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IN THE SUPREME COURT OF THE UNITED STATES

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NEW PROCESS STEEL, L.P., :

Petitioner :

v. : No. 08-1457

NATIONAL LABOR RELATIONS BOARD :

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Washington, D.C.

Tuesday, March 23, 2010

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:08 a.m.

APPEARANCES:

SHELDON E. RICHIE, ESQ., Austin, Texas; on behalf of  
Petitioner.

NEAL K. KATYAL, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 08-1457, New Process Steel v. The National Labor Relations Board.

Mr. Richie.

ORAL ARGUMENT OF SHELDON E. RICHIE

ON BEHALF OF THE PETITIONER

MR. RICHIE: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the National Labor Relations Board can continue to issue adjudicatory decisions when its membership falls to two. The National Labor Relations Act clearly states that at all times, a quorum of the board will be not less than three members. The board's interpretation --

JUSTICE SCALIA: Is it your position that all of the actions of the board, including those taken by the regional offices and by the general counsel and by everybody else, is inoperative once -- once the membership falls below three?

MR. RICHIE: No, Justice Scalia, particularly with respect to the general counsel, the statute at 153(d) has a separate enumeration of -- of obligations and powers and authority, so we don't think

1 that that fails.

2 We also think that, with respect to certain  
3 administrative type functions --

4 JUSTICE SCALIA: Well, it has a separate --  
5 a separate authorization for these three -- three-person  
6 adjudicatory panels as well, doesn't it?

7 MR. RICHIE: It has -- it does,  
8 Justice Scalia. It does have a separate authorization  
9 for panels of three or more members. It does not have,  
10 as in this case, a separate authorization for panels of  
11 two members.

12 JUSTICE SCALIA: Okay. But that's a  
13 different argument from the argument you were starting  
14 off with, which, as I understood it, was once the  
15 membership of the board falls below the quorum of three,  
16 by reason of that, the three -- former three-member  
17 panels, of which there are now only two left, cannot  
18 act. Is that your argument?

19 MR. RICHIE: It is our argument that the --  
20 that once the membership falls below three, that the  
21 National Labor --

22 JUSTICE SCALIA: The membership of the  
23 board?

24 MR. RICHIE: I'm sorry, Your Honor?

25 JUSTICE SCALIA: The membership of the

1 board?

2 MR. RICHIE: When the membership of the  
3 board falls below three. But we also believe that when  
4 the membership of the group falls below three, that the  
5 delegee group's authority to make adjudicatory decisions  
6 lapses.

7 JUSTICE SCALIA: I understood that argument  
8 and I thought that was the only one you were making.  
9 But you are making a broader one, that it also happens  
10 whenever the -- whenever the board's quorum disappears.

11 MR. RICHIE: You are correct,  
12 Justice Scalia. We are making that argument. It's  
13 because of the first sentence of 153(b), which states  
14 that the delegations have to be to members of three or  
15 more members.

16 JUSTICE SCALIA: So the regional offices  
17 can't function, of the NLRB?

18 MR. RICHIE: Well, we believe they can  
19 function. They can receive, for example, unfair labor  
20 practices complaints. They can't make adjudicatory  
21 decisions. And we think that that is exactly what --

22 JUSTICE SCALIA: Can the board pay salaries?

23 MR. RICHIE: We believe they can, because  
24 there is probably a different statute that enumerates  
25 that, Justice Scalia, other than this statute with

1 respect to the authority with respect to adjudicatory  
2 decisions.

3 JUSTICE SCALIA: I'm really reluctant to  
4 rely upon this first argument that you are making,  
5 because I really don't know what it does to all of the  
6 functioning of the board.

7 MR. RICHIE: Well, one of the --  
8 Justice Scalia, one of the things that we think is clear  
9 is that the remedy for fixing an undersized board is not  
10 for the board to redefine itself and to read the  
11 statute, but for Congress or the president to act. And  
12 there are many ways in which the president and Congress  
13 could -- could fix the problem of an undersized board.

14 JUSTICE GINSBURG: But here the court of  
15 appeals said that the Act does two things. First, it  
16 said that the full board can delegate full powers to any  
17 three-member group. That was step one, and that was  
18 done here.

19 And then it says there's this rule that a  
20 quorum is three, but then it said: Except as to one of  
21 these three-member groups that has been designated,  
22 except, and there the quorum is two. So why doesn't the  
23 statute answer the question that, yes, a quorum is  
24 three, except when it's two?

