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., ET AL.

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF SENATE REPUBLICAN LEADER MITCH MCCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

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QUESTIONS PRESENTED

The Constitution makes the Senate's "Advice and Consent" a condition precedent to the appointment of federal officers, except for inferior officers exempted by Congress. U.S. Const. art. II, § 2, cl. 2. The Recess Appointments Clause, *id.* art. II, § 2, cl. 3, permits the President to "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." But the Senate itself is empowered to "determine the Rules of its Proceedings," *id.* art. I, § 5, cl. 2, including when and how to hold sessions and to adjourn. *Amici* will address the following question:

Whether the President lawfully exercised his authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, when he purportedly appointed three individuals to be Members of the National Labor Relations Board on January 4, 2012, while the Senate's records show that it convened sessions every three days.

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INTEREST OF *AMICI CURIAE*

Amici curiae are Senate Republican Leader Mitch McConnell and 44 other members of the United States Senate (listed in Appendix B). As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process and its authority to prescribe and administer its own procedures—both of which the Executive sought to usurp here. Particularly given Senate rules and practices providing all members of the Senate a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's claim of power to make appointments unilaterally—which the Framers deliberately withheld—is repudiated.[1]

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive's claim that the court of appeals' decision upsets the constitutional structure and deprives the President of power the Framers granted has matters exactly backwards. It is the *President* who, by making the January 2012 recess appointments that the decision below invalidated, usurped two powers the Constitution confers on the *Senate*—and claimed a unilateral appointment authority that the Framers intentionally withheld. Article II gives the Senate a veto over federal appointments, requiring its "Advice and Consent" for appointments to all principal offices (and inferior posts not exempted by Congress). U.S. Const. art. II, § 2, cl. 2. And although the Framers allowed the President to fill "Vacancies that may happen during the Recess of the Senate" with temporary commissions, *id.* art. II, § 2, cl. 3, they reserved to the *Senate* plenary power over "all matters of method," *United States* v. *Ballin*, 144 U.S. 1, 5-6 (1892); *see* U.S. Const. art. I, § 5, cl. 2, including (with few, enumerated exceptions) when and how to hold sessions and when to adjourn.

The January 2012 appointments eviscerated both of these Senate prerogatives. By purporting to appoint principal officers without the Senate's approval, the President contravened the advice-and-consent protocol. As the court of appeals held, those appointments cannot be justified by the Recess Appointments Clause without distorting that provision's text and purpose beyond recognition: The appointments were made neither during "the Recess of the Senate," but instead in an intrasession adjournment, nor to fill "vacancies that … happen[ed] during the Recess," but to preexisting openings. U.S. Const.

art. II, § 2, cl. 3; *see* Pet. App. 17a-52a. Each of those holdings is correct and sufficient to affirm the court of appeals' judgment.

The January 2012 appointments are also invalid, however, for an additional, independent reason: Even accepting the Executive's strained reading of the Recess Appointments Clause, the President still could not make those appointments without usurping the Senate's exclusive authority over its procedures. The Executive accepts that, at a minimum, Senate adjournments of three days or less are too short to "trigger the President's recess-appointments authority." Pet'r Br. 18. But the January 4, 2012, appointments were made during just such an adjournment; the Senate held scheduled sessions on January 3 and 6. The Executive's claim that the President could disregard those sessions and draw his *own* "conclusion" whether the Senate really convened (*id.* at 45) is a naked assault on Senate self-governance. The President has no power to declare a House of Congress adjourned when it says otherwise—least of all when it is, as here, demonstrably capable of exercising its constitutional authority.

That alone dooms the January 2012 appointments. Indeed, the Court can resolve the case on that basis, without confronting the other questions it presents. If the Court nevertheless addresses those other issues, it should affirm the decision below for the reasons given by the court of appeals and Noel Canning. Noel Canning Br. 8-49. Two specific aspects of the Executive's defense of the appointments, however, pose particular threats to the constitutional structure and warrant special rebuke. Its reliance on supposed Senate acquiescence in the Executive's view of the recess-appointments power is doubly

misplaced: The Senate *cannot* cede its constitutional authority expressly, much less by silence, and in any event it *has not* done so. And the Executive's claim that its rewriting of the Recess Appointments Clause is necessary to *safeguard* the separation of powers turns the constitutional structure upside-down. It is the Executive's theory that would upset the careful balance the Framers struck and dangerously concentrate powers they deliberately divided.

ARGUMENT

I. THE EXECUTIVE HAD NO AUTHORITY AND NO BASIS TO DEEM THE SENATE IN "THE RECESS" WHILE IT CHOSE TO HOLD SESSIONS.

This case raises several important constitutional issues, but the parties' controversy can be resolved by answering one question: Who determines—the Senate, or the President—whether the Senate is in session? The Constitution's text and structure point to only one answer: the Senate. The Executive had no basis for second-guessing its determination here.

A. The Senate's Determinations That It Would Be, And In Fact Was, In Session On Certain Days Are Dispositive.

The January 2012 appointments' legality depends on the President's claimed, but illusory, authority to deem the Senate in "Recess" when it declares itself in session. The Executive has long maintained, and admits even now, that the Senate is *not* in "Recess" for purposes of the Recess Appointments Clause when it has adjourned within a "Session" for three days or fewer. *See* Pet'r Br. 18; Resp't Letter Br. 3, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457); *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25

(1921). And for good reason: Such short breaks do not require even the consent of the House. U.S. Const. art. I, § 5, cl. 4. And it would make little sense to permit the President to fill offices for up to two *years* because the Senate adjourns for two *days*—or even two hours. The January 4, 2012, appointments, however, were made during a three-day adjournment: The Senate held sessions on January 3 and 6. S. Journal, 112th Cong., 2d Sess. 1-2 (2012) (minute book). The appointments are thus invalid *unless* the President has power to declare those sessions nullities.

He does not. The Constitution vests authority to prescribe Senate procedure in the chamber itself. And its official account of its activities is controlling. The Executive's contrary claim has no foothold in the Constitution's text or structure, and if upheld would severely undermine the separation of powers.

1. Analysis of whether the Senate was in session on January 3 and 6, 2012, begins and ends with the Senate's determinations that it was. The Senate alone has power to decide, within wide limits, when and how it will meet, and its account of its actions is authoritative.

a. The Constitution accords the Senate broad authority to prescribe and administer its own procedures. Article I authorizes "[e]ach House" to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Rules of Proceedings Clause thus reserves "all matters of method … to the determination of the house" itself. *Ballin*, 144 U.S. at 5. That authority is indispensable to the Senate's functioning. If it "did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and

order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (1833). Thus, unless the Senate's procedures overstep another constitutional constraint, or bear no "reasonable relation" whatsoever to their ends, its discretion is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. Other branches' speculation that "some other way would be better, more accurate or even more just" is irrelevant. *Ibid.*

The Senate's power over procedure includes generally determining for itself when and how to meet and adjourn. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Residence Bill* (July 15, 1790), *reprinted in* 17 *The Papers of Thomas Jefferson* 194, 195 (1965). The Constitution imposes only modest constraints on the Senate's schedule: It must meet once a year—on January 3, unless Congress establishes another date by law, U.S. Const. amend. XX, § 2, *superseding id.* art. I, § 4, cl. 2—and when called into special session by the President, *id.* art. II, § 3. And once the Senate has convened, it cannot adjourn for more than three days, or to another place, without the House's consent. *Id.* art. I, § 5, cl. 4. The Senate's power over its schedule is otherwise absolute.

The Executive's role regarding the Senate's schedule, in contrast, is sharply circumscribed. He may call the Senate into session on "extraordinary Occasions." U.S. Const. art. II, § 3. And if the House and Senate tender a "Disagreement" concerning adjournments, he can resolve it. *Ibid.* Beyond that, he has no say in Senate meetings and adjournments.

