> order & interest. It is to be hoped however that all such questions will be precluded by a proper decision of nine States in the H. of R.[10]

Madison's strategic objective is clear. If the lame-duck House refuses to elect Jefferson, let's get the new one into town as soon as possible—since Republicans would outnumber Federalists by two to one in the new House, they would have no trouble delivering nine states to Jefferson as soon as they came to Washington.

To be sure, the written Constitution did not give the Republican front-runners any legal authority to summon Congress, nor did it legally empower the new House to name a new president. But these "irregularit[ies] . . . lie in form only" while the Federalist "remedies . . . are substantial violations of the will of the people, of the scope of the Constitution, and of the public order & interest."[11] This letter to Jefferson is dated January 10, but similar Madisonian missives were already circulating among politicians of both parties in Washington, D.C.[12]

The Federalists' Reply

As the Republicans began contemplating unconventional action, Federalists were publicly wrapping themselves in the written Constitution. A powerful essay, appearing under the name "Horatius," was printed twice in newspapers circulating in the Washington area—on January 2 in the *Alexandria Advertiser,* and on January 6 in the *Washington Federalist*. Provocatively entitled "The Presidential Knot," the essay proposes to cut through the impending constitutional crisis with 2,500 words of finely honed legal argument.

After describing the likely prospect of a House deadlock, Horatius sets out to eliminate the Madisonian solution from the field of play. The written Constitution, he emphasizes, provides that "the House of Representatives shall *immediately* chuse, by ballot, one" of the contenders: "The choice is required to be *immediately made,* in order that the result may be declared in the presence of the Senate, and to prevent the possibility of intrigue and corruption. The choice must be therefore made before the house adjourns or disperses, and after the convention of the Senate and

House of Representatives terminates, the house cannot at a future day act upon this subject."

Horatius does not explicitly describe Madison's proposal, but any knowledgeable politician would have understood the point: Madison's opinions notwithstanding, the Republican effort to resolve the deadlock by an appeal to the newly elected House is nothing less than an all-out assault on the Constitution.

After giving Madison's unconventional ruminations the back of his hand, Horatius confronts the Republicans' efforts to create a constitutional crisis: "Some gentlemen," he explains, are "over zealous for the success of Mr. Jefferson, [and] utter threats that unless he is elected the government shall be at an end. Menaces of this kind are always unbecoming and at no time to be regarded, and the writer of these observations, being by no means inclined to give the preference to Mr. Burr, regrets that they were not repressed."

In contrast to Republican hotheads, Horatius casts himself as a cool legalist seeking to resolve the crisis through the power of reason alone. He begins with the relevant provisions regulating presidential succession in Article II, and predictably opts for a broad reading of the key phrase: "inability to discharge the power and duties of said office." On his view, there is no reason to restrict this term to physical incapacity: "[I]n the interpretation of a written constitution or form of government, that interpretation is never to be made which will frustrate the end of the . . . constitution," which in this case is "self preservation."

Having cleared a constitutional path for congressional action, Horatius then takes a surprising turn. As we have seen, the succession statute of 1792 required new elections to fill vacancies—a procedure that seemed to be the best possible way of resolving an impasse in the House. What is more, that statute would have allowed the Federalist Senate to appoint one of their partisans as interim president—a prospect that the *Washington Federalist* ought to have found pleasing.

And yet Horatius rejects this obvious solution. According to him, Congress had not only made a bad choice in 1792 in designating the president pro tem of the Senate as interim president; it had acted *unconstitutionally,* and as a consequence, the lame-duck Congress was absolutely required to pass a new statute to fill the resulting gap.

To make his case, Horatius once again returns to the text, emphasiz-

ing that the language of Article II limits succession to "officers." On his view, this term signifies only federal officials who have "received their commissions and appointments from the President, according to which criterion the President of the Senate pro tempore is not an officer." He buttresses this claim by citing the Senate's refusal to impeach one of its colleagues, William Blount, on the ground that he was a member of Congress and not an "officer of the United States" as required by the impeachment clause. By parity of reasoning, the senator chosen as president pro tem does not qualify as an "officer" and so cannot constitutionally succeed to the presidency.

Horatius also denies that the statute of 1792 can be saved by recourse to the great residual source of congressional power: the "necessary and proper" clause. Where, as here, there is a clause explicitly directed to the problem of presidential succession, it should serve as the exclusive source of constitutional authority—especially when the necessary and proper clause would authorize Congress to appoint a "member out of their own body [who] may continue in office for the whole term of the ensuing four years, or perhaps longer."