25 MR. RICHIE: Well, I think there is two

1 answers to that, Justice Ginsburg. One is here the  
2 government -- the board takes the position, as they say  
3 on page 29 in a footnote to their brief, that when a  
4 delegate group possessed of all of the board's power  
5 acts, it is acting as the board and not as an agent of  
6 the board.

7           So first, we would say that the second  
8 quorum provision isn't even applicable to this group  
9 that was established -- of members Kirsanow, Liebman and  
10 Schaumber. And so we think the three-member quorum --

11           JUSTICE SCALIA: I didn't understand that.  
12 Would you -- would you make that argument again?

13           MR. RICHIE: Certainly, Justice Scalia. The  
14 government -- I'm sorry, "the government." The NLRB in  
15 its brief in footnote 21 on page 29, as well as in the  
16 delegation, the minutes of the delegation in 2007, which  
17 are found in our brief in the appendix on -- I think  
18 it's pages 4a and 5a. Both say that when -- the NLRB  
19 says in the footnote "When the delegee group possessed  
20 of all of the board's powers," which is what we have  
21 here, "acts, it is acting as the board and not as an  
22 agent of the board. So our position is that when you  
23 become the board, as this group did, now you are subject  
24 to that minimum three-member delegee -- three member  
25 quorum requirement.

1 JUSTICE GINSBURG: But it's not an agent of  
2 the board because the three-member group that has a  
3 quorum of two has the full powers of the board. So the  
4 statute doesn't say anything about a three-member group  
5 that has a quorum of two being an agent of the board.

6 MR. RICHIE: It's a -- it's a group that is  
7 delegated authority, and therefore, whether it's a full  
8 delegation or partial delegation, we believe that the  
9 common law principles of agency and principal make that  
10 delegee group an agent.

11 JUSTICE GINSBURG: But where does the  
12 statute make that three-member group with a quorum of  
13 two, a quorum of two, an agent? It says they may be  
14 designated to exercise any and all powers?

15 MR. RICHIE: Justice Ginsburg, it does not  
16 say the word "agent" in it. But the delegation that  
17 it's referring to is at common law a principal-agency  
18 relationship. So it's our position that once that  
19 delegation occurs that the -- in a normal situation,  
20 because you could have a three-member group of four  
21 members, a board of four or a board of five, and you  
22 could have a group with three members. When the  
23 delegation is made, it's our position and we believe  
24 that this is the position that the D.C. Circuit took as  
25 well, that that's an agent of the board.



1 JUSTICE BREYER: You should -- you should  
2 have a very direct answer to this question.

3 Were you finished, because I don't want to  
4 interrupt that train of thought?

5 JUSTICE GINSBURG: The D.C. Circuit I think  
6 was the source of your opening argument because they  
7 said when the number drops below three there is no  
8 board, and I guess that's what your opening argument was  
9 based on.

10 MR. RICHIE: Yes, Justice Ginsburg, it did  
11 say that. But it also went on to say that it was  
12 applying the rules, the common law rules of principal  
13 and agency, and that when the board without three  
14 members lost its authority to act, that the delegee  
15 group to which the delegation was made also lost  
16 authority to act. And in this case that's exactly what  
17 happened. We had a three-member board -- we actually  
18 had four delegate to three, and then two terms expired.

19 JUSTICE KENNEDY: Well, just on this same  
20 point before Justice Breyer I think moves to another  
21 point. The statute does use the word "quorum" twice  
22 and, as Justice Ginsburg has pointed out, except that  
23 two members -- in its last phrase it uses the word  
24 "quorum" twice: "Except that two members shall  
25 constitute a quorum." It doesn't say two members may

1 act.

2 MR. RICHIE: Justice Kennedy --

3 JUSTICE KENNEDY: It says shall constitute a  
4 quorum."

5 MR. RICHIE: Justice Kennedy, I think we  
6 have to start first -- and you are correct, there are  
7 two quorum provisions, but "quorum" is not defined  
8 differently. Quorum -- I think we agree within NLRB  
9 that a quorum is the minimum number of members of a body  
10 necessary to transact business. We have two different  
11 bodies defined in this statute. We have the board as  
12 one body and we have the group as a different body. And  
13 so when the -- when the exception appears in the  
14 statute, we agree again with the D.C. Circuit's  
15 interpretation of that as simply defining two different  
16 numbers of people necessary to fill out a quorum of  
17 these two different bodies that are defined within the  
18 statute.