The Framers expressly *excluded* adjournment resolutions from the presentment requirement. *Id.* art. I, § 7, cl. 3. And they *withheld* from the President the power (wielded by the Crown and some States' executives) to "prorogue" legislative sessions unilaterally. The Federalist No. 69, at 417-18 (Alexander Hamilton) (Clinton Rossiter ed., 2003); *see* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1550-53 (2005); *cf.* 3 *The Records of the Federal Convention of 1787*, at 111, 202 (M. Farrand ed., 1911).

b. The Senate not only can decide when it will meet, but also has the final word regarding whether it has done so. More than a century ago, this Court made clear that each House's official accounts of its actions are controlling. *See Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 670-80 (1892). With few exceptions, moreover, each can choose how its accounts shall be kept. *See id.* at 671.

Article I provides that each chamber "shall keep a Journal of its Proceedings," U.S. Const. art. I, § 5, cl. 3, and specifies some matters that must be entered upon it, *ibid.* (yeas and nays, if requested by one-fifth of members present); *id.* art. I, § 7, cl. 2 (reasons for presidential veto, and members voting for and against overriding it). But the Framers otherwise "left to the discretion of the respective houses" how to record and authenticate their actions. *Marshall Field*, 143 U.S. at 671. *Marshall Field* thus rejected a claim that a bill both Houses purported to have passed was not *actually* approved. *See id.* at 672-73. Each chamber's presiding officer had signed the bill, which under extant "rules" and "usage" constituted an "official attestation" of Congress's approval. *Id.* at 671-72, 680.

Where Senate practices do *not* prescribe another method for recording its actions, its Journal should be conclusive. *See Ballin*, 144 U.S. at 4 (to the extent "reference may be had" to the Journal, "it must be assumed to speak the truth"); *see id.* at 9 (enrolled bill *plus* House Journal entry placed bill's passage "beyond challenge"). The Senate is required to record its proceedings in its Journal, *see* U.S. Const. art. I, § 5, cl. 3, and the "presumption in favor of regularity" in Congress's affairs requires other branches to assume it did so faithfully. *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929); *see Shapiro* v. *United States*, 335 U.S. 1, 14 n.19 (1948) (presumption applicable to "record of the Senate Committee proceedings").

Ballin demonstrates that either House's determination that it is in session and able to do business is especially immune to second-guessing by outsiders. *Ballin* rejected a challenge to the House's protocol for ascertaining whether it had a quorum. *See* 144 U.S. at 5-6; U.S. Const. art. I, § 5, cls. 1-2. The House rule at issue provided that members who declined to vote but were present "'in the hall of the house'" counted towards a quorum. 144 U.S. at 5 (citation omitted). That procedure, the Court held, was well within its power to prescribe. *See id.* at 5-6. And because the "presence of [a] quorum was determined in accordance with a valid rule theretofore adopted by the house," the chamber's determination that it had a quorum could not be attacked with "parol evidence." *Id.* at 4, 9.

c. These principles make short work of this case. The January 4, 2012, appointments are invalid if the Senate held sessions on January 3 and 6. The Senate's records leave no doubt that it planned to do so,

S. Journal, 112th Cong., 1st Sess. 923 (2011), and did, S. Journal, 112th Cong., 2d Sess. 1-2. The Executive's claim that the "Senate as a body" expressed no "conclusion" that it "was not in recess for purposes of the [Recess Appointments] Clause" (C.A. Resp't Br. 56) is simply false. The order scheduling the sessions and Senate records confirming that they occurred make clear the *Senate's* view that it held sessions both days. The absence of a concurrent resolution allowing the Senate to adjourn for more than three days cements that conclusion.

That the order scheduling the January 3 and 6 meetings described them as "pro forma" and stated that "no business" would "be transacted," S. Journal, 112th Cong., 1st Sess. 923, changes nothing. Longstanding congressional practice confirms that the Senate understood that it was not in "Recess" when it held such meetings. Both Houses have employed pro forma sessions for decades to satisfy two constitutional requirements: the prohibition on adjourning for more than three days without the other's consent, U.S. Const. art. I, § 5, cl. 4, and their duty to meet once annually on January 3, *id.* amend. XX, § 2. *See* Christopher M. Davis, Cong. Research Serv., *Memorandum: Certain Questions Related to Pro Forma Sessions of the Senate* (2012), *reprinted in* 158 Cong. Rec. S5954, S5955 (Aug. 2, 2012); Noel Canning Br. 50-53. The Senate's reliance on such meetings as valid for other constitutional purposes dispels any doubt that it believed its January 3 and 6 sessions were not part of a "continuous … recess." Pet'r Br. 50. Indeed, the Senate was constitutionally *required* to meet both days: on January 3 by the Twentieth Amendment, U.S. Const. amend. XX, § 2, and on both days by the Adjournments Clause, be-

cause the House and Senate did not agree to adjourn for more than three days, *see id.* art. I, § 5, cl. 4.[2]

The Executive does not dispute that both Houses have long used pro forma sessions to satisfy these constitutional requirements. Instead, it dismisses this practice as irrelevant to the Recess Appointments Clause. *See* Pet'r Br. 60-62; *see also* 2012 OLC Op. at 18-19 & n.25. The Executive, however, has never explained how the Senate could believe itself to be in *session* for purposes of some constitutional provisions, yet simultaneously in "*Recess*" for another.

The best it has offered is the bare assertion that the Adjournments Clause and Twentieth Amendment "relat[e] to internal operations and obligations of the Legislative Branch," C.A. Resp't Br. 49; *see id.* at 53, and "affect the Legislative Branch *alone*," 2012 OLC Op. at 19; *see also* Pet'r Br. 60-62. But the Senate's determination that it is in session for purposes of either provision plainly affects persons outside the Legislative Branch—including the Executive. Whether both chambers are open and able to do business determines whether they can enact legislation governing the Nation that the President must "faithfully execut[e]." U.S. Const. art. II, § 3. And

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[2] Contrary to the Executive's suggestion, the decision to hold pro forma sessions in January 2012 was not "forced by actions of the House." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, slip op. at 2 (Jan. 6, 2012) ("2012 OLC Op."). Had the Senate wished to "Recess" but been blocked by the House, it could have asked the President to resolve the chambers' "Disagreement" by adjourning both to a time he chose. U.S. Const. art. II, § 3. That the Senate did not do so confirms that the chamber itself decided not to "Recess."

whether the Senate has begun a new "Session" under the Twentieth Amendment directly affects when existing recess appointments will expire.[3]

The Senate also has recognized pro forma sessions as valid when they indisputably affect persons outside Congress—even at the expense of Senate interests. Senate Rules require that nominations not "finally acted upon" be returned to the President during intrasession adjournments of more than 30 days. Senate Rule XXXI(6), *Senate Manual*, S. Doc. No. 112-1, at 58 (2011). But when it has convened pro forma sessions for "periods in excess of thirty days," the Senate has *not* returned pending nominations. 158 Cong. Rec. S5955. Additionally, various federal statutes provide for expedited congressional review of Executive actions, and prevent such actions from taking effect before a certain number of days that the Senate, House, or both are in session have elapsed. *See id.* at S5955-56. Against their own interests, the Senate and House have counted days when pro forma sessions are held like any other (as has the Executive). *See ibid.*

Recent history shows, in fact, that the Senate understands pro forma sessions as valid for purposes

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[3] The Executive now contends that pro forma sessions do not satisfy the Adjournments Clause, Pet'r Br. 60-61—and are either *unable* to satisfy the Twentieth Amendment, *id.* at 61 n.60, or *unnecessary* to do so, on the perplexing theory that the Amendment somehow calls Senate sessions into being by operation of law, *whether or not* the Senate convenes, *id.* at 2, 48; C.A. Resp't Br. 50-54. Those claims are untenable for the reasons Noel Canning expounds. Noel Canning Br. 56-58. For present purposes, it suffices that the Executive's claims cannot explain why for decades the Senate and House have held pro forma sessions precisely to comply with these provisions.

of the Recess Appointments Clause *itself*. As the Executive has acknowledged, the Senate Majority Leader has repeatedly explained "that such pro forma sessions break a long recess into shorter adjournments … thus preventing the President from exercising his constitutional power to make recess appointments." 2012 OLC Op. at 2; *see* 154 Cong. Rec. S7558 (July 28, 2008) (Sen. Reid) ("[T]here will be no recess. We will meet every third day pro forma…."). Indeed, well before 2012, the Senate held "pro forma sessions" *precisely* "to prevent recess appointments." 153 Cong. Rec. S14,609 (Nov. 16, 2007) (Sen. Reid).

