NO. 12-1281

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SENATE PARLIAMENTARY EXPERTS ROBERT B. DOVE AND MARTIN B. GOLD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a former Parliamentarian of the United States Senate and a former parliamentary advisor to the Senate Majority Leader who is one of the nation's foremost experts on congressional procedure.

Amicus Robert B. Dove is one of only six persons to hold the office of Parliamentarian of the United States Senate since the creation of that office in 1937. Mr. Dove joined the Senate Parliamentarian's Office as Assistant Parliamentarian in 1966. He served the Senate as Parliamentarian from 1981 through 1987, and from 1995 through 2001. In his role as Parliamentarian, Mr. Dove served as the official procedural counselor to the Senate's presiding officer. He has also served as a parliamentary advisor to Senate Minority Leader Robert Dole and as a parliamentary consultant to a number of foreign legislatures, including the State Duma of Russia, the National Assembly of Bulgaria, the National Assembly of Kuwait, and the Parliament of Poland.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

Amicus Martin B. Gold served as Floor Advisor and Counsel to U.S. Senate Majority Leader Bill Frist, assisting him with floor procedure and strategy. He also served as counsel to former Senate Majority Leader Howard Baker and former Senator Mark O. Hatfield, whom he served as Minority Staff Director and Counsel to the Senate Committee on Rules and Administration. One of the nation's leading experts on congressional procedure, Mr. Gold has presented hundreds of seminars on Senate procedures and practices for congressional, governmental, academic, and private sector audiences. He has lectured on the parliamentary processes of the U.S. Congress at the Russian Federal Assembly, the Parliament of the Ukraine, and the Beijing Foreign Studies University, among many others. He is the author of an authoritative treatise, *Senate Procedure and Practice*, which has been through three editions since its publication in 2004, and which is cited three times by the Brief for the Petitioner in this case.

Together, Mr. Dove and Mr. Gold hold a wealth of collective expertise in Senate procedural rules. In addition, given their decades of service to the Senate, they have a personal interest in calling for the protection the Senate's institutional prerogatives, which are threatened by the Executive in this case.

SUMMARY OF THE ARGUMENT

When the United States Senate convenes in pro forma sessions, it is in session. It is not in recess. And, contrary to the Executive's argument in this case, during a pro forma session, the Senate is not both in session and in recess at the same time.

The arguments set forth in the Brief for the Petitioner ("Pet. Br.") and the 2012 Memorandum of the Office of Legal Counsel ("OLC Memo") (collectively, "the Executive"), fail to provide any convincing support for the Executive's claim that the U.S. Senate was in recess on January 4, 2012.

I. The Executive's discussions of the Senate's pro forma sessions reflect a fundamental misunderstanding of the Senate's history and traditions, and its role in our constitutional structure. First, the Executive misconstrues the deference that is due to the Senate in determining whether the Senate is in session under the Rules of Proceedings Clause. The Executive contends that the Legislative Branch is not entitled to any deference on the quintessentially legislative question of whether a house of the legislature is in session. Its argument disregards this Court's longstanding recognition that the Senate is entitled to substantial deference on such questions, even when they implicate the prerogatives of the President as well as the Senate.

Second, the Executive contends that the Senate's pro forma sessions constitute a parliamentary "device" or "stratagem" that wrongly elevates form

over substance. This argument betrays the Executive's tin ear to history. Over centuries, the Senate's traditions have incubated a variety of procedural devices that empower the minority to frustrate the will of the majority and of the Executive. Such devices promote consensus-building behind the scenes and permit the Senate to serve as the "cooling saucer" for executive initiatives.

Third, this case arises from a prolonged and recurring conflict between the Senate and the Presidency over competing prerogatives. This Court has called for "high walls and clear distinctions" in such cases. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). Such "high walls" are particularly appropriate here, because the politically diverse Senate is an unequal competitor with the unitary Executive in such prolonged conflict. The Executive has a consistent incentive to take an ever-broadening view of executive power. By contrast, at any given time, a significant subset of the Senate tends to side with the Presidency against the Senate's prerogatives. This dynamic threatens to gradually erode the prerogatives of the Senate, which exist not only for that institution's sake, but as structural checks to guarantee the liberty of all Americans.

II. The Senate's pro forma sessions constitute valid sessions of the Senate for every constitutional and parliamentary purpose. First, they constitute valid sessions of the Senate under the Presentment Clause; the Executive concedes that legislation may be passed under that Clause during pro forma sessions. Second, they constitute valid sessions of

the Senate under the Assembly Clause, as evidenced by decades of Congress's historical practice. Third, they constitute valid sessions of the Senate under the Adjournment Clause, in light of an even longer tradition. Fourth, they constitute valid sessions of the Senate under the Appointments Clause, because the Senate may just as easily confirm nominations by unanimous consent as it may pass legislation. Fifth, they constitute valid sessions of the Senate for other parliamentary purposes, such as permitting cloture votes to ripen, hearing presidential addresses, and entering formal messages into the Congressional Record.

The Executive contends that pro forma sessions are valid sessions of the Senate for purposes of the Presentment Clause and the Appointments Clause, but not for purposes of the Assembly Clause, the Adjournment Clause, or the Recess Appointments Clause. The Constitution contains no warrant for this contorted view that pro forma sessions are simultaneously part session and part recess.

