

Loose Talk About Strict Construction

George F. Will

In fighting impeachment President Nixon's supporters are indulging in loose talk about "strict construction" of the Constitution. Conservatives, regardless of their views about Mr. Nixon's impeachment, have a special obligation to refute that talk.

The debate concerns Article II, Section 4. What kinds of behavior constitute "high crimes and misdemeanors" for which a President "shall be removed?" The White House contends that a strict construction of these words leads to a narrow interpretation: a President can be removed only for an indictable offense — a normal crime.

If this is true, no President can be removed for a political offense — neglect of duty, violation of the public trust, subversion of the people's liberties and the government's republicanism.

The White House argument is a model of perversity under pressure: a President must be impeached before indicted; he can only be impeached for an indictable crime; we must leave indictable crimes to the courts. But conservatives, who should be strict constructionists, should recognize that the White House premise — that strict construction dictates a narrow interpretation — is false.

Strict construction always begins with, and often need not go beyond, respect for the intentions of the Founders. A superb guide to those intentions is "The Federalist," the 85 papers written by Alexander Hamilton, James Madison and John Jay to persuade New Yorkers to ratify the Constitution.

Hamilton wrote (Federalist 70) that, "Energy in the executive is a leading character in the definition of good

government." Thus it is significant that Madison and Jay left to Hamilton, a notorious supporter of a strong presidency, the delicate task of interpreting the impeachment provision — the weapon for disciplining an executive who uses his "energy" for vicious ends.

Hamilton argued (Federalist 65) that impeachment concerns "those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be

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denoted *political*, as they relate chiefly to injuries done immediately to the society itself" (Hamilton's emphasis).

Diminished rights and liberties were the political "injuries" against "society itself" that the Founders feared most. Thus in Federalist 77 Hamilton addressed this question: Does the Constitution provide "safety in the republican sense — a due dependence on the people — a due responsibility?" He said the answer to this question is "satisfactorily deducible" from, among other things, the fact that the President is elected every four years by electors

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chosen by the people, *and* from the fact that the President is "at all times liable to impeachment."

Thus he listed impeachment among the Constitution's "great precautions" for the manifestly *political* purpose of securing "safety in the republican sense."

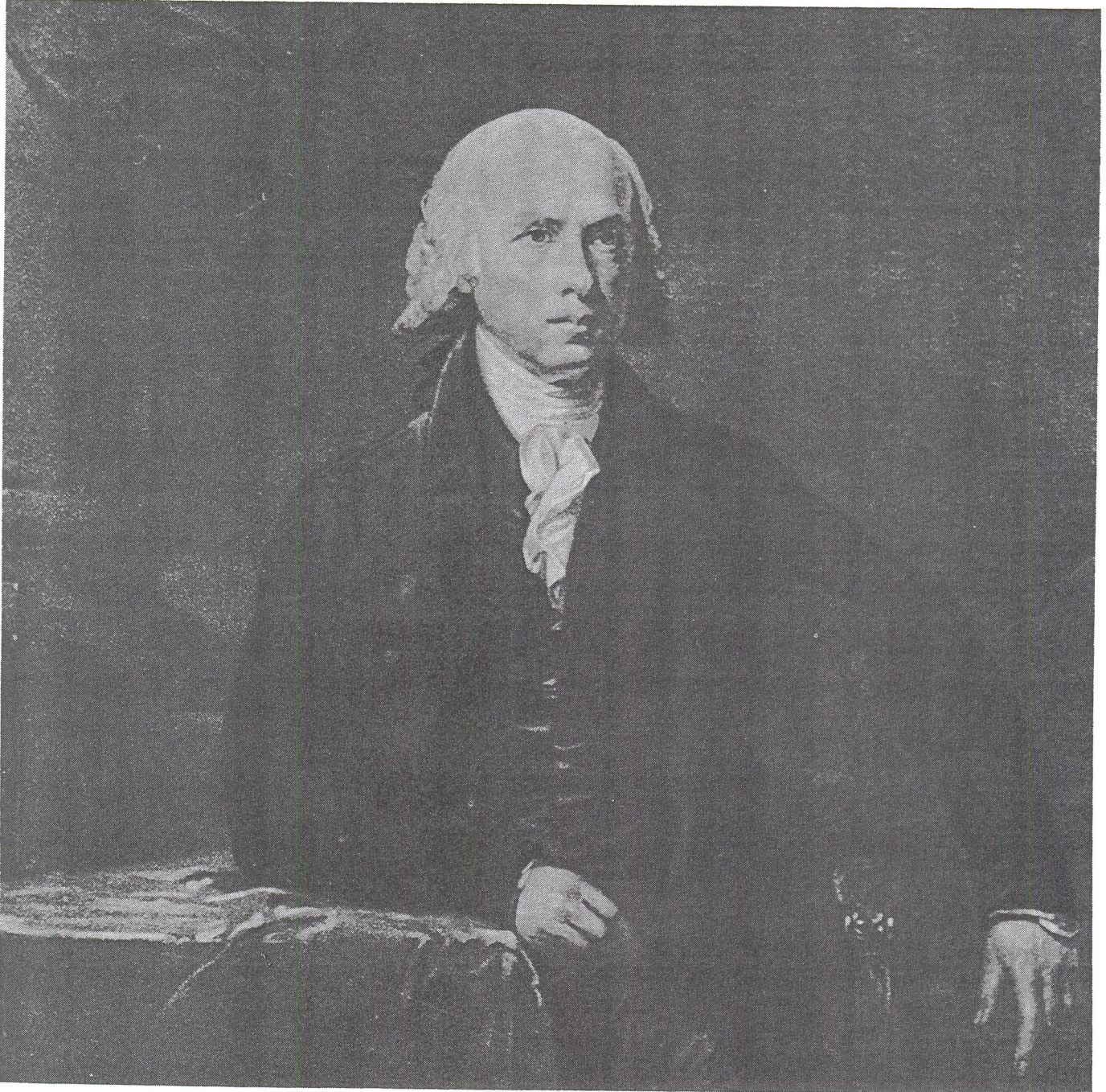
In Federalist 84 Hamilton responded to critics who wanted to defeat the Constitution because it came from the Philadelphia Convention without a bill of rights enumerating "various provisions in favor of particular privileges and rights." Hamilton argued that the Constitution contained a "number of such provisions" and he listed the following: protection against the suspension of the writ of *habeas corpus*; proscription of bills of attainder and ex post facto laws; the ban on titles of nobility; the guarantee of jury trial; the narrow definition of treason.

But the first item on Hamilton's list of the Constitution's "securities to liberty and republicanism" was the impeachment provision. Obviously Hamilton thought of impeachment

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primarily as a response to political offenses — assaults against liberty and republicanism — not just as a device for dealing with public officials guilty of normal indictable crimes.

Thus the question today is not whether "political" offenses are grounds for impeachment, but



James Madison

whether Mr. Nixon has committed such offenses. And according to Madison the answer depends in part on what Mr. Nixon's men have done. Madison said a President could be impeached "if he suffers (his appointees) to perpetuate with impunity high crimes or misdemeanors against the United States, or neglects to

superintend their conduct, so as to check their excesses."

Obviously strict construction — the intent of the framers — does not serve the purposes of the current regime. But conservatives should not flinch. Regimes come and go. The cardinal tenet of conservatism never varies. It is fidelity to the republican liberty

guaranteed by the Constitution that "The Federalist" interprets so brilliantly.

That is why we may see the names "Hamilton, A." and "Madison, J." on the next White House enemies list.

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