Until January 2012, even the *Executive* agreed that pro forma sessions precluded the "Recess of the Senate." In 2010, it informed this Court that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Resp't Letter Br. 3, *New Process Steel*, 130 S. Ct. 2635, a period in which it repeatedly held only pro forma sessions for weeks at a time, *see* Joint Comm. on Printing, 112th Cong., *2011-2012 Congressional Directory* 537 (2011). Now that its concession proves inconvenient, the Executive abandons it. Pet'r Br. 58-59. Whether or not its justifications for discarding that view are persuasive, that 2010 admission confirms that when the Senate convened the January 2012 sessions, it had every reason to believe that it was *not* in "the Recess."

2. The Senate's determination that it was in "session" on January 3 and 6, 2012, is dispositive unless it exceeded the chamber's authority. *See Ballin*, 144 U.S. at 5-6. The Executive does not and cannot claim that the Senate's action is ultra vires because it "violate[d]" any "fundamental rights" or is utterly

irrational. *Id.* at 5. It is therefore left to argue that the Senate exceeded some other "constitutional restrain[t]." *Ibid.* But the only violation it alleges is premised on a presidential power that does not exist.

a. The Executive claims that the President can draw his *own* "conclusion that the Senate was in recess," and that by blocking recess appointments by holding pro forma sessions the Senate "strip[ped] the President of his constitutional authority to make" them. Pet'r Br. 20, 45; *see* 2012 OLC Op. at 13-18. But neither the President's claimed ability to determine for himself whether the Senate is really in session, nor his purported freestanding authority to make recess appointments, has any constitutional basis.

The Constitution confers no power on the President to deem otherwise-valid Senate sessions nullities. No provision remotely contains an *express* grant of such authority. The powers that *are* conferred, moreover, only underscore the narrow limits of the President's role. He may summon the Senate into special session. U.S. Const. art. II, § 3. But he cannot determine independently whether a quorum is present, or compel its presence—powers the Constitution reserves to the Senate, *see id.* art. I, § 5, cls. 1-2. And he can break a tie when the Senate and House "[d]isagre[e]" concerning adjournments. *Id.* art. II, § 3. But unlike the Crown, he cannot prorogue them as he pleases.

Contrary to the Executive's claim, the President also has no *implied* power to disregard Senate sessions—pro forma or otherwise—in order to protect his recess-appointments "authority" from being "unilaterally extinguish[ed]." Pet'r Br. 45; *see* 2012 OLC Op. at 9 n.13. The freestanding power of the Execu-

tive's imagining needs no such protection—because it does not exist. The authority the Recess Appointments Clause confers is purely *contingent*. It arises only if the Senate chooses to "Recess." If the Senate chooses to remain in session, the President's power is not "extinguish[ed]," but simply never arises. And that remains the case whatever the reasons for the Senate's decision, even if—*especially* if—the Senate purposefully remains in session to enforce compliance with Article II's advice-and-consent protocol.

The Recess Appointments Clause, in fact, was not designed for the Executive's benefit, but for the *Senate's*. The alternative was to require the Senate to remain "continually in session for the appointment of officers," which would "improper[ly]" burden the chamber. The Federalist No. 67, at 408 (Alexander Hamilton); 3 Story, *supra*, § 1551, at 410. The Framers avoided those burdens by allowing the chamber to recess—and enabled the President, *if the Senate does so*, to make temporary appointments. The Senate thus cannot, by *declining* to adjourn, deprive the President of any power. If it does not enter "the Recess," the President's "auxiliary" power to make recess appointments (The Federalist No. 67, at 408) is never triggered, and the ordinary, advice-and-consent appointments process must be obeyed.

b. Permitting the President to deem the Senate in "Recess" unilaterally, moreover, would directly undermine the constitutional structure. All too familiar with "'manipulation of official appointments'" by the Executive, *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), the Framers intentionally withheld from the President power to appoint officers unilaterally. *See* The Federalist No. 76, at 455-56 (Alexander Hamilton). They instead gave the

Senate a veto over appointments except for offices Congress itself exempts. U.S. Const. art. II, § 2, cl. 2. Requiring the Senate's "Advice and Consent," *ibid.*, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (citations omitted; second alteration in original). The chamber's exercise of its authority would be checked by the political process, not by the President. *See id.* at 659-60. The Senate is thus expressly empowered to prevent appointments—and entitled to insist, by remaining in session, that the President secure its consent before granting commissions.

Allowing the President to override the Senate's determination that it is in session would preclude the Senate from performing its advice-and-consent responsibility—and grant the President the very powers the Framers withheld to prorogue the Senate at his pleasure and appoint principal officers unilaterally. If the President can deem the Senate not "available" (Pet'r Br. 45) based on his opinion of its work—as he did here, grading its performance by counting how many bills it passes, how many speeches are given, how long sessions last, etc., *id.* at 48—nothing prevents him from sidestepping the Senate whenever it does not swiftly approve his nominees. That would leave "Advice and Consent" a dead letter. Indeed, the President might declare the chamber unavailable because partisan divisions make confirmation improbable—or because it is too busy with other matters to confirm appointments immediately.

The President, in fact, did *exactly that* here. He waited less than three weeks after nominating two individuals to recess-appoint them. *See* Pet. App. 15a-16a; 157 Cong. Rec. S8691 (Dec. 15, 2011). And he explicitly made another recess appointment the same day because he perceived that the Senate opposed his nominee, and he "refuse[d] to take no for an answer." 2012 Daily Comp. Pres. Docs. No. 00003, at 3 (Jan. 4, 2012). It should be alarming in a republic to hear one branch of government declare another branch incapacitated—simply because the latter disagrees, or merely moves too slowly—and claim power to govern alone.

c. The Executive doubtless will disavow any future ambition to circumvent advice and consent. But its theory lacks any limiting principle that could prevent such abuse going forward. The simple but central premise of the separation of powers is that "[g]ood fences make good neighbors." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995). The Executive identifies no principled, enforceable barrier capable of preventing future encroachments. Even an explicit Executive promise not to use recess appointments to sidestep the Senate cannot suffice. The Constitution's structural safeguards, no less than its guarantees of individual liberties, do not leave the Nation "at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010).

The Executive's track record regarding recess appointments well illustrates why. Nearly every limit on recess appointments heretofore solemnly embraced by the Executive, starting with the Washington Administration, has been serially swept aside. *Compare* Edmund Randolph, *Opinion on Recess Ap-*

pointments (July 7, 1792), *reprinted in* 24 *The Papers of Thomas Jefferson* 165, 166 (1990) (vacancy must arise during recess), *President—Appointment of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 603 (1901) (intrasession recess appointments forbidden), *and* 33 Op. Att'y Gen. at 24-25 (intrasession adjournment of ten days insufficient), *with* 2012 OLC Op. at 4-23 (we were just kidding). One is left to wonder whether any Executive pledge concerning recess appointments can survive the controversy that occasions it.