19 JUSTICE BREYER: Can you -- can you -- if  
20 you are right, it seems to me you should have a very  
21 clear, concise answer to the question that I'm just  
22 going to ask you. And this is the question: Imagine  
23 that there was no delegation, none. Now we have five  
24 members; is that right? One of them dies. So there is  
25 a vacancy. Now, can the remaining four exercise the

1 board's power?

2 MR. RICHIE: Clearly.

3 JUSTICE BREYER: Clearly. Okay. So what is  
4 the difference between the situation I just described  
5 and this situation where the Board simply delegated its  
6 power to three people and one of them dies? What's the  
7 difference? I can't find any difference in the  
8 language. So what is the difference?

9 MR. RICHIE: Justice Breyer, the difference  
10 is that in this statute there is a clear statement that  
11 at all times the board must have a three-member quorum.  
12 In your hypothetical there were still four members.

13 JUSTICE BREYER: Correct.

14 MR. RICHIE: The board was still in place.

15 JUSTICE BREYER: Except that two members  
16 shall constitute a quorum of any group designated  
17 pursuant to the first sentence, which says "The board is  
18 authorized to delegate to any group of three all of the  
19 powers which it may itself exercise. " So, what's the  
20 difference?

21 MR. RICHIE: Well, the difference is that  
22 once the -- the difference between the hypothetical and  
23 the situation we are in is that there were four members,  
24 and the statute --

25 JUSTICE BREYER: Well, I know that, but I'm

1 asking why does that make a difference?

2 MR. RICHIE: It makes a difference because  
3 the statute requires that at all times the board shall  
4 have a quorum of three members, a minimum quorum of  
5 three members.

6 JUSTICE BREYER: Except.

7 JUSTICE SOTOMAYOR: But isn't that tied to a  
8 quorum for the board as a whole to act? Once it's  
9 delegated a responsibility to a three-member board, it's  
10 already said, unless it takes another vote, that it's  
11 going to let those three people decide. It has -- I  
12 understand the word "delegated" to mean it's given over  
13 its power to a subgroup. If it wants to take it back,  
14 it needs a quorum to do that. That's what I understand.

15 MR. RICHIE: Well, I think the problem is,  
16 Justice Sotomayor, that the delegation to a group of  
17 three is indeed a valid delegation. We don't contest  
18 that. But what we have here is a phantom group. And  
19 what the -- what the board said, because member  
20 Kirsanow's term expired in December, about 11 days after  
21 the delegation. And if you look at the minutes of the  
22 board when they are delegating to the group, it says in  
23 the minutes that they "are continuing to be a two-member  
24 quorum of a three-member group," as if member Kirsanow  
25 is a phantom . It's a fiction. The group ceases to

1 exist and the board -- it's not just that the board  
2 falls below three and the board ceases to exist with all  
3 delegated powers to this group. The group ceases to  
4 exist.

5 JUSTICE KENNEDY: But that brings you back  
6 to Justice Breyer's hypothetical. There's five members  
7 on the board. Clearly they can delegate under the  
8 statute. Now there are only four members. Something  
9 happens to the fifth. Under your theory, the entity  
10 that originally delegated no longer exists and therefore  
11 the group, the entity that received the delegation of  
12 powers, must cease, must cease to act.

13 MR. RICHIE: Justice Kennedy, I --

14 JUSTICE KENNEDY: If the quorum of three  
15 that authorized two to act disappears and that means the  
16 principal is no longer there, so the agent can't  
17 exercise the authority, why isn't it the same when five  
18 become four?

19 MR. RICHIE: Well, we believe that the  
20 reason that it isn't, Justice Kennedy, the same is --  
21 terrible sentence. It's not the same because the  
22 statute contemplates vacancies on the board and multiple  
23 vacancies, so long as they don't go below three. The  
24 statute -- the vacancy clause in the statute doesn't  
25 apply to a group at all. So the delegating group in the

1 hypothetical clearly is still in place as the board  
2 because it's the board that delegated. And the board  
3 still exists.

