No. 12-1281

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In The
Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION
OF THE NOEL CORP., *ET AL.*,
Respondents.

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

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AMICUS CURIAE BRIEF OF PROFESSOR TUAN SAMAHON IN SUPPORT OF RESPONDENT NOEL CANNING

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INTERESTS OF *AMICUS CURIAE*

Amicus Professor Tuan Samahon, who writes about appointment and removal authority, teaches constitutional law at Villanova University School of Law.[1] His past scholarship has examined various Office of Legal Counsel (OLC) interpretations of separation-of-powers issues confronting prior administrations. *See, e.g.*, Tuan Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169 (2011) (examining OLC subdelegation jurisprudence).

Amicus has a significant interest in this case beyond his research and teaching in these areas. Pursuant to the Freedom of Information Act (FOIA), *Amicus* requested a copy of a February 2004 OLC memorandum written by former Assistant Attorney General Jack Goldsmith on the issue of recess appointments and a January 2009 OLC memorandum written by Deputy Assistant Attorney General John Elwood on recess appointments during Senate pro-forma sessions ("Elwood Memorandum"). The Department of Justice, which released only a very heavily redacted version of the Goldsmith Memorandum and withheld entirely the Elwood Memorandum (collectively, "OLC Memoranda"),

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief. *Amicus'* institutional affiliation is provided only for identification purposes and does not represent any position of Villanova University.

effectively blocked research into OLC's treatment of the recess appointments issue in the prior administration. *Amicus* seeks the release the OLC Memoranda in FOIA litigation filed elsewhere. *See Samahon v. Department of Justice*, 2:13-cv-06462 (E.D. Pa. filed Nov. 6, 2013).

Relevantly, the Solicitor General relies on the same redacted and withheld advice to press factual claims and arguments about acquiescence before this Court. As *Amicus* is strongly committed to the proper interpretation of the Appointments Clause and its exceptions, he files this brief to call the Court's attention to the questionable pedigree of assertions based upon the OLC Memoranda. Before executive claims pressed before the Court may be afforded decisive weight as long pursued practice, Congress, the Court, and the public must have access to the historical records that purport to establish the asserted authority.

SUMMARY OF ARGUMENT

First, Justice Jackson's seminal *Youngstown* concurrence provides the relevant functionalist framework for resolving this congressional-executive dispute. This case falls within category three. The President labors under the heaviest of burdens articulated under this category as the President's January 4, 2012 recess appointments were incompatible with the will of Congress and any historical practice of congressional acquiescence is not pertinent. The President is left to rely solely on those powers that properly belong to his office, such as appointment under the recess exception.

The Pay Act embodies a strong congressional policy *disfavoring* presidential recess appointments; it is not properly read as congressional authorization to make the January 4 appointments.

If presidential recess appointments during pro-forma Senate sessions do not represent actions incompatible with the expressed or implied will of Congress, leaving the President in the lowest ebb, the President, at best, falls within the no man's land of Justice Jackson's "zone of twilight."

Second, if within *Youngstown* category two, Justice Frankfurter's approach to historical gloss requires the Court to *identify the specific executive practice to be addressed*. The Court should consider the four necessary elements with respect to that particular executive branch practice that is the narrowest ground for this Court's decision, i.e.,

presidential appointment when the Senate says it is in pro-forma session, or the conduct at issue in the third question presented in the certiorari grant.

To assess this historical practice, the Court must inquire whether the executive practice constitutes legitimate interpretive "gloss." It is gloss if it satisfies all four of the component elements Justice Frankfurter identified. Was the executive practice: (1) "systematic"; (2) "unbroken"; (3) "long pursued to the knowledge of the Congress and never before questioned"; and (4) "engaged in by Presidents who have also sworn to uphold the Constitution"?

The President's January 4, 2012 appointments were unprecedented and therefore not "long pursued" by the executive under the third element. Assistant Attorney General Seitz categorized the issue surrounding this practice as "novel." Novelty is not the hallmark of executive practice "long pursued" and entitled to treatment as "gloss." No prior President had attempted appointing in the manner done by President Obama on January 4, 2012.

Neither did other Presidents engage in the practice of recess appointment during a pro-forma Senate session. President Bush declined to make such appointments in January 2009 after receiving legal advice from Deputy Assistant Attorney General John Elwood. To avoid the clear implication that a past President declined to engage in this appointment conduct, the Solicitor General denies the Bush administration acknowledged the legitimacy of pro forma sessions as a means of

preventing recess appointments. Yet, the executive branch has withheld the Elwood Memorandum on FOIA Exemption 5 grounds and has repeatedly refused to release it for the Court, Congress, and the public to inspect.