The Framers wisely did not trust the "great security against [the] gradual concentration of … powers" to Executive assurances of good faith. The Federalist No. 51, at 318 (James Madison). It is unthinkable that they made an unwritten exception for appointments, "'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag*, 501 U.S. at 883 (citation omitted).

B. The Senate Is Not In "The Recess" When It Convenes Pro Forma Sessions.

Even if the Senate's determinations that it held sessions on January 3 and 6 were not controlling, the Executive had no basis to disregard them here. The Executive argues that the Senate was really in "Recess" when it convened pro forma sessions because it could not "participate as a body in the appointments process" and was not "available to provide advice and consent." Pet'r Br. 45. That is demonstrably incorrect. The Executive's claim conflates the Senate's *availability* to act with its *willingness* to do so.

1. The Senate is entirely capable of exercising its constitutional powers during pro forma sessions. Like any other session, all of the personnel necessary to do business are present, including at least: the

presiding officer; if there is to be a change in the governing unanimous-consent agreement, often at least one other Senator; the Senate Parliamentarian (or representative); the Bill or Legislative Clerk; the Journal Clerk; and the Reporter of Debates. With these dramatis personae on hand, the Senate can engage in any business it chooses—including passing legislation.

Indeed, the Senate did so—twice—in the months preceding the January 2012 appointments. On August 5, 2011, during a pro forma session indistinguishable from those on January 3 and 6, 2012, it passed the Airport and Airway Extension Act of 2011, Part IV, by unanimous consent, S. Journal, 112th Cong., 1st Sess. 583; *cf.* 157 Cong. Rec. S5292 (Aug. 2, 2011), which the President signed into law, *see* Pub. L. No. 112-27, 125 Stat. 270 (2011). And on December 23, 2011, in a pro forma session scheduled by the same order as the January 3 and 6 sessions, the Senate passed another bill by unanimous consent, *see* S. Journal, 112th Cong., 1st Sess. 923-24; Pub. L. No. 112-78, 125 Stat. 1280 (2011)—at the President's own urging, *see* 2011 Daily Comp. Pres. Docs. No. 00962, at 1-2 (Dec. 22, 2011).[4]

The Senate's passage of legislation during pro forma sessions erases any doubt that it can act on

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[4] The Senate also has taken other legislative action in pro forma sessions—including appointing (or authorizing appointment of) conferees, as it did on December 23, 2011, S. Journal, 112th Cong., 1st Sess. 924; *see also*, *e.g.*, 152 Cong. Rec. S11,107-08, D1118 (Dec. 4, 2006); *cf. id.* at S11,105-06 (Nov. 16, 2006), and reading and calendaring bills reported out of committee, *see*, *e.g.*, 150 Cong. Rec. S9363 (Sept. 16, 2004); *cf. id.* at S9361 (Sept. 15, 2004).

appointments during such sessions, using the same unanimous-consent procedure. "*[M]ost* nominations," in fact, are confirmed by unanimous consent. Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013) (emphasis added).[5] The Senate also can perform other critical appointments-related functions during pro forma sessions—including receiving nominations and referring them to committee, *see*, *e.g.*, 152 Cong. Rec. S11,106, S11,109-10, D1118; *cf.* 157 Cong. Rec. S14 (Jan. 5, 2011) (standing order authorizing Secretary of Senate "to receive messages from the President"). The Senate is thus unquestionably *capable* of "participat[ing] as a body in the appointment process" (Pet'r Br. 45) during pro forma sessions.

2. The Executive rejoins that the January 3 and 6 sessions were nevertheless part of an uninterrupted 20-day "Recess" because the scheduling order provided that "'no business'" *would* be "'conducted.'" Pet'r Br. 48 (citation omitted). By the Executive's lights, the Senate was "barred … from conducting any business," *ibid.*, and its passage of legislation in prior pro forma sessions illustrates only the "remote possibility" that it could change its mind and resume business—just as it might return early from a recess, *id.* at 52. The Executive's argument misunderstands

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[5] *E.g.*, 149 Cong. Rec. S5929 (May 8, 2003) (confirming John G. Roberts, Jr., to U.S. Court of Appeals for the D.C. Circuit); 138 Cong. Rec. S12,290 (Aug. 11, 1992) (confirming, *inter alios*, Sonia Sotomayor to U.S. District Court for Southern District of New York); 136 Cong. Rec. S5281 (Apr. 27, 1990) (confirming, *inter alios*, David H. Souter and Samuel A. Alito, Jr., to U.S. Courts of Appeals for the First and Third Circuits, respectively).

the Senate's order and basic tenets of Senate procedure.

The "no business" proviso in the scheduling order did *not* preclude the Senate from acting. It remained entirely free to conduct business by unanimous consent, whenever it chose—as it did in August and December 2011. The Senate can *always* "suspen[d]" its rules and procedures by unanimous consent—even "without notice." Senate Rule V(1). A unanimous-consent agreement—like the December 17 order scheduling the pro forma sessions—thus can be "supersede[d]" at any time by a new unanimous-consent agreement. Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1354 (1992) ("*Riddick's*"). In reality, all that such "no business" orders do is require that any business be done by unanimous consent—the procedure by which the Senate conducts *most* business, *see id.* at 1311; Walter J. Oleszek, Cong. Research Serv., RL33939, *The Rise of Unanimous Consent Agreements* 6 (2008). This method lies squarely within the Senate's exclusive power over procedure; others' opinions that "some other way would be better" have no bearing. *Ballin*, 144 U.S. at 5.

The Executive is therefore incorrect that Senators who do not attend pro forma sessions have "assurance that they [can] leave … without concern that any business would be conducted." Pet'r Br. 55. Each absent member assumes the risk that the Senate will act in his absence. Indeed, so far as Senate Rules are concerned, nothing prevented the members presiding on January 3 and 6—members of the President's own party, S. Journal, 112th Cong., 2d Sess. 1-2 (Sens. Warner and Webb)—from confirming any

pending nominations by unanimous consent. It is the Senate's traditions of trust, consensus, and collegiality—and the universal recognition that political Armageddon would ensue—that prevent such gambits. But that only underscores that the Senate *as a body* has chosen to govern itself by these rules.[6]

The Executive's claim that superseding a "no business" order is equivalent to returning early from an adjournment (Pet'r Br. 52-55) is equally incorrect. When the Senate holds pro forma sessions, it is *in session*; it has simply chosen not to engage in business other than by unanimous consent. When it is adjourned, in contrast, it cannot act *at all*. The better analogy is instead to instances where the Senate remains in session but chooses not to engage in *particular* business. The Senate, for example, frequently schedules periods in which it will meet "for debate only." *E.g.*, 159 Cong. Rec. S7708 (Oct. 31, 2013); 158 Cong. Rec. S8530 (Dec. 30, 2012); 157 Cong. Rec. S2585 (May 2, 2011). In such instances, as in pro forma sessions, the chamber remains perfectly *capable* of doing other business, provided the Senate unanimously consents. No reasonable reader of the Recess Appointments Clause—at the Founding or today—would conclude that the Senate is in "Recess," even if *every* Senator is present, merely because they have agreed to engage only in debate for a given period.

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[6] For the same reasons, the Executive's claim that the President "rel[ied] on the Senate's order that no business would be conducted" (Pet'r Br. 51) is meritless. Moreover, he *did not* assume that the Senate would not do business, and indeed successfully *urged* it to pass legislation. *Supra* at 18.

Yet that is exactly how the Executive interprets the Recess Appointments Clause. Indeed, its view means that the President can declare the Senate constructively adjourned whenever it chooses not to conduct the *specific* business of acting on appointments. On the Executive's theory, recess appointments are permissible when the Senate decides during presidential-election years not to act on judicial nominations or hold further confirmation hearings "without agreement." 150 Cong. Rec. S11,831 (Nov. 20, 2004) (Sen. Leahy).

At bottom, the Executive's claim equates the Senate's *ability* to act with its *willingness* to do so. But the two are worlds apart. The Recess Appointments Clause permits filling vacancies that arise when the Senate, due to its Recess, *cannot* advise and consent to appointments. It does not permit the President to circumvent the chamber merely because it declines to confirm his nominees—or takes longer than he would like. The Senate is constitutionally *entitled* to withhold its consent; doing so cannot possibly provide a predicate for bypassing it entirely.

3. Unable to prove that the Senate cannot act on appointments during pro forma sessions, the Executive offers a hodgepodge of "hallmarks of a recess" supposedly present on January 3 and 6. Pet'r Br. 47. The Executive does not articulate any actual test to be applied with these factors. Nor does it identify any constitutional basis for its arbitrary assemblage of "hallmarks," undoubtedly because none exists. The best it offers is a self-serving Executive Branch opinion, *see id.* at 46 (citing 33 Op. Att'y Gen. at 24-25), which purported to distill the Senate's own understanding of "the Recess" from a Senate Judiciary Committee report issued to *protest* another type of

recess-appointments abuse, *see* S. Rep. No. 58-4389 (1905) ("1905 Report"), *reprinted in* 39 Cong. Rec. 3823 (Mar. 2, 1905). But the 1905 Report does not remotely support the Executive's I-know-it-when-I-see-it notion of "Recess."[7]

The 1905 Report denounced recess appointments President Roosevelt made during an instantaneous "constructive" intersession recess that supposedly occurred when one Senate Session was terminated automatically by the beginning of the next. *See* 39 Cong. Rec. 3823-24. The Report argued that such an artificial, illusory break did not constitute "the Recess" because the chamber continued meeting without interruption. *Ibid.* The indicia it cited to distinguish a genuine "Recess" from ersatz adjournments—that the members "owe no duty of attendance," that the "Chamber is empty," that it cannot "receive communications from the President," etc.—were *necessary* conditions for "the Recess" to occur. *Id.* at 3823. The Report nowhere suggests that those factors alone are *sufficient* to render the Senate in "Recess" when it declares itself in session. It underscores, moreover, that when the Senate can "exercise its function of advice and consent"—as it can during

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[7] The Executive alludes (at 46-47) to the Pocket Veto Clause, U.S. Const. art. I, § 7, cl. 2, curious given its insistence that that Clause "does not determine the meaning of the Recess Appointments Clause." C.A. Resp't Br. 55. Indeed, the Pocket Veto Clause refutes the Executive's approach to recess appointments: It explicitly requires inquiry not only into whether Congress has "[a]djourn[ed]," but *also* into the adjournment's *effect—i.e.*, whether it "prevent[ed] [the] return" of a vetoed bill. U.S. Const. art. I, § 7, cl. 2. The Recess Appointments Clause, in contrast, calls for no such analysis of effects.

pro forma sessions—recess appointments are off-limits. *Id.* at 3824.

In any case, the Executive's grab-bag of factors does not help it here. The number of bills passed or other actions taken (Pet'r Br. 48) does not prove anything about whether the Senate *could* do business if it chose. *Cf.* S. Journal, 113th Cong., 1st Sess. 431 (2013) (minute book). Nor does the number of speeches. Pet'r Br. 48. The short duration of pro forma sessions (*ibid.*) likewise bears no correlation to the Senate's ability to act—as its passage of legislation during a two-minute pro forma session amply demonstrates, *see* S. Journal, 112th Cong., 1st Sess. 923-24.

The Executive's claim that Senators "'owed no duty of attendance'" (Pet'r Br. 49 (citation and alteration omitted)) also adds nothing, because it is not true. "Senators are required to attend *all* sessions of the Senate unless they are excused." *Riddick's* at 214 (emphasis added); *see* Senate Rule VI(2). Nothing in the order scheduling pro forma sessions excused them. S. Journal, 112th Cong., 1st Sess. 923; Pet. App. 91a-92a.

The Executive's assertion—based on C-SPAN footage, Pet'r Br. 49—that few Senators actually obeyed that duty is doubly irrelevant. First, the Senate can be in session *whether or not* a quorum is present. The Constitution itself contemplates that fewer will be present while the Senate is in session. *See* U.S. Const. art. I, § 5, cl. 1 ("smaller Number may adjourn from day to day" and, if authorized, "compel the Attendance of absent Members"). Indeed, aside from roll-call votes, it is "unusual" for 51 Senators to be present on the floor. Elizabeth Ry-

bicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013).

Second, even if a quorum *were* necessary for a Senate session to be valid, the fact that the *Senate* made no determination that one was lacking on January 3 or 6 should be dispositive, the Executive's nose-counting notwithstanding. The Senate made no such determination because it "operates on the assumption that a quorum is present regardless of how few or how many are in attendance, until someone suggests the absence of a quorum," *Riddick's* at 214, which any Senator may do "at any time," Senate Rule VI(3). The Senate, in other words, has provided that a quorum is *presumed* present until proven otherwise. The Executive does not dispute the validity of that procedure—one plainly within the Senate's power to prescribe. *See Ballin*, 144 U.S. at 5; *cf. Nixon* v. *United States*, 506 U.S. 224, 237-38 (1993) ("final authority" over method to "try" impeachments "committed to the Senate"). It accordingly cannot question the Senate's determination that a quorum was present based on "parol evidence," be it C-SPAN video or its 1890s equivalent. *Ballin*, 144 U.S. at 5.

The Executive's observation that the Secretary of the Senate invoked the chamber's standing authorization "'to receive messages from the President'" in between other pro forma sessions is particularly puzzling. Pet'r Br. 50 (citation omitted). The Senate's ability to "receive communications from the President" is, on the Executive's own view, a reason *not* to declare it constructively adjourned. *Id.* at 45. Even if the Recess Appointments Clause, like the Pocket Veto Clause, required analysis of the effect of an adjournment, the Senate's ability to receive messages through its Secretary would cut *against* the Execu-

tive's claim that it was actually absent. *Cf. Wright* v. *United States*, 302 U.S. 583, 592-98 (1938). That the President's messages were not immediately laid before the chamber does not prove it was not sitting. The President cannot declare a House of Congress adjourned because it does not drop everything upon receiving his missives or promptly return his calls.

II. THE EXECUTIVE'S CLAIMS OF SENATE ACQUIESCENCE AND AGGRANDIZEMENT ARE BASELESS AND CANNOT JUSTIFY DISTORTING THE CONSTITUTIONAL TEXT AND STRUCTURE.

The Court can decide this case without resolving the first two questions presented concerning the Recess Appointments Clause's scope. If it reaches those two questions, it should affirm for the reasons explained by the court of appeals and Noel Canning. *See* Pet. App. 17a-52a; Noel Canning Br. 8-49. Two planks in the Executive's argument against the decision below merit special reprobation—both because they are particularly misguided, and because their implications extend far beyond this case: The Executive's claim that supposed Senate acquiescence in the Executive's reading of the Recess Appointments Clause supports that interpretation has no basis in law or fact. And its contention that the Clause must be construed expansively to safeguard the separation of powers turns the constitutional structure on its head.