4 JUSTICE ALITO: As far as the interests of  
5 your client are concerned, is there any functional  
6 difference between what happened here and what could  
7 happen very routinely even if the board had five  
8 members, namely that after the case was assigned to a  
9 three-member panel one of the three members of the panel  
10 became unable to sit on that case, but the remaining two  
11 members were able to reach agreement so the case could  
12 be decided?

13 MR. RICHIE: Justice Alito, the difference  
14 is that here there was never a way to reconstitute this  
15 board -- I'm sorry, the group -- as three members. When  
16 you have five or you have four members of the board and  
17 a member of a three-member group is unable to perform  
18 his or her function --

19 JUSTICE SCALIA: Isn't there another  
20 difference? Is it not the case that the decisions of  
21 these panels can be appealed to the full board? Are  
22 they automatically final? Can the board not revise the  
23 decision of one of its panels?

24 MR. RICHIE: Well, I believe that the board  
25 could revise the decision of one of its panels.

1 JUSTICE SCALIA: You've got to tell me more  
2 than you believe it. What is the case?

3 MR. RICHIE: The adjudication is final.

4 JUSTICE SCALIA: The adjudication is final.

5 MR. RICHIE: Of the three-member group.

6 JUSTICE SCALIA: There is no appeal to the  
7 full board?

8 MR. RICHIE: That is correct.

9 JUSTICE BREYER: Then what is the reason --  
10 I now see. Your answer to my question is that the  
11 vacancy clause applies to the full board but not to the  
12 group.

13 MR. RICHIE: That's correct, Justice Breyer.

14 JUSTICE BREYER: Okay. Now, got that  
15 answer. And now I see how you could read the statute  
16 that way. So, now I would like -- and that would be in  
17 your favor.

18 MR. RICHIE: That's true.

19 JUSTICE BREYER: And -- and, therefore, I  
20 would like to know, since you could also read it the  
21 other way, why should it be read your way? I mean, I  
22 can think of a lot of reasons why not. One is something  
23 that Justice Scalia was raising: It may work havoc as  
24 to what remains effective, what doesn't, what about the  
25 board staff decisions, which are, which aren't. I can

1 see a lot of reasons for not doing it.

2 But what are your best reasons for reading  
3 that vacancy clause the way you want me to read it?

4 MR. RICHIE: Justice Breyer, we -- we  
5 believe that it is important to have a promote -- to  
6 have a robust debate and an expression of -- a potential  
7 for expression of dissent. And what you have here is  
8 you have two members in a group and -- who have publicly  
9 announced that on more than one occasion over the last 2  
10 years plus 3 months when this board has sat with only 2  
11 members, that they have sometimes compromised their  
12 opinions in the interest of the institutional purposes,  
13 basically to keep the doors open.

14 And so you don't have a full and robust  
15 debate. You don't have the potential for an expression  
16 of a dissenting view, and that's the -- that's the  
17 distinction that we see.

18 JUSTICE SOTOMAYOR: But the problem is that  
19 that exists whether we read your rule or not in the way  
20 you want. You have -- you've conceded that a  
21 three-member board could lose a member, a three-member  
22 group could lose a member and its acts still be binding,  
23 as long as you say there is -- there is three members on  
24 the full board. But this lack of opportunity for  
25 dissent exists any time there is a vacancy. You just



1 don't like the system.

2 MR. RICHIE: Justice Sotomayor, if we  
3 consented that when there was an absence, a member who  
4 dies, retires, is incapacitated, that the two members of  
5 a properly constituted three -- three-member group could  
6 still function, I certainly did not mean to say that.  
7 We do not consent to that or agree with that  
8 proposition. What -- what somebody --

9 JUSTICE SOTOMAYOR: I'm sorry. You are now  
10 saying that the group always has to be three members?

11 MR. RICHIE: Yes.

12 JUSTICE SOTOMAYOR: That somebody can't die,  
13 leave, recuse themselves from that group without  
14 invalidating the actions of that subgroup. Where in the  
15 statute do you read that limitation when it says a  
16 quorum of two is okay to act?

17 MR. RICHIE: The definition of a quorum,  
18 Justice Sotomayor, is the minimum number of persons of a  
19 body necessary to transact business. The body here is  
20 defined as three or more people. So, when the --

21 JUSTICE SOTOMAYOR: No, I am talking about  
22 the group.

23 MR. RICHIE: I am, too.

24 JUSTICE SOTOMAYOR: So the group is not  
25 defined as three or more people. It's defined as three.

1 The board is defined as three or more. The group is  
2 defined as three. So I'm -- I'm a little confused.

3 MR. RICHIE: In the statute, the group is  
4 defined as -- the board is authorized, and I'm reading  
5 from 153(b), Appendix 1a to our brief: "The board is  
6 authorized to delegate to any group of three or more  
7 members" --

8 JUSTICE SOTOMAYOR: I see.

9 MR. RICHIE: -- "any or all" -- that is  
10 where we find it necessary that the group must contain  
11 at least three members.

12 JUSTICE SCALIA: That's -- that's a totally  
13 different argument from the one that relies upon the  
14 size of the board, right?

15 MR. RICHIE: It is, and we think it's an  
16 additional argument. We think there's multiple --

17 JUSTICE SCALIA: Even if the board were  
18 still properly constituted and had a full five members,  
19 if one of the three members to a -- a board should die,  
20 it would no longer be a three-member board and could no  
21 longer be, as your argument goes, the recipient of the  
22 delegation, right?

23 MR. RICHIE: That's correct, Justice Scalia.  
24 But what's happened routinely for -- for 60 years since  
25 1947 when Taft-Hartley was passed, is that what the

1 board did was it reconstituted the panels any time a  
2 member died or retired.

3 JUSTICE GINSBURG: There have been  
4 situations before where the board dwindled to two  
5 members. Is this the first time that the board has  
6 continued to adjudicate the cases that they can, or when  
7 there were prior periods with only two did the board  
8 continue to adjudicate?

9 MR. RICHIE: This is the first time, yes.  
10 For over -- from 1947 through 19 -- up to 2007, any time  
11 the board fell to two members -- as far as we know, any  
12 time the board fell to two members, the board  
13 reconstituted -- I'm sorry. Any time a group fell to  
14 two members, the board reconstituted the group to a  
15 three-member group.

16 JUSTICE ALITO: There is a well-established  
17 practice on the court of appeals that when a three-judge  
18 panel for some reason loses one of the members due to a  
19 death or resignation or recusal, the panel can continue  
20 to decide the case if the remaining two judges can  
21 agree. And -- and do you see -- do you think the -- the  
22 situation is different with the NLRB for some reason?  
23 Or do you think that that -- that those decisions on the  
24 courts of appeals are unlawful as well?

25 MR. RICHIE: Well, Justice Alito, I think

1 it's a different statute. But we also -- I also think  
2 the court of appeals, which is the delegating body that  
3 forms the -- the three-member courts, still is in  
4 existence. And if we just --

5 JUSTICE SCALIA: Well, you are shifting  
6 arguments. You can't keep jumping back and forth  
7 between the two arguments. The one is that the  
8 appointing body has to still be fully constituted, or at  
9 least have a quorum, and the other one, which I thought  
10 Justice Alito was addressing, is the quite separate  
11 argument that the recipient of the delegation has to be  
12 three. And when it falls below three it's only two.

13 And I don't know that you have a response  
14 to -- to -- to his point, with respect to the latter  
15 argument, except -- except that it's a different  
16 statute.

17 MR. RICHIE: Well, Justice Scalia, it's a  
18 different statute but it's also a very temporary and  
19 limited circumstance. You have a panel that was formed  
20 to hear a case. Here you have got a delegation of all  
21 the authority, the board has -- the group has become the  
22 board, and we effectively have a two-member National  
23 Labor Relations Board.

24 JUSTICE BREYER: So I would have thought,  
25 but this is only me -- other people don't necessarily go

1 in for this kind of argument. But in thinking of the --  
2 the -- the arguments in your favor, the one that sort of  
3 resonated a bit with me was that this is a very  
4 Republican Congress in 1947 that passed Taft-Hartley,  
5 and one of the things they were really aiming at was to  
6 move the board from three to five. And this is a way so  
7 that that just doesn't happen.

8 But I assume from the briefs filed that  
9 there is no supporting legislative history for that,  
10 what I've just said, so I better wipe it out of my mind.

11 (Laughter.)

12 JUSTICE SCALIA: If there is no legislative  
13 history, it could be true.

14 (Laughter.)

15 MR. RICHIE: Justice Breyer, the legislative  
16 history I think is -- there is no legislative history on  
17 what happens when the board falls below two members.  
18 But it is clear that from 1935 to 1947, the board was  
19 made up of three members, and the statute clearly said  
20 under the Wagner Act two members could be a quorum of a  
21 three-member board.

22 In 1947 when Taft-Hartley was passed,  
23 Congress intentionally increased the quorum and  
24 increased the size of the board. If it had intended to  
25 have only two members serve at any time as a two-member

1 board, they would not -- that would be a strange way to  
2 do it, in a statute that not only increases the size of  
3 the board, but changes the minimum quorum requirement  
4 from two to three.

5 JUSTICE ALITO: I was surprised by your  
6 answer to -- I was surprised by your answer to one of  
7 the earlier questions, because one of your amici says  
8 that any member of the board, regardless of whether he  
9 or she sits on the panel hearing a case, may request  
10 that the case be heard by all five board members. Is  
11 that -- is that not correct?

12 MR. RICHIE: That is correct, but that's to  
13 hear it as opposed to overturn it once the decision is  
14 made.

15 JUSTICE GINSBURG: Heard an initial -- an  
16 initial decision. But just -- the review of the panel  
17 is in the court of appeals, right?

18 MR. RICHIE: That's correct,  
19 Justice Ginsburg.

20 JUSTICE GINSBURG: So you could have  
21 initially a panel of five, but that would not be  
22 reviewing the panel of three?

23 MR. RICHIE: That's correct,  
24 Justice Ginsburg. The -- the -- the five-member board  
25 would not review the three-member group's decision. But

1 in response to Justice --

2 JUSTICE SCALIA: What's the use of having a  
3 five-member board, then? I really don't understand  
4 what -- what has been accomplished --

5 MR. RICHIE: What was --

6 JUSTICE SCALIA: -- if you have a -- you are  
7 changing, oh, we had a three-member board, that's no  
8 good, we thought that's unfair. We are going to make to  
9 five. But then we allow the five to convert themselves  
10 to three for finally deciding all the cases. What --  
11 what has been accomplished?

12 MR. RICHIE: Multiple --

13 JUSTICE SCALIA: Nothing.

14 MR. RICHIE: I'm sorry, Justice Scalia.

15 Multiple members of three. And so before  
16 you had a -- a -- without a delegation, you had a group  
17 of three members. They could -- that group could  
18 hear -- or board --

19 JUSTICE ALITO: The amicus says that the  
20 members of the board not serving on a panel are given  
21 the opportunity to review draft decisions, thus no case  
22 will issue unless it reflects the majority opinion of  
23 the full board.

24 MR. RICHIE: It's a draft --

25 JUSTICE ALITO: So that can be, in effect,

1 the opportunity for full board review before a draft  
2 decision is issued in final form; is that the way it  
3 works?

4 MR. RICHIE: Yes, Justice Alito, it does.

5 CHIEF JUSTICE ROBERTS: Only --

6 MR. RICHIE: That's not --

7 CHIEF JUSTICE ROBERTS: Only if a majority  
8 of the board wants to do that, right?

9 MR. RICHIE: No, Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: One member of the  
11 full board can overturn a group delegation, in other  
12 words, and hear the initial decision?

13 MR. RICHIE: No, Mr. Chief Justice. They  
14 can agree to -- to review the decision and they can  
15 agree before the decision is made to join the panel,  
16 basically is what they do.

17 CHIEF JUSTICE ROBERTS: What if one board  
18 member wants to do that and four don't? What happens?

19 MR. RICHIE: One member wants to join the  
20 panel?

21 CHIEF JUSTICE ROBERTS: One member wants to  
22 review the group's decision.

23 MR. RICHIE: That member would review the  
24 group's decision. He wouldn't be able -- he or she  
25 wouldn't be able to overturn the group's decision.



1 JUSTICE SCALIA: What -- I am really  
2 confused now.

3 Is it or is it not the case that the full  
4 board has the power to review a decision of one of these  
5 panels? Before you said no; before you said it's final.

6 MR. RICHIE: The decision is final once it  
7 is rendered. They can review the decision in draft form  
8 before it is --

9 JUSTICE SCALIA: But that is -- that is my  
10 question, whether they -- they can review it before it  
11 is rendered, is that what you are saying?

12 MR. RICHIE: They can do that or they can  
13 ask to be included on the -- on the panel.

14 JUSTICE SCALIA: They can review it before  
15 it is rendered. Okay.

16 MR. RICHIE: But they can't overturn it.

17 JUSTICE GINSBURG: Is this different from  
18 the practice that some courts of appeals follow of  
19 circulating a panel decision to the full court some days  
20 before it's issued to the public? That doesn't put the  
21 non-panel members on the panel. Is this practice that  
22 you are describing the same or is it different?

23 MR. RICHIE: I believe it's the same,  
24 Justice Ginsburg, that it's exactly the same. But --  
25 but you have an additional opportunity --

1 JUSTICE GINSBURG: But that's quite  
2 different from the court of appeals sitting en banc.  
3 The practice of circulating the opinion does not put all  
4 of the members of the court on the panel.

5 MR. RICHIE: That is correct,  
6 Justice Ginsburg.

7 JUSTICE ALITO: But it provides an  
8 opportunity for them to vote to hear the case en banc  
9 before it's ever issued.

10 MR. RICHIE: That's correct, Justice Alito.  
11 It does. And it -- and therefore you have what we don't  
12 have here, is an opportunity for a robust debate.

13 If there are no other questions I would like  
14 to reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Katyal.

17 ORAL ARGUMENT OF NEAL K. KATYAL  
18 ON BEHALF OF THE RESPONDENT

19 MR. KATYAL: Thank you, Mr. Chief Justice,  
20 and may it please the Court:

21 We agree that the plain text controls this  
22 case and there are three features to that text.

23 First, section 153(b) permits delegation of  
24 any or all of the board's power to three or more  
25 members. Second, that section sets out a general quorum

1 rule of three members. And third, as Justices Alito --  
2 Justices Alito, Kennedy and Ginsburg have pointed out,  
3 there is the phrase "except that" in the rule, a special  
4 quorum provision that sets up panel quorums at two  
5 members.

6 And in this case, faced with a vacancy  
7 crisis, the board validly delegated its powers in  
8 December 2007 to a three-member panel, and Petitioners  
9 have never contested otherwise. Rather, they argue that  
10 when the board dropped it down to two members --

11 JUSTICE SCALIA: Just before the third  
12 member no longer became -- no longer was a member of the  
13 board.

14 MR. KATYAL: That's true.

15 JUSTICE SCALIA: So knowing when it gave it  
16 to this three member panel that it would shortly become  
17 a two-member panel, and that thereby the board would be  
18 able to act with only two members instead of with three,  
19 which is what the quorum requirement for the board is.

20 I must say that seems to be a very strange  
21 procedure when you have a statute that says the board  
22 has to -- has to have three for a quorum. When the  
23 board sees, oh, God, we are about to lose our third  
24 member, let's set up a three-member panel with this guy  
25 who's about to go off. It will immediately become a

1 two-member panel and then we can act with only two  
2 members. That's wonderful.

3 It doesn't seem to you like an evasion of  
4 the whole purpose of the -- of the quorum requirement?

5 MR. KATYAL: I don't think so. I think it's  
6 precisely what was -- what the text allows, because it's  
7 not, Justice Scalia, simply a three-member quorum  
8 requirement. It's a three-member quorum requirement,  
9 "except that."

10 JUSTICE STEVENS: Except -- may I just  
11 interrupt a bit, just on the "except" clause at the very  
12 bottom. When you are talking about individual cases  
13 it's easy. Sure, one member dies; the other two can  
14 finish. But you are talking about long-run governance  
15 of the board. The two members -- two members shall  
16 constitute a quorum of any group designated pursuant to  
17 the first sentence.

18 Now, 2 years later, after -- what is the  
19 group designated pursuant to the first sentence at the  
20 time of the decision 2 years later?

21 MR. KATYAL: It is the same group of people  
22 that were --

23 JUSTICE STEVENS: But there is no such group  
24 exists at the time that that power is being exercised.

25 MR. KATYAL: Well, Justice Stevens, the

1 language is written in the past tense. It's "any" --  
2 the language in this is found in the government's brief  
3 at 10a.

4 JUSTICE STEVENS: No, it's not the past  
5 tense. "Two members shall constitute a quorum."

6 MR. KATYAL: "Of any group designated  
7 pursuant to" the first sentence.

8 JUSTICE STEVENS: But there is no group  
9 around at the time they're -- that this case is being  
10 decided, that was designated before.

11 MR. KATYAL: That group was designated on  
12 December 20, 2007, and that met the requirements of --

13 JUSTICE STEVENS: But your -- your inquiry  
14 is focusing on what happens 2 years later.

15 MR. KATYAL: And -- and with respect to 2  
16 years later, I submit to you that that penultimate  
17 sentence in 153(b) is met. That is a designated group  
18 pursuant to the first sentence.

19 JUSTICE KENNEDY: Well, I don't know how you  
20 could write the sentence without the "ed" unless you  
21 want to say -- to make your point, if the statute had  
22 been written the other way, to any group continuously  
23 being designated.

24 MR. KATYAL: Sure, I think you could say  
25 something like constitute a -- that two members shall

1 constitute a quorum of any group that continues to meet  
2 the requirements of the first sentence thereof, or  
3 something like that.

4 JUSTICE BREYER: To read -- you can read the  
5 language the way you want, that -- because of the  
6 vacancy clause. You see, there is a sentence there that  
7 says "A vacancy shall not impair the right of the  
8 remaining members to exercise the power." That implies  
9 in the absence of that clause, five to four, they  
10 couldn't. Okay?

11 Now, you say that clause applies to the  
12 remaining members, i.e., to the three. And now we don't  
13 have three. And since we don't have three, there are --  
14 and you have to have three. Because they're not --  
15 there's not -- there are not the remaining members, you  
16 see.

17 MR. KATYAL: Right. So let me say a few  
18 things about that. The first is --

19 JUSTICE BREYER: As long as there was  
20 another member, you could -- you could do it. But  
21 without that remaining member, you can't.

22 MR. KATYAL: So the first thing to say about  
23 that argument, Justice Breyer, and it's one that  
24 Justice Scalia brought up to my friend before --

25 JUSTICE BREYER: Yes.

1 MR. KATYAL: -- it is a totally different  
2 argument. It really does rest on the first sentence of  
3 153(b).

4 JUSTICE BREYER: Yes. Yes.

5 MR. KATYAL: And my friend admitted, it's a  
6 totally new, different argument.

7 JUSTICE BREYER: Yes.

8 MR. KATYAL: It's not in the question  
9 presented. It's not before the Court. But were the  
10 Court interested in it, I do think that the language of  
11 the quorum provision, "quorum" meaning a number  
12 sufficient to transact business, is the most relevant  
13 language, and that suggests that two is enough so long  
14 as you have that initial delegation to a group of three  
15 and then one member drops off.

16 JUSTICE SCALIA: Well, don't -- don't you  
17 think it is significant that the -- the vacancy clause  
18 that you were discussing -- where is it? It's in (b).  
19 "A vacancy in the board shall not impair the right of  
20 the remaining members to exercise all of the powers of  
21 the board." And it says nothing about a vacancy in the  
22 group not impairing the power of the group.

23 MR. KATYAL: The -- the --

24 JUSTICE SCALIA: Which -- which buttresses,  
25 it seems to me, the argument that when the group is no

1 longer a group of three the delegation is no longer  
2 effective.

3 MR. KATYAL: I don't think so. The -- the  
4 language is "A vacancy in the board -- in the board  
5 shall not impair the powers of the remaining members of  
6 the board."

7 JUSTICE SCALIA: Of the board.

8 MR. KATYAL: Of the board. And --

9 JUSTICE SCALIA: But it doesn't say that  
10 about the group. That's my point.

11 MR. KATYAL: Well, but by definition,  
12 Justice Scalia, the members that had been delegated this  
13 power on December 20th are members of the board. And  
14 they are not -- they are not simply extraneous actors.  
15 And so the vacancy clause, I think --

16 JUSTICE SCALIA: No. The -- this whole  
17 passage distinguishes between the board and the group.  
18 I mean, it's -- it doesn't -- it doesn't mean the group  
19 when it says "the board" and the board when it says "the  
20 group."

21 MR. KATYAL: Well, I think it -- I don't  
22 know that there is a distinction. I think that there  
23 when they say the board, it by definition includes the  
24 group, because that is part of the board. They aren't  
25 extraneous individuals.



1 CHIEF JUSTICE ROBERTS: So, counsel, if I --

2 JUSTICE SCALIA: I'm sorry.

3 CHIEF JUSTICE ROBERTS: No, go ahead;  
4 finish.

5 JUSTICE SCALIA: The quorum for the group  
6 should be three, then. Right?

7 MR. KATYAL: The quorