

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH KIRCHNER,

Plaintiff,

v.

MIKE JOHNSON, in his individual and official
capacity as Speaker of the United States House of
Representatives;
DONALD J. TRUMP, in his individual capacity as
former and current President of the United States;
PAM BONDI, in her individual and official
capacity as Attorney General of the United States;
BRENDAN CARR, in his individual and official
capacity as Chairman of the Federal
Communications Commission;
THE UNITED STATES HOUSE OF
REPRESENTATIVES;
ANTHROPIC PBC;
OPENAI, INC.;
APPLE INC.;
COMCAST CABLE COMMUNICATIONS, LLC;
METR (MODEL EVALUATION & THREAT
RESEARCH);
and DOES 1-20, unknown co-conspirators,
Defendants.

Case No. 1:25-cv-02735-ACR

**MEMORANDUM IN
SUPPORT K: THE
CONSTITUTIONAL
NECESSITY OF JUDICIAL
RECOGNITION OF
SEPARATION OF POWERS
VIOLATIONS**

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**MEMORANDUM OF LAW: The Constitutional Necessity of Judicial Recognition of
Separation of Powers Violations and Adoption of an Objective Compliance Test**

TABLE OF AUTHORITIES

CASES

Citation
<i>Baker v. Carr</i> , 369 U.S. 186, 217 (1962)
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818-19 (1982)
<i>Interstate Circuit, Inc. v. United States</i> , 306 U.S. 208, 222-27 (1939)
<i>Kirchner v. Johnson</i> , No. 1:25-cv-02735-ACR (D.D.C.)
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring)

CONSTITUTIONAL PROVISIONS

Citation
U.S. Const. art. I, § 7, cl. 1 (Origination Clause)
U.S. Const. art. I, § 8, cl. 11 (War Powers Clause)
U.S. Const. art. II, § 2, cl. 1 (Commander in Chief Clause)

STATUTES AND RULES

Citation
50 U.S.C. § 1541(c) (War Powers Resolution)
50 U.S.C. § 1543(a)(1) (War Powers Resolution — Reporting Requirement)
Fed. R. Evid. 201(b)(2) (Judicial Notice)
Fed. R. Evid. 607 (Who May Impeach a Witness)
Fed. R. Evid. 801(d)(2)(A) (Party Opponent Admission)
Fed. R. Evid. 901 (Authenticating or Identifying Evidence)

FOUNDING ERA SOURCES

Citation

James Madison, Notes of Debates in the Federal Convention of 1787 (August 17, 1787)
James Madison, Federalist No. 47 (January 30, 1788)
James Madison, Federalist No. 48 (February 1, 1788)
James Madison, Federalist No. 49 (February 2, 1788)
James Madison, Federalist No. 51 (February 6, 1788)
James Madison, <i>Report on the Virginia Resolutions</i> , 4 Elliot's Debates 546 (1800)

I. INTRODUCTION

A. Purpose and Scope of This Memorandum

1. This memorandum is submitted in support of Plaintiff's claims in *Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), which concern multiple separation of powers violations including: (1) Executive usurpation of revenue origination authority under Article I, Section 7, Clause 1; (2) Executive circumvention of the Presentment Clause through implementation of rejected legislation; (3) Congressional abdication of the Progress Clause duty to secure authors' exclusive rights; and (4) Judicial usurpation of appellate jurisdiction through unauthorized stays of interlocutory orders. This memorandum does not seek to litigate the Iran war, congressional capture, or any separation of powers violation outside the scope of the instant case.

2. Rather, this memorandum demonstrates — through urgent, real-time constitutional crisis — why this Court must recognize separation of powers violations as judicially cognizable and adopt an objective test for their identification. The events documented herein establish that the absence of such recognition and such a test is not an abstract jurisprudential gap. It is a life-and-death failure of constitutional governance occurring as this memorandum is written.

3. The Universal Compliance Test proposed herein applies to any separation of powers violation, including those committed by the Defendants in this action. But the need for judicial adoption of an objective test is demonstrated most urgently by the ongoing crisis: six American

service members dead, 2,000 citizens trapped abroad, hundreds of children killed, and a captured Congress unable to check executive overreach.

4. If the courts cannot recognize and remedy separation of powers violations — if no objective test exists to identify them — then the constitutional structure fails not only in the instant case but in every case where one branch exceeds its constitutional authority. The evidence that follows establishes the dire and immediate need for what this Court is asked to provide: judicial recognition that separation of powers violations are justiciable and an objective framework for their identification.

B. The Constitutional Crisis Demonstrating the Need

5. On February 28, 2026, the President of the United States ordered major combat operations against Iran without congressional authorization. Six American service members are dead. Two thousand American citizens are trapped in conflict zones abroad. Hundreds of Iranian children have been killed. The war continues with no clear exit strategy and no constitutional foundation. *See* § III, *infra*, for the complete factual record established by the administration's own statements.

6. This memorandum establishes two interconnected constitutional violations that together represent the most serious structural failure in American governance since the founding. First, the Executive Branch initiated war in violation of Article I, Section 8, which vests the war power exclusively in Congress — Speaker Johnson and Secretary Rubio's own admissions establish that no attack on the United States had occurred, that the triggering event was Israel's planned offensive, and that the United States struck "preemptively" rather than defensively. Second, the Legislative Branch failed to check this violation because Congress has been captured by foreign influence — eighty to ninety-five percent of Congress receives campaign contributions from

AIPAC-aligned organizations, and Israeli officials have publicly described their mechanisms for removing non-compliant Western politicians.

7. These violations cannot be understood in isolation. The Executive overreached because Congress was captured and could not check; Congress remained silent because the constitutional violation served its captors' interests. The March 4, 2026 Senate vote of 47-53 against a war powers resolution further illustrates the irreversible character of separation of powers violations: once hostilities are initiated without authorization, subsequent congressional action faces the counterargument that constraint would endanger deployed forces or invite retaliatory attacks on American soil. The constitutional violation transforms the deliberative framework, making congressional assertion of authority appear irresponsible after the fact.

8. This memorandum applies the evidentiary framework established in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939), to demonstrate that Congress's pattern of parallel failure — uniform across eight distinct constitutional violations — combined with documented funding flows and recorded admissions of influence mechanisms, compels the inference of foreign capture. The separation of powers has failed not because one branch overreached, but because a foreign nation has neutralized the branch designed to check such overreach. The courts are the last remaining check; this memorandum establishes the legal and factual basis for judicial intervention.