A. The Senate Could Not And Did Not Acquiesce In The Executive's Reading Of The Recess Appointments Clause.

The Executive's case for its expansive, atextual view of the Recess Appointments Clause rests heavily on purported historical practice. Pet'r Br. 21-28, 35-44. But its appeal to history does not take the

typical form. Here there is no colorable claim of an unbroken, unchallenged practice supporting its position from the Founding forward—or even in early Congresses—that might provide "'"evidence" of the Constitution's *meaning*.'" *Printz* v. *United States*, 521 U.S. 898, 905 (1997) (emphasis added) (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986)); *cf. Myers* v. *United States*, 272 U.S. 52, 175 (1926). The first Attorney General forswore recess appointments to preexisting vacancies. *See* Randolph, *supra*, at 166. And his successors disclaimed power to make intrasession appointments until the twentieth century. *See* 23 Op. Att'y Gen. at 603. The Executive's abandonment of those limitations shows not that the Clause's text allows such appointments, but that the Executive now finds those textual strictures too confining. As the Executive once understood, such "argument[s] from inconvenience … can not be admitted to obscure the true principles" of the Constitution. *Ibid*.

The Executive's historical claim is instead that a practice rejected for many years but embraced decades later by the Executive has become the constitutional boundary line because the Senate allegedly has "acquiesce[d]" in or "accepted" that practice. *See* Pet'r Br. 20, 26-27, 35-38; *cf. Evans* v. *Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (en banc); *United States* v. *Woodley*, 751 F.2d 1008, 1010-11 (9th Cir. 1985) (en banc); *United States* v. *Allocco*, 305 F.2d 704, 714 (2d Cir. 1962). The Executive's acquiescence theory is fundamentally flawed both in principle and in application.

1. The Executive's acquiescence claim erroneously assumes that the Senate can forfeit its powers under the Appointments Clause. This Court has made

clear, however, that neither Congress nor the President can even "*waive* th[e] structural protection[s]" that that Clause or others establish—because those protections are not theirs to give away. *Freytag*, 501 U.S. at 880 (emphasis added). "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Ibid*. The Constitution's structural constraints do not shield only the political branches themselves, but "protect the individual as well," *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2012), providing essential safeguards for individual liberty, *see Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Whatever light prior practice may shed on the meaning of powers the Constitution confers, it thus cannot transfer power from one branch to another—any more than it can "'create power,'" *Medellín* v. *Texas*, 552 U.S. 491, 531-32 (2008) (citation omitted). "[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring); *cf. Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). That is especially true of the Senate here. While *Congress* may authorize unilateral appointment of inferior officers, U.S. Const. art. II, § 2, cl. 2, or allow designation of acting officials, Pet. App. 44a-45a, the Senate *alone* cannot authorize aberrations from Article II's appointments protocol.

And what the Senate cannot waive affirmatively, it assuredly cannot forfeit by *inaction*. Drawing inferences from "*congressional* silence" is a particularly "precarious" project, given the "various veto-gates" and other obstacles that may prevent Congress from acting for "reasons [that] have nothing to do with the

ideas of institutional agreement or waiver undergirding theories of acquiescence." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 448 (2012) (emphasis added). Even Congress's "failure to overturn" other branches' reading of *statutes* does not "represen[t] affirmative congressional approval." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (internal quotation marks omitted). *A fortiori*, congressional inaction in response to *constitutional* trespasses is hardly proof of tacit assent.

2. The Senate, at any rate, has not gone gentle into the good night, but has protested the Executive's encroachments at every turn. When nineteenth-century Presidents asserted authority to make recess appointments to preexisting vacancies, the Senate strenuously objected. *See* S. Rep. No. 37-80, at 3 (1863) (vacancy must arise "after one session has closed and before another session has begun"); 38 Annals of Cong. 489, 500 (1822) (Military Affairs Committee report) (President "had no power to make" appointments to fill offices created during Senate session "because the vacancies did not *happen* in the recess of the Senate"). It also took action. In 1863, it passed what is now the Pay Act, Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646, *codified as amended at* 5 U.S.C. § 5503, withholding pay from recess appointees to preexisting vacancies for the express purpose of curtailing such appointments. *See*, *e.g.*, Cong. Globe, 37th Cong., 3d Sess. 564-65 (Jan. 28, 1863). That is the antithesis of acquiescence.

The Executive cites exceptions that Congress later added to the Pay Act's categorical ban as proof that Congress approves some recess appointments to

preexisting vacancies. Pet'r Br. 37. But those exceptions are hardly an endorsement of invalid appointments. They reflect at most a desire not to punish public servants caught in the crossfire for the sins of their patron. The specific exceptions Congress carved out, moreover, cover circumstances in which it is least likely that the President used recess appointments to circumvent Senate opposition to a nominee: cases where a "vacancy arose within 30 days before the end" of the Senate's session—in which vetting, nominating, and confirming a successor might legitimately be difficult; where a nomination was pending at the end of a session for a nominee *not* already holding a recess appointment; or where the Senate rejects a nominee less than 30 days before adjourning and the President then recess-appoints someone *else*. 5 U.S.C. § 5503(a)(1)-(3).

Nor has the Senate acquiesced in intrasession recess appointments. As Noel Canning chronicles, throughout the nineteenth century, members of the Senate consistently denied that the President can make such appointments. *See* Noel Canning Br. 19-20. The Executive also inflates the extent of the practice to which the Senate supposedly assented. *Id.* at 24-25. And even the Executive does not allege any were made for at least *eight decades* after ratification. *See* Pet'r Br. 21. It offers the 1905 Report, *id.* at 24—which opposed Executive abuses concerning putative *intersession* recess appointments—but that Report nowhere hints that the Senate believed the President may make intrasession appointments,

which the Executive had recently disavowed, 23 Op. Att'y Gen. at 603.[8]

In short, even if the Executive's allegations of Senate acquiescence were relevant to the Constitution's meaning (and they are not), a reasonable fact-finder could reach only one conclusion: Not proved.

B. It Is The Executive's Interpretation Of The Recess Appointments Clause, Not The Court Of Appeals' Reading, That Threatens The Separation Of Powers.

Most misguided and pernicious of all is the Executive's claim that its revision of the Recess Appointments Clause is necessary to *safeguard* the constitutional structure. *See* Pet'r Br. 19-20, 31-34, 63-64. Quite the contrary, it is the Executive's position that puts the separation of powers in grave danger.

The Executive's case for blue-penciling boils down to its belief that unless the President can fill already-vacant offices whenever the Senate is not present to approve appointments, he cannot fulfill his "responsibility to 'take Care that the Laws be faithfully executed.'" Pet'r Br. 19 (quoting U.S. Const. art. II, § 3). That argument erroneously presumes that the President is constitutionally entitled to prompt confirmation of his nominees. The Constitution squarely refutes that premise. The Framers deliberately gave the Senate a *veto* over most ap-

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[8] The contrary view expressed in the 1940s by one subordinate "legislative officer," Pet'r Br. 26 (citing 28 Comp. Gen. 30, 34 (1948))—which, in attempting to describe extant law, mistook the Attorney General's later distortion of the 1905 Report as settled doctrine—does not even purport to reflect the views of the Senate itself.

pointments. U.S. Const. art. II, § 2, cl. 2. The Senate is free to reject nominees, or to take no action at all. The President's inability to fill offices at will, therefore, is not an evil the Framers aimed to avoid. It is an essential feature of the constitutional structure they designed.

In any event, rumors of the take-care power's demise are greatly exaggerated. The advice-and-consent process does not preclude filling offices, but merely requires compromise (as the Framers intended). Any doubt is erased by the Senate's recent confirmation of different nominees for the very posts the January 2012 appointments filled. Pet'r Br. 7 n.3. Moreover, Congress can, if it chooses, vest appointment of inferior officers in the "President alone" or "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. And for principal offices Congress determines should never be vacant, it can authorize temporary designation of *acting* officers—as it has done. *See* Pet. App. 44a-45a (collecting statutes). The Executive's claim that forcing the President to rely for "significant periods" on acting officers whom he did not select "impinge[s] on" Executive authority and accountability (Pet'r Br. 34) is not a reason why recess appointments should be expanded, but a transparent attack on the advice-and-consent requirement itself. Only the President's failure promptly to nominate a candidate *acceptable to the Senate* would cause a principal office to remain vacant for many months on end.

