The Players:

**John Adams –** outgoing president, Federalist

**John Marshall** – John Adams’ Secretary of State, later Chief Justice of the Supreme Court

**Thomas Jefferson –** incoming president, Anti-Federalist

**James Madison** – Thomas Jefferson’s Secretary of State

**William Marbury** – appointed to a judgeship by John Adams, waiting for his commission

**Congress** – passed the Judiciary Act of 1789

*SCENE 1*

**Narrator:**  Our story begins in 1789, during the first Congress.

**CONGRESS:** The Constitution gives us the power to create the courts of the federal judicial system, and as part of that responsibility we have passed the Judiciary Act of 1789. Among other things, this Act gives the Supreme Court the ability to issue *writs of mandamus* – court orders that direct governmental officials to take a specific legal action. Nice work, everyone!

***Narrator****:* Eleven years pass.

SCENE 2

*John Adams and Thomas Jefferson have a conversation.*

**John Adams:** [to Thomas Jefferson] The election of 1800 is only days away, and as the sitting President I intend to defeat you, Mr. Jefferson. I beat you 4 years ago, and I’ll do it again.

**Thomas Jefferson**: [to John Adams] Mr. Adams, the country has grown tired of your pro-British leanings. It is time for us to build a new republic, freed from the injustices of our past and independent of our overly strict political parents. You and your federalist allies will cede your power.

***Narrator:*** The voting begins on Friday, October 31 and continues until Wednesday, December 3, 1800. Jefferson has won the popular vote, but the Electoral College now meets in Congress to cast their votes. Back then, Electors cast two votes: one for president and another intended to be for vice president. The candidate that receives the most votes becomes President. However, Thomas Jefferson and his running mate, Aaron Burr, tied the vote. In the case of a tie, the election goes to the House of Representatives.

**CONGRESS:** We’ve cast 35 different ballots and we also keep getting a tie! Finally, on our 36th attempt Jefferson received one more vote than Burr, and he is elected president, with Burr as the Vice President. The incumbent, John Adams, has lost.

Next, we’ll pass the 12th Amendment to the constitution to fix this problem so it doesn’t happen again. From now on, when Electors cast their votes for President and Vice-President, they’ll do so for a single ticket. Presidential candidates must run as a slate with a Vice-President.

SCENE 3

*John Adams, John Marshall, and William Marbury have a conversation.*

**John Adams:** Well shoot. I thought we had him. I have only a few weeks before Jefferson becomes president, so I better make the most of them. I’m going to fill all those judicial vacancies that Congress created when it passed the Judiciary Act of 1789.

**Narrator:** But sir, if you pass those now, won’t they be overturned by Jefferson?

**John Adams:** I’ll sign them on midnight the day before Jefferson’s inauguration if I have to.

**Narrator:** Okay, who are you going to appoint?

**John Adams:** Well, let’s see. We’re going to need a Chief Justice of the Supreme Court.

[to John Marshall] John, you’re my Secretary of State and you’ve been great. How about it?

**John Marshall:** I’d be pleased to, John. It will be my honor to serve as Chief on the highest court.

**John Adams**: Great. Great. In addition, how about if we appoint ole’ Will Marbury to be Justice of the Peace for the District of Columbia.

[to William Marbury] How about it, Will? Sounds like a cushy job, doesn’t it?

**William Marbury:** That sounds great. What does a Justice of the Peace do, anyway?

**John Adams:** They keep peace, Will. Can you do that?

**William Marbury:** Sure I can. Sure I can.

**John Marshall**: [To John Adams] Mr. President, if you make these appointments at the 11th hour, how are we going to make sure the appointees take their new posts? I mean, what’s to stop Thomas Jefferson from ignoring your appointments?

**John Adams:** Well, John, that’s going to be up to you, old friend. Right now, you’re the Secretary of State, right?

**John Marshall:** Yes, I am.

**John Adams**: Well, that means that it’s your responsibility to deliver these commissions to my appointees. Do you think you can get a memo to yourself about making you Chief Justice of the Supreme Court? [Smiling]

**John Marshall:** I can do so, in a timely and efficient manner, sir.

**John Adams:** Good. Good. But there are a lot of these to get out. Do your best to get all these commissions to my judicial appointees *before* Jefferson is inaugurated. Who knows what those Democratic-Republicans have in store for us. Oh, and while you’re at it, take all the letter “F’s” off their keyboards so they can never properly write their President’s name.

**John Marshall:** Sure. But…uh…what’s a keyboard?

**John Adams:** never mind. Just make haste! Remember, if you don’t get all those commissions delivered, then it will be up to whoever Jefferson appoints to Secretary of State to deliver them. We cannot trust that the appointments will happen under such circumstances.

**John Marshall:** I shall do my best.

*SCENE 4*

*Thomas Jefferson and James Madison have a conversation.*

**Narrator:** Meanwhile, on the other side of the political spectrum, there is a celebratory mood.

**James Madison:** Congratulations, Mr. President!

**Thomas Jefferson:** Why thank you, James. I’m pleased to have finally succeeded in my pursuit of this high office. While I have your attention, there’s something important I’d like to ask you.

**James Madison:** Of course, sir. How can I be of service?

**Thomas Jefferson:** I’d like to ask you to serve as my Secretary of State.

**James Madison:** I’d be honored, sir.

*SCENE 5*

**Narrator:**  After the inauguration, with Jefferson in the newly built White House and Madison serving as Secretary of State, James Madison makes a surprising discovery. He rushes to tell Jefferson about it.

**James Madison:** Good day, Mr. President.

**Thomas Jefferson:** Good day, Mr. Secretary. How can I help you?

**James Madison:** Mr. President, there is something you should know. On his way out of office, President Adams made several last minute judicial appointments.

**Thomas Jefferson:** Well, that’s not too surprising. There were a number of vacancies in the judicial branch. I have no doubt that Adams sought to fill those before he left office.

**James Madison:** Indeed, sir. The Judiciary Act also says that it is the responsibility of the Secretary of State to deliver the commissions to the President’s appointees.

**Thomas Jefferson:** Is that so?

**James Madison:** Yes, sir. However, John Marshal, my predecessor, was not able to deliver all of those commissions prior to your inauguration.

**Thomas Jefferson:** I see.

**James Madison:** Mr. President, I have no intention of delivering Mr. Adams’ commissions.

**Thomas Jefferson**: No, of course not. Why should you? The posts remain vacant, officially, and I shall make my own appointments.

**James Madison:** Yes, sir. I quite agree.

*SCENE 6*

*William Marbury and John Adams have a conversation.*

**William Marbury:** John, I’m quite displeased!

**John Adams**: Well I can see that, Will. Try to calm down.

**William Marbury:**  I know it was difficult for John Marshall to deliver all of those last minute commissions in a timely manner, but I’m quite annoyed that *I* was the one left out! He seemed to have no trouble making sure he took his post as Chief Justice!

**John Adams:** Well, let’s not assume the worst, Will. It wasn’t too hard for him to deliver a commission to himself. I quite regret that he didn’t get yours to you in time.

**William Marbury:** James Madison has absolutely no intention in delivering that commission to me. But I feel we should compel him to. I have a legal right to my new job!

**John Adams:** Yes, I believe you do. I think we could prove it, too.

**William Marbury:** Yes, I think we can.

**John Adams:** In fact, The Judiciary Act gives us the appropriate tools. I recall that the Supreme Court has the power to issue a *writ of mandamus*. Using this writ, we can ask to Court to compel James Madison to deliver your commission.

**William Marbury:** Yes, that’s a brilliant strategy. It’s Congress that has given the Supreme Court this power, in the Judiciary Act. This separation of powers thing is working in our favor here. Congress gives the Court a power to compel the Executive to do its job.

**John Adams:** What we need to do, is to bring a law suit again James Madison. In the suit, you should sue him for not delivering your commission. Request that the Court issue a *writ of mandamus* to compel him to finally give you your rightful job.

*SCENE 7*

*At the Supreme Court. Chief Justice John Marshall speaks to James Madison and William Marbury*.

**Narrator:** Before going to deliver his decision to Marbury and Madison, Chief Justice John Marshall does some deep thinking, out loud.

**JOHN MARSHALL:** This is a difficult situation for me. On the one hand, Congress has given the Court the power to issue a *writ of mandamus*. If I consider the Judiciary Act to be constitutional, then the issuing of this *writ* must also be constitutional.

However, if I declare these constitutional and force Madison to deliver the commission, what would happen if Jefferson and Madison ignore the order? Could this cause a constitutional crisis? Or could it perhaps undermine the authority of the Court and show that the Executive branch is more powerful than the Judicial branch?