II. CONSTITUTIONAL FRAMEWORK

A. Article I, Section 8 War Powers

9. Article I, Section 8, Clause 11 of the United States Constitution provides that "The Congress shall have Power... To declare War, grant Letters of Marque and Reprisal, and make

Rules concerning Captures on Land and Water." This assignment of the war power to Congress was deliberate and unambiguous.

10. Article II, Section 2 designates the President as "Commander in Chief of the Army and Navy of the United States." These provisions establish a deliberate division of authority: Congress decides whether the nation goes to war; the President commands military operations once war is authorized.

11. The Framers' intent is unmistakable. James Madison's notes from the Constitutional Convention record that the delegates changed the draft language from giving Congress power to "make war" to "declare war" with the express purpose of preserving the President's ability to "repel sudden attacks" when Congress cannot convene. Madison recorded on August 17, 1787: "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."

12. This narrow exception — defensive response to actual attack — is the only circumstance in which the President may initiate military action without prior congressional authorization. The exception exists because the Framers recognized that Congress might not be in session when an enemy attacks American soil. It does not authorize preemptive strikes, offensive operations, or military action based on anticipated threats.

13. The war powers clause reflects the founding purpose itself. The Declaration of Independence was a rejection of monarchy — of a sovereign who could commit countless lives to war by the wave of a single hand, without the consent of the governed. The Constitution's assignment of war powers to Congress embodies the core promise of American democracy: that Americans live and die by shared cause, not unilateral decree. Unilateral presidential war-

making is not merely an Article I violation. It is a return to the tyranny from which the nation declared independence.

B. The "Repel Sudden Attacks" Exception

14. The constitutional exception permitting presidential military action without congressional authorization is narrow and specific. It requires an actual attack on the United States or its forces. It requires circumstances in which congressional deliberation is impossible due to the immediacy of the threat. It authorizes only defensive response — repelling the attack — not offensive military campaigns.

15. The exception does not encompass preemptive military action based on anticipated threats. It does not authorize strikes to prevent hypothetical future attacks. It does not permit offensive operations on an ally's timeline. The President cannot manufacture an emergency by choosing to act before seeking authorization and then claim the manufactured urgency justified bypassing Congress.

16. When the President has time to prepare military operations — deploying naval strike groups, positioning aircraft and personnel, briefing congressional leadership, coordinating with foreign allies — the President has time to seek congressional authorization. The presence of extensive preparation negates any claim of emergency requiring immediate unilateral action.

C. The War Powers Resolution of 1973

17. The War Powers Resolution, 50 U.S.C. § 1541 et seq., enacted in 1973 over presidential veto, attempted to codify the constitutional limits on presidential war-making. The Resolution limits unilateral presidential action to situations involving "a national emergency created by

attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c).

18. The statutory language contemplates actual attack — not anticipated retaliation, not preemptive action, not hypothetical future threats contingent on an ally's military decisions. Even this statute, which some scholars argue unconstitutionally expanded presidential authority, does not authorize the military action at issue here.

19. The Resolution requires the President to report to Congress within 48 hours of introducing forces into hostilities and to terminate the use of force within 60 days unless Congress authorizes continuation. These procedural requirements do not cure the underlying constitutional defect when the initial military action lacks constitutional foundation.

20. The War Powers Resolution suffers from the same subjective qualifier defect that plagues other congressional delegations. Section 1543(a) requires presidential reporting when forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). But the statute provides no objective metrics: What is "imminent"? Twenty-four hours? Seven days? Weeks of preparation? What constitutes "clearly indicated"? Who determines clarity? The Executive self-certifies.

21. These subjective qualifiers create a Power Separations Vulnerability identical to that identified in tariff delegation statutes. *See* Memo I, Section X.A. Just as Section 122 of the Trade Act authorizes surcharges for "large and persistent" balance-of-payments deficits without defining "large" or "persistent," the War Powers Resolution authorizes presidential action when hostilities are "imminent" and "clearly indicated" without defining either term. The President

invokes statutory jurisdiction without demonstrating how the subjective conditions are met — and no pre-enforcement venue exists to adjudicate the question while preserving the status quo.

22. The "essentially objective" fallacy identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), applies with equal force. A standard is either objective or it is not; objectivity admits no degrees. "Clearly imminent" is no more objective than "essentially objective." The Iran war exposes this defect: the administration had weeks to prepare military operations, coordinate with Israel, brief congressional leadership, and deploy naval strike groups — yet claims the situation was so "imminent" that congressional authorization was impossible. The subjective qualifier permits the administration to define its own emergency. *See* Memo I, Section X.A (Power Separations Vulnerability in subjective statutory authorization conditions).

23. The Constitution is self-executing on the allocation of war powers and requires no statutory clarification. Article II, Section 2 designates the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." The operative phrase is "when called into the actual Service." Two mechanisms exist for this call: an attack upon the United States, or a congressional declaration of war.

24. An attack upon the United States *is* the call into service — self-executing and indisputable. An honorable service member does not wait for orders to prepare to defend the nation; the attack itself calls the troops into readiness as part of the oath they took. The President's role under Article II, Section 2 is to command and organize the defense — not to issue the call, but to direct forces already called by the attack. The calling and commanding occur concurrently as part of the same constitutional moment. No legislation is required. No

statute can add to or subtract from this reality. The Framers' change from "make war" to "declare war" preserved precisely this defensive authority.

25. Congressional declaration of war constitutes the legislative call into service for offensive operations. Article I, Section 8, Clause 11 vests in Congress alone the power to initiate hostilities against a nation that has not attacked the United States. When Congress declares war, Congress calls the armed forces into service, and the President then commands the authorized war. These two mechanisms — attack triggering defensive response, declaration authorizing offensive action — exhaust the constitutional framework.

26. The War Powers Resolution is therefore either surplusage or unconstitutional. To the extent it restates the President's authority to respond to attacks on the United States, it merely recites what the Constitution already provides and adds nothing. To the extent it purports to authorize offensive military operations for 60-90 days without congressional declaration, it attempts to transfer Article I, Section 8 authority through ordinary Article I legislation — which cannot be accomplished without Article V amendment. The 60-90 day window does not exist in the Constitution. The subjective qualifiers ("imminent," "clearly indicated") do not exist in the Constitution. The War Powers Resolution muddies what Madison made precise.

D. The Absence of Objective Standards for Separation of Powers Violations

27. No objective legal definition of "separation of powers violation" exists in American jurisprudence. The *Youngstown* framework describes zones of presidential power but does not define when a violation occurs. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring). Formalist approaches categorize powers but provide no violation test. Functionalist approaches employ balancing tests that are inherently subjective.

The political question doctrine identifies when courts will decline to hear cases but does not define what constitutes a violation. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

28. Yet the Constitution contains its own validity test. The Supremacy Clause declares that only laws "made in Pursuance" of the Constitution are supreme. U.S. Const. art. VI, cl. 2. This phrase is not surplusage — it establishes that not all federal action qualifies as constitutional. An executive action that violates the constitutional distribution of powers is not "made in Pursuance" and therefore does not bind the courts or the people. *See* Memo J, § II.M (Supremacy Clause's built-in validity test). The Supremacy Clause provides the test courts need: is the action "in Pursuance" of constitutional structure?

29. The consequence of this definitional void is that separation of powers disputes are resolved by power rather than law. The party in power defines its own limits. The Constitution becomes advisory. This memorandum proposes the Universal Compliance Test as an objective framework: if a governmental action cannot be derived through an unbroken chain of constitutional authorization, it constitutes a violation. The Iran war fails this test. The derivation breaks at congressional authorization.

30. The test reflects constitutional definition itself. "Separation of powers" and "non-delegation" are not two different doctrines — they are definitional synonyms. To "separate" powers means to keep them apart; to "delegate" means to transfer them together. These are antonyms. When the President wages war without congressional authorization, Congress's war power is exercised by the Executive, destroying separation by definition. This is not a policy question requiring judicial judgment — it is a logical identity the Constitution instantiates in structural form. *See* Memo J, § II.J (Definitional identity: separation = non-delegation).

31. Madison warned in Federalist No. 47 that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny." The separation of powers was designed as a structural check that prevents tyranny regardless of who holds office. But if violations cannot be objectively identified, the structure provides no check.

III. THE IRAN WAR: AN UNAMBIGUOUS ARTICLE I VIOLATION

A. The Factual Record

1. President Trump's Assertion of Unlimited Authority

32. President Trump's disregard for Article I congressional authority is systematic, not isolated. On February 20, 2026, when asked why he would not work with Congress on tariffs — an enumerated Article I, Section 8 power — President Trump responded: "I don't have to," and declared: "We have a right to do pretty much what we want." (White House press conference, Feb. 20, 2026) (public record subject to judicial notice under Fed. R. Evid. 201(b)(2)). The same President who claims "I don't have to" work with Congress on tariffs initiated the Iran war without congressional authorization — the attitude is consistent: Article I enumerated powers (whether tariffs under § 8, cl. 1 or war powers under § 8, cl. 11) are treated as suggestions rather than constitutional assignments.

33. The President's assertion directly contradicts the terms under which the states ratified the Constitution. Virginia's formal ratification declaration established that the federal government acts "only in those instances in which power is given by the Constitution" and that powers "may be resumed by them whensoever the same shall be perverted to their injury or oppression." *See* Memo J, § II.H (Virginia ratification declaration). The President's claim that

"we have a right to do pretty much what we want" violates not merely Article I but the foundational terms of Virginia's conditional ratification.

2. Speaker Johnson's Admission That No Attack on the United States Occurred

34. On March 2, 2026, Speaker Mike Johnson characterized the Iran strikes as defensive: "this was a defensive measure, a defensive operation," and "it's not something that the president was required... to come to Congress and get a vote first." (Speaker Johnson press conference, Mar. 2, 2026) (public record subject to judicial notice under Fed. R. Evid. 201(b)(2)). Yet Johnson's own words established that no attack on the United States had occurred or was imminent: "Israel was determined to act in their own defense here with or without American support. Why? Because Israel faced what they deemed to be an existential threat." Johnson continued: "if Israel... fired upon Iran, it took action against Iran to take out the missiles. Then they would've immediately retaliated against US personnel and assets."

35. The constitutional significance of this admission is dispositive. The threat to the United States was conditional — "if... then." The triggering event was Israel's planned action, not an attack on the United States. Johnson's own formulation establishes that the United States was not under attack: Israel was planning an offensive operation, and the United States chose to participate.

3. Secretary Rubio's Admission of Preemptive Strike

36. On March 3, 2026, Secretary of State Marco Rubio made the admission that destroys the administration's constitutional defense: "We knew that there was going to be an Israeli action. We knew that that would precipitate an attack against American forces. And we knew that if we didn't **preemptively** go after them **before they launched those attacks**, we would suffer higher casualties." (Secretary Rubio media statement, Mar. 3, 2026) (public record subject to judicial

notice under Fed. R. Evid. 201(b)(2)). Rubio used the word "preemptively"; he stated the strikes occurred "before they launched those attacks." Iran had not attacked the United States — the United States struck first based on anticipated Iranian retaliation to a planned Israeli offensive that had not yet occurred. Preemptive military action is, by definition, the opposite of defensive action; preemptive action is the initiation of hostilities — precisely what requires congressional authorization under Article I. The Secretary of State has admitted on the record that the Iran war began with an American preemptive strike, which is dispositive of the constitutional question.

B. The Destruction of the "Defensive" Claim

I. No Attack on the United States Occurred

37. The constitutional exception allowing presidential military action without congressional authorization requires an actual attack on the United States. No such attack occurred. Iran did not attack American territory or forces; the "threat" was a hypothetical future retaliation contingent on Israel choosing to launch an offensive operation that had not yet taken place. Johnson's own conditional formulation — "if Israel fired upon Iran... then they would've retaliated" — establishes the future and conditional nature of the threat. A conditional future threat triggered by an ally's planned offensive is not a "sudden attack" requiring immediate defensive response.

38. Weeks of preparation prove no emergency. The administration had extensive advance preparation time: naval strike groups deployed to the region over weeks; the Gang of Eight briefed more than seven days before the strikes; Speaker Johnson acknowledging "multiple conversations" with the President; Secretary Rubio briefing congressional leadership days in advance. If the President had weeks to deploy strike groups, position aircraft, coordinate with Israel, and brief select members, then the President had time to convene Congress and seek

authorization. The constitutional exception for repelling sudden attacks exists because Congress might not be in session when an enemy attacks American soil — here, the President had weeks of advance notice and Congress was in session. The President chose unilateral action.

39. Madison addressed this precise question in 1806. Facing an actual emergency — former Vice President Aaron Burr's armed conspiracy — Madison as Secretary of State refused to find implied emergency power for the President to deploy regular federal troops without explicit statutory authorization. Only when Congress enacted the Insurrection Act of 1807 did presidential authority to deploy regular troops exist. *See* Memo J, § II.N (Madison's 1806 opinion rejecting implied emergency power). If Madison refused emergency justification for unilateral executive action facing genuine armed conspiracy, the Iran war's manufactured emergency — created by choosing to act immediately rather than seeking authorization — cannot justify bypassing Congress.