The Executive's atextual view thus is not necessary to preserve the Constitution's balance of power. Indeed, it would do just the opposite. Armed with authority to appoint any officer, whenever he concludes that the Senate is "unavailable," Pet'r Br. 11,

for up to two years at a time, the President could effectively exclude the Senate from the appointments process altogether. The Executive's assurance that the Senate can "vote on the President's nominees" when it is back in session (*id.* at 63) offers cold comfort. Recess appointees remain in office until "the End of [the Senate's] next Session" regardless of the Senate's views. U.S. Const. art. II, § 2, cl. 3. And if the President can fill offices without advice and consent for two-year stints, he need not make conventional nominations to many offices at all. Indeed, the Executive's efforts to show how commonplace recess appointments have become, *see* Pet'r Br. 21-28, 35-38; *id.* App. 1a-88a—given that most recent recess appointees have previously been nominated to the same posts[9]—illustrate the reality of such evasion.

Emptiest of all is the Executive's pledge that the Senate can prevent recess appointments by "remain[ing] 'continually in session.'" Pet'r Br. 63 (citation omitted). The President expressly claims the power to determine *for himself* whether the Senate is in a "'real'" session, *id.* at 46 (citation omitted)—and invoked that purported power here to override the Senate's determination that it *was* in session. The ability to remain in session and block appointments only at the President's pleasure is a feeble bulwark indeed.

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[9] *See* Henry B. Hogue & Maureen Bearden, Cong. Research Service, R42329, *Recess Appointments Made by President Barack Obama* 7 (2012); Henry B. Hogue & Maureen Bearden, Cong. Research Service, RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 1, 5 (2008).

The Executive, at bottom, seeks nothing less than the very unilateral appointments authority that the Framers deliberately withheld. And its position would combine the powers that they strove to separate. The Court should not countenance such encroachment on the "great security" against "concentration of … powers" so "essential to the preservation of liberty." The Federalist No. 51, at 318. It should repudiate the Executive's overreaching and reaffirm the continuing vitality of the constitutional structure.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

The Constitution of the United States, Article I, Section 3, Clause 2 provides:

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

The Constitution of the United States, Article I, Section 4, Clause 2 provides:

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

The Constitution of the United States, Article I, Section 5, Clause 1 provides:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

The Constitution of the United States, Article I, Section 5, Clause 2 provides:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

The Constitution of the United States, Article I, Section 5, Clause 3 provides:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

The Constitution of the United States, Article I, Section 5, Clause 4 provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The Constitution of the United States, Article I, Section 7, Clause 2 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, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The Constitution of the United States, Article I, Section 7, Clause 3 provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The Constitution of the United States, Article II, Section 2, Clause 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution of the United States, Article II, Section 2, Clause 3 provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The Constitution of the United States, Article II, Section 3 provides:

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Twentieth Amendment to the Constitution of the United States, Section 2 provides:

Section 2. The 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.

Section 5503 of Title 5, United States Code, provides:

> (a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—
>
> > (1) if the vacancy arose within 30 days before the end of the session of the Senate;
> >
> > (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
> >
> > (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.
>
> (b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

Section 153(b) of Title 29, United States Code, provides:

> **(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**
>
> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Rule V of the Standing Rules of the Senate provides:

SUSPENSION AND AMENDMENT OF THE RULES

1. No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.

2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

Rule VI of the Standing Rules of the Senate provides:

QUORUM—ABSENT SENATORS MAY BE SENT FOR

1. A quorum shall consist of a majority of the Senators duly chosen and sworn.

2. No Senator shall absent himself from the service of the Senate without leave.

3. If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result, and these proceedings shall be without debate.

4. Whenever upon such roll call it shall be ascertained that a quorum is not present, a majority of the Senators present may direct the Sergeant at Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution, and until a quorum shall be present, no debate nor motion, except to adjourn, or to recess pursuant to a previous order entered by unanimous consent, shall be in order.

Rule XXII(1) of the Standing Rules of the Senate provides:

PRECEDENCE OF MOTIONS

1. When a question is pending, no motion shall be received but—

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

…

Rule XXXI(6) of the Standing Rules of the Senate provides:

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS

…

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

APPENDIX B

The following members of the United States Senate respectfully join the foregoing brief as *amici curiae*:

Senate Republican Leader Mitch McConnell

Senator Lamar Alexander

Senator Kelly Ayotte

Senator John Barrasso

Senator Roy Blunt

Senator John Boozman

Senator Richard Burr

Senator Saxby Chambliss

Senator Daniel Coats

Senator Tom Coburn

Senator Thad Cochran

Senator Susan M. Collins

Senator Bob Corker

Senator John Cornyn

Senator Mike Crapo

Senator Ted Cruz

Senator Michael B. Enzi

Senator Deb Fischer

Senator Jeff Flake

Senator Lindsey Graham

Senator Chuck Grassley

Senator Orrin G. Hatch
Senator Dean Heller
Senator John Hoeven
Senator James M. Inhofe
Senator Johnny Isakson
Senator Mike Johanns
Senator Ron Johnson
Senator Mark Kirk
Senator Mike Lee
Senator John McCain
Senator Jerry Moran
Senator Lisa Murkowski
Senator Rand Paul
Senator Rob Portman
Senator James E. Risch
Senator Pat Roberts
Senator Marco Rubio
Senator Tim Scott
Senator Jeff Sessions
Senator Richard C. Shelby
Senator John Thune
Senator Patrick J. Toomey
Senator David Vitter
Senator Roger F. Wicker

APPENDIX C

Senate Journal, 112th Cong., 1st Sess. 583 (2011)

. . .

FRIDAY, AUGUST 5, 2011

(Legislative day of Tuesday, August 2, 2011)

Mr. BENJAMIN L. CARDIN, from the State of Maryland, called the Senate to order at 10 a.m., and

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. SENATE
PRESIDENT PRO TEMPORE,
Washington, DC, August 5, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable BENJAMIN L. CARDIN, a Senator from the State of Maryland, to perform the duties of the Chair.

DANIEL K. INOUYE,
PRESIDENT pro tempore.

Mr. CARDIN took the chair.

AIRPORT AND AIRWAY EXTENSION ACT OF 2011, PART IV

By unanimous consent, on the request of Mr. WEBB,

The Senate proceeded to consider the bill (H.R. 2553) to amend the Internal Revenue Code of 1986 to extend the funding and expenditure authority of the Airport and Airway Trust Fund, to amend title 49, Untied States Code, to extend the airport improvement program, and for other purposes.

The question being on the passage of the bill; and

No amendment being proposed,

The bill was read the third time, by unanimous consent.

Resolved, That it pass.

A motion to reconsider was deemed made and laid on the table, by unanimous consent.

RECESS

Under the authority of the order of Tuesday, August 2, 2011,

At 10:00:59 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate recessed, under its order of Tuesday, August 2, 2011, until 11 a.m., on Tuesday, August 9, 2011

. . .

Senate Journal, 112th Cong., 1st Sess. 917-923 (2011)

. . .

SATURDAY, DECEMBER 17, 2011

Mr. RICHARD BLUMENTHAL, from the State of Connecticut, called the Senate to order at 9 a.m., the Chaplain offered a prayer, and Mr. BLUMENTHAL led the Senate in reciting the Pledge of allegiance to the Flag of the United States of America.

. . .