The decision to withhold the Elwood Memorandum, while simultaneously relying on it as evidence of a prior administration's concurrence, casts doubt on its suitability for that purpose. There would be no reason for the administration to conceal the Elwood Memorandum if, in fact, it was in accord with the position taken by the Seitz Memorandum and asserted by the NLRB in this case. This Court should draw a negative inference from the refusal to disclose the legal advice provided in the Elwood Memorandum.

Third, this Court may take judicial notice that on November 21, 2013, the Senate abolished the filibuster for most presidential nominations. The filibuster's abolition facilitates the exercise of the advice and consent function and undermines any pragmatic argument in favor of broad appointment power under the recess exception.

ARGUMENT

I. The President Acted Incompatibly With Congress By Appointing During A Pro-Forma Session Intended To Prevent Appointment Without The Senate's Advice and Consent, Thereby Situating This Dispute Within Jackson's "Lowest Ebb" Category 3.

Justice Jackson's seminal *Youngstown* concurrence provides the relevant functionalist framework for resolving this congressional-executive dispute. Its approach groups possible disputes into three categories. "As one progresses from one category to the next, the President shoulders an increasing burden to come forward and defend his claim that Congress, acting pursuant to its enumerated powers, is treading on the President's independent, substantive powers…." Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1739 (2006).

In the first category, the President acts "pursuant to an express or implied authorization of Congress" and enjoys all power Congress can delegate plus constitutional power the President holds "in his own right." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The second category covers those instances where the President acts with neither a congressional grant nor denial of power. If acting in this "zone of twilight," the President's claims must stand or fall on the basis of his independent

constitutional powers. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Historical practice that evidences congressional "acquiescence is pertinent when the President's action falls within the second category, not the third." *Medellin v. Texas*, 552 U.S. 491, 495 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

In category three, the President's claims are the weakest. There, he takes "measures incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). He is at the "lowest ebb" of his power. *Id.* at 637-38 (Jackson, J., concurring). He must rely on his own authority "minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., concurring). "In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). Unlike category two, claims of congressional acquiescence are not pertinent because that branch has spoken. "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring).

The President labors under the heavy burdens of category three with his January 4, 2012 recess appointments. The Senate, in concert with the House, intended to thwart presidential appointment by using pro forma Senate sessions to divide a unitary intra-session "recess" into short periods not

amenable to recess appointments. It thereby expressed its will. Nonetheless, the President acted contrary to it and recess appointed four officers. Accordingly, the President acts at the "lowest ebb" of his power and must rely uniquely on his recess appointment authority "minus any constitutional powers of Congress over the matter." *Id.* at 637-38 (Jackson, J., concurring). By making recess appointing notwithstanding the Senate's decision to remain in session, "the President cannot claim that [his action] is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). The President enjoys only those constitutional powers that properly belong to his office, such as appointment under the recess exception, less those constitutional powers Congress properly exercises, such as its ability to frame rules for its proceedings.

Conspicuously absent from NLRB's briefing is *any* discussion of Jackson's *Youngstown* framework. NLRB is aware of *Youngstown*, yet cites only Justice Frankfurter's concurrence and how historical practice and acquiescence operate. Pet. Br. at 27-28. The Teamsters too ignore the three-category framework but likewise cite Justice Frankfurter's concurrence on historical practice. *See* Br. Resp. Int'l Brotherhood Teamsters, Local 760 at 12. The Brennan Center, in the sole merits brief that cites or discusses Justice Jackson's framework in support of Petitioner's position, does quote at length his concurrence. *See* Br. *AMICUS CURIAE* Brennan Center for Justice at 8. It relevantly observes that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with

those of Congress." *Id.* Curiously, however, it does not situate this action taken in "disjunction" with Congress within any Jackson category. Given the burden the President shoulders in category three, one is left with the abiding impression that Petitioner and its *amici* would prefer that the question of "which category?" be left unasked and unanswered. *Amicus* suggests that at oral argument the Court might inquire why this dispute does not plainly fall within category three.

Assistant Attorney General Virginia Seitz's Memorandum offers the sole analysis of Justice Jackson's *Youngstown* opinion in defense of NLRB's position. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. __ (Jan. 6, 2012) ("Seitz Memorandum"). Tucked out of sight in footnote 27, page 21, OLC took the position that the *Youngstown* framework does not apply. It attempted to escape the "lowest ebb" implication by stating "it is unclear that Justice Jackson's framework would apply in matters involving the balance between the President's constitutional authority to make recess appointments and a single House of Congress's constitutional authority to set its internal rules." Seitz Memorandum at 21 n. 27. It is "unclear," however, why that distinction between one-chamber and two-chamber legislative action matters. *Chadha* recognized that under the Constitution "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Article I." *INS v. Chadha*, 462 U.S. 919, 952 (1983). Indeed, "[t]he

Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments," *id.* at 955, just as the Constitution gave the Senate power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. And, in any case, as the Seitz memorandum elsewhere points out, the Senate and House *did* act jointly in insisting on pro-forma sessions to block ostensible "recess" appointments. *See* Seitz Memorandum at **2-3.**

If the *Youngstown* framework does control, the Seitz Memorandum claims that Congress authorized the President to recess appoint, by virtue of the Pay Act. In other words, OLC claims that the President acted within category one with explicit or implied Senate approval. It cited the executive branch's interpretation of the Pay Act, but it did not actually cite the text of the statute itself, which is hardly permissive in text or purpose.

> (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.

5 U.S.C. 5503 (2006) (emphasis added).

> The statute embodies a strong congressional policy disfavoring presidential recess appointments, except in limited circumstances where Congress deemed the appointment *not* to be an attempt to circumvent the ordinary advice and consent process. Nowhere does the Pay Act authorize, let alone encourage, recess appointments made in derogation of a Senate's (pro-forma) session. Finally, assuming, arguendo, that the Pay Act represents congressional authority to recess appoint during intra-session adjournments, NLRB would still need to demonstrate that the Pay Act specifically

authorized recess appointments *during Senate pro-forma sessions*.

Ironically, the Seitz Memorandum relies on the Pay Act as congressional authorization to recess appoint. First, as noted above, the statute is manifestly a restraint on the President. Second, traditionally, OLC has *doubted* the Pay Act's constitutionality. On the one hand, it characterizes the Pay Act as authorizing an allegedly broad-spanning recess power. *See* Seitz Memorandum at 7, 13, 21 n.27. On the other hand, OLC claims the Pay Act constitutes unconstitutional congressional shackles that unduly restrict presidential recess appointment authority. *See* Seitz Memorandum at 17 n.20. OLC, however, cannot have it both ways. If the Pay Act is unconstitutional, it cannot authorize recess appointments during pro-forma Senate sessions. If it is constitutional, it properly indicates Congress's desire to restrain recess appointment practice. In either case, the President cannot claim this dispute falls within category one.

II. Assuming, Arguendo, The Senate Has Been Silent And This Dispute Occurs Within *Youngstown*'s "Zone of Twilight," Undisclosed OLC's Opinions, Or Those Citing Them In Reliance, Are Undeserving of Any Judicial Deference As Interpretive Gloss.

If presidential recess appointments during pro-forma Senate sessions do not represent "measures incompatible with the expressed or implied will of Congress," the President, at best,

finds himself in the no man's land of Justice Jackson's "zone of twilight." Historical practice that amounts to "acquiescence is pertinent when the President's action falls within the second category, not the third." *Medellin*, 552 U.S. at 495.

Not all historical practice is entitled to deference. Justice Frankfurter, who was committed to judicial minimalism and facilitating workable government, nonetheless observed that some longstanding practices would not survive judicial scrutiny. "Deeply embedded traditional ways of conducting government *cannot* supplant the constitution…." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).[2] Neither Article V nor the judicial function permit historical practice to accumulate, like deposited sediment, to the point that it blankets and replaces a provision's bedrock principle. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), adopted this approach to gloss when it observed that "past practice cannot create power," *id.* at 686, as if some sort of adverse possession over another's land. A clause's textual specificity and clear purpose resist contrary characterization by practice. Rule-oriented provisions, like the

[2] In *Youngstown*, Justice Frankfurter interpreted the open-textured language of "the executive power." *Id.* He still concluded insufficient historical practice supported the President's challenged conduct under that clause. *Id.* In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court noted that "the executive power" language did not "enjoy any textual detail" and in that context deferred to the interpretive gloss placed upon it by traditional foreign affairs practice. *Id.* at 414.

Appointments Clause and its auxiliary exceptions, recall the "single, finely wrought and exhaustively considered, procedure" that governs the legislative process. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

But assuming, *arguendo*, the words of the recess exception may suffer from ambiguity, the "gloss which life has written upon" them may assist in their interpretation and is entitled to judicial deference. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Historical practice constitutes legitimate interpretive gloss when it satisfies all four of the component elements Justice Frankfurter identified. Was the executive practice: (1) "systematic"; (2) "unbroken"; (3) "long pursued to the knowledge of the Congress and never before questioned"; and (4) "engaged in by Presidents who have also sworn to uphold the Constitution"?[3] *Id.* at 610-11. Three elements (1, 2, and 4) focus on the President and his executive practice. Element 3 concerns Congress and the "sanction of long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers." *Id.* at 610 (Frankfurter, J., concurring). Historical practice short of these requirements does not merit judicial solicitude; they may represent nothing more than instances of *ultra vires* adventurism.

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[3] Justice Frankfurter offered his test in the context of a challenge to a President's executive practice. Presumably it operates symmetrically to save legislative practice that is (1) systematic; (2) unbroken; (3) long pursued to the President's knowledge and never before questioned; and (4) engaged in by prior congressional majorities whose members had also sworn to uphold the Constitution.

As a threshold matter, Justice Frankfurter's approach to historical gloss requires the Court to *identify the executive practice to be addressed*. The Court should consider the four necessary elements with respect to that particular executive branch practice that is the narrowest ground for this Court's decision: presidential appointment when the Senate says it is in pro-forma session, i.e. the third question presented in the certiorari grant. A cursory review of the elements quickly reveals the executive practice is entitled to no deference as Justice Frankfurter's interpretive "gloss."

This Court has upheld executive practice as "long pursued" when the "practice goes back over 200 years." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003). By contrast, "unprecedented action" is by definition not long pursued and not entitled to deference. *Medellin v. Texas*, 552 U.S. 491, 532 (2008).

Such unprecedented action occurred on January 4, 2012 when President Obama took a calculated risk to become the very first president to recess appoint officers during a Senate pro-forma session.[4] OLC candidly recognized the novelty of the practice's constitutionality. Assistant Attorney General Seitz called the legality of the practice a "novel" question "with substantial arguments on each side creat[ing] some litigation risk for such appointments." Seitz Memorandum at 4 (emphasis added). Novelty is not the hallmark of executive

[4] CFPB Director Richard Cordray's appointment is not at stake here.

practice "long pursued" and entitled to treatment as "gloss."

Neither has another President sworn to uphold the Constitution engaged in recess appointment during Senate pro-forma sessions. No prior President had attempted appointing in the manner done by President Obama on January 4, 2012. Senator Harry Reid first deployed pro-forma sessions to block Bush recess appointments in November 2007. On January 9, 2009, OLC Deputy Assistant Attorney General John Elwood considered the legality of recess appointing during a Senate's pro-forma session. Apparently, President Bush sought advice on whether he might recess appoint during the Senate's pro-forma session in his presidency's final days. The Seitz Memorandum noted his advice suggesting its reliance upon it:

> We draw on the analysis developed by this Office when it first considered the issue. *See* Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic 'Pro Forma Sessions' (Jan. 9, 2009).

Seitz Memorandum at 4**.** Yet, President Bush never recess appointed during the January 2009 Senate pro-forma session; presumably the Elwood Memorandum had advised he may not so appoint, or that it was highly doubtful such action would

withstand challenge. This reticence hardly constitutes a prior President's warm embrace of the practice.

To avoid the clear implication that a past President declined to engage in this appointment conduct, the Solicitor General denies the Bush administration acknowledged the legitimacy of pro forma sessions as a means of preventing recess appointments. His office claims that "there were no such acknowledgements…." Brief for the Petitioner at 10, *NLRB v. Noel Canning*, No. 12-1281 (Sep. 13, 2013). He assures that whether the President recess appointed or not during the pro-forma session "merely reflects the truism that the advice-and-consent process engages political leaders in a long course of repeated interactions, in which short-term compromises can be made despite disagreements…." Br. at 57-58. He cites a 2010 newspaper editorial, co-authored by Elwood, which implies from its title and by virtue of its authorship that the 2009 Elwood Memorandum backed presidential power to recess appoint during Senate pro-forma sessions. Br. at 57-58 n.57 (citing Steven G. Bradbury & John P. Elwood, *Recess is canceled: President Obama should call the Senate's bluff*, WASH. POST, Oct. 15, 2010, at A19).

Yet, the executive branch has withheld the Elwood Memorandum on FOIA Exemption 5 grounds and has repeatedly refused to release it for the Court, Congress, and the public to inspect. Multiple FOIA requesters, including *Amicus*, have sought it to determine whether the Seitz Memorandum is in

continuity with, or departs from, the Bush administration's reasoning. *See, e.g.*, *New York Times Co. v. U.S. Dep't of Justice*, No. 12 CIV. 3215, 2013 WL 174222 (S.D.N.Y. Jan. 7, 2013) (denying FOIA request for release of Elwood Memorandum). Disclosure would allow the public to assess whether the Bush administration believed itself free to engage in the same recess appointment conduct.

The decision to withhold the Elwood Memorandum, while simultaneously relying on it as evidence of a prior administration's concurrence, casts doubt on its suitability for that purpose. When OLC relies on prior advice as the legal basis for its reasoning, it should be disclosed to the public. When the document represents the legal opinion of an agency, "the public can only be enlightened by knowing what the [agency] believes the law to be." *Tax Analysts v. IRS,* 117 F.3d 607, 618 (D.C. Cir. 1997). By basing its claim of authority on withheld advice, the government attempts to whipsaw the Court and the public. Through the Seitz Memorandum, the administration claims to draw from legal analysis expressed in the Elwood Memorandum, while shielding the analysis that ostensibly supports this position from public view. To the extent the Elwood Memorandum is relied upon not only by the Seitz Memorandum itself but by Petitioner's repeated reliance upon the Seitz Memorandum, it has been adopted as executive branch policy and should have been released.

This Court should draw a negative inference from the refusal to disclose the legal advice provided

in the Elwood Memorandum. In civil litigation, the concealment of evidence gives rise to the presumption that the evidence, if presented, would be unfavorable to the party responsible for the concealment, and all inferences may be drawn against that party.[5] There would be no reason for the administration to conceal the Elwood Memorandum if, in fact, it was in accord with the position taken by the Seitz Memorandum and asserted by the NLRB in this case.

III. Particularly Now the Senate Has Abolished the Filibuster, the Court Should Interpret the Recess Exception to Avoid Undermining the Workable Check-and-Balance of Appointment With Senate Advice and Consent.

This Court may take judicial notice that on November 21, 2013, the Senate abolished the filibuster for most presidential nominations.[6] The Senate did so by invoking the so-called "nuclear option," or as defended by some, the "constitutional option." *See* Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and*

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[5] Black's Law Dictionary defines spoliation as: "*The intentional destruction, mutilation, alteration, or concealment of evidence*." Blacks Law Dictionary (9th ed. 2009). It goes on to state that "*If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible*." *Id.*

[6] Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, *available at* http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

Procedures: A Majoritarian Means to Overcome the Filibuster, 28 HARV. J.L. & PUB. POL'Y 205 (2004) (elaborating parliamentary procedure to invoke rule change by simple majority vote). Senate Rule XXII had required a three-fifths supermajority vote (i.e. 60 out of 100 votes) to invoke cloture and move to a merits vote on nominations. Now, if the President's nominee enjoys simple majority support (i.e. 51 out of 100 votes), their vote will suffice both to conclude debate and to move to a confirmation vote to approve, or disapprove, in most cases.[7]

The filibuster's abolition facilitates a President's Senate confederates in exercising the advice and consent function by simple majority. This change undermines those pragmatic arguments pressed by Petitioner's *amici* that the ordinary democratic confirmation process, because of the filibuster, had become unworkable with Senate pro-forma recess sessions. Their arguments had erroneously assumed "neither Republican nor Democratic Senators are willing to relinquish the filibuster rule." Brennan Cntr. Br. at 31-32. That factual predicate was the basis for their claims that the D.C. Circuit's interpretation of the recess power would allow a Senate minority "to hold the advice and consent process hostage to obstructionist tactics and deprive the President of any alternative means of timely filling vacancies…." *Id.* at 34-35.

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[7] The precedent established on November 21 does not apply to nominations for this Court or for action on legislation. *Id.* Should the Senate elect to revise that rule in the future, it might once more invoke the procedures of November 21 to apply majority voting rules.

"[P]ragmatic approaches to law are not naïve" and may take account of new developments in the real world, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 83 (2011), such as the end of the filibuster.

It remains that Petitioner and its supporting *amici* might claim the Senate obstructs the President when he loses majority votes for nominees unacceptable to the fifty-first senator. That approach, however, effectively claims the confirmation process is flawed because the President dislikes the outcomes. That approach would not justify broad spanning presidential recess appointment authority when not "during the Recess of the Senate." Under category 3, "[i]n choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). Elections have consequences and post-filibuster the country will feel them more acutely. The President's remedy for lost Senate political fights is enhanced constitutional recess appointment power. It is to win more Senate seats in the 2014-midterm elections.

CONCLUSION

The Court should affirm the judgment of the U.S. Court of Appeals.

Respectfully submitted,

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