40. The United States could have controlled Israel's timeline. Israel is the largest recipient of American military aid (~\$3.8 billion annually) and depends on the United States for weapons systems, ammunition resupply, intelligence sharing, UN Security Council vetoes, Iron Dome funding, and aerial refueling essential for long-range operations against Iran. The United States could have instructed Israel to delay its operation for fourteen days while the President sought congressional authorization, and Israel would have complied because it cannot conduct sustained operations against Iran without American support. The administration did not lack leverage to control the timeline; it chose not to exercise that leverage. The Constitution does not contain an exception for circumstances when allies want to move quickly.

41. Trapped American citizens prove the fraudulent emergency. Approximately 2,000 American citizens are now trapped in countries affected by the conflict. The State Department

issued urgent warnings for Americans to leave 14 countries in the Middle East — after the strikes began. Commercial flights have been canceled at rates exceeding ten times the pandemic disruption. The administration chose to endanger American citizens rather than provide warnings that would expose the constitutional violation: warning citizens would have revealed that strikes were imminent, proven that extensive planning had occurred, established that time existed for congressional authorization, and destroyed the "defensive emergency" justification. The 2,000 trapped Americans are direct victims of the constitutional violation — their safety was sacrificed to maintain the fraudulent "emergency" justification.

C. The Universal Compliance Test Applied

42. The Universal Compliance Test asks whether a governmental action can be derived through an unbroken chain of constitutional authorization. Applied to Operation Epic Fury, the derivation fails.

43. The President claims authority as Commander in Chief under Article II, Section 2. This provision grants the President command of the armed forces but does not grant authority to initiate hostilities. The President's authority to wage war derives from congressional authorization. No such authorization exists for Operation Epic Fury.

44. The sole exception — the power to repel sudden attacks — requires an actual attack on the United States. By the administration's own admission, no attack occurred. The triggering event was Israel's planned offensive, and the threat to American forces was hypothetical and future.

45. The derivation chain breaks at the requirement for congressional authorization. Operation Epic Fury cannot be constitutionally derived. This is a separation of powers violation.

IV. A FOREIGN ALLY'S TIMELINE SUBORDINATED THE CONSTITUTION

A. The Constitutional Inversion

46. The administration's defense reduces to a remarkable admission: the United States had to act on Israel's schedule. Speaker Johnson stated that "Israel was determined to act in their own defense here with or without American support." *See* ¶ 34, *supra*. The implication is that the United States had no choice but to join Israel's operation when Israel chose to launch it.

47. This framing inverts the constitutional structure. The Constitution does not subordinate American war-making to foreign nations' operational preferences. Article I assigns the war power to Congress precisely to ensure that the American people, through their elected representatives, decide when American blood and treasure will be committed to military conflict.

48. The administration chose Israel's operational timeline over the requirements of Article I. A foreign nation's military preferences took precedence over the United States Constitution. This is not defense, and it is not emergency. It is the subordination of constitutional structure to a foreign government's war plans.

B. The Choice to Bypass Congress

49. The administration faced a choice between constitutional compliance and immediate military action on Israel's preferred timeline. The administration chose Israel's timeline.

50. The President could have instructed Israel to delay its planned offensive for two weeks while he sought congressional authorization. Given Israel's dependence on American support, Israel would have complied. Congress could have debated and voted. If Congress authorized military action, the President could have proceeded with constitutional legitimacy. If Congress declined, the constitutional structure would have functioned as designed.

51. Instead, the President bypassed Congress, waged war on Israel's timeline, and now claims the manufactured urgency justified the constitutional violation. This reasoning is circular. The President created the "emergency" by choosing to act immediately rather than seeking authorization. The President cannot cite his own choice as justification for bypassing constitutional requirements.

V. WHY CONGRESS FAILED TO CHECK THE EXECUTIVE: FOREIGN CAPTURE UNDER INTERSTATE CIRCUIT STANDARDS

A. The Interstate Circuit Doctrine

52. In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222-27 (1939), the Supreme Court established that conspiracy may be inferred from circumstantial evidence when direct proof of agreement is unavailable. The Court held that "acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy." *Id.* at 227.

53. The Interstate Circuit doctrine recognizes that conspirators rarely memorialize their agreements. When parallel conduct among multiple actors would be against each actor's individual self-interest if undertaken unilaterally, and when "plus factors" suggest coordination rather than coincidence, the trier of fact may infer agreement from circumstantial evidence.

54. The doctrine does not distinguish based on the nationality of coordinating parties. The analytical framework asks whether parallel conduct makes sense without coordination. If anything, coordination with foreign actors to subvert constitutional governance faces heightened constitutional scrutiny, not relaxed evidentiary standards.

55. The structural mechanism enabling foreign capture operates through the constitutional dynamic Madison identified in Federalist No. 51: "Each department should have a will of its own." When one department receives another's power — or fails to assert its own — that department loses its independent will on that matter. *See* Memo J, § II.I (Each department's own will). Congress's failure to assert war powers reflects not merely political cowardice or foreign bribery in isolation; it reflects the structural reality that Congress, having delegated emergency authorities and failed to reclaim war powers across decades, lacks the institutional will to check executive overreach. The captured Congress is doubly captured: once by foreign influence, and structurally by its own prior abdications.

B. The Parallel Conduct: Eight Constitutional Violations Without Congressional Response

56. The evidence establishes that Congress has failed to respond to eight distinct constitutional violations. The failures are uniform across party lines, across constitutional domains, and across time. This pattern of parallel failure constitutes the first element of the Interstate Circuit analysis.

1. The FRE 901/607 Conflation (43 Days)

57. From July 7 through August 18, 2025, Speaker Mike Johnson deployed a fraudulent "credible evidence" framework claiming executive authority to pre-determine evidence credibility before releasing Epstein-related files to the public. The framework appeared fifteen times across seven public exhibits. *See Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-24 (Appendix K: Bondi and Patel's Coordinated Investigative Fraud by Refusal to Investigate and Prejudiced Evidence Dismissal) (documenting the systematic conflation of FRE 901 and 607 to withhold Epstein files from the American public).

58. The legal error was elementary. Federal Rule of Evidence 607 addresses witness credibility during testimony. Federal Rule of Evidence 901 establishes authentication requirements to support a finding by the constitutional fact-finder. No provision of the Federal Rules of Evidence grants executive officials authority to filter evidence based on their assessment of "credibility." This principle is taught in the first year of law school. *See* ECF No. 13-14 (App. A: Legislative and Executive Branch Ultra Vires Coordination) (establishing cross-branch coordination through manipulation of "credible evidence" terminology).