ORDERS FOR ADJOURNMENT UNTIL 11 A.M. ON TUESDAY, DECEMBER 20, 2011, FOR PRO FORMA SESSIONS UNTIL 2 P.M. ON MONDAY, JANUARY 23, 2012, AND FOR PROGRAM

By unanimous consent, on the request of Mr. WYDEN,

Ordered, That, when the Senate concludes its business on today, it adjourn until 11 a.m. on Tuesday, December 20, 2011, for a pro forma session; that the Senate then adjourn until 9:30 a.m. on Friday, December 23, 2011, for a pro forma session; that the Senate then adjourn until 12 noon on Tuesday, December 27, 2011, for a pro forma session; that the Senate then adjourn until 11 a.m. on Friday, December 30, 2011, for a pro forma session; that the second session of the 112th Congress convene at 12 noon on Tuesday, January 3, 2012, for a pro forma session; that the Senate then adjourn until 11 a.m. on Tuesday, January 10, 2012, for a pro forma session; that the Senate then adjourn until 12 noon on Friday, January 13, 2012, for a pro forma session; that the Senate then adjourn until 10:15 a.m. on Tuesday, January 17, 2012, for a pro forma session; that the

Senate then adjourn until 2 p.m. on Friday, January 20, for a pro forma session; that no business be transacted on the aforementioned days; that the Senate then adjourn until 2 p.m. on Monday, January 23, 2012; that on Monday, January 23, 2012, immediately following the prayer and reciting of the Pledge of Allegiance to the Flag of the United States of America, the Journal of the proceedings of the Senate be approved to date, the morning hour be deemed expired, and the times for the two leaders be reserved; that the Senate then proceed to a period of one hour for the transaction of morning business until 4 p.m., with Senators permitted to speak for 10 minutes each therein, and that, following morning business, the Senate proceed to executive session, as pursuant to the order of today.

ADJOURNMENT

By unanimous consent, on the request of Mr. WYDEN,

At 3:33 p.m.,

The Senate adjourned, under its order of today, until 11 a.m. on Tuesday, December 20, 2011.

. . .

Senate Journal, 112th Cong., 1st Sess. 923-924 (2011)

. . .

FRIDAY, DECEMBER 23, 2011

Mr. MARK R. WARNER, from the Commonwealth of Virginia, called the Senate to order at 9:30:21 a.m., and

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The read the following communication from the PRESIDENT pro tempore:

U.S. SENATE
PRESIDENT PRO TEMPORE,
Washington, DC, December 23, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable MARK R. WARNER, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

DANIEL K. INOUYE,
PRESIDENT pro tempore.

Mr. WARNER took the chair.

ORDER FOR RECOGNITION

By unanimous consent, on the request of Mr. REID,

Ordered, That he be recognized.

ORDER FOR CONSIDERATION OF CERTAIN LEGISLATION

By unanimous consent, on the request of Mr. REID,

Ordered, That when the Senate receives from the House of Representatives for concurrence a bill, relative to a two-month extension of reduced payroll tax, unemployment insurance, TANF, and Medicare payment fix, identical to the text at the desk, the bill be deemed read twice, considered, read the third time, and passed; and that a motion to reconsider be considered made and laid on the table.

MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT

By unanimous consent, on the request of Mr. REID,

Ordered, That the Senate having received a message from the House of Representatives on the bill (H.R. 3630) to extend the payroll tax holiday, unemployment compensation, Medicare physician payment, provide for the consideration of the Keystone XL pipeline, and for other purposes on Tuesday, December 20, 2011, the Senate insist on its amendment, and agree to the conference asked by the House; and that the Chair be authorized to appoint conferees on the part of the Senate in a ratio of 4 majority- to 3 minority-party Senators.

ORDER FOR CONDITIONAL ACTION RELATIVE TO BILL H.R. 3630

By unanimous consent, on the request of Mr. REID,

Ordered, That, if the House does not pass, by January 1, 2012, said bill relative to a two-month extension, the aforementioned Senate action relative to bill H.R. 3630 be vitiated.

TEMPORARY PAYROLL TAX CUT CONTINUATION ACT

Subsequently, the bill (H.R. 3765) to extend the payroll tax holiday, unemployment compensation, Medicare physician payment, provide for the consideration of the Keystone XL pipeline, and for other purposes, having been received from the House of Representatives for concurrence, and being identical to text at the desk, was deemed read twice, considered, read the third time, and passed, as pursuant to the order of today.

ADJOURNMENT

Under the authority of the order of Saturday, December 17, 2011, as modified,

At 9:31:46 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, December 17, 2011, until 12 noon on Tuesday, December 27, 2011.

. . .

Senate Journal, 112th Cong., 2d Sess. 1 (2012) (minute book)

Tuesday, January 3, 2012

Mr. Mark R. Warner, from the Commonwealth of Virginia, called the Senate to order at 12:01:32 p.m., and

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, December 20, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Mark R. Warner, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

Daniel K. Inouye,
PRESIDENT pro tempore.

Mr. Warner took the chair.

Under the authority of the order of Saturday, December 17, 2011, as modified,

At 12:03:13 p.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, De-

cember 17, 2011, until 11 a.m. on Friday, *January* 6, 2012.

Senate Journal, 112th Cong., 2d Sess. 2 (2012) (minute book)

Friday, January 6, 2012

Mr. Jim Webb, from the Commonwealth of Virginia, called the Senate to order at 11:00:03 a.m., and

The Assistant Bill Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, January 6, 2012.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Jim Webb, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

Daniel K. Inouye,
PRESIDENT pro tempore.

Mr. Webb took the chair.

Under the authority of the order of Saturday, December 17, 2011,

At 11:00:32 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, December 17, 2011, until 11 a.m. on Tuesday, January 10, 2012.

Senate Journal, 113th Cong., 1st Sess. 431 (2013) (minute book)

Sunday, October 13, 2013

Ms. Heidi Heitkamp, from the State of North Dakota, called the Senate to order at 1 p.m., the Chaplain offered a prayer, and Ms. Heitkamp led the Senate in reciting the Pledge of Allegiance to the Flag of the United States of America.

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, October 13, 2013.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Heidi Heitkamp, a Senator from the State of North Dakota, to perform the duties of the Chair.

Patrick J. Leahy,
PRESIDENT pro tempore.

Ms. Heitkamp took the chair.

Pursuant to the order of yesterday,

The Journal of the proceedings of the Senate was deemed approved to date.

Pursuant to the order of yesterday,

The morning hour being deemed expired, and the times for the recognition of the two leaders being reserved.

On motion by Mr. Reid that the Senate proceed to consider (cal. 211) the bill (S. 1569).

The question being on agreeing to the motion.

Pending debate,

By unanimous consent, on the request of Mr. REID,

Ordered, That, effective immediately, the Senate proceed to a period for the transaction of morning business, with Senators permitted to speak for 10 minutes each therein.

The Senate having convened following an adjournment,

The Presiding Officer (Ms. Klobuchar in the chair) laid before the Senate the joint resolution (H.J. Res. 76), received from the House of Representatives for concurrence on yesterday, and read the first time; which was read the second time.

Mr. REID objected to further proceedings on the joint resolution.

Whereupon,

The Presiding Officer stated that, pursuant to the provisions of rule XIV of the Standing Rules of the Senate, the joint resolution would be placed on the calendar.

By unanimous consent, on the request of Mr. REID,

Ordered, That, when the Senate concludes its business today, it adjourn until 2 p.m. on tomorrow; that, on tomorrow, immediately following the prayer and reciting of the Pledge of Allegiance to the Flag of the United States of America, the Journal of the proceedings of the Senate be approved to date, the morning hour be deemed expired, and the times for the two leaders be reserved; and that, at 5 p.m., the Senate proceed to executive session, as pursuant to the order of Saturday, October 5, 2013.

By unanimous consent, on the request of Mr. REID,

At 4:46 p.m.,

The Senate adjourned, under its order of today, until 2 p.m. tomorrow.