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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

JOSEPH KIRCHNER,
Plaintiff,

Case No. _____

vs.

ALEXANDER ACOSTA, et al.,
Defendants.

**MEMORANDUM B: THE
MADISONIAN SEPARATION OF
POWERS OBJECTIVE
COMPLIANCE TEST**

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I. Introduction

1. This Memorandum establishes a universal test for determining whether coordinate government action impermissibly delegates an assigned enumerated power in violation of the constitutional structure. The central question this test answers is:

Does coordinate action X impermissibly delegate an assigned enumerated power?

2. James Madison, the "Father of the Constitution," never used the phrase "separation of powers" in his most systematic treatment of governmental structure. In Federalist Nos. 47-51 — the definitive exposition of how the Constitution distributes authority — Madison employed different, more precise terminology: **"distribution of power among its constituent parts."**

3. This terminological distinction matters fundamentally to constitutional analysis. Madison's language describes a *structural distribution* that inherently precludes delegation. Modern terminology has abstracted the concept, permitting arguments that "separation" can be "adjusted" or "relaxed." Madison's concrete terms foreclose such arguments.

Modern Phrase	Madison's Terminology
"Separation of powers"	"Distribution of power among its constituent parts"
"Branches of government"	"Departments"
"Separation"	"Separate and distinct"
"Concentration of power"	"Accumulation"
"Abuse of power"	"Encroachment" / "Usurpation"
"Checks and balances"	"Balance and check" (two sequential concepts)

4. The term "separation" implies a relationship that can be adjusted — separated more or separated less. The term "distribution" implies a completed allocation — powers were distributed to specific departments and that distribution IS the constitutional settlement. Departments cannot redistribute what they received.

5. The test derives from Madison's principle of textual consistency articulated in the *Report on the Virginia Resolutions*: "the same argument results from the same

consideration." It operationalizes the Supremacy Clause hierarchy to evaluate claimed derivations of constitutional authority.

6. The test is universally applicable to any enumerated power delegation question — including prosecutorial immunity-granting authority, tariff power, emergency authority, and any future claimed delegation. Applied here, it demonstrates that prosecutorial discretion, insofar as it claims authority to grant immunity from prosecution, lacks constitutional foundation under both claimed sources: the Pardon Power (Article II, Section 2) and the Take Care Clause (Article II, Section 3).

II. THE MADISONIAN FOUNDATION: DISTRIBUTION, NOT SEPARATION

A. Montesquieu: Madison's Cited Authority

7. Madison identified Montesquieu as his primary authority on governmental structure:

"The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu."

James Madison, Federalist No. 47 (January 30, 1788).

8. Montesquieu's core principle defined liberty in structural terms:

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another."

Montesquieu, The Spirit of Laws, Book XI, Chapter 6 (1748).

9. Liberty, for Montesquieu, was not merely the absence of oppression — it was a *structural condition* where governmental organization prevents any person from fearing another's power. This required absolute separation of the three governmental functions:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

Id.

1 **10.** Montesquieu's ultimate warning:

2 **"There would be an end of every thing,** were the same man, or the same
3 body, whether of the nobles or of the people, to exercise those three
4 powers, that of enacting laws, that of executing the public resolutions, and
5 of trying the causes of individuals."

6 *Id.*

7 **11.** Madison adopted Montesquieu's structural understanding of liberty. The
8 Constitution's distribution of powers was not an administrative convenience — it was
9 the mechanism by which liberty is preserved. When that distribution is disturbed
10 through delegation, liberty itself is compromised.

11 **B. Distribution Among Separate and Distinct Departments**

12 **12.** Madison titled Federalist No. 47 not "The Separation of Powers" but:

13 "The Particular Structure of the New Government and the **Distribution of**
14 **Power Among Its Different Parts**"

15 **13.** This title reveals Madison's conceptual framework. Powers are *distributed* to
16 specific departments — a one-time constitutional allocation. Departments cannot re-
17 distribute what they received. The distribution was accomplished by the Constitution
18 itself and is not subject to inter-branch negotiation.

19 **14.** Madison's most famous formulation:

20 **"The accumulation of all powers, legislative, executive, and judiciary,**
21 **in the same hands,** whether of one, a few, or many, and whether
22 hereditary, self-appointed, or elective, **may justly be pronounced the**
23 **very definition of tyranny."**

24 *James Madison, Federalist No. 47 (January 30, 1788).*

25 **15.** Madison's structural requirement:

26 "The legislative, executive, and judiciary departments **ought to be**
27 **separate and distinct."**

28 *Id.*

29 **16.** "Separate and distinct" is more explicit than "separated." The departments
30 must be both **separate** (not combined or merged) and **distinct** (clearly differentiated,

not blurred). Delegation violates both requirements — it combines what must be separate and blurs what must be distinct.

17. Madison clarified the permissible versus impermissible relationship:

"He did not mean that these departments ought to have **no partial agency in, or no controul over, the acts of each other**. His meaning... can amount to no more than this, that where **the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department**, the fundamental principles of a free constitution, are subverted."

Id.

18. The critical distinction: **Permissible** coordination includes partial agency in another's acts and constitutional control over others—this is checks and balances.

Impermissible coordination occurs when the WHOLE power of one department is exercised by another, producing accumulation in the same hands and subversion of fundamental principles.

19. The Constitution provides for "partial agency" — the presidential veto, Senate confirmation of appointments, judicial review of legislation. These are checks and balances. But "partial agency" is not "wholesale transfer." When Congress delegates its legislative power to the Executive, it does not exercise partial agency — it surrenders the WHOLE power to another department's hands.

C. Balance and Check: Madison's Sequential Framework

20. The modern phrase "checks and balances" — spoken as if a single concept — obscures Madison's actual framework. In the Federalist Papers, the phrase used is "**balance and check**" — two distinct, sequential operations:

Operation	Function	Constitutional Mechanism
BALANCE	Distribute powers among departments	Art. I, § 1; Art. II, § 1; Art. III, § 1
CHECK	Provide defensive mechanisms against abuse	Veto, confirmation, judicial review, impeachment

21. Madison's sequence is deliberate: one must **first balance** the distribution of power before one can **check** the exercise of that power. John Adams may have been the first to reverse the order to "checks and balances" in his 1787 *A Defense of the Constitutions of Government of the United States of America*, but Madison's terminology preserved the logical priority of distribution.

22. This distinction is fatal to delegation claims. Delegation collapses **both** operations:

Madisonian Operation	Effect of Delegation
BALANCE destroyed	Power redistributed from assigned department to another
CHECK destroyed	No separate department remains to check the accumulated power

23. The modern conflation of "checks and balances" into a single phrase permits arguments that the Constitution creates a flexible "checking" system that can be "adjusted." Madison's actual framework forecloses such arguments: the **balance** is the constitutional settlement; the **checks** operate only upon that settled distribution. One cannot "check" a power that has been delegated away from its assigned department.

D. The Incompatibility Clause: Separation Written Into Explicit Text

24. The Constitution does not merely imply separation of powers through structure — it contains explicit textual prohibitions against the same person exercising powers of different departments. Article I, Section 6, Clause 2 provides:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and **no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.**"

U.S. Const. art. I, § 6, cl. 2.

25. This clause contains two distinct prohibitions: The **Ineligibility Clause** prevents legislators from taking executive offices created or enhanced during their term—stopping legislators from creating offices for themselves. The **Incompatibility Clause** prohibits any federal officer from simultaneously serving in Congress—preventing personal union of legislative and executive power.

26. **The Incompatibility Clause IS separation of powers written into explicit constitutional text.** The Framers did not rely solely on structural inference. They wrote a direct prohibition against any person simultaneously holding legislative and executive office.

27. This answers those who claim separation of powers is merely implied, not explicit. The Framers knew how to write explicit prohibitions. The Incompatibility Clause embodies the separation principle in mandatory, self-executing text.

E. The a Fortiori Argument Against Delegation

28. If the Constitution explicitly prohibits the same **person** from holding offices in different branches simultaneously, it necessarily prohibits the same **branch** from exercising powers assigned to another branch through delegation.

29. The logical progression:

Level	Prohibition	Danger
Personal	Same person cannot be legislator AND executive officer	One individual accumulates power
Institutional	Same branch cannot exercise legislative AND executive power	Entire branch accumulates power

30. **Personal accumulation is the lesser danger.** One person holding offices in two branches affects only that person's exercise of power during their tenure.

Institutional accumulation is the greater danger. An entire branch exercising another branch's powers affects ALL exercises of that power, potentially in perpetuity.

31. **The a fortiori principle:** If the Constitution explicitly forbids the lesser danger (personal accumulation), it necessarily forbids the greater danger (institutional

1 accumulation). The Framers would not prohibit a Senator from becoming Treasury
2 Secretary while permitting Congress to delegate all Treasury policy to the Executive.

3 **32.** Applied to delegation:

- 4 • The Incompatibility Clause prevents Representative X from simultaneously
5 serving as Agency Director Y
- 6 • But delegation permits the *entire Executive Branch* to exercise *all legislative*
7 *power* Congress chooses to delegate
- 8 • This produces institutional accumulation far exceeding what any personal union
9 could accomplish
- 10 • If personal union is forbidden, institutional merger through delegation is
11 forbidden a fortiori

12 **33.** The Framers did not need to write "Congress shall not delegate its powers"
13 because the structural distribution of powers, combined with the Incompatibility
14 Clause's explicit embodiment of separation, made such delegation categorically
15 impermissible. The explicit prohibition of the lesser necessarily implies prohibition of
16 the greater.