59. Congress contains over 100 members with law degrees. For 43 consecutive days, while Speaker Johnson publicly deployed this fraudulent framework fifteen times, not one member identified the error. Not one lawyer in Congress stated the obvious: the Federal Rules of Evidence do not authorize what the Speaker claimed.

2. The July 7 Memo Dontradiction

60. On July 7, 2025, the Department of Justice issued a memorandum claiming "exhaustive review" of the Epstein investigation. On October 1, 2025, Commerce Secretary Howard Lutnick publicly described Jeffrey Epstein as "the greatest blackmailer ever" and described video recording operations as Epstein's blackmail methodology.

61. This testimony directly contradicted the July 7 memo's claimed conclusions. When Senator Kennedy asked Attorney General Bondi whether she planned to investigate Secretary Lutnick's testimony, Bondi responded with legally absurd passive construction: "if he wants to talk to the FBI or the FBI wants to talk to him."

62. No member of Congress demanded investigation. No member noted the contradiction between the July 7 memo's claims and Lutnick's testimony. No oversight hearing was convened.

3. Article I War Powers Abdication

63. The President initiated major combat operations against Iran without congressional authorization. The administration's own statements establish that no attack on the United States had occurred, that the strikes were preemptive, and that the United States acted on Israel's timeline.

64. Congress has not meaningfully asserted its Article I authority. War powers resolutions face certain veto and lack override majorities. The constitutional check exists on paper while the Executive wages war.

4. Genesis Mission (99-1 Vote Nullified)

65. On July 1, 2025, the United States Senate voted 99-1 to remove a proposed 10-year moratorium on state-level AI regulation from H.R. 1. This near-unanimous vote explicitly preserved state authority to regulate AI companies.

66. Five months later, on November 24, 2025, President Trump issued the "Genesis Mission" Executive Order establishing comprehensive federal control over artificial intelligence development — precisely what Congress had rejected 99-1. *See* ECF No. 13-6 (Memo G: Genesis Mission Executive Order as Formalization of Criminal Appropriation Enterprise).

67. Under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring), when the President acts contrary to the expressed will of Congress, executive authority is at its "lowest ebb." Here, Congress voted 99-1. The President possesses no independent authority to override that determination.

68. Congressional response: Silence. No member declared the constitutional violation. No hearing was convened. No legislation was introduced to countermand the Order.

5. Presidential Authorship of Revenue Legislation

69. President Trump repeatedly characterized H.R. 1 as "my one big beautiful bill" in public statements. This constitutes a party admission under Federal Rule of Evidence 801(d)(2)(A) of presidential authorship of legislation. *See Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-7 (Memo H: Revenue Origination Analysis).

70. Article I, Section 7, Clause 1 provides: "All Bills for raising Revenue shall originate in the House of Representatives." Presidential authorship of revenue legislation violates the Origination Clause and creates constitutional impossibility — the President cannot present legislation to himself for review. *See* ECF No. 13-7.

71. Over 100 members of Congress hold law degrees. The Origination Clause is taught in first-year constitutional law. Congressional response: Silence. Not one lawyer in Congress stated the obvious: the President cannot author revenue legislation.

6. SCOTUS Shadow Docket Ultra Vires Jurisdiction (Eight Years)

72. Since at least 2017, the Supreme Court has exercised emergency docket jurisdiction without statutory authority. 28 U.S.C. § 2101(f) limits Supreme Court stay authority to cases "pending appeal" — yet the Court routinely grants stays in cases where no appeal is pending, no certiorari petition has been filed, and no lower court judgment exists to stay. *See Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-9 (Memorandum in Support I: Ultra Vires SCOTUS Shadow Docket Overreach Practice); *Kirchner v. Ellison*, No. 0:26-cv-00726-PJS-ECW (D. Minn.), ECF No. 26 Att. 13 (comprehensive 134-application historical analysis 1952-2026, appeal pending 8th Cir. No. 26-1615). The underlying SCOTUS emergency-docket analysis and shadow-docket jurisdiction-fraud schematic are available at ECF Nos. 13-81 and 13-82 and from the MN Chapter 8 standalone complaint.

73. The pattern extends across 80+ emergency applications from 2017 to 2026, including applications citing vacated precedent as jurisdictional foundation. The June 26, 2017 Travel Ban stay was vacated on October 10, 2017, destroying its precedential value — yet subsequent applications cite it as authority. *See* ECF No. 13-9, §§ IV-V.

74. Congressional response: Silence. No member has challenged the Court's systematic exercise of jurisdiction Congress never granted. No hearing has examined whether 28 U.S.C. § 2101(f) authorizes what the Court claims. The constitutional violation — judicial expansion of congressional limits — proceeds unchecked.

7. Birthright Citizenship: Three-Branch Constitutional Subversion (2025)

75. On January 20, 2025, President Trump issued an Executive Order purporting to redefine birthright citizenship under the Fourteenth Amendment, affecting an estimated ten million persons. The Government's litigation position advances the "primary purpose" fallacy — that constitutional provisions protect only the specific groups targeted when enacted, not the universal principles the text embodies. *See Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-12 (Birthright Citizenship Cases as Proof of Coordinated Constitutional Subversion).

76. The Supreme Court granted certiorari before judgment in *Trump v. CASA*, No. 24A884, bypassing normal appellate process through the same ultra vires shadow docket mechanism documented in ECF No. 13-9. The probability of neutral adjudication given the Court's 100% grant rate for Trump Administration emergency applications falls below statistical significance. *See* ECF No. 13-12, § VI.A.

77. Congressional response: Silence. No member has challenged executive reinterpretation of the Fourteenth Amendment through executive order. No member has objected to the Court's

procedurally irregular certiorari grants. The three branches coordinate to rewrite constitutional citizenship requirements while the constitutional structure fails to check any branch.

8. Article I, Section 8 Progress Clause Violation: Mass Copyright Appropriation (2025)

78. The artificial intelligence industry has constructed billion-dollar valuations on mass copyright appropriation — copying millions of copyrighted works without authorization, license, or compensation — in direct violation of Article I, Section 8, Clause 8's constitutional theory of innovation. The Progress Clause establishes: Protect creators → incentivize creation → promote progress. The AI industry inverts this: Appropriate works → build systems → refuse compensation. *See Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-3 (Memo D: Constitutional Violation of Article I Section 8 and Comprehensive Fair Use Defense Failure).