There is only one way to cut the "presidential knot." If the House deadlocks, the lame-duck Federalist Congress and president should, as one of their final acts, pass a new statute naming an "officer of the United States" to serve as president instead of Thomas Jefferson. And who might that "officer" be?

Horatius is silent on this matter, but there could be little doubt that the palm would go to Secretary of State John Marshall. As a matter of protocol, his cabinet position was the first created in 1789, and so Marshall served as the senior "officer" of the United States; as a matter of politics, Marshall was the most popular Federalist leader of the moment—probably the only man acceptable both to the Adams and Hamilton wings of the party.[13] Once he took up residence in the President's House, he would have been the obvious man for the Federalists to rally a round in a last desperate campaign to prevent the atheist and Francophile Jefferson from coming to power.[14]

The *Washington Federalist* was, in short, offering to cut two presidential knots at once. It was not only denouncing as revolutionary any Jeffersonian effort to resolve the deadlock by an unconventional appeal to the next House of Representatives. It was telling the Federalists of the existing

Congress that the Constitution, properly construed, imposed on them the high responsibility to take statutory action to promote their own leading presidential candidate to the President's House!

It would be a bad mistake to dismiss Horatius's aggressive conclusions as the ravings of a heated partisan. To the contrary, the legal argumentation is of the highest quality, and the best modern scholarship suggests that Horatius had a very good legal point. There are indeed powerful reasons against allowing Congress to promote one of its own members to the presidency. His insistence that Congress appoint an "officer" appointed by the president makes good constitutional sense.[15]

Whatever its abstract legal merit, Horatius's conclusion could not have been more inflammatory in the context of 1801. Republicans were already denouncing Federalist efforts to place Burr into the presidency in defiance of their party's campaign for Jefferson. But their protests would have escalated to dangerous levels if their opponents denied *both* candidates the electoral prize and exploited legal technicalities to enable John Marshall to sit in the President's House and run for a full term in a special election.

The written Constitution was fast becoming a partisan weapon in the new world of party politics.[16] Rather than smoothing the path of democratic transition, it was disrupting an already tense situation. Part of the problem was bad draftsmanship, which allowed Horatius to play the game of legalistic reasoning without an adequate set of rules to cover the case at hand. This point, while important, should not lead us to ignore the deeper source of the potential conflict: the Republicans were operating on an understanding of the presidency that had simply been unknown at the time the Convention was writing down its rules. Call it the *plebiscitary theory:* Jefferson had become the People's choice for president since his party had put him at the top of their ticket and had won electoral support in the electoral campaigns around the country. Since the Founders had not foreseen the rise of parties, they could hardly conjure with the plebiscitary theory. Little wonder, then, that their constitutional text could generate an outcome so greatly at variance with its dictates—and that the Republicans could question the good faith of men, like Horatius, who aggressively pushed legalism in the Federalist direction.

The *Washington Federalist* was the party's paper in the new capital, and it was voraciously devoured by politicos. Though Jefferson was al-

ready writing privately about the threat of a Marshall presidency, the fact that the Federalists had gone public made the prospect far more serious. So far as the Republicans were concerned, Marshall was emerging as a potential leader of a constitutional coup.

Matters reached tragicomic heights later in the month when Adams named Marshall to the Supreme Court, asking him also to stay on as secretary of state. As the Founding system spun out of control, Marshall loomed as acting secretary of state, permanent chief justice of the Supreme Court, and potential interim president of the United States![17]

Who Dunnit?

And we have not yet glimpsed the worst of it. To put the point gently, there is substantial reason to believe that the brilliant author of the Horatius essay was none other than John Marshall himself.

This was the view of Marshall's great biographer of the early twentieth century, Albert Beveridge, though his enthusiasm for his hero blinded him to the damaging implications of his conclusion.[18] More curiously, Beveridge's discovery has almost entirely dropped from view in our more scientific and skeptical age. I have found only one passing mention of it during the past half-century of scholarship,[19] and the Horatius essay is not even mentioned, much less reproduced, in the authoritative edition of John Marshall's papers painstakingly edited by a team of scholars under the general editorship of Herbert A. Johnson and Charles E. Hobson. In response to my inquiry, Professor Hobson explained the omission:

> I am afraid there is nothing in our collection that can confirm Marshall as the author of the "Horatius" essay. I would be skeptical of Beveridge and even more skeptical of the political gossip and rumors of the time that pointed to M. as the author of this piece and of much of what appeared in the *Washington Federalist*. We certainly would have published it as a Marshall document if there was some stronger proof than that collected by Beveridge.[20]

In the five years since I received Professor Hobson's letter, I've been puttering around for "stronger proof," since I very much agree with Beveridge that Horatius's presentation is "so perfectly in Marshall's