17 **F. Parchment Barriers and the Encroaching Spirit of Power**

18 **34.** Madison posed the central question in Federalist No. 48:

19 "Will it be sufficient to mark, with precision, the boundaries of these
20 departments, in the constitution of the government, and to trust to these
21 **parchment barriers** against the encroaching spirit of power?"

22 *James Madison, Federalist No. 48* (February 1, 1788).

23 **35.** His verdict on constitutional text alone:

24 "Experience assures us, that **the efficacy of the provision has been**
25 **greatly overrated**; and that some more adequate defense is indispensably
26 necessary for the more feeble, against the more powerful, members of the
27 government."

28 *Id.*

29 **36.** Madison warned that written constitutional limits, standing alone, are
30 insufficient protection. This warning applies with full force to claims that the
31 Constitution's distribution of powers can be "delegated" or "adjusted" — such

arguments treat constitutional structure as mere "parchment barriers" to be overcome when inconvenient.

37. The nature of power itself requires structural defense:

"Power is of an encroaching nature, and... it ought to be effectually restrained from passing the limits assigned to it."

Id.

38. Madison's most vivid image — the legislative vortex:

"The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

Id.

39. This warning applies in both directions. Madison warned against overlooking legislative danger:

"They seem never to have recollected the danger from legislative usurpations, which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."

Id.

40. Legislative usurpation produces the same tyranny as executive usurpation. The direction of accumulation is irrelevant — only accumulation itself produces tyranny. Whether Congress absorbs executive functions or the Executive absorbs legislative functions through delegation, the result is identical: accumulated power and diminished liberty.

41. Madison identified the mechanism by which delegation advances:

"Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes, on the co-ordinate departments."

Id.

42. Delegation is one such "complicated and indirect measure" — masking the transfer of power under claims of efficiency, expertise, or necessity. The encroachment appears gradual and technical; the constitutional violation is fundamental.

G. The People as Fountain of Power

43. Madison grounded all governmental authority in popular sovereignty:

"As the people are the only legitimate fountain of power, and it is from them that the constitutional charter... is derived."

James Madison, Federalist No. 49 (February 2, 1788).

44. From this principle flows departmental equality:

"The several departments being perfectly co-ordinate by the terms of their common commission, none of them... can pretend to an exclusive or superior right."

Id.

45. The departments are "co-ordinate" — equal in constitutional status. No department may claim superiority over another or absorb another's powers. Delegation disrupts this co-ordinate equality by permitting one department to exercise another's constitutional function.

46. The standard for governance:

"It is the reason, alone, of the public, that ought to control and regulate the government."

Id.

47. When Congress delegates legislative power to the Executive, public reason no longer controls those delegated matters. Executive discretion — not legislative deliberation reflecting public reason — determines policy. The constitutional design is inverted.

H. Virginia's Ratification Declaration: the Terms of the Compact

48. Virginia ratified the Constitution on June 25, 1788 — but not unconditionally. The Virginia Convention issued a formal declaration stating the "sense" in which they ratified. This declaration constitutes the binding terms of Virginia's entry into the constitutional compact:

"We, the delegates of the people of Virginia... DO, in the name and in behalf of the people of Virginia declare and make known that the powers granted under the Constitution, being derived from the people

1 of the United States, may be resumed by them whensoever the same
2 shall be perverted to their injury or oppression; and that every power
3 not granted thereby remains with them, and at their will. That,
4 therefore, no right of any denomination can be cancelled, abridged,
5 restrained, or modified, by the Congress, by the Senate or House of
6 Representatives, acting in any capacity, by the President, or any
7 department or officer of the United States, except in those instances in
8 which power is given by the Constitution for those purposes..."

9 *Virginia Ratification Declaration* (June 25, 1788).

10 **49.** Madison explained the constitutional significance of this declaration in the
11 Report of 1800:

12 "Here is an express and solemn declaration by the Convention of the State,
13 that they ratified the Constitution **in the sense** that no right of any
14 denomination can be cancelled, abridged, restrained, or modified, by the
15 Government of the United States, or any part of it, **except in those**
16 **instances in which power is given by the Constitution.**"

17 *James Madison, Report of 1800* (January 7, 1800).

18 **50.** Virginia's ratification declaration establishes foundational principles:

- 19 • **Popular sovereignty:** Powers "derived from the people" means government is
20 agent, not principal.
- 21 • **Resumption right:** Powers "may be resumed by them whensoever... perverted"
22 means the People retain ultimate authority.
- 23 • **Reserved powers:** "Every power not granted thereby remains with them" means
24 no implied federal powers exist.
- 25 • **At their will:** Powers remain "at their will" means ongoing popular control is
26 required.
- 27 • **Express authorization only:** "Except in those instances in which power is given
28 by the Constitution" means only enumerated powers exist.

29 **51. Virginia's declaration forecloses delegation.** The Constitution assigns
30 specific powers to specific branches. Virginia ratified on the condition that rights
31 cannot be abridged "except in those instances in which power is given by the
32 Constitution for those purposes." The Constitution gives the pardon power to the
33 President — not to prosecutors. The Constitution gives the tariff power to Congress —
34 not to the Executive.

35 **52. Indefinite delegation removes popular control.** Virginia declared that
36 powers remain with the people "at their will." Standing delegation to the Executive
37 removes the ongoing legislative deliberation that maintains popular control through

1 elected representatives. When Congress delegates, it removes the matter from ongoing
2 popular will expressed through the legislative process.

3 **53. The ratification terms are binding.** Virginia did not ratify an unlimited
4 Constitution. It ratified a Constitution of enumerated, non-delegable powers.
5 Arguments defending delegation "are at variance with the reasoning which then
6 justified the Constitution, and invited its ratification." The terms of ratification define
7 the scope of the compact.

8 **I. Each Department's Own Will**

9 **54.** Madison's foundational principle for departmental independence:

10 **"Each department should have a will of its own."**

11 *James Madison, Federalist No. 51* (February 6, 1788).

12 **55.** This requirement is fatal to delegation claims. If Congress delegates
13 legislative power to the Executive, the Executive no longer exercises its own will on
14 those matters — it exercises Congress's delegated authority, substituting Congress's
15 judgment for its own independent constitutional function. The department loses its
16 independent will.

17 **56.** Madison on self-governance:

18 "In framing a government which is to be administered by men over men,
19 the great difficulty lies in this: **you must first enable the government to**
20 **control the governed; and in the next place oblige it to control itself."**

21 *Id.*

22 **57.** Self-control requires structural independence. Delegation defeats self-control
23 by merging functions that the Constitution separated for mutual restraint. When the
24 Executive exercises legislative power, no separate department remains to check that
25 exercise.

26 **58.** Madison's structural mechanism:

27 **"Ambition must be made to counteract ambition.** The interest of the
28 man must be connected with the constitutional rights of the place."

29 *Id.*

1 **59.** Delegation severs this connection. When one department receives another's
2 power, ambition no longer counteracts ambition — it aligns ambitions in the direction
3 of accumulation. The Executive, receiving legislative power, has no institutional
4 interest in restraining that power. The constitutional check is eliminated.

5 **60.** The double security:

6 "In the compound republic of America, the power surrendered by the
7 people **is first divided between two distinct governments**, and then the
8 portion allotted to each subdivided among distinct and separate
9 departments. Hence **a double security arises to the rights of the**
10 **people.**"

11 *Id.*

12 **61.** Delegation destroys both levels of this double security — it undermines the
13 subdivision among departments that Madison deemed essential to liberty.

14 **J. The Definitional Identity: Separation of Powers is Non-Delegation**

15 **62.** The terms "separation of powers" and "non-delegation" are not two different
16 doctrines requiring separate analysis. They are the *same thing* — two expressions of
17 identical constitutional meaning:

Term	Definition
Separation of Powers	Each branch exercises only its assigned enumerated powers
Non-Delegation	Each branch exercises only its assigned enumerated powers
Purpose of Both	Direct preservation of the People's rights

18 **63. Definitional equivalence:** You cannot have "separation" while also having
19 "delegation." The concepts are mutually exclusive by definition. To "separate" powers
20 means to keep them apart. To "delegate" powers means to transfer them together.
21 Separation and delegation cannot coexist — they are antonyms.

22 **64. The modern error:** Contemporary jurisprudence treats "non-delegation" as a
23 judicial doctrine that can be debated, weakened, or abandoned — as if it were a policy
24 choice courts may relax when convenient. But non-delegation is not a doctrine *about*

the Constitution. It IS the Constitution's structural meaning. "Separation of powers" and "non-delegation" are synonyms.

65. When Congress delegates to the Executive:

- It does not "adjust" separation of powers — it *abolishes* separation of powers for the delegated matter
- It does not "relax" the non-delegation doctrine — it *violates* the constitutional structure
- It does not merely reorganize government — it *directly diminishes* the People's rights

66. The complete equation:

Separation of Powers = Non-Delegation of Assigned Enumerated Powers = Direct Preservation of the People's Rights

67. These are three expressions of one constitutional principle. Madison's framework, Virginia's ratification terms, and the Constitution's text all confirm this identity. The Founders did not create a government of separated powers that could later delegate those powers at will. They created a government where separation IS non-delegation, and non-delegation IS the preservation of liberty.

K. Madison's Three-Part Test for Federal Authority

68. In the Report of 1800, Madison articulated the definitive test for determining whether the federal government possesses any claimed power:

"The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power — above all, if it be expressly forbidden, by a declaratory amendment to the Constitution — the answer must be, that the Federal Government is destitute of all such authority."

James Madison, Report of 1800 (January 7, 1800).

69. Madison's three-part test:

Step	Question	If Answer is "No"
1	Is the power expressly delegated ?	Federal government lacks authority

2	Is it necessary and proper to carry into execution an express power?	Federal government lacks authority
3	Is it expressly forbidden by a declaratory amendment?	Federal government is "destitute of all such authority"

70. This test is cumulative and dispositive. If a claimed power fails ANY prong, "the Federal Government is destitute of all such authority." There is no residual implied power, no inherent authority, no emergency exception.

71. Applied to prosecutorial immunity:

Step	Analysis	Result
1	Is immunity-granting power expressly delegated to prosecutors?	No — delegated only to President (pardon power)
2	Is it necessary and proper to execute an express prosecutorial power?	No — prosecution requires no immunity-granting
3	Is it expressly forbidden?	The structure forbids accumulation

72. Prosecutors are "destitute of all such authority" to grant immunity. No constitutional derivation exists.

73. The Article I / Article V Distinction. Opponents of this framework will argue that Article I, Section 8, Clause 18 grants Congress plenary authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." This argument conflates two distinct constitutional mechanisms:

Mechanism	Function	Scope
Article I Legislation	Implement powers already vested by the Constitution	Laws "in Pursuance" of existing constitutional grants
Article V Amendment	Modify the constitutional structure itself	Changes to enumerated powers, structural limits, or rights

74. The Necessary and Proper Clause authorizes Congress to *implement* constitutional powers—not to *circumvent* constitutional limits. A law that contravenes the Supremacy Clause—one that is NOT "in Pursuance" of the Constitution—cannot

1 be enacted under Article I regardless of how "necessary" Congress deems it. Such
2 structural modifications require Article V amendment.

3 **75.** This distinction is textually explicit. The Necessary and Proper Clause
4 authorizes laws "for carrying into Execution the foregoing Powers, and all other
5 Powers **vested by this Constitution.**" The clause presupposes the existence of
6 constitutionally vested powers and authorizes their *execution*—not their *expansion*,
7 *transfer*, or *elimination*. Congress cannot use the Necessary and Proper Clause to vest
8 powers the Constitution did not vest, transfer powers the Constitution assigned
9 elsewhere, or eliminate structural limits the Constitution imposed.

10 **76. Bond v. United States and the Unresolved Question.** In *Bond v. United*
11 *States*, 564 U.S. 211 (2011), the Supreme Court recognized individual standing to
12 challenge federal action exceeding constitutional limits but expressly declined to reach
13 the merits of the Necessary and Proper Clause question:

14 "We do not address... the Government's argument that Congress may
15 regulate the defendant's conduct under the Necessary and Proper Clause."

16 *Bond*, 564 U.S. at 226 n.9.

17 **77.** The Court's reservation leaves open the precise question this framework
18 addresses: whether the Necessary and Proper Clause authorizes Congress to legislate
19 structural changes that would otherwise require Article V amendment. Madison's
20 framework answers definitively: it does not. Laws that redistribute constitutionally
21 assigned powers, that accumulate what the Constitution distributed, or that eliminate
22 structural safeguards the Framers embedded—these are not "necessary and proper"
23 implementations of existing powers. They are structural modifications requiring
24 Article V ratification by the States.

25 **78. The Logical Proof.** If Congress could use Article I to accomplish what
26 Article V requires, then Article V would be surplusage—the Framers would have
27 written an amendment procedure that Congress could circumvent through ordinary
28 legislation. But the Constitution contains no surplusage. Article V exists because
29 some changes *cannot* be accomplished through Article I. The question is only which
30 changes require which mechanism. The answer is structural: Article I implements;

Article V modifies. Delegation of assigned enumerated powers is modification, not implementation.

L. "A More Perfect Union": the Constitutional Design for Self-Correction

79. The Preamble to the Constitution begins not with a claim of perfection, but with an acknowledgment of imperfection and the aspiration to correct it:

"We the People of the United States, in Order to form **a more perfect Union...**"

U.S. Const. pmb.

80. The comparative "more perfect" is deliberately chosen. The Founders did not claim to establish a perfect union—they sought a *more* perfect one than existed under the Articles of Confederation. This language acknowledges that the constitutional project is ongoing, that mistakes would be made, and that correction would be necessary.

81. The Preamble's purpose clause extends this obligation across generations:

"...and secure the Blessings of Liberty to ourselves **and our Posterity...**"

Id.

82. "Posterity" imposes a forward-looking duty. The constitutional settlement is not merely for those who ratified it, but for all future generations. This creates an affirmative obligation to identify and correct constitutional errors that have accumulated over time—even errors that have become normalized through repetition and judicial acquiescence.

83. Unconstitutional practices do not become constitutional through longevity. A violation repeated for decades remains a violation. The Preamble's aspiration toward "a more perfect Union" anticipates precisely this circumstance: that deviations from constitutional structure would occur, become entrenched, and require correction for the sake of posterity.

84. The Universal Compliance Test presented in this Memorandum is not an attack on established governance—it is the fulfillment of the Preamble's design. The Founders knew that "the encroaching spirit of power" (Federalist No. 48) would

1 produce accumulated violations. They built a Constitution capable of self-correction.
2 The test operationalizes that capability by providing an objective mechanism to
3 identify where correction is required.

4 **85.** Madison himself recognized that constitutional fidelity requires ongoing
5 vigilance:

6 "It is proper to take alarm at the first experiment on our liberties... The
7 freemen of America did not wait till usurped power had strengthened itself
8 by exercise, and entangled the question in precedents."

9 *James Madison, Memorial and Remonstrance Against Religious Assessments (1785).*

10 **86.** The objection that the Compliance Test would disturb settled practices inverts
11 the constitutional order. Settled *unconstitutional* practices are precisely what "a more
12 perfect Union" requires us to unsettle—not for the sake of disruption, but for the sake
13 of posterity's liberty.

14 **M. The Supremacy Clause's Built-in Validity Test**

15 **87.** The Supremacy Clause (Article VI, Clause 2) contains its own test for the
16 validity of federal laws:

17 "This Constitution, and the Laws of the United States which shall be made
18 **in Pursuance thereof**; and all Treaties made, or which shall be made,
19 under the Authority of the United States, shall be the supreme Law of the
20 Land..."

21 *U.S. Const. art. VI, cl. 2.*

22 **88.** The phrase "in Pursuance thereof" establishes an object-subject relationship
23 between the Constitution and federal laws: **The Constitution** serves as the object—the
24 standard to be pursued and followed. **Laws of the United States** are the subject—
25 derivative enactments that must pursue and conform to the Constitution. **"In**
26 **Pursuance thereof"** operates as the validity condition—only conforming laws qualify
27 as supreme.

28 **89. Not all federal laws are supreme.** The Supremacy Clause does not declare
29 that all federal laws are the supreme law of the land. It declares that only laws made

"in Pursuance" of the Constitution hold that status. Laws not made in pursuance of the Constitution fail the clause's own test — they are not supreme and need not be obeyed.

90. The Constitution is the measure. Laws are tested against the Constitution — not the reverse. A law that contradicts the Constitution's structure, exceeds its enumerated grants, or violates its prohibitions is not made "in Pursuance thereof."

91. Hamilton confirmed this understanding in Federalist No. 78:

"There is no position which depends on clearer principles, than that **every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void**. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves."

Alexander Hamilton, Federalist No. 78 (May 28, 1788).

92. Applied to delegation: A law that delegates Congress's enumerated powers to the Executive is NOT made "in Pursuance" of a Constitution that:

- **Distributes** specific powers to specific departments (Art. I, § 1; Art. II, § 1; Art. III, § 1)
- Requires departments to remain **separate and distinct** (structural design)
- Demands each department have **a will of its own** (Federalist No. 51)
- Prohibits the **accumulation** of powers (Federalist No. 47)
- Explicitly forbids **personal union** of legislative and executive office (Art. I, § 6, cl. 2)

93. Such a law fails the Supremacy Clause's own validity test. It is not "in Pursuance" of the Constitution. It is not the supreme law of the land. It is void.

94. The textual proof: The Framers could have written "the Laws of the United States" without qualification. Instead, they added "which shall be made in Pursuance thereof" — demonstrating that they contemplated laws that would NOT be in pursuance of the Constitution, and that such laws would NOT be supreme.

95. The Constitution as Integrated Whole. The Supremacy Clause concludes with language that demands the Constitution be applied as an integrated whole, not selectively:

"...and the Judges in every State shall be bound thereby, **any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**"

1 *U.S. Const. art. VI, cl. 2.*

2 **96.** The phrase "any Thing... notwithstanding" establishes that **nothing** — no
3 single constitutional provision interpreted in isolation, no state law, no judicial
4 doctrine, no legislative abdication — may stand in contradiction to the constitutional
5 whole. The Constitution operates as an integrated structure; its provisions must be read
6 together, not selectively applied.

7 **97. The Inversion Problem.** When courts create doctrines that carve exceptions
8 from constitutional structure—permitting one clause to be interpreted differently than
9 parallel clauses, or allowing powers to be delegated that the distributional structure
10 forbids—those doctrines become "Things" that claim supremacy over the integrated
11 Constitution. Under proper constitutional design, the Constitution (as integrated
12 whole) is **supreme**, laws "in Pursuance thereof" are derivative and valid only if
13 conforming, and everything else is subordinate. But doctrinal exceptions invert this
14 hierarchy: judicial doctrines creating exceptions claim supremacy over constitutional
15 structure, legislative abdication permitting delegation elevates delegation above
16 distributional design, and either becomes a "Thing" contradicting the whole.

17 **98.** This textual structure supports the Madisonian Test's consistency requirement.
18 The test demands that interpretive methods work across ALL parallel clauses precisely
19 because "any Thing... notwithstanding" means the Constitution cannot be selectively
20 applied. An interpretation that validates prosecutorial immunity from the Pardon
21 Power but cannot validate prosecutorial exercise of the Treaty Power contradicts the
22 integrated whole — and therefore violates the Supremacy Clause itself.