79. As of December 2025, no federal court has issued final judgment validating AI training as fair use. Multiple judges have denied motions to dismiss. The legal foundation upon which the entire AI industry rests remains untested and likely invalid. *See* ECF No. 13-3, § I.

80. Congressional response: Silence. No member has demanded enforcement of Article I, Section 8 against systematic appropriation. No hearing has examined whether the Progress Clause permits mass copyright violation. The enumerated constitutional power to "promote Progress... by securing... exclusive Right to Authors" is rendered nugatory while Congress watches.

C. Conduct Against Individual Self-Interest

81. Each failure documented above should expose individual members to significant political costs. A lawyer in Congress who fails to identify a first-year evidence law error for 43 days faces professional embarrassment. A member who ignores testimonial contradictions faces

constituent criticism for failed oversight. A member who abdicates Article I war powers faces historical condemnation. A member who permits executive nullification of a 99-1 vote faces the absurdity of their own vote being rendered meaningless.

82. If these were independent failures — individual members making individual mistakes — we would expect variation. Some lawyers would catch the FRE error while others missed it. Some oversight members would note the memo contradiction while others did not. Some members would vigorously assert war powers while others deferred.

83. Instead, we observe uniform failure across eight distinct constitutional violations. Zero of 100+ lawyers identified the FRE error for 43 days. Zero oversight members noted the July 7 memo contradiction. Near-zero meaningful assertion of war powers. Zero members protested executive nullification of a 99-1 vote. Zero lawyers challenged presidential authorship of revenue legislation.

84. Parallel failure of this magnitude does not occur through coincidence. When 100+ lawyers simultaneously miss first-year evidence law, when every oversight member simultaneously ignores obvious contradiction, when 535 members simultaneously abandon constitutional duty — the pattern demands explanation beyond incompetence.

D. The Plus Factors

1. AIPAC Funding (80-95% of Congress)

85. Public Federal Election Commission records establish that 80-95% of Congress receives campaign contributions from AIPAC-aligned political action committees and donors. This funding creates financial dependence on organizations whose primary purpose is advancing Israeli interests in American policy.

86. The funding is not incidental. AIPAC and aligned organizations systematically contribute to candidates across both parties, creating bipartisan dependence. Members who oppose Israeli interests face the prospect of funding withdrawal and opposition from well-financed primary challengers.

2. Israeli Agent's Admission of Removal Mechanism

87. On October 21, 2024, Mosab Yousef — identified as an Israeli agent — stated publicly that politicians in the West who oppose Israeli interests "are going to fall." *Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-74 (Ex. A-5, Section I).

88. When asked about the mechanism, Yousef explained: "We live in democracy and we have the right to bring them up and to bring them down. Those who agree with [terrorists], we don't want them in office." ECF No. 13-74.

89. This is not speculation about Israeli influence. It is recorded admission of the influence scheme by an Israeli agent speaking publicly. The threat is explicit: politicians who oppose Israeli interests will be removed through coordinated political action.

3. Netanyahu's "Weapons" Statement

90. On September 26, 2025, Israeli Prime Minister Benjamin Netanyahu described social media platforms as "weapons" and "tools of battle" for influence operations. *Kirchner v. Johnson*, No. 1:25-cv-02735-ACR (D.D.C.), ECF No. 13-77 (Ex. A-5, Section II).

91. Netanyahu stated: "We have to fight with the weapons that apply to the battlefields in which we're engaged. And the most important ones are the social media." He identified TikTok and X (formerly Twitter) as the "most important" weapons and stated regarding Elon Musk: "He's not an enemy. He's a friend." ECF No. 13-77.

92. Netanyahu explicitly described the need to "secure that part of our the base of our support in the United States that is being challenged systematically." This is the head of a foreign government describing information warfare operations targeting American public opinion and political support. ECF No. 13-77.

4. Observable Effect: Israel's Timeline Controls American War

93. The Iran war provides real-time demonstration of the influence operation's effect. By the administration's own admission, the United States attacked Iran because "Israel was determined to act with or without American support." Secretary Rubio stated the strikes occurred "preemptively" based on Israel's planned offensive.

94. The United States had leverage to control the timeline. Israel depends on American support. The administration could have instructed Israel to delay while seeking congressional authorization. Instead, the administration subordinated the Constitution to Israel's operational preferences. A foreign nation's military timeline took precedence over Article I.

E. Eliminating Innocent Explanations

95. Each innocent explanation fails on examination. **Mass incompetence** cannot explain why 100+ lawyers missed first-year evidence law for 43 days while those same members successfully perform constituent services, fundraise, and advance their careers — and incompetence does not explain why the failures uniformly serve foreign interests. **Partisan loyalty** fails because the failures cross party lines: Democrats and Republicans alike received AIPAC funding, failed to identify the FRE fraud, and have not meaningfully asserted war powers; the 99-1 vote was bipartisan yet both parties accepted its nullification. **Deference to Executive** does not explain lawyers failing to identify evidence law errors, oversight members

ignoring testimonial contradictions, or 99 Senators accepting nullification of their own bipartisan vote — these failures require active blindness, not mere deference.

96. Coincidence is statistically impossible: 100+ lawyers independently and simultaneously missing first-year evidence law for 43 days across 15 public deployments, while also missing an Origination Clause violation, while 99 Senators accept nullification of their vote, while all 535 members abandon war powers — the probability of independent action approaches zero.

F. The Inference Compelled

97. Under Interstate Circuit, when the factual pattern "excludes the possibility of independent action," the inference of coordination is compelled. The parallel conduct is established across eight distinct constitutional violations. The conduct is against individual self-interest. The plus factors are extensive: documented funding, recorded threats, explicit description of influence operations, and observable effect.

98. When innocent explanations are eliminated, the inference of coordination remains. Congress's pattern of parallel failure serves Israeli interests at the expense of American constitutional governance. The failures align with documented funding flows from AIPAC-aligned organizations. Israeli officials have publicly described their mechanisms for controlling Western politicians. The observable effect is American war-making on Israeli timeline.

99. Under Interstate Circuit standards, this circumstantial evidence supports the inference that Congress has been captured by foreign influence.

VI. THE BYPASS AS PROTECTION: WHY THE CONSTITUTIONAL VIOLATION SERVES THE CAPTURE

A. The Impossible Choice Facing Captured Members

100. Had President Trump sought congressional authorization for the Iran war, every member of Congress would have faced a recorded vote: YES or NO on war with Iran.

101. This would have created an impossible dilemma for captured members. American public opinion consistently opposes war with Iran. Constituents do not want their representatives voting to send Americans to die in another Middle Eastern conflict. A YES vote would generate constituent backlash, primary challenges, and electoral vulnerability.

102. But Israeli interests — and AIPAC-aligned donors — strongly support military action against Iran. Israel views Iran as an existential threat. The documented influence apparatus exists precisely to ensure American policy aligns with Israeli security priorities. A NO vote would trigger the mechanism Mosab Yousef described: "we have the right to bring them up and to bring them down."

103. A recorded vote would force each captured member to choose — publicly, permanently, on the record — between Israeli interests and constituent interests. This is the scenario captured members must avoid at all costs.

B. How Bypassing Congress Protects Captured Members

104. By bypassing Congress entirely, President Trump did captured members a favor. He removed the moment of exposure. No recorded vote exists. No member had to choose between AIPAC and constituents. The capture remains concealed.

105. This explains the otherwise inexplicable congressional response to an obvious Article I violation. No member loudly declares an Article I, Section 8 violation because a serious

declaration would require action, and action would require votes, and votes would force the impossible choice. Minority leaders can "huff and puff" without consequence because symbolic opposition costs nothing — leaders can posture for constituents while knowing their statements will produce no accountability moment. War powers resolutions are designed to fail because sponsors know resolutions will be vetoed and lack override majorities — the resolutions provide political cover without ever forcing the recorded choice on war itself.

106. The bypass is not a bug — it is a feature of the capture. The constitutional violation protects the captured.

C. The March 4, 2026 Senate Vote: the Irreversibility of Constitutional Harm

107. On March 4, 2026, the Senate voted on a war powers resolution sponsored by Senator Tim Kaine that would have required congressional authorization before further military action against Iran. The resolution failed 47-53.

108. The vote illustrates the irreversible character of separation of powers violations in the war-making context. Once hostilities are initiated without congressional authorization, any subsequent congressional action to limit military operations faces powerful counterarguments: that constraining the Executive would endanger American forces already deployed in hostile territory, and that limiting military response capability could invite retaliatory attacks on American soil.

109. This is the constitutional trap created by unauthorized initiation of hostilities. Before attack, Congress can deliberate whether American lives should be risked. After attack, the question shifts: would limiting war powers now place American lives in greater danger from foreign retaliation — not only abroad but domestically? President Trump himself has acknowledged the possibility of Iranian attacks on American soil following the preemptive

strikes. The constitutional violation thus creates conditions under which any congressional assertion of war powers authority can be characterized as inviting attacks on the American homeland.

110. The fifty-three senators who voted against the resolution may have been motivated by various considerations — partisan loyalty, policy preferences, or genuine concern for national security. But whatever their motivations, the structural point remains: the Executive's unauthorized initiation of hostilities placed Congress in a position where asserting its constitutional authority could be characterized as endangering both deployed forces and the American homeland.

111. This is precisely why the Framers required congressional authorization *before* hostilities commence. The constitutional structure was designed to ensure deliberation occurs when the question is "should we risk American lives?" — not after, when the question becomes "should we abandon Americans already at risk?" The unauthorized initiation inverts the constitutional framework and makes subsequent congressional assertion of authority appear irresponsible.

112. The constitutional violation is thus irreversible in character. Congress cannot undo the initiation of hostilities. It can only respond to a situation the Executive has already created — a situation in which the Executive's constitutional violation has reframed the question in terms favorable to continued executive action.

D. The Inadequacy of Legislative Remedy

113. Even had the war powers resolution passed, it could not have remedied the constitutional violation already committed. A resolution constraining future military action cannot undo the initiation of hostilities without authorization. Six service members are dead.

Two thousand citizens are trapped. The harm has occurred. Prospective constraint is not retrospective remedy.

114. Two remedies exist for a separation of powers violation already committed. First, Congress could formally recognize that the violation occurred and pursue executive accountability through its constitutional mechanisms — impeachment, censure, or investigation resulting in findings of fact. But a captured Congress will not recognize violations that serve its captors' interests. The fifty-three senators who voted against the resolution will not vote to recognize the constitutional violation their vote enabled.

115. Second, the courts could provide declaratory relief — a judicial determination that the Executive exceeded constitutional authority. Declaratory relief does not undo the harm, but it establishes the violation as a matter of law. It creates precedent. It provides the formal recognition that captured political branches refuse to provide.

116. This memorandum does not seek declaratory relief for the Iran war. That matter lies beyond the scope of *Kirchner v. Acosta* — not for want of standing, but because proper venue and subject matter jurisdiction for such a claim would lie elsewhere. But judicial recognition that separation of powers violations are cognizable — and adoption of an objective test for their identification — would establish the framework through which such relief could be pursued in the appropriate forum.

VII. THE HUMAN COST

A. The Diffusion of Moral Responsibility

117. Madison's separation of powers was designed not merely to distribute authority but to distribute responsibility. When Congress debates and votes on war, each representative must

confront the question, each name is recorded, and representatives must answer to constituents for their decisions — the constitutional structure forces specific, named individuals to bear the moral weight of authorizing war. When the President bypasses Congress, this moral architecture collapses: President Trump ordered the strikes but has demonstrated himself incapable of moral reflection; Speaker Johnson was briefed but did not vote and claims no responsibility; Congress was notified after the strikes began and made no decision; the military followed orders. No one voted to launch this war; no congressional record documents who said yes; the moral weight of mass killing is borne by no one.

118. Madison established in Federalist No. 49 that "the people are the only legitimate fountain of power" and that "the reason of the public" must control governmental operations. When the President wages war without congressional authorization, the fountain is bypassed entirely — executive discretion substitutes for legislative deliberation, and the will of the people is displaced. *See* Memo J, § II.G (The people as fountain of power). The separation of powers violation does not merely break a constitutional rule — it anonymizes mass death, severs the connection between decision and consequence, and permits everyone involved to claim they did not choose this outcome.

B. The Dignity Denied to Gold Star Families

119. Six American service members have died in Operation Epic Fury as of this writing, and the President has warned that more will follow. These families have been denied something the Constitution was designed to guarantee: the dignity of knowing their child died by the will of the American people. When Congress declares war, the nation collectively decides to ask its sons and daughters to risk their lives — representatives deliberate, votes are recorded, and the people through their elected officials authorize the sacrifice. A soldier who falls in a congressionally

authorized war dies in service to the constitutional republic, and the family can know with certainty that their loved one gave their life for their country, by the will of its people.

120. When the President wages unauthorized war, no such assurance exists. One person ordered American service members into combat, and the constitutional process that legitimizes sacrifice was bypassed. The six families who have lost their children must now live with an unanswerable question: Did my child give their life for their country and Constitution, by the will of the American people? Or was my child's life sacrificed by an executive acting in violation of the Constitution, in service of a foreign nation's strategic interests? Congressional declaration of war is not a procedural formality — it is the instrument by which the American people sanctify the sacrifice they ask of their children. Without it, the fallen are denied the dignity they earned.

C. The 2,000 Trapped American Citizens

121. Approximately 2,000 American citizens are trapped in countries affected by the conflict, unable to travel to safety. The State Department issued urgent warnings only after the strikes began; these citizens could have evacuated had they received advance warning. The administration chose to endanger these citizens rather than provide warnings that would have exposed the constitutional violation. The trapped Americans are direct victims of the Article I bypass — their safety sacrificed to maintain the fraudulent "emergency" justification.

VIII. THE SYSTEMIC FAILURE: 239 YEARS WITHOUT AN ENFORCEMENT MECHANISM

A. Historical Pattern of Unidentified and Unremedied Violations

122. From 1787 to March 4, 2026 — 239 years — the United States of America has failed to develop mechanisms to define what a separation of powers violation is, test for when one has occurred, or remedy one when it happens.

123. The Alien and Sedition Acts of 1798 were addressed only through political opposition and electoral defeat in 1800 — not through constitutional enforcement. President Lincoln's suspension of habeas corpus in 1861 was objected to by Chief Justice Taney and ignored — no remedy was provided. Japanese internment during World War II was deferred to by the courts and remedied only through a 1988 apology, decades after the fact. President Nixon's impoundment of appropriated funds was addressed by Congress passing the Budget Act — but Nixon left office due to Watergate, not judicial enforcement of separation of powers. The endless undeclared wars from 2001 to the present have produced sporadic complaints but no remedy.

124. The Iran war continues this pattern. The violation is obvious. The mechanism for identification and remedy does not exist.

B. The Universal Compliance Test as the Missing Constitutional Component

125. The separation of powers — Madison's primary structural safeguard against tyranny — has operated for 239 years without an objective definition, an objective test, or an enforcement mechanism.

126. The Universal Compliance Test proposed in this memorandum addresses this gap. The test asks whether a governmental action can be derived through an unbroken chain of

constitutional authorization. If the derivation fails at any step, a violation exists. The test is objective — it does not depend on policy preferences, partisan alignment, or judicial intuition.

127. The Iran war fails this test. The President claims Commander in Chief authority. That authority does not include initiating hostilities without congressional authorization except to repel sudden attacks. No sudden attack occurred. The derivation fails. The violation exists.

C. The Identical Problem: Inability to Identify Separation of Powers Violations

128. The Iran war and *Kirchner v. Acosta* present the identical constitutional problem: the absence of any mechanism to identify when a separation of powers violation has occurred. In the Iran war, a President exceeded his constitutional authority by initiating hostilities without congressional authorization. In *Kirchner v. Acosta*, a federal prosecutor exceeded presidential pardon power by granting immunity that only the President may constitutionally bestow. Both are separation of powers violations. Neither can be remedied without first being identified as such.

129. The consequences of unidentified separation of powers violations compound over time. Defendant Acosta's 2008 Non-Prosecution Agreement — a separation of powers violation that exceeded presidential pardon power — resulted in eighteen years of non-accountability for child sex trafficking. Jeffrey Epstein continued his crimes. Victims continued to suffer. Co-conspirators remained unidentified. The constitutional violation was never recognized, and its consequences multiplied across nearly two decades.

130. The Iran war demonstrates that unauthorized wars produce similarly compounding consequences. Six American service members are already dead. More will follow. Two thousand Americans are trapped abroad. Regional destabilization will persist for years. Alliances are strained. And because no mechanism exists to identify the separation of powers

violation, these consequences will accumulate without constitutional remedy — just as eighteen years of child sex trafficking accumulated without remedy in the Acosta matter.

131. This memorandum does not ask the Court to adjudicate the Iran war. It asks the Court to recognize that the same constitutional deficiency — the inability to identify separation of powers violations — enables both the ongoing war and the eighteen-year failure in *Kirchner v. Acosta*. The remedy is identical: judicial recognition that separation of powers violations are cognizable and adoption of an objective test for their identification. Without such recognition and such a test, both the Acosta violation and the Iran war violation will join the 239-year pattern of constitutional failures that erode the Republic one unidentified violation at a time.

IX. CONCLUSION

A. The Life-and-Death Urgency

132. The events documented herein establish that judicial recognition of separation of powers violations is not an academic question — it is a matter of life and death. Six service members are dead, more will die, children are dead, citizens are trapped, and the constitutional mechanism that was supposed to prevent all of this could not function because no court has ever established an objective test for identifying when it has been violated.

133. For 239 years, no objective test existed to fill this void. The Universal Compliance Test proposed herein is not a novel invention — it is derived directly from Madison's *Report on the Virginia Resolutions* (1800), which established that "the same argument results from the same consideration": if an interpretive method is valid for one constitutional clause, the same method must be valid for parallel clauses. *See* Memo J, § III.A (Madison's textual consistency principle). The test has existed in Madison's writings for 226 years; what has been missing is judicial

recognition that such a test can and must be applied. Its objectivity does not depend on judicial recognition — App. A applies the six-step test to forty-three coordinate government actions, including thirty-six historical validation cases spanning 154 years of Supreme Court jurisprudence (1872-2021), and the test correctly identifies every action the Court struck down (36/36).

134. The courts can decline to recognize the test, but its objectivity remains. If the courts decline to recognize separation of powers violations as justiciable, Madison's warning is fulfilled: "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." *James Madison, Federalist No. 48* (February 1, 1788); *see* Memo J, § II.F (Parchment barriers). The Constitution without an enforcement mechanism is parchment.

B. The Relief Requested

135. Plaintiff respectfully requests that this Court: (1) recognize that separation of powers violations are judicially cognizable and not barred by political question doctrine when an objective test can be applied; (2) adopt the Universal Compliance Test or a substantially similar objective framework for identifying separation of powers violations; and (3) apply that test to Defendant Acosta's conduct in exceeding presidential pardon power through the 2008 Non-Prosecution Agreement.

136. The courts are the last remaining check. This Court is asked to provide what 239 years of constitutional practice has failed to establish: an objective mechanism by which the separation of powers can be enforced. The lives lost and the lives at stake demand nothing less.

Respectfully submitted,

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