks after these events, John Marshall wrote:

I did not send out the commissions because I apprehended such as were for a fixd (sic) time to be completed when signd (sic) & seald (sic) & such as depended on the will of the President might at any time be revokd (sic). To with hold the commission of the Marshal [of the District] is equal to displacing him which the President I presume has the power to do; but to with hold the commission of the Justices is an act of which I entertaind (sic) no suspicion. I shoud (sic) however have sent out the commissions which had been signd (sic) & seald (sic) but for the extreme hurry of the time & the absence of Mr. Wagner [clerk in the office of Secretary of State] who had been called on by the President to act as his private secretary.⁶⁴

As this letter indicates, John Marshall both knew that some commissions had not been delivered and, more significantly, had already formulated the theory he was to use as Chief Justice for concluding that delivery was not necessary to complete the appointment of the Justices of the Peace. This view was an essential step in the argument justifying the conclusion that delivery was a ministerial, not discretionary, act that could be ordered by a writ of mandamus. Thus, it is at least possible that in the waning hours of the Adams' Administration, John Marshall, with or without his brother James, knowingly withheld the delivery of

Quarrels That Have Shaped the Constitution at 10-13 (cited in note 5).

62. *Marbury*, 5 U.S. (1 Cranch) at 137.

63. Dewey, *Marshall Versus Jefferson* at 44 (cited in note 3).

64. Letter from John Marshall to James M. Marshall at 90 (cited in note 18).

some commissions to set the stage for this profoundly important case in our country's legal foundation.

It is also possible (and more likely) that Marbury and his colleagues knowingly chose to sue in the Supreme Court, and not the Circuit Court, precisely because the Supreme Court could use the case in the manner it did. Sometime before December 1801, Chief Justice Marshall might have foreseen that he could use the case in the manner he eventually did and might have let it be known that suing in the Supreme Court was the preferred course. As noted, he had already articulated an important aspect of the *Marbury* logic.

Moreover, the case for "orchestration" is strengthened by the fact that, notwithstanding Marshall's clear declaration in *Marbury* of Marbury and his colleagues' right to the commissions and to a writ of mandamus from an appropriate court, none of the petitioners appears to have pursued his quest. Why not? Close to three years remained of their five-year term. Armed with the Chief Justice's opinion, they could have easily marched into the Circuit Court of the District of Columbia and sought the writ.⁶⁵ If Marbury and his co-petitioners were so anxious for the office, sufficiently so to take their case to the highest court of the land, why, when it seemed so available, did none of them pursue it? The justice of the peace position was, it is true, a relatively low level job, but it was an important stepping stone to higher office and, however modest, appeared to be perceived by the litigants as desirable.⁶⁶ It is not unduly cynical to question the true mission of their Supreme Court suit: Did they really want these commissions or were they simply being good Federalists giving John Marshall the perfect vehicle by which to establish

65. From the time of the *Marbury* decision on February 24, 1803 until November 16, 1803, the composition of the circuit court remained the same: Kilty, Cranch, and James Marshall. After James Marshall resigned in November, he was replaced by Nicholas Fitzhugh, who took his seat on November 25, 1803.

66. For a description of duties of justice of the peace, see note 2. According to Dewey, in the areas of the District outside the towns of Alexandria and Georgetown, the justices of the peace were the principal governing body. Dewey, *Marshall Versus Jefferson* at 81 (cited in note 3). Dewey also says, quoting Charles Sydnor, that in Virginia politics "admission to the office of justice of the peace [or magistrate] . . . [was] the first upward step in a political career . . ." Apparently, this step had been taken by George Washington, Thomas Jefferson, James Madison, George Wythe, and George Mason. Dewey, *Marshall Versus Jefferson* at 82 (cited on note 3). President James Monroe evidently thought it worthwhile to serve as a magistrate even after he left the White House. *Id.*; Daniel C. Gilman, *Giants of America: The Founding Fathers Series* 231-32 (Arlington House, 1970); See also Forte, 45 *Cath. U. L. Rev.* at 354 (cited in note 5). On the other hand, as James Simon has noted, none of the four petitioners in *Marbury* needed the money from the job. Simon, *What Kind of Nation* at 175 (cited in note 4).

the powers of the Court? It certainly fit well into Marshall's desire to strengthen the court.⁶⁷

CONCLUSION

Precisely why William Marbury, William Harper, Robert Townsend Hooe, and Dennis Ramsay brought their suit in the United States Supreme Court will probably remain a mystery. All we can say with certainty is that the Circuit Court of the District of Columbia was up and running in 1801, that Marbury and his lawyer were clearly aware of that fact, that the Circuit Court had jurisdiction to issue a writ of mandamus in a case of this type, and that it was willing to exercise this power in the appropriate situation. Whether the Circuit Court would have done so if Marbury had sued there, and whether anyone knew the Supreme Court would find that it did not have original jurisdiction to do so, will probably never be known. But these questions pale in light of the profound impact of the resulting decision.⁶⁸ Whether by clever orchestration or mere serendipity, William Marbury's decision to sue in the Supreme Court, instead of the Circuit Court of the District of Columbia, profoundly impacted our constitutional history. With this relatively simple case, Chief Justice John Marshall was able to establish the power of the federal judiciary to review both executive and legislative actions, while "modestly" declining jurisdiction, ordering no one to do anything, and thus providing no opportunity for defiance or resistance. It was a remarkable feat for which we are all in his debt.

67. Marshall began the practice of writing opinions for the Court, instead of the prior practice of *seriatim* opinions. Here, too, Jefferson disapproved. In the 1823 letter to Judge Johnson, cited in note 51, Jefferson wrote:

I rejoice in the example you set of *seriatim* opinions. I have heard it often noticed, and always with high approbation. Some of your brethren will be encouraged to follow it occasionally, and in time, it may be felt by all as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority.

68. And perhaps Bacon, not Shakespeare, wrote the plays. But, in the end, what counts, in terms of our everlasting betterment, is that someone did.