23 **99. The logical consequence:** A judicial doctrine that permits selective
24 interpretation — accepting a claimed derivation for one clause while the same method
25 yields absurd results for parallel clauses — is itself a "Thing" that stands above the
26 Constitution. Such a doctrine claims authority to determine which parts of the
27 constitutional structure apply and which may be excepted. But the Supremacy Clause
28 permits no such authority. The Constitution as a whole is supreme; no doctrine may
29 selectively override that whole.

N. Madison's 1806 Opinion: Rejection of Implied Emergency Powers

100. Madison's constitutional principles were not merely theoretical. He applied them rigorously when serving as Secretary of State under President Jefferson. In October 1806, facing Aaron Burr's armed conspiracy, President Jefferson sought to deploy regular federal troops to suppress the threat. Madison — confronting an actual emergency — provided his legal analysis.

101. Madison's conclusion was unequivocal:

"It does not appear that regular Troops can be employed, under any legal provision agst. insurrections, but only agst. expeditions having foreign Countries for the object."

James Madison, Legal Opinion on Militia and Regular Troops (October 21, 1806).

102. Madison's opinion rested on strict enumerated powers principles:

- **Enumerated powers require explicit authorization:** The Constitution granted Congress power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" (Article I, Section 8, Clause 15). Congress had exercised this power in the Militia Acts of 1792 and 1795.
- **Regular troops distinguished from militia:** The statutes authorized calling forth the *militia* against insurrections, but contained no parallel authorization for regular federal troops. Madison refused to read authorization by implication.
- **Executive Commander-in-Chief power insufficient:** Despite the President's constitutional role as Commander-in-Chief, Madison determined this did not grant inherent authority to deploy forces domestically absent congressional authorization.

103. Madison refused to find implied emergency power. Even facing an armed conspiracy by a former Vice President, Madison did not reason: "Surely the President must have power to respond." He examined the text, found no authorization, and concluded none existed.

104. This stands in stark contrast to modern claims of inherent executive emergency powers. Madison — confronting an actual conspiracy — refused to find implied authority. If the Constitution did not grant it, the President did not possess it. Emergency does not create power; it reveals the necessity of obtaining proper authorization.

1 **105. The constitutional sequence:** First, the Constitution grants power—vesting it
2 in Congress. Second, Congress implements that grant through "necessary and proper"
3 legislation. Third, the President executes congressional directives. This sequence is
4 inviolable.

5 **106.** The Executive cannot skip step two. Congressional implementation is
6 mandatory before executive execution is lawful. This is the constitutional design
7 Madison helped create and consistently applied — even when facing genuine
8 emergency.

9 **107.** Jefferson followed Madison's advice. Unable to deploy troops without
10 authorization, Jefferson addressed Congress on January 22, 1807 to request legislation.
11 Congress responded by enacting the Insurrection Act of 1807, which explicitly
12 authorized presidential deployment of regular troops against domestic insurrection.

13 **108. The Insurrection Act vindicates Madison's methodology.** Congress did not
14 ratify inherent executive power — Congress *created* the authority by statute. The
15 President could employ troops only because Congress made it "lawful." The statute's
16 existence proves Madison's point: no such authority existed absent legislation.

17 **O. The Non-Delegation Equation**

18 **109.** Madison's framework establishes the following definitional relationship:

19 **Distribution of Power = Separate and Distinct Departments = Each**
20 **Having Its Own Will = Liberty**

21 **110.** The inverse is equally true:

22 **Delegation of Power = Accumulated Departments = Substituted Will**
23 **= Tyranny**

24 **111.** These are definitional relationships, not policy preferences. Madison defined
25 tyranny as accumulation. Delegation produces accumulation. The syllogism is
26 complete: delegation produces tyranny.

27 **112.** Madison warned that constitutional violations typically occur not through
28 dramatic usurpation but through gradual erosion:

1 "There are more instances of the abridgment of the freedom of the people
2 by **gradual and silent encroachments** of those in power than by violent
3 and sudden usurpations."

4 *James Madison, Speech to the Virginia Ratifying Convention* (June 16, 1788).

5 **113.** Delegation is the mechanism of "gradual and silent encroachment." Each
6 delegation appears limited; the cumulative effect is constitutional transformation. The
7 administrative state did not emerge through dramatic usurpation — it emerged through
8 decades of delegations, each appearing necessary, each approved by courts deferring to
9 congressional judgment.

10 **114.** Madison's framework provides the antidote: every delegation must be tested
11 against the constitutional structure. If delegation produces accumulation, and
12 accumulation produces tyranny, then delegation — however convenient, however well-
13 intentioned — is constitutionally forbidden.

14 **P. The Grammatical Foundation: Constitutional Text as English Construction**

15 **115.** Constitutional interpretation that disregards the basic constructive principles
16 of language — subject-predicate relationships, clausal relationships, and the role of
17 punctuation in linguistic construction — is not interpretation at all. It is rewriting. The
18 Constitution is written in English. English has grammatical rules. Those rules
19 determine meaning independent of judicial preference.

20 **116.** Article II, Section 2 demonstrates this principle through its grammatical
21 structure:

22 "The **President** shall be Commander in Chief of the Army and Navy of
23 the United States, and of the Militia of the several States, when called into
24 the actual Service of the United States; he may require the Opinion, in
25 writing, of the principal Officer in each of the executive Departments,
26 upon any Subject relating to the Duties of their respective Offices, and **he**
27 **shall have Power to grant Reprieves and Pardons** for Offences against
28 the United States, except in Cases of Impeachment."

29 *U.S. Const. art. II, § 2, cl. 1.*

30 **117.** The grammatical structure is precise:

Element	Function	Constitutional Effect
"The President"	Grammatical subject	Identifies the Position of Assigned Power
Semicolons	Clause conjunctions	Connect multiple predicates to the same subject
"he"	Pronoun reference	Continues reference to "The President" as subject
"shall have Power to grant"	Predicate	Describes power belonging to the subject

118. The semicolon is not decorative punctuation. In English grammar, semicolons conjoin independent clauses that share a logical relationship — here, a shared grammatical subject. Each clause after the semicolon in Article II, Section 2 continues to describe powers of "The President." The subject does not change. The semicolon structure *requires* that "The President" remain the subject across all conjoined clauses.

119. The Grammatical Impossibility of Prosecutorial Derivation. The doctrine claiming prosecutorial immunity "derives" from the Pardon Power commits a grammatical impossibility: it substitutes "prosecutors" for "The President" as the grammatical subject while claiming the same predicate ("shall have Power to grant... Pardons") applies. This is not constitutional interpretation — it is subject-predicate substitution that violates basic English construction.

120. Stated as a grammatical syllogism:

Step	Premise
MAJOR	In Article II, Section 2, "The President" is the grammatical subject; semicolons conjoin predicates to that subject
MINOR	Prosecutorial discretion claims to exercise a predicate ("grant... Pardons") assigned to "The President"
CONCLUSION	This requires changing the grammatical subject from "The President" to "prosecutors" — which violates the sentence's grammatical structure

121. The Pronoun Proof. The text uses "he" to continue reference to "The President" throughout Section 2. "He may require the Opinion... he shall have Power to

grant Reprieves and Pardons." The pronoun "he" grammatically refers to the antecedent noun — "The President." A doctrine claiming prosecutors exercise this power must explain how "he" suddenly refers to prosecutors rather than the President. No such explanation exists because the grammatical reference is unambiguous.

122. Constitutional Text Is Not a Policy Document. The Constitution is a legal instrument whose meaning derives from the words chosen and the grammatical structures employed. The Framers could have written: "The Executive Branch shall have Power to grant Reprieves and Pardons." They did not. They wrote "The President shall have Power." The choice of "The President" over "The Executive Branch" is not stylistic preference — it is a substantive grammatical choice that determines meaning.

123. The Interpretive Fraud Exposed. When courts or commentators claim that prosecutorial immunity "derives" from the Pardon Power, they commit interpretive fraud through grammatical substitution:

Text Says	Doctrine Claims	Grammatical Operation
"The President... shall have Power to grant... Pardons"	Prosecutors may grant immunity	Subject substitution: "The President" → "prosecutors"
"he shall have Power"	They shall have power	Pronoun substitution: "he" → "they"
Semicolons conjoin clauses to single subject	Powers may be distributed to subordinates	Structural dissolution: single subject → multiple subjects

124. This is not interpretation. It is rewriting. The Constitution says "The President." No grammatical operation permits substituting "prosecutors" for "The President" while maintaining that the predicate ("shall have Power to grant... Pardons") remains valid. The subject and predicate are grammatically bound. Change the subject, and the predicate no longer applies.

125. The Universal Principle. This grammatical analysis applies to every constitutional provision. When the Constitution assigns power to a specific subject — "The Congress," "The President," "the judicial Power" — that assignment is grammatically fixed. Courts cannot substitute alternative subjects and claim the same

1 predicates apply. The grammatical structure of constitutional text is not advisory; it is
2 determinative of meaning.

3 **126.** The Universal Compliance Test's Position of Assigned Power analysis (Step
4 Six) operationalizes this grammatical principle. The "Position of Assigned Power" IS
5 the grammatical subject of the constitutional clause. The definitional clauses that
6 constitute that position are grammatically bound to the subject. A claim cannot
7 selectively adopt the predicate ("shall have Power to grant Pardons") while disclaiming
8 the subject to which that predicate is grammatically assigned ("The President").

9 III. THE UNIVERSAL COMPLIANCE TEST

10 A. Madison's Textual Consistency Principle

11 **127.** Madison articulated a principle of textual consistency that applies universally
12 across all constitutional provisions. In the *Report on the Virginia Resolutions*,
13 Madison wrote:

14 "Fourthly. If the words and phrases in the amendment are to be
15 considered as chosen with a studied discrimination, which yields an
16 argument for a power over the press under the limitation that its freedom
17 be not abridged, **the same argument results from the same**
18 **consideration** for a power over the exercise of religion, under the
19 limitation that its freedom be not prohibited."

20 *James Madison, Report on the Virginia Resolutions*, 4 Elliot's Debates 546, 570 (1800)
21 (emphasis added).

22 **128.** Madison's principle establishes that if an interpretive method is valid for one
23 constitutional clause, the **same method** must be valid for **parallel clauses** in the same
24 Section or Article. An interpretive method that yields absurd results when applied to
25 parallel clauses cannot be valid for the clause under consideration.

26 **129.** This principle prevents selective constitutional interpretation that would
27 permit delegation of some powers while prohibiting delegation of others within the
28 same constitutional provision — an approach that would violate the Framers' "studied
29 discrimination" in choosing constitutional language.

1 **130. The principle extends to every constitutional clause.** If textual consistency
2 demands uniform interpretation of First Amendment provisions, it equally demands
3 uniform interpretation of all enumerated powers. The Constitution must be read as a
4 coherent whole, not selectively interpreted to permit convenient delegations while
5 prohibiting inconvenient ones.

6 **B. The Six Steps**

7 **131.** The Madisonian Separation of Powers Objective Compliance Test proceeds
8 through six analytical steps:

9 101A. The six-step test operationalizes Madison's "balance and check" framework:

Madisonian Operation	Test Steps	Function
BALANCE	Steps 1-4	Determine whether power is properly distributed (clause identification, classification, syllogism, textual consistency)
CHECK	Steps 5-6	Determine whether structural safeguards are satisfied (structural impossibility, position indivisibility)

10 The test first asks: was the power properly *balanced* (assigned to the correct
11 department)? Only then does it ask: are the *checks* satisfied (can the actor
12 constitutionally exercise that power)?

13 **1. Step One: Identify the Constitutional Clause**

14 **132.** The first step requires identifying the express textual assignment of power in
15 the Constitution. This establishes the **Major Premise** for the syllogistic analysis that
16 follows.

17 **133.** The identification must be precise. The analyst must locate the specific
18 clause, section, and article that assigns the power at issue. General references to
19 "executive power" or "judicial power" are insufficient; the test requires identification of
20 the specific enumerated power claimed as the source of authority.

2. Step Two: Determine the Nature of the Coordinate Action

134. The second step classifies the coordinate action being tested. Government actions fall into three categories, each with distinct constitutional constraints:

Type	Source	Constitutional Constraint
Legislative enactment	Congress (Art. I, § 7)	Must be "in Pursuance" of Constitution
Judicial doctrine	Courts (Art. III)	Must not exceed "Cases" and "Controversies"; cannot legislate
Executive enforcement	President/Officers (Art. II)	Must "take Care that Laws be faithfully executed"

135. This classification matters because different types of coordinate actions have different relationships to the constitutional text. A statute may validly implement constitutional authority in ways that judicial doctrine cannot, and vice versa.

3. Step Three: Construct the Syllogism

136. The third step constructs a syllogism to test whether the coordinate action validly derives from constitutional authority under the Supremacy Clause hierarchy.

137. The Supremacy Clause, Article VI, Clause 2, establishes the hierarchy of legal authority. Under this hierarchy, the Constitution is supreme, and laws are valid only if "made in Pursuance" of the Constitution. The syllogism tests whether this relationship holds:

Step	Premise
MAJOR	The constitutional clause assigns power X to Branch/Officer Y
MINOR	Coordinate action Z is "Law made in Pursuance" of that clause
CONCLUSION	Therefore, action Z validly derives from constitutional authority

1 **138.** If the Minor Premise cannot be established—if the coordinate action is not
2 validly "in Pursuance" of the constitutional clause—the syllogism fails and the action
3 lacks constitutional foundation.

4 **4. Step Four: Apply the Textual Consistency Test**

5 **139.** The fourth step applies Madison's textual consistency principle. This is the
6 critical step — Madison's principle operationalized.

7 **140.** The test proceeds as follows:

- 8 a. Identify all clauses within the same Section (or Article) as the clause at issue;
- 9 b. Apply the **same interpretive method** used to justify the coordinate action to each
10 parallel clause;
- 11 c. Determine whether the interpretive method yields valid results for all parallel
12 clauses;
- 13 d. If the method yields **absurd or impossible results** for any parallel clause, the
14 method is invalid and the claimed derivation fails.

15 **141.** This test prevents selective interpretation. If a judicial doctrine claims to
16 derive from one clause but cannot logically derive from parallel clauses in the same
17 Section, the doctrine's claimed derivation is textually inconsistent and therefore invalid.

18 **5. Step Five: Structural Impossibility Determination**

19 **142.** The fifth step determines whether the power at issue is **inherently non-**
20 **delegable** based on constitutional structure.

21 **143.** Certain constitutional powers are non-delegable because:

- 22 a. **Express personal assignment:** The Constitution uses language assigning power to a
23 specific officer ("The President shall...") rather than to an office or branch generally;
- 24 b. **Constitutional specificity:** The Framers chose specific language when general
25 language was available, indicating deliberate limitation;
- 26 c. **Separation of powers architecture:** Delegation would transfer power between
27 branches, violating the constitutional distribution that prevents accumulation of power;
- 28 d. **Incompatibility Clause confirmation:** The explicit prohibition of personal
29 accumulation (Art. I, § 6, cl. 2) necessarily implies prohibition of institutional
30 accumulation a fortiori.

1 **144.** If a power is structurally non-delegable, no coordinate action — legislative,
2 judicial, or executive — can create valid delegation authority.

3 **6. Step Six: Position of Assigned Power (Indivisibility Test)**

4 **145.** The sixth step analyzes the **position of assigned power** — the constitutional
5 officer to whom power is assigned. When the Constitution assigns power to "the
6 President" or "the Congress," it does not use these terms as mere labels. Each term
7 incorporates every constitutional provision that defines, constitutes, and characterizes
8 that position.

9 **146.** The Position of Assigned Power for "the President" includes:

Clause	Constitutional Definition
Art. II, § 1, Cl. 1	"The executive Power shall be vested in a President of the United States of America"
Art. II, § 1, Cl. 2-3	Electoral selection by Electors appointed by each State
Art. II, § 1, Cl. 5	Qualifications: natural born Citizen, thirty-five Years, fourteen Years a Resident
Art. II, § 1, Cl. 6	Succession provisions
Art. II, § 1, Cl. 7	Compensation provisions
Art. II, § 1, Cl. 8	Oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States"

10 **147.** These clauses are constitutionally indivisible. They constitute the **complete**
11 **definition** of the position. When Article II, Section 2 says "The President shall have
12 Power to grant Reprieves and Pardons," the word "President" means the officer
13 satisfying ALL definitional clauses — not any subordinate who happens to work
14 within the executive branch.

15 **148. The Indivisibility Principle:** Any coordinate action claiming to exercise a
16 power assigned to "the President" must satisfy ALL definitional clauses — not merely
17 the clause granting the specific power. A claim cannot selectively adopt the power-
18 granting clause while disclaiming the position-defining clauses.

1 **149. The Logical Test:** If coordinate action X claims to exercise "The President
2 shall have Power to [Y]," then X must also satisfy:

- 3 • C1: Is X vested with "the executive Power"?
- 4 • C2: Was X selected by constitutional Electors?
- 5 • C3: Does X satisfy presidential qualifications?
- 6 • C4: Did X take the presidential oath?

7 **150.** If the answer to ANY definitional question is "No," then coordinate action X
8 cannot exercise the power assigned to "the President." The position of assigned power
9 is constitutionally indivisible.

10 **IV. APPLICATION TO THE PARDON POWER (ARTICLE II, § 2)**

11 **A. Steps One Through Three**

12 **151. Step One — Clause Identification:** The Pardon Power is assigned by Article
13 II, Section 2, Clause 1:

14 "The President... shall have Power to grant Reprieves and Pardons for
15 Offenses against the United States, except in Cases of Impeachment."

16 **152.** This clause establishes the **Major Premise:** The President shall have power to
17 grant pardons.

18 **153. Step Two — Classification:** "Prosecutorial discretion" — the claimed
19 authority by which prosecutors purport to grant immunity — is a **judicial doctrine**. It
20 is not a legislative enactment (no statute authorizes it) and it is not executive
21 enforcement (it is claimed as inherent authority, not execution of law).

22 **154.** As a judicial doctrine, prosecutorial discretion must satisfy Article III
23 constraints and must derive from constitutional authority through valid interpretive
24 method.

25 **155. Step Three — Syllogism Construction:** The claimed syllogism for
26 prosecutorial discretion derived from the Pardon Power:

Step	Premise
MAJOR	"The President shall have Power to grant Reprieves and

Require opinions from principal officers	No	This is a presidential prerogative; judicial doctrine cannot compel cabinet opinions
Make Treaties	No	Requires Presidential signature plus Senate consent; structurally impossible to delegate
Nominate ambassadors, judges, officers	No	Constitution expressly requires Presidential nomination
Fill Vacancies during Recess	No	Express constitutional assignment to President alone
Grant Pardons	By textual consistency: NO	

159. The interpretive method fails for every parallel clause. Judicial doctrine cannot delegate the Commander in Chief authority. Judicial doctrine cannot delegate the Treaty power. Judicial doctrine cannot delegate the Appointments power. Judicial doctrine cannot delegate the Recess Appointments power.

160. By Madison's principle, "the same argument results from the same consideration." If the interpretive method cannot derive authority from parallel clauses, it cannot derive authority from the Pardon Power.

161. Conclusion: The textual consistency test **FAILS**. Prosecutorial discretion cannot derive from the Pardon Power.

C. Step Five: Structural Impossibility

162. The Pardon Power is structurally non-delegable:

a. **Express personal assignment:** "The President... shall have Power" assigns to the constitutional officer personally, not to subordinate officers or derivative doctrine;

b. **Constitutional specificity:** The Framers granted this power to "the President," not to "the Executive" or "such officers as Congress may designate";

1 c. **Historical understanding:** The pardon power derives from royal prerogative and
2 was deliberately vested in a single, accountable officer;

3 d. **Incompatibility Clause confirmation:** If the same person cannot hold legislative
4 and executive office simultaneously, a fortiori the same doctrine cannot exercise both
5 prosecutorial and pardon functions.

6 **163.** No constitutional mechanism exists for transferring the Pardon Power to
7 prosecutors. The power is personal to the President and structurally incapable of
8 delegation.

9 **164. Conclusion:** The Pardon Power is **structurally non-delegable**. Prosecutorial
10 discretion cannot derive from it.

11 **D. Step Six: Position of Assigned Power Failure**

12 **165.** The Pardon Power is assigned to "the President." This term incorporates all
13 constitutional provisions defining the position:

Definitional Clause	Requirement	Prosecutor Satisfies?
Art. II, § 1, Cl. 1	"The executive Power shall be vested in a President"	No — prosecutor not vested with "the executive Power"
Art. II, § 1, Cl. 2-3	Selected by constitutional Electors	No — prosecutors are appointed, not elected
Art. II, § 1, Cl. 5	Natural born Citizen, 35 years, 14 years Resident	Not required — prosecutors need not satisfy
Art. II, § 1, Cl. 8	Oath to "preserve, protect and defend the Constitution"	No — prosecutors take Art. VI oath to "support" Constitution

14 **166.** The position of assigned power is indivisible. A prosecutor claiming to
15 exercise "The President shall have Power to grant Reprieves and Pardons" must also
16 satisfy all definitional clauses that constitute "the President." Because prosecutors do
17 not satisfy these clauses, they cannot exercise the power.

18 **167. The Logical Syllogism:**

Step	Premise
MAJOR	The Position of Assigned Power "President" = C1 (executive Power vested) + C2 (Electoral selection) + C3 (Qualifications) + C4 (Presidential Oath)
MINOR	If prosecutorial discretion = "President shall have Power to grant Pardons" but prosecutorial discretion $\neq$ C1, C2, C3, C4
CONCLUSION	Then prosecutorial discretion $\neq$ "President" and cannot exercise powers assigned to "the President"

1 **168. Conclusion:** The Position of Assigned Power test **FAILS**. Prosecutors are not
2 "the President" and cannot exercise powers assigned to that constitutionally-defined
3 position.

4 **V. Application to the Take Care Clause (article II, § 3)**

5 **A. Steps One Through Three**

6 **169. Step One — Clause Identification:** The Take Care Clause is contained in
7 Article II, Section 3:

8 "he shall take Care that the Laws be faithfully executed"

9 **170.** This clause establishes the **Major Premise**: The President shall take care that
10 the laws be faithfully executed.

11 **171. Step Two — Classification:** As established above, "prosecutorial discretion"
12 is a **judicial doctrine**.

13 **172. Step Three — Syllogism Construction:** The claimed syllogism for
14 prosecutorial discretion derived from the Take Care Clause:

Step	Premise
MAJOR	"He [the President] shall take Care that the Laws be faithfully executed"
MINOR	Judicial doctrine of prosecutorial discretion is law "pursuant thereto"

CONCLUSION	Therefore, prosecutors may exercise discretion (including immunity) as derivative of Take Care duty
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1 **173.** This syllogism must survive the textual consistency test.

2 **B. Step Four: Textual Consistency Failure**

3 **174.** Article II, Section 3 reads in full:

4 "He shall from time to time give to the Congress Information of the State
5 of the Union, and recommend to their Consideration such Measures as he
6 shall judge necessary and expedient; he may, on extraordinary Occasions,
7 convene both Houses, or either of them, and in Case of Disagreement
8 between them, with Respect to the Time of Adjournment, he may adjourn
9 them to such Time as he shall think proper; he shall receive Ambassadors
10 and other public Ministers; he shall take Care that the Laws be faithfully
11 executed, and shall Commission all the Officers of the United States."

12 **175.** The Section contains seven distinct presidential duties and powers: (1) give
13 Congress Information on the State of the Union; (2) recommend Measures to Congress;
14 (3) convene both Houses on extraordinary occasions; (4) adjourn them in case of
15 disagreement; (5) receive Ambassadors and other public Ministers; (6) take Care that
16 the Laws be faithfully executed; and (7) Commission all Officers of the United States.

17 **176.** Apply the textual consistency test. If judicial doctrine can derive from the
18 Take Care Clause, the **same judicial doctrine** must be capable of deriving from
19 parallel clauses:

Parallel Clause	Can Judicial Doctrine Derive This Power?	Analysis
Give Congress Information on State of the Union	No	Personal presidential communication to Congress
Recommend Measures to Congress	No	Presidential judgment; non-transferable
Convene both Houses on extraordinary occasions	No	Personal presidential authority over Congress

b. **Grammatical impossibility:** Judicial doctrine cannot substitute for "he" in any clause of the Section. Judicial doctrine cannot "give Information to Congress." Judicial doctrine cannot "receive Ambassadors." Judicial doctrine cannot "Commission Officers." Therefore, judicial doctrine cannot "take Care" either.

182. Conclusion: The Take Care Clause is **structurally non-delegable**. The pronoun "he" refers to the President personally, and no judicial doctrine can occupy this constitutional position.

D. Step Six: Position of Assigned Power Failure

183. The Take Care Clause assigns duty to "he"—referring to the President. As with the Pardon Power, this term incorporates all constitutional provisions defining the position: Under Article II, Section 1, Clause 1, "he" is the officer vested with "the executive Power"—prosecutors are not. Under Clauses 2-3, "he" is the person selected by Electors—prosecutors are appointed, not elected. Under Clause 8, "he" is the officer who swore to "preserve, protect and defend"—prosecutors take a different oath to "support" the Constitution.

184. The pronoun "he" in Article II, Section 3 is not ambiguous. It refers to the same constitutional officer defined in Section 1 — the President of the United States. The Take Care duty belongs to that officer, not to subordinates who happen to work within the executive branch.

185. The Logical Syllogism:

Step	Premise
MAJOR	"He" in Art. II, § 3 = "the President" = C1 (executive Power vested) + C2 (Electoral selection) + C4 (Presidential Oath)
MINOR	Prosecutorial discretion claims to exercise "he shall take Care" but prosecutorial discretion $\neq$ C1, C2, C4
CONCLUSION	Prosecutorial discretion $\neq$ "he" and cannot exercise the Take Care duty

1 **186. Conclusion:** The Position of Assigned Power test **FAILS**. The "he" of
2 Article II, Section 3 is the President as constitutionally defined. Prosecutors are not
3 that "he" and cannot exercise duties assigned to that position.

4 **VI. THE OATH DISTINCTION: WHY DELEGATION FAILS** 5 **INDEPENDENTLY**

6 **A. Two Constitutionally Distinct Oaths**

7 **187.** The Constitution establishes distinct oaths for different officers. The
8 President, under Article II, Section 1, Clause 8, swears to "preserve, protect and defend
9 the Constitution"—a duty personal to the Office of President. Subordinate executive
10 officers and federal prosecutors, by contrast, take the Article VI, Clause 3 oath to
11 "support this Constitution"—a duty personal to each individual officer.

12 **188.** The President's oath is unique: to "preserve, protect and defend" the
13 Constitution. Subordinate officers take a different oath: to "support" the Constitution.
14 This textual distinction indicates that subordinate duties are **not derivative** of the
15 President's duty but are **independently constituted** by their own oath.

16 **B. Independent Constitutional Responsibility**

17 **189.** Proponents of prosecutorial discretion might argue that prosecutors act as
18 delegates of the President and therefore exercise derivative Take Care authority. This
19 argument fails because subordinate officers have their **own oath of office** creating a
20 **separate constitutional relationship**.

21 **190.** Article VI, Clause 3 provides:

22 "The Senators and Representatives before mentioned, and the Members of
23 the several State Legislatures, and **all executive and judicial Officers,**
24 **both of the United States and of the several States, shall be bound by**
25 **Oath or Affirmation, to support this Constitution...**"

26 **191.** This clause creates independent constitutional duty for every executive
27 officer, including federal prosecutors. Their responsibility derives from their own oath
28 to "support this Constitution" — not from delegation of the President's personal duties.

1 **192.** Madison's "will of its own" principle applies here. Each officer, bound by
2 their own oath, has independent constitutional responsibility. Prosecutors exercising
3 claimed "derivative" presidential authority are substituting the President's will for their
4 own independent constitutional duty — precisely what Madison warned against.

5 **C. Lawful Source of Prosecutorial Authority**

6 **193.** The President's duty to "take Care that the Laws be faithfully executed" is
7 **personal to the Office of the President.** It cannot be delegated because:

- 8 a. The Take Care Clause uses "he" — a personal pronoun referring to the President;
- 9 b. Subordinate officers have their own oath creating independent constitutional duty;
- 10 c. No textual mechanism exists for transferring the President's personal duty to
11 subordinates.

12 **194.** Prosecutors are bound by their **own oath** to "support this Constitution." Their
13 lawful responsibility derives from:

- 14 a. Their personal oath under Article VI, Clause 3;
- 15 b. Statutes enacted "in Pursuance" of the Constitution;
- 16 c. **NOT** from delegation of the President's Take Care duty.

17 **195.** Therefore, "prosecutorial discretion" cannot be a **derivative** of the Take Care
18 Clause. The Take Care Clause imposes duty on "he" (the President personally).
19 Prosecutors have their own constitutional oath creating separate responsibility. There
20 is no textual mechanism for transferring the President's **personal duty** to create
21 independent authority in subordinates.

22 **196.** To the extent prosecutors have lawful discretion, it must derive from **statute**
23 enacted "in Pursuance" of the Constitution — not from claimed derivative authority
24 under the Take Care Clause.

VII. THE STATUTORY GAP

A. The Only Statutory Immunity Mechanism

197. The sole statutory mechanism for prosecutorial immunity grants is 18 U.S.C. §§ 6001-6005, enacted as Title II of the Organized Crime Control Act of 1970.

198. This statutory framework authorizes only **use immunity** — not transactional immunity:

"no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

18 U.S.C. § 6002.

199. The statute requires:

- a. A **court order** compelling testimony;
- b. **Attorney General or designated Assistant Attorney General approval** for the United States Attorney's request;
- c. A finding that "the testimony or other information from such individual may be necessary to the public interest";
- d. A finding that the witness "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

18 U.S.C. § 6003.

B. What the Statute Does Not Authorize

200. The statutory immunity framework does **not** authorize:

Type of Immunity	Statutory Authorization
Transactional immunity (complete immunity from prosecution)	None
Immunity to unnamed persons	None
Immunity for unspecified crimes	None

Non-prosecution agreements (NPAs)	None
"Letter immunity" or "informal immunity"	None

1 **201.** "Letter immunity" or "informal immunity" — voluntary agreements between
2 prosecutors and witnesses — operates **outside** the statutory framework. No statute
3 authorizes such agreements. They are based entirely on claimed "prosecutorial
4 discretion."

5 **C. Kastigar Confirmation**

6 **202.** The Supreme Court upheld this statutory framework in *Kastigar v. United*
7 *States*, 406 U.S. 441 (1972), finding that use immunity is "coextensive with the scope
8 of the privilege against self-incrimination." *Id.* at 453.

9 **203.** *Kastigar* establishes use immunity as both the constitutional floor AND
10 ceiling for statutory immunity. Prosecutors may not grant less (which would violate
11 the Fifth Amendment) or more (which would exceed statutory authority).

12 **D. Application to Ultra Vires Immunity Grants**

13 **204.** When a prosecutor grants immunity that exceeds the statutory framework —
14 for example, transactional immunity to unnamed co-conspirators for unspecified
15 crimes — the grant is ultra vires:

16 a. **No statutory authorization:** 18 U.S.C. §§ 6001-6005 does not authorize such
17 grants;

18 b. **No constitutional derivation from Pardon Power:** Textual consistency test fails;

19 c. **No constitutional derivation from Take Care Clause:** Textual consistency test
20 fails;

21 d. **No "inherent" executive power:** All executive power derives from Article II, and
22 no residual authority exists outside the constitutional text — as Madison confirmed in
23 his 1806 opinion.

24 **205.** Such grants exceed constitutional authority and are **void ab initio**.

1 **VIII. UNIVERSAL APPLICATION AND THE PARCHMENT BARRIERS**
2 **PROBLEM**

3 **A. The Test Applies to Any Enumerated Power**

4 **206.** The Madisonian Separation of Powers Objective Compliance Test is not
5 limited to prosecutorial immunity. It applies to any claimed delegation of enumerated
6 power:

7 a. **Tariff delegation:** Article I, Section 8 assigns tariff power to "the Congress." The
8 Position of Assigned Power for "Congress" includes bicameral structure, House
9 origination of revenue bills, and presentment. The Executive satisfies none of these
10 definitional clauses. The same textual consistency test applied to parallel clauses
11 (declare war, coin money, establish post offices) demonstrates that no statute can
12 transfer these powers wholesale to the Executive;

13 b. **Emergency powers:** Any claimed inherent executive authority must survive
14 Madison's 1806 methodology — explicit statutory authorization is required.
15 Emergency does not create implied power, as Madison demonstrated when he refused
16 to find authority to deploy troops against Aaron Burr's conspiracy absent congressional
17 authorization;

18 c. **Qualified immunity:** Judicial doctrine claiming constitutional derivation faces the
19 same textual consistency challenge — if the doctrine cannot derive from parallel
20 clauses, it cannot derive from the claimed source;

21 d. **Any future question:** The test is objective and reproducible.

22 **207.** Any court applying this test will reach the same result because it depends on
23 textual analysis, not policy judgment.

24 **B. Historical Validation: the Test's Proven Accuracy**

25 **208.** To validate this methodology, the Universal Compliance Test has been
26 applied to thirty-six coordinate government actions the Supreme Court has addressed.
27 *See* Appendix A (Madisonian Separation of Powers Compliance Testing). The thirty-
28 six cases span 154 years (1872-2021) and diverse constitutional contexts:

1 congressional interference with executive powers (*Klein, Zivotofsky*), New Deal
2 delegations (*Panama Refining, Schechter Poultry, Carter Coal*), executive seizures
3 (*Youngstown*), legislative vetoes (*Chadha*), appointment defects (*Buckley, Lucia,*
4 *Arthrex*), commandeering prohibitions (*Printz, New York, Murphy*), removal
5 restrictions (*Seila Law, Collins, Free Enterprise Fund, Myers*), Article III violations
6 (*Northern Pipeline, Plaut, Stern*), Commerce Clause limits (*Lopez, Morrison*),
7 federalism and sovereign immunity (*Seminole Tribe, Alden, Shelby County, NFIB,*
8 *Boumediene, Medellin*), Section 5 limits (*City of Boerne*), legislative encroachment
9 (*Springer*), and individual standing for structural violations (*Bond*).

10 **209. Perfect Correspondence: 36/36.** The Madisonian Test produces
11 "UNCONSTITUTIONAL" for every coordinate action the Supreme Court invalidated
12 and confirms standing where the Court granted it. All thirty-five unconstitutional-
13 action cases fail Steps 3, 4, 5, and 6—demonstrating consistent failure patterns across
14 the syllogism, textual consistency, structural impossibility, and position indivisibility
15 tests. The standing case (*Bond v. United States*) confirms the test correctly identifies
16 individual standing for federalism violations. This consistency reflects the integrated
17 nature of constitutional structure: an action that violates separation of powers typically
18 fails at every substantive step.

19 **210. The Methodological Shield.** The 36/36 validation demonstrates the test is
20 not outcome-driven. A critic cannot claim the methodology is designed to produce
21 politically convenient results when it perfectly replicates 154 years of Supreme Court
22 jurisprudence.

23 **211. The Logical Bind.** Officials and courts face a dilemma when confronting the
24 Test's application to coordinate actions not yet adjudicated: (a) **accept the**
25 **methodology** and accept its results for untested coordinate actions (tariff delegation,
26 qualified immunity, administrative rulemaking, prosecutorial immunity grants); or (b)
27 **reject the methodology** and explain why it works perfectly for the thirty-six cases the
28 Supreme Court decided but fails for actions officials prefer not to examine.

29 **212.** The only intellectually honest position is that the test identifies constitutional
30 structure violations consistently—whether or not the results are comfortable to address.

1 There is no principled distinction between the validated cases and the pending
2 applications.

3 **213. Burden Shift.** With 36/36 proven accuracy, the burden shifts. Anyone
4 claiming that the Test errs when applied to tariff delegation, qualified immunity, or
5 prosecutorial discretion must explain what distinguishes these coordinate actions from
6 the thirty-six the Court has decided—and the six-step methodology reveals no
7 principled distinction exists.

8 **214. Comprehensive Validation.** Appendix A documents the validation analysis
9 for all thirty-six cases, including the original twenty cases (Tests H-AA) and sixteen
10 extended cases spanning separation of powers, federalism, and standing jurisprudence:
11 *Stern v. Marshall* (2011); *Hamdan v. Rumsfeld* (2006); *City of Boerne v. Flores* (1997);
12 *United States v. Lopez* (1995); *United States v. Morrison* (2000); *Medellin v. Texas*
13 (2008); *Murphy v. NCAA* (2018); *Boumediene v. Bush* (2008); *Shelby County v. Holder*
14 (2013); *Alden v. Maine* (1999); *Seminole Tribe v. Florida* (1996); *Carter v. Carter*
15 *Coal Co.* (1936); *Bond v. United States* (2011); *NFIB v. Sebelius* (2012); *Myers v.*
16 *United States* (1926); and *Springer v. Philippine Islands* (1928). Thirty-five produce
17 "UNCONSTITUTIONAL" under the Madisonian Test, and one (*Bond*) confirms
18 individual standing for federalism claims—yielding a combined validation record of
19 36/36 (100%).

20 **215. Implications for Pending Applications.** The validated Madisonian Test
21 produces "UNCONSTITUTIONAL" for coordinate actions including tariff delegation
22 under Section 122 and IEEPA, qualified immunity doctrine, executive origination of
23 revenue bills, administrative rulemaking as legislative delegation, impoundment
24 authority, and prosecutorial non-prosecution agreements granting immunity. The test
25 correctly identifies unconstitutional actions across 154 years of Supreme Court
26 jurisprudence; there is no reason to believe it fails for actions the Court has not yet
27 reviewed.

C. The Universal Hierarchical Derivation: Applicable to Any Position of Assigned Power

216. The Madisonian framework's most powerful application is **hierarchical derivation analysis**—tracing any claimed authority through the complete chain of legal sources applicable to a specific Position of Assigned Power (POAP). This methodology applies universally to any enumerated position at any level of government.

217. The Core Principle: Every POAP has a unique hierarchical structure through which authority flows. The Constitution (federal or state) sits at the apex, and each subsequent tier derives from and is constrained by all higher tiers. No lower-tier source can expand, contradict, or modify authority granted at a higher tier.

218. The Methodology:

- a. **Identify the POAP** being analyzed
- b. **Map the hierarchical tiers** applicable to that specific position
- c. **Trace claimed authority** through each tier
- d. **Test each derivation** for constitutional validity
- e. **Identify the constraint point** where claimed authority exceeds granted authority

219. Illustrative Hierarchy: Federal Magistrate Judge. The methodology applies to any Position of Assigned Power. For a federal Magistrate Judge, the hierarchy proceeds through four tiers:

Tier	Source	Key Provisions
1	U.S. Constitution	Art. III, § 1 (judicial power vested in courts); Art. II, § 2, cl. 2 (appointment of officers)
2	Federal Statutes	28 U.S.C. § 631 (appointment and tenure); 28 U.S.C. § 636 (jurisdiction, powers, and temporary assignment)
3	Federal Rules	Fed. R. Civ. P. 72, 73 (magistrate authority); Fed. R. Crim. P. 58, 59 (criminal matters)
4	District Orders	Standing orders; individual case referrals

1 **220.** This hierarchical structure applies universally—to Article III judges,
2 prosecutors, the Speaker of the House, state attorneys general, or any other
3 constitutionally-defined position. Each position has a unique hierarchy through which
4 authority flows, and each claimed power must be traceable through every tier.

5 **221. The Universal Rule:** At each tier, claimed authority must derive FROM a
6 higher-tier grant. Authority **cannot flow upward**—a lower tier cannot create power
7 the higher tier did not grant. Authority **cannot skip tiers**—a district standing order
8 cannot expand magistrate authority beyond statutory limits.

9 **222. Application to Magistrate Judge Authority:**

Magistrate Action	Hierarchical Analysis	Result
Issue search warrants	Tier 2 (§ 636(a)(1)) expressly authorizes	VALID
Conduct pretrial conferences	Tier 2 (§ 636(b)(1)(A)) authorizes with district court referral	VALID
Enter final judgment in felony trial	No tier authorizes without defendant consent; Art. III requires life-tenured judge	INVALID
Dismiss case with prejudice sua sponte	Exceeds Tier 2 authority; requires Art. III judge or consent	INVALID

10 **223. Reproducibility for Any POAP:** This hierarchical analysis can be completed
11 for any Position of Assigned Power with careful identification of:

- 12 • The constitutional provisions creating and defining the position
- 13 • The intermediate legal sources (statutes, rules, regulations) applicable to that
- 14 position
- 15 • The administrative or internal policies governing day-to-day operations
- 16 • The constraints imposed at each tier

17 **224. The Madisonian Test operates at every tier.** The six-step analysis applies
18 not only to constitutional questions but to each derivation point in the hierarchy. A
19 state statute granting AG authority must satisfy the Madisonian Test against the state
20 constitution. An administrative policy must satisfy the test against enabling statutes.
21 The methodology cascades through the entire structure.

1 **225. Why This Matters:** Modern claims of governmental authority often obscure
2 their derivation chains. Officials invoke "inherent authority," "traditional practice," or
3 "necessary discretion" without tracing the claimed power through applicable legal tiers.
4 The hierarchical derivation methodology forces explicit identification of each link in
5 the chain—and reveals where chains are broken or fabricated.

6 **D. Madison's Warning Made Operational**

7 **226.** Madison warned that "parchment barriers" are insufficient without
8 enforcement mechanisms:

9 **"A mere demarcation on parchment** of the constitutional limits of the
10 several departments, **is not a sufficient guard** against those
11 encroachments which lead to a tyrannical concentration of all the powers
12 of government in the same hands."

13 *James Madison, Federalist No. 48* (February 1, 1788).

14 **227.** The Compliance Test provides the analytical mechanism — identifying
15 violations through textual analysis that reveals when claimed delegations exceed
16 constitutional authority.

17 **228.** Article III's equity jurisdiction (*see* MEMO A: The Recovery of Equitable
18 Standing for Enumerated Constitutional Violations) provides the enforcement
19 mechanism — permitting citizens to bring identified violations before courts when
20 those violations affect all citizens equally and no individual possesses particularized
21 injury under traditional *Lujan* standing. The Law/Equity distinction preserved in
22 Article III, Section 2 means equitable relief for structural violations does not require
23 particularized injury.

24 **229.** Together, the Compliance Test (identification) and equitable standing
25 (enforcement) provide what Madison recognized written limits alone cannot: structural
26 enforcement of constitutional distribution.

27 **230.** The standing doctrine gap — where enumerated limits become unenforceable
28 because no individual has particularized injury — is precisely the "parchment barrier"
29 problem Madison identified. Constitutional text says prosecutors cannot grant
30 immunity exceeding pardon power, but without a standing pathway to enforce that

limit, the text becomes what Madison called a "mere demarcation on parchment." Article III's equity jurisdiction converts the parchment barrier into an enforceable structural limit.

E. The Structural Equation Applied

231. Every delegation identified by this test represents Madison's "accumulation." Every accumulation represents Madison's "tyranny." The test does not create this relationship — it reveals it.

232. Courts applying the test are not making policy judgments — they are enforcing constitutional structure. Madison's framework is not a balancing test that weighs efficiency against liberty. It is a definitional relationship: accumulated power IS tyranny; distributed power among separate departments IS liberty.

233. The test operationalizes Madison's language. When a claimed delegation fails the textual consistency test, it fails because Madison's principle — "the same argument results from the same consideration" — reveals the delegation as selective interpretation that violates the Framers' "studied discrimination" in constitutional drafting.

IX. CONCLUSION

234. Madison's language establishes distribution as the constitutional settlement — non-delegable by definition:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

235. This Memorandum has established the complete Madisonian framework:

Element	Constitutional Foundation
Distribution, not separation	Powers allocated to specific departments; cannot be redistributed

Incompatibility Clause	Explicit text prohibiting personal accumulation; institutional accumulation forbidden a fortiori
Parchment barriers	Written limits insufficient without structural enforcement
Virginia's ratification terms	Government acts only where Constitution gives power
Will of its own	Each department's independent judgment; delegation destroys independence
Definitional identity	Separation = Non-Delegation = Liberty preservation
Three-part test	Expressly delegated + Necessary and proper + Not forbidden
"In Pursuance Thereof"	Supremacy Clause's built-in validity test
Madison's 1806 opinion	Emergency does not create implied power

236. The Madisonian Separation of Powers Objective Compliance Test operationalizes Madison's principles into a reproducible judicial tool. The test proceeds through six steps: (1) identify the constitutional clause; (2) classify the coordinate action; (3) construct the Supremacy Clause syllogism; (4) apply Madison's textual consistency principle; (5) determine structural impossibility; and (6) test position of assigned power indivisibility.

237. Application of this test to "prosecutorial discretion" demonstrates that the judicial doctrine lacks constitutional foundation:

Claimed Source	Test Result	Reason
Pardon Power (Art. II, § 2)	FAILS	Textual consistency: Same doctrine cannot delegate Treaty power, Appointments power, Recess Appointments power
Take Care Clause (Art. II, § 3)	FAILS	Textual consistency: Same doctrine cannot receive Ambassadors, give State of Union, convene Congress, Commission Officers

238. Both failures are compounded by:

- **Structural impossibility:** Constitutional text assigns powers to "the President" using personal pronouns

- **Incompatibility Clause confirmation:** Personal accumulation forbidden;
institutional accumulation forbidden a fortiori
- **Oath distinction:** Subordinate officers have independent constitutional duty via
Article VI
- **Position indivisibility:** Prosecutors do not satisfy definitional clauses constituting
"the President"

239. The statutory framework of 18 U.S.C. §§ 6001-6005 authorizes only use
immunity with court order and Attorney General approval. Immunity grants exceeding
this framework — including transactional immunity, immunity to unnamed persons,
and immunity for unspecified crimes — have no statutory authorization and cannot
derive from constitutional text.

240. Prosecutorial discretion, insofar as it claims authority to grant immunity from
prosecution beyond the statutory framework, is a judicial doctrine **without**
constitutional foundation. Actions taken pursuant to this claimed authority —
including the immunity grants challenged in *Kirchner v. Acosta* — are ultra vires and
void ab initio.

241. The combined argument is complete: even if the 2008 immunity grants had
been narrower than presidential pardon power, they would still be unconstitutional
because prosecutorial discretion lacks constitutional foundation for immunity grants.
The "exceeds pardon power" argument is independently sufficient, but the Compliance
Test proves the grants would be void even if they had been limited to a single named
individual for a single specified crime — because the claimed authority itself does not
exist.

242. The test is universally applicable and provides courts an objective method for
evaluating separation of powers claims grounded in constitutional text rather than
policy balancing. Madison's framework is not a preference to be weighed — it is a
definitional relationship to be enforced:

**Distribution of Power = Separate and Distinct Departments = Each
Having Its Own Will = Liberty**

**Delegation of Power = Accumulated Departments = Substituted Will
= Tyranny**

1 **243.** The Constitution establishes the former and prohibits the latter. This test
2 reveals when that prohibition has been violated.

3 **Respectfully submitted,**

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