III. Until the 2012 OLC Memo, every authority within the political branches to consider the question either presupposed or expressly understood that pro forma sessions constitute valid sessions of the Senate. The 1876 Senate floor debate cited by the Executive actually supports the view that pro forma sessions satisfy the Adjournment Clause. Even the Senators who were most scrupulously committed to compliance with the Adjournment Clause expressed no qualms about the use of pro forma sessions to satisfy that constitutional requirement. Likewise, pro forma sessions satisfy each of the four criteria

set forth in the 1905 Senate Judiciary Committee Report cited by the Executive. In more recent decades, Senators and Presidents of both political parties have understood that pro forma sessions are effective to prevent recess appointments. Finally, the current Administration advised this Court on the basis of that understanding as recently as 2010.

For all these reasons, as well as those stated in the Brief of Respondent, this Court should reject the Executive's position regarding pro forma sessions and affirm the judgment of the court below.

ARGUMENT

I. The Executive's Discussion of the Senate's Pro Forma Sessions Misapprehends Basic Principles of the Senate's History and Constitutional Role.

The Executive's argument regarding the Senate's pro forma sessions misapprehends basic principles of the Senate's history and procedure and its role in our constitutional framework.

A. The Senate's Determination of Whether the Senate Is in Session Is Entitled to Substantial Deference.

First, the Executive misconstrues the deference that is due to the Senate in regulating its own proceedings. In both the OLC Memo and its Opening Brief, the Executive contends that, while the Senate may be entitled to "some leeway" on "internal matters," Pet. Br. 60, such deference "has no proper bearing" when "the President . . . has a direct interest" in determining whether the Senate is in session, *id.* at 62. *See also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___ (Jan. 6, 2012), *available at* www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (all Internet materials last visited Nov. 23, 2013) ("OLC Memo"), at 20-21.

The Executive cites no judicial authority for its no-deference theory, and it has no support in this Court's jurisprudence. Rather, this Court's cases

establish that (1) on internal legislative matters, disputes about Congress's rules and procedures constitute non-justiciable political questions, while (2) on matters implicating the rights of third parties, including the President's prerogatives, the questions are justiciable but the Legislative Branch is still entitled to very substantial deference. In *United States v. Ballin*, this Court expounded this rule as follows:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.... The power to make rules ... is a continuous power, always subject to be exercised by the house, and within the limitations suggested, *absolute and beyond the challenge of any other body or tribunal*.

144 U.S. 1, 5 (1892) (emphasis added); *see also id.* ("Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration.").

This Court has consistently adhered to this interpretation. For example, in *United States v. Smith*, 286 U.S. 6 (1932), considering the validity of

a presidential appointment to the Federal Power Commission, this Court emphasized that "[i]n deciding the issue, the Court must give great weight to the Senate's present construction of its own rules." *Id.* at 33 (quoting *Ballin*, 144 U.S. at 5); *see also Christoffel v. United States*, 338 U.S. 84, 88 (1949) ("Congressional practice in the transaction of ordinary legislative business is of course none of our concern...."). Addressing a dispute between the President and the Senate over an appointment, this Court in *Smith* required "compelling" reasons to overrule the Senate's interpretation of its own rules. 286 U.S. at 48. The Court stated:

> To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.

Id. Notably absent from *Smith* is any statement that the President, rather than the Senate, is entitled to deference in such cases.

Without invoking this Court's cases, the Executive contends that the President's determination whether the Senate is in session is entitled to something like *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Executive argues that "the President is necessarily vested with a large, although not unlimited, discretion to

determine when there is a real and genuine recess," and that "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take." OLC Memo, at 5 (quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921) ("Daugherty Opinion")) (brackets added by OLC Memo). The assertion of deference to the President's determination whether the Senate is in session is a constant refrain of the Executive's analysis. *See* OLC Memo, at 1, 5, 9, 13, 14, 15, 17, 21, 23.

The notion that the President, rather than the Senate, should command deference in this context is an innovation unique to the Executive. The only support cited by the Executive for this counterintuitive proposition consists of a series of prior Executive opinions interpreting the scope of the Executive's own power. *See id.* at 5. The ultimate source of this theory is a dictum in the 1921 opinion of Attorney General Daugherty, added as an afterthought, which cites nothing at all on this point. *See* OLC Memo, at 14 (quoting Daugherty Opinion, 33 Op. Att'y Gen. at 25). For the reasons stated above, this principle is inconsistent both with this Court's cases and with the Rules of Proceedings Clause. U.S. Const. art. I, § 5, cl. 2. Though the Recess Appointments Clause implicates the prerogatives of both the Senate and the President, the question whether the Senate is in session is one of uniquely legislative competence, which the Constitution vests (quite naturally) in the Legislature. *See Smith*, 286 U.S. at 48.

B. The Use of Parliamentary "Stratagems" and "Devices" To Magnify the Power of the Minority Is a Fundamental Attribute of the Senate.

Second, the Executive repeatedly complains that the use of pro forma sessions to prevent a recess of the Senate rewards parliamentary maneuvering and elevates form over substance. For example, the Executive's brief contends that pro forma sessions constitute a parliamentary "stratagem," Pet. Br. 9, 10, 12, 50; that they "were being held merely as a matter of form," *id.* at 10; that they are a "legal fiction," *id.* at 11, 62; that they constitute "shirking," *id.* at 45; that they were "a stratagem to paper over what was in substance a continuous Senate recess," *id.* at 50; that they are a procedural "device," *id.* at 55; and that they constitute a "gambit," *id.* at 56.