On the other hand, if I do not force Madison to deliver the commission, I risk a political crisis by jeopardizing the long standing relationship of trust I’ve built with John Adams.

I think I know what I’m going to do.

**Narrator:** John Marshall goes to speak with Marbury and Madison.

**John Marshall:** Gentlemen. There are two separate legal questions at hand in this case.

First, does Marbury have a right to his commission or did it expire since it was undelivered when the new president took office?

And second, does the Supreme Court have the ability to order the president and secretary of state to deliver a commission using the *writ of mandamus*?

On the first question, there’s no doubt that Marbury has a right to the commission. The appointment was legal and sound. Mr. Marbury, you absolutely have a right to your appointment as Justice of the Peace.

**William Marbury:** All right! I knew we would win this thing!

**John Marshall:** The second question, though, is a little more complicated. Congress gave the Judiciary the power to issue a *writ of mandamus* in the Judiciary Act of 1789; however, this stands in conflict with the Constitution. Article 3 of the Constitution does not list petitions for *writs of mandamus* as a part of the Court’s power.

A law passed by Congress, and signed by the President, cannot supersede the Constitution. Since these two stand in conflict with one another, the constitution must prevail. Unless Congress wants to amend the Constitution, Congress does not have the power to define the Court’s original jurisdiction by law.

Therefore, I must declare that the section of the Judiciary Act of 1789, in which Congress gave the Court the power to issue *writs of mandamus*, is unconstitutional. I am not declaring the whole Act to be unconstitutional, just this one provision that is inconsistent with the Constitution.

**William Marbury:** Oh no.

**James Madison:** I see where you’re going with this.

**John Marshall:** The court does not have the power to compel anyone, through a *writ of mandamus*, to deliver a commission. I’m sorry Will. Even though you have a legal right to your job, it is not within my power to compel Mr. Madison to give it to you.

**William Marbury:** But wait, John. You’re the Chief Justice of the Supreme Court! You mean to tell me there is something over which you do not have power? Come on!

**John Marshall:** Indeed, Will. I have no more power than the Constitution gives me. Congress was wrong to write a law that gives the Court a power that the constitution did not intend.

**James Madison:** Ahh. Yes. You’re very clever, Mr. Marshall.

**John Marshall:** Why thank you, Mr. Madison. What is your meaning?

**James Madison:** You want me to believe that you are somehow restricting your powers? [*With skepticism or sarcasm:*] Your hands are tied, are they? Congress was wrong to try to give you more power, was it? You’d like me to think that you’re being magnanimous, humble even. Wouldn’t you? I can see right through your hubris, Mr. Chief Justice.

**John Marshall:** And how is that?

**James Madison:** Sure. You’ve restricted the Court’s powers. Your decision in this case gives Congress a minor reprimand for trying to give the Court a power that was not in the Constitution. But it’s a slap on the wrist.

**John Marshall:** How can you be so sure?

**James Madison:** Because what you’ve really done here is *interpret the constitution*.

**John Marshall:** [Naively:] Oh, have I?

**James Madison:** You have. You may be limiting the Supreme Court’s power in the short run. Sure. With this decision you do not have the power to issue *writs of mandamus*. But what you really have in this decision is a MUCH bigger power.

**John Marshall:** And what is that?

**James Madison:** Don’t be so coy. You’ve established the power of Judicial review.

**John Marshall:** I suppose I have, haven’t I?

**James Madison:** By offering us an interpretation of the constitution, the very act of declaring a section of the Judiciary Act of 1789 unconstitutional, sets a legal precedent that the Supreme Court has the power to A.) interpret the constitution and B.) declare entire laws, or sections of laws, unconstitutional.

**John Marshall:** What makes you think that the Court will use this power again?

**James Madison:** I have a hunch. Oh, and I’d like to point out, that the power of Judicial Review is *also NOT* in the constitution. You just created it. Simply by doing it.

**John Marshall:** And what are you going to do about it?

**James Madison:** Absolutely nothing. I got what I wanted out of this. I do not have to issue any of those darn commissions that Adams made on his way out the door.

**William Marbury:** I’d like to be mad about not getting my commission, but your ruling says that I have a right to it, so I don’t have a legal leg to stand on. It’s hard to argue with your ruling.

**John Marshall:** Indeed!

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