Such arguments turn a blind eye to the actual history and practice of the Senate. The use of parliamentary maneuvering in the Senate, and the elevation of parliamentary form over substance, are not constitutionally suspect novelties. Rather, they are fundamental attributes of Senate procedure and practice, established over centuries of parliamentary tradition. In fact, the use of such maneuvers to magnify the power of minority voices, and encourage consensus-building behind the scenes, is perhaps the most distinctive historical attribute of the Senate:

> Unlike the House, the Senate is not a majoritarian institution. … In the Senate, the minority has a distinct voice, and the majority often struggles to govern at all….

> The Senate is a place where political minorities and individual members hold great power, resting on authority drawn from Senate rules and more than two hundred years of related precedents and traditions.

Martin B. Gold, *Senate Procedure and Practice* xii (2d ed. 2008); *see also* Richard A. Arenberg & Robert B. Dove, *Defending the Filibuster: The Soul of the Senate* 10-18 (2012). "[I]n the end, it is the privilege of debate and amendment that protects the minority, encourages consensus, and establishes the Senate as the stabilizing force in our national politics." Arenberg & Dove, *supra*, at 177. One example (among many) of this principle is the tradition of an individual senator imposing a "hold" on legislation, which is cited by the Executive in this case. *See* Pet. Br. 54 n.53. "A senator's power to impose and enforce a hold is grounded in his right to debate and his unilateral ability to object to unanimous consent requests." Gold, *supra*, at 84. The power to impose holds greatly amplifies the power of a single senator, often to the frustration of majority blocs and the Executive.

This case involves the use of a parliamentary procedure (the pro forma session) by a determined minority of Senators to frustrate the objectives of a majority of Senators and the Executive. Exactly the same dynamic is at work in other well-known Senate practices that routinely permit Senate minorities to thwart the aims of the majority and the Executive. *See* Arenberg & Dove, *supra*, at 18 (explaining the function of various Senate parliamentary tactics as

"protecting minority rights" and "encourag[ing] a search for consensus in the Senate"). Such devices implement the Framers' vision that the Senate should operate by supermajority or consensus and thus serve as a powerful check on the Executive, as reflected in the oft-repeated but "probably apocryphal story of George Washington explaining to Thomas Jefferson … that the Senate was included in the federal design to serve the same function as the saucer into which he poured his hot tea to cool." *Id.* at 2-3.

C. This Court Should Closely Scrutinize This Assertion of Executive Power Because the Senate and the Unitary Executive Are Unequal Competitors In Interbranch Rivalry Over Prerogatives.

In *Plaut v. Spendthrift Farm, Inc.*, this Court stated:

> [T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features … it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

514 U.S. 211, 239 (1995). This observation applies with special force in this case. "[I]n the heat of interbranch conflict," *id.*, the unitary nature of the Presidency gives it a structural advantage over the

politically diverse Senate. Regardless of which party holds the Presidency, the Executive has a consistent incentive to take a broad view of executive power. By contrast, at any given time, either the majority or a significant minority of the Senate typically sides with the President, as partisan loyalty tends to trump institutional loyalty in these cases. Thus, over decades and centuries, the Executive speaks with a unified voice in favor of executive power, while the Senate seldom, if ever, speaks with a unified voice in defense of threatened Senate prerogatives.

This case vividly illustrates this structural dynamic. The OLC Memo that sparked this controversy has two notable features: (1) its extensive reliance on authorities from within the Executive to support its key contentions; and (2) its reflection of the Executive's steadily broadening view of its own power. For example, the dictum in the 1921 opinion of Attorney General Daugherty, on which the Executive principally relies for its erroneous theory of deference to the President, was actually intended to disavow the claim that an adjournment of five or ten days could constitute a "recess":

> And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned [*i.e.*, less than three days] is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.

Daugherty Opinion, 33 Op. Att'y Gen. at 25 (concluding that a 28-day intrasession adjournment constituted a "recess"). Nine decades later, the Executive has made at least one recess appointment during a ten-day adjournment, while recess appointments during 11-day, 12-day, and 13-day adjournments have become commonplace. *See* OLC Memo, at 7 n.9. Moreover, in contrast to the Daugherty Opinion, the recent OLC Memo declines to concede even that the three-day adjournment authorized by the Adjournment Clause is not a "recess." *See id.* at 9 n.13; *but see* Pet. Br. 18.

By contrast, there is no comparable tradition in the politically diverse Senate of taking a consistently broadening view of the Senate's authority against the President. On the contrary, at any given time, a significant subset of the Senate—those Senators of the President's political party—typically aligns with the President on such questions.

Over time, the Executive's structural advantage in an interbranch rivalry of this nature leads to a gradual encroachment upon the prerogatives of the Senate. Moreover, the structural safeguards of the separation of powers do not exist solely, or even principally, for the sake of the Senate as an institution. Rather, as this Court has frequently observed, "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Indeed, "[t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that

allocated powers among three independent branches. This design serves not only to make government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). This Court, therefore, should scrutinize the Executive's assertion of power in this context with particular care, giving due consideration to the Senate's unique role in our constitutional structure as a check upon the power of the President.

II. Pro Forma Sessions Constitute Valid Sessions of the Senate For Every Constitutional and Parliamentary Purpose.

On the Executive's view, when the Senate meets in pro forma session, the Senate is in session for purposes of the Presentment Clause and the Appointments Clause, but in recess for purposes of the Recess Appointments Clause, the Assembly Clause, and the Adjournment Clause. The common thread of the Executive's position is that the Senate is in session when its being in session will result in an increase in the authority of the Executive; otherwise, it is in recess. Contrary to the Executive's argument, this is not the "better view." Pet. Br. 59. The "better view," *id.*, is that the Senate is simply and unqualifiedly in session when it meets in pro forma sessions.

A. The Executive Concedes That, During Pro Forma Sessions, Legislation May Be "Passed" Within the Meaning of the Presentment Clause.

First, the Executive does not dispute that a bill may be "passed" by the Senate during a pro forma session under the Presentment Clause. U.S. Const. art. I, § 7, cl. 2. That clause provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated….

Id. On December 23, 2011, during a pro forma session, the Senate passed H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). This bill was passed by unanimous consent, notwithstanding the Senate's previous order of December 17, 2011, stating that there would be "no business conducted" during this pro forma session. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). On August 5, 2011, during a pro forma session, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). The President "approve[d]" both bills and signed them into law. U.S. Const. art. I, § 7, cl. 2; *see also* Resp. Br. 53-54. Moreover, the OLC Memo acknowledges that "[t]wice in 2011, the Senate passed legislation during pro forma sessions by unanimous consent, evidenced

by the lack of objection from any member who might have been present at the time." OLC Memo, at 21.

In this case, the Executive does not contend that the Temporary Payroll Tax Cut Continuation Act of 2011 and the Airport and Airway Extension Act of 2011, both of which the President signed into law, are constitutionally invalid. The Executive's concession that these pieces of legislation were validly "passed" under the Presentment Clause is deeply damaging to its litigation position. It is difficult to see how a pro forma session may be dismissed as a mere "legal fiction," Pet. Br. 11, 62, when the Senate exercised one of its most consequential functions—passing legislation—during such a session.

B. Pro Forma Sessions Constitute Valid Sessions of the Senate For Purposes of the Assembly Clause.

Section Two of the Twentieth Amendment requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2. The Senate has satisfied its constitutional obligation to assemble at noon on the third of January with a pro forma session at least six times over more than three decades. Christopher M. Davis, Cong. Research Serv., *Memorandum re: Certain Questions Related to Pro Forma Sessions of the Senate*, 158 Cong. Rec. S5954, 5955 (daily ed. Aug. 2, 2012); *see also* Resp. C.A. Br. 43-44. The House of Representatives has likewise fulfilled its obligation

under the Assembly Clause with pro forma sessions. *See, e.g.*, 158 Cong. Rec. H1 (daily ed. Jan. 3, 2012) ("This being the day fixed pursuant to the 20th Amendment to the Constitution for the meeting of the second session of the 112th Congress, the House met at noon and was called to order by the Speaker pro tempore…. Pursuant to section 4(a) of House Resolution 493, no organizational or legislative business will be conducted on this day."); Pub. L. No. 111-121, 123 Stat. 3479 (2009) (providing that the next congressional session would begin at noon on January 5, 2010); 156 Cong. Rec. H2 (daily ed. Jan. 5, 2010) ("[N]o organizational or legislative business will be conducted on this day."); H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) ("[W]hen the Congress convenes on January 3, 1980, … neither the House nor the Senate shall conduct organizational or legislative business until Tuesday, January 22, 1980, [unless convened sooner by House or Senate leadership]."). *See also* Resp. C.A. Br. 43-44 & n.24.

Prior to this case, the validity of this practice had never been questioned by the Executive or any other agency. Even the OLC Memo concedes that pro forma sessions satisfy the Assembly Clause. OLC Memo, at 18 & n.22 (conceding that "in other contexts … a pro forma session may have the same legal effect as any other session and thus may fulfill certain constitutional requirements," including those of the Assembly Clause and the Adjournment Clause). During this litigation, however, the Executive has shifted its position to contend that the practice of satisfying the Assembly Clause through pro forma sessions is constitutionally suspect. *See*

Pet. Br. 61 n.60. This argument has no merit. First, it is inconsistent with the Executive's position in this very case, because the Executive repeatedly contends that the putative "recess" at issue consisted of "the 20-day period" between *January 3* and January 23, 2013, thus presuming that the Senate validly assembled on January 3, 2013. *See, e.g.*, Pet. Br. 45, 50, 51, 60. Second, it runs afoul of the Executive's own standards for historical legitimization, set forth in Section I of its Opening Brief: "[A] practice of at least twenty years duration ... is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." Pet. Br. 27-28 (quoting *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)). Third, it cannot be squared with the deference due to the Senate's determination of whether and when it is in session under the Rules of Proceedings Clause. *See supra* Part I.A.

The Executive also suggests that the Senate does not "assemble" within the meaning of the Twentieth Amendment through a pro forma session attended by only one Member. Pet. Br. 61 n.60. This contention is meritless in light of longstanding Senate procedural traditions. "In daily practice, the Senate operates on the principle of a presumptive quorum, which means that the presence of a quorum is assumed unless its absence is suggested." Gold, *supra*, at 37. Thus, a quorum of the Senate is presumed to be present at a pro forma session, unless an attending senator raises a point of no quorum. As noted above, this presumptive-quorum rule is just the sort of internal legislative procedural

rule that is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5.

C. Pro Forma Sessions Constitute Valid Sessions of the Senate Under the Adjournment Clause.

Article I, section 5, clause 4 of the Constitution provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days...." U.S. Const. art. 1, § 5, cl. 4. It is undisputed that both Houses of Congress have used pro forma sessions to satisfy their obligations under the Adjournment Clause for the better part of a century, without objection from the Executive. *See* OLC Memo, at 19 n.25 (detailing 13 documented examples of the use of pro forma sessions to satisfy the Adjournment Clause, occurring in 1929, 1950, 1980, and 1981); Resp. C.A. Br. 42 n.23 (citing 21 examples in the Congressional Record of the Senate's use of pro forma sessions to satisfy the Adjournment Clause, dating to 1949); *see also* Gold, *supra*, at 30 ("In the absence of an adjournment resolution, the Senate and/or House may meet in pro forma sessions in order to have convened frequently enough to meet constitutional requirements."). In fact, the Senate first used pro forma sessions to satisfy the Adjournment Clause in 1854. Resp. Br. 51.

The OLC Memo does not question the validity of using pro forma sessions to satisfy the Adjournment Clause. OLC Memo, at 18. Yet, here again, the Executive has shifted its position in this litigation and belatedly questions the use of pro forma sessions

to satisfy the Adjournment Clause, contending that "the better view is that pro-forma sessions do not comply with the Adjournment Clause." Pet. Br. 59-60. This argument suffers from the same defects as afflict the Executive's objection to the Senate's use of pro forma sessions to satisfy the Assembly Clause. *See supra* Part II.B. Because both Houses of Congress have used pro forma sessions to satisfy the Adjournment Clause numerous times dating back to 1854, the Executive's position contradicts its own contention that "a practice of at least twenty years duration ... is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." Pet. Br. 27-28 (quoting *The Pocket Veto Case*, 279 U.S. at 690). Moreover, once again, Congress is owed substantial deference in its determination of whether and when it is session under the Rules of Proceedings Clause. *See supra* Part I.A.

The Executive argues in the alternative that the legitimacy of Congress's use of pro forma sessions to satisfy the Assembly and Adjournment Clauses does not translate to the Recess Appointments Clause, because the former clauses serve mere "housekeeping purposes," "affect the operations of only the House in question," or in any case "affect the Legislative Branch *alone*." OLC Memo, at 19 (emphasis in original); *see also* Pet. Br. 60 (arguing that the Adjournment Clause is "principally related to internal matters"); *id.* at 61-62 (characterizing the House and Senate's Adjournment Clause obligations as "obligations to one another" in which "the President has no direct interest"). This argument

rests on the erroneous premise that the Legislative Branch is not entitled to deference on matters of peculiarly legislative competence that implicate the prerogatives of the Executive; this premise has no merit for the reasons discussed above. *See supra* Part I.A. Moreover, the constitutional requirements that the Houses of Congress meet regularly and in conjunction with one another are not mere "housekeeping" requirements; they ensure that the federal legislature is available and able to conduct the affairs of the nation.

D. Pro Forma Sessions Constitute Valid Sessions of the Senate Under the Appointments Clause.

Furthermore, the Executive concedes that pro forma sessions constitute valid sessions of the Senate under the Appointments Clause. Article II, section 2, clause 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States...." U.S. Const. art II, § 2, cl. 2. It is beyond dispute that the most common method for the Senate to exercise its authority of "Advice and Consent" is by unanimous consent. *See, e.g.*, S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 942 (1992) ("By unanimous consent the Senate could go into executive session for the consideration of a specific nomination regardless of its location on the Calendar."). And the Executive does not dispute that the Senate may pass legislation by unanimous

consent at pro forma sessions. By parity of reasoning, it is indisputable that the Senate may confirm presidential appointments by unanimous consent during pro forma sessions. Indeed, the OLC Memo expressly acknowledges this possibility; after noting that the Senate has validly passed legislation and engaged in other actions at pro forma sessions, the OLC Memo concedes that "[c]onceivably, the Senate might provide advice and consent on pending nominations during a pro forma session in the same manner." OLC Memo, at 21; *see also* 158 Cong. Rec. S113 (daily ed. Jan. 26, 2012) (Sen. Lee) ("During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent.").

This concession is perhaps the most damaging of all to the Executive's position in this case. The Appointments Clause immediately precedes the Recess Appointments Clause in Article II. The Executive recognizes that two are so conceptually interrelated that they should be viewed as a single provision governing presidential appointments. *See* OLC Memo, at 9-10. In essence, the Executive claims that, when the Senate meets pro forma, it is *available* to provide advice and consent on presidential appointments under the Appointments Clause at the very same time that it is *unavailable* to provide advice and consent on presidential appointments under the Recess Appointments Clause. This simply will not do.

In attempt to explain this contradiction, the Executive contends that the Senate's December 17,

2011, order stating that there would be "no business conducted" at the pro forma sessions rendered the Senate "unavailable" to provide advice and consent on presidential nominations. *See* Pet. Br. 48 (quoting Pet. App. 91a); *see also* OLC Memo, at 21-22. This explanation has no merit. The Executive contends that "the December 17 order *barred* the Senate as a body from conducting any business—including providing advice and consent on Presidential nominations—for the entire 20-day period between the start of the Second Session of the 112th Congress at noon on January 3 and the Senate's next regular session on January 23." Pet. Br. 48 (emphasis added). But, on the very same page, the Executive concedes that "the Senate did pass legislation … on a day when it had been scheduled to hold a pro-forma session" pursuant to the very same December 17 order stating that "no business" would be "conducted." *Id.* at 48 n.47. Thus, it is perfectly plain that the Senate was not "barred" from considering presidential nominations during the pro forma sessions by the December 17 order, any more than it was "barred" from passing legislation during the pro forma sessions, as it went on to do. The Senate was in session and available to consider the President's nominations; it simply failed to act on them. While this inaction may be a source of great frustration to the Executive, such frustration is both commonplace and inherent in the constitutional role of the Senate as a check on executive power.

E. Pro Forma Sessions Constitute Valid Sessions of the Senate For Other Parliamentary Purposes.

Pro forma sessions also constitute valid sessions of the Senate for many other parliamentary purposes. Among other things, the Senate has used pro forma sessions to enable Senate committees to meet, *see, e.g.*, 154 Cong. Rec. S8907 (daily ed. Sept. 17, 2008); to permit a cloture vote to ripen, *see, e.g.*, 133 Cong. Rec. 15,445 (1987); to hear a presidential address, *see, e.g.*, 139 Cong. Rec. 3039 (1993); to enter formal messages into the Congressional Record, *see, e.g.*, 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011); to revise its schedule by unanimous consent, *see, e.g.*, 127 Cong. Rec. 263 (1981); and to authorize its "Presiding Officer . . . to sign bills and joint resolutions passed by the two Houses and found truly enrolled," 109 Cong. Rec. 22,941 (1963). Such activities belie the Executive's attempt to characterize pro forma sessions as empty formalities.

This history also demonstrates that pro forma sessions satisfy even the Executive's chosen standard for a legitimate Senate session. For example, one part of the Executive's argument is that, "for Recess-Appointments-Clause purposes, a 'recess' exists during 'the period of time . . . when, because of its absence, [the Senate] cannot receive communications from the President...." Pet. Br. 45 (quoting S. Rep. No. 58-4389, at 2 (1905) ("1905 Senate Report")). By this standard, the Executive argues, the Senate must have been in "recess" between January 3 and January 23, 2012, because two messages from the President and the House that

"arrived" during that period were not "formally laid before the Senate" until January 23rd. Pet. Br. 49; *see also* OLC Memo, at 14. But it is undisputed that the Senate has entered formal messages into the Congressional Record at a pro forma session. *See* OLC Memo, at 21 (citing 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011)). The Senate could have done likewise with the messages received between January 3 and January 23, 2012. Thus, the Executive cannot claim that it was in recess on those grounds. *See also infra* Part III.B.

In sum, on the Executive's view, a pro forma session is neither fish nor fowl—or if it is fowl, it is an odd duck indeed. It is sufficiently robust to allow the Senate to fulfill even the most consequential of functions—such as passing legislation—but, at the same time, it is sufficiently flimsy and fictitious as to render the Senate unavailable to consider executive nominations by unanimous consent. This contorted view is not "the better view." Pet. Br. 59. The better view is that the Senate is simply in session during a pro forma session.

III. Every Political Authority To Consider the Question Prior To January 2012 Understood That Pro Forma Sessions Are Valid Sessions of the Senate.

Notably, the OLC Memo was the first authority within the political branches to opine that pro forma sessions do not constitute valid sessions of the Senate for purposes of the Recess Appointments Clause. *See* OLC Memo, at 4 ("The question is a novel one...."). In fact, every authority within the

political branches to consider the question prior to January 2012 either presupposed or expressly understood that periodic pro forma sessions prevent a "recess" of the Senate within the meaning of the Recess Appointments Clause.

A. The 1876 Floor Debate Presupposed the Validity of Pro Forma Sessions.

The Executive contends that, in an 1876 floor debate, "the Senate appears to have concluded" that pro forma sessions were not valid sessions of the Senate for purposes of the Adjournment Clause. Pet. Br. 60-61 (citing 5 Cong. Rec. 333 (1876)). In fact, the 1876 Senate floor debate demonstrates the exact opposite: Even the Senators who were most scrupulously committed to compliance with the Adjournment Clause expressed no qualms about the use of pro forma sessions to satisfy that constitutional requirement.

The 1876 Senate floor debate considered how to effect a nine-day holiday break without running afoul of the Adjournment Clause. The House of Representatives had just adopted a "formal resolution" stating it would "adjourn over for the constitutional period [i.e., three days], to meet each day of adjournment and adjourn again, and so on until Wednesday, the 3d of January." 5 Cong. Rec. 333 (1876) (Sen. Anthony). The Senate was considering a parallel resolution, but certain Senators objected that adopting such a resolution would be tantamount to planning a nine-day recess without House approval, in violation of the Adjournment Clause. *Id.* at 334 (Sen. Bayard); *id.* at

334-35 (Sen. Conkling). In response to these objections, another Senator proposed that the Senate proceed with a resolution providing for only the initial three-day adjournment, with a "general understanding" that it would take two subsequent three-day adjournments, "[w]ithout the transaction of any business in the mean time." *Id.* at 333 (Sen. Anthony). That proposal carried the day. *Id.* at 338.

The transcript of the 1876 debate undermines several of the Executive's claims in this case. Most notably, at the debate's conclusion, the Senate decided (in the form of a "general understanding") to meet in three pro forma sessions interrupted by three-day recesses over the course of nine days, apparently satisfied that doing so would not run afoul of the Adjournment Clause. *Id.* That hardly qualifies as having "concluded" that pro forma sessions do not satisfy the Adjournment Clause. Moreover, in the course of the debate, it was suggested (1) that taking serial three-day adjournments would not be a novel course of action, *see id.* at 334 (Sen. Anthony) ("Therefore I suggested that there be an informal understanding that tomorrow we shall adjourn for three days, and then for three days, and then for three days again, *which has been frequently done here*, and it is done now by the House.") (emphasis added); and (2) that one advantage of holding pro forma sessions was that the Senate would remain available to conduct business as necessary. *Id.* (Sen. Anthony) (noting that the proposal "leaves it in the power of the Senate, if any exigency should occur, to take any action that might be deemed necessary").

Furthermore, even the two Senators who objected to the originally proposed resolution did not object that holding only pro forma sessions over a nine-day period would violate the Adjournment Clause. Rather, their objections were purely procedural: that formalizing a plan for three successive adjournments in advance might violate the Adjournment Clause, and that it would not be possible for the Senate to vote on subsequent adjournments in the absence of a quorum, and so the Senate might have to adjourn from day-to-day, rather than for three-day periods. *See id.* at 334 (Sen. Conkling and Sen. Bayard). Neither of these objections comes close to an argument that pro forma sessions fail to satisfy the Adjournment Clause.

B. Pro Forma Sessions Satisfy the Criteria Set Forth in the 1905 Senate Judiciary Committee Report.

The Senate Judiciary Committee Report of 1905, upon which the Executive heavily relies, likewise supports the validity of pro forma sessions. *See* S. Rep. No. 58-4389 (1905) ("1905 Senate Report"). In 1903, President Theodore Roosevelt had attempted to make recess appointments between two sessions of Congress with no temporal break at all between them—*i.e.*, one session had ended at the very moment that the next began. In response, the Senate Judiciary Committee wrote an opinion stressing that "a recess of the Senate" had to be "something real, not something imaginary; something actual, not something fictitious." *Id.* at 1-2. The Committee stated that a "recess" is

> the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 2 (emphasis in original). The Executive interprets the 1905 Senate Report as supporting a "functional standard" for a recess, permitting the President to determine that the Senate is effectively in "recess" for the purpose of the Recess Appointments Clause, even when it is meeting regularly in pro forma sessions. *See* Pet. Br. 45-49; OLC Memo, at 12-14. But the Senate report argued quite the opposite. It argued that the President could not simply deem the Senate to be in recess whenever it suited his purposes; the Senate had to be genuinely unavailable in order for the Recess Appointments Clause to be triggered:

> The framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.

1905 Senate Report, at 3 (emphases in original).

Moreover, pro forma sessions satisfy each of the criteria enumerated in the 1905 Senate Report. First, pro forma sessions consist of "sitting in regular ... session as a branch of Congress," *id.* at 2. The Executive's contention to the contrary is entirely question-begging. In fact, pro forma sessions routinely occur while the Senate is sitting in regular session. *See* Pet. Br. 48 (noting that noon on January 3, 2012, marked the beginning of the Second Session of the 112th Congress). Second, all members of the Senate have the same duty of attendance at pro forma sessions as at any other session of the Senate. *See* Resp. Br. 61-63.

Third, during pro forma sessions, the Senate's "Chamber" is not "empty." 1905 Senate Report, at 2. Rather, certain Senators are in attendance at each session; even the Executive does not contend that the chamber is "empty." *See* Pet. Br. 48 (noting that, "on January 6, 2012, a virtually empty chamber was gaveled into pro-forma session by Senator Webb"); *see also* Resp. Br. 58-60 (noting the difficulty of ascertaining how many Senators were in fact in attendance at any pro forma session). Moreover, the number of members physically in attendance is not, by itself, a good indicator of the Senate's level of activity. *See* Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013) ("As any observer of the Senate soon notices, typically only a handful of Senators are present during floor debates. It is unusual for as many as 51 Senators to be present on the floor at the same time...."). And even with very few Senators in attendance, the Senate can conduct vital business, including passing legislation and approving

presidential nominations. *See supra* Part II; OLC Memo, at 13 n.17, 21; Resp. Br. 58-60; *see also* Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013) ("Most nominations are brought up by unanimous consent and approved without objection....").

Finally, the Senate is fully capable of both receiving communications from the President and "participat[ing] as a body in making appointments" during pro forma sessions. 1905 Senate Report, at 2. There is no doubt that the Senate can enter formal messages into the Congressional Record at a pro forma session. *See* OLC Memo, at 21 (citing 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011)). The Senate can also convene committee meetings for consideration of presidential nominees during pro forma sessions. *See* 154 Cong. Rec. S8907 (daily ed. Sept. 17, 2008) ("We will be in pro forma session so committees can still meet...."). And the Executive itself has acknowledged that the Senate could "provide advice and consent on pending nominations during a pro forma session . . . ." OLC Memo, at 21. *See also supra* Parts II.D., II.E. Thus, the Senate's pro forma sessions satisfy all of the 1905 Senate Report's criteria for a valid Senate session.

C. President Reagan and Senator Byrd Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Senator Inhofe's account of negotiations between the Senate and the White House during the Reagan

Administration also indicates that pro forma sessions were regarded as valid sessions of the Senate under the Recess Appointments Clause. According to Senator Inhofe's comments in November 1999, Senator Robert Byrd wrote a letter to the White House in 1985 urging the President to desist making recess appointments. According to Senator Inhofe, Senator Byrd asked President Reagan

> to give the list to the majority leader in sufficient time in advance that [the Senate] could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and *staying in pro forma so the recess appointments could not take place.*

145 Cong. Rec. 29,915 (1999) (Sen. Inhofe) (emphasis added). In response, President Reagan evidently agreed to notify the Senate of any contemplated recess appointments in advance. *Id.* Notably, Senator Inhofe's comments were made long before the Executive first contemplated the "novel" question, OLC Memo, at 4, of disregarding pro forma sessions for the purpose of making recess appointments.

The Executive has tried to explain this evidence by suggesting that Senator Inhofe misunderstood the nature of the agreement between Senator Byrd and President Reagan. Pet. Br. 57. Even if that were true, it would be beside the point. Whether Senator Inhofe's recollection of 1985 was accurate or not, his matter-of-fact description of those events is itself

powerful evidence that it was commonly understood in the 1980s and 1990s that pro forma sessions could block recess appointments. Nothing in his description suggests that Senator Byrd's threat to use pro forma sessions to block recess appointments was novel or in any other way remarkable. *See also* Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 11 n.44 (2013) (discussing evidence that "this practice was considered, but not implemented, during the 1980s and 1990s"), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP%5CW%3B%20P%20%20%0A. In short, Senator Inhofe's comments afford substantial evidence that, up until January 2012, it was widely accepted by both branches that pro forma sessions prevent a "recess" within the meaning of the Recess Appointments Clause.

D. President Bush and Senator Reid Also Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Both the Legislative and the Executive Branches have continued to regard pro forma sessions as valid sessions in recent years, and both political parties have used them for that purpose. In 2007, Senate Majority Leader Harry Reid introduced the practice at issue in this case by causing the Senate to "com[e] in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments." 153 Cong. Rec. S14609 (2007) (Sen. Reid); *see also* Henry B. Hogue & Maureen Bearden, Cong. Research Serv., RL33310, *Recess Appointments Made by President*

George W. Bush, January 20, 2001-October 31, 2008 6-7 (2008), *available at* http://www.fas.org/sgp/crs/misc/-RL33310.pdf (listing this and subsequent similar declarations by Senator Reid). Senator Reid's statements on this issue are particularly telling, because they provide the most contemporaneous expression of the effect of pro forma sessions by the person most clearly empowered by office to make this determination—namely, the Senate Majority Leader. President George W. Bush acknowledged the validity of pro forma sessions for this purpose, refraining from making any further recess appointments for the remainder of his term, despite an active history of making recess appointments prior to Senator Reid's change in Senate procedure. *See id.* at 6-7; Hogue, *Recess Appointments: Frequently Asked Questions*, *supra*, at 11, *available at* http://www.senate.gov/-CRSReports/crs-publish.cfm?pid=%270DP%2BP%5-CW%3B%20P%20%20%0A.

E. The Solicitor General's 2010 Letter Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Most recently, the Solicitor General acknowledged the efficacy of pro forma sessions in blocking recess appointments, in a letter to the Clerk of the Supreme Court in the case of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). That case addressed the validity of an NLRB determination during a period in which the Board had only two members; subsequently, several vacancies were filled by recess appointments. *New Process Steel*,

560 U.S at 674. Because two vacancies on the NLRB had since been filled by recess appointment, the Court requested letter briefing addressing the effect, if any, of the later appointments on the disposition of the case before it. In the course of advising the Court on that question, the Solicitor General pointed out the likelihood that prolonged vacancies on the NLRB would recur, given the Senate's use of frequent pro forma sessions to prevent the President from making recess appointments:

> [G]iven the complexities and potential length of the Senate confirmation process, multiple vacancies [on the NLRB] could arise again in the future. Although a President may fill such vacancies through the use of his recess appointment power, as the President did on March 27 of this year, *the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period.*

Letter from the Solicitor General to William K. Suter, Clerk, Supreme Court of the United States at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), *available at* http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf (emphasis added). To be sure, as the OLC Memo points out, the Solicitor General did not purport in this letter to give this Court an opinion of the constitutional status of pro forma sessions. *See* OLC Memo, at 23. But it remains significant that

the Solicitor General, consistent with every other historical source, understood that pro forma sessions were indeed effective in disabling the President's power to make recess appointments, and advised this Court on the basis of that understanding.

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In sum, the Senate's pro forma sessions constitute valid sessions of the Senate. When the Senate was meeting in pro forma sessions between December 17, 2011, and January 23, 2012, it was not in "recess" under the Recess Appointments Clause or any other Clause of the Constitution. Rather, the Senate was in session, and the President had no power to make recess appointments.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the court below.

Respectfully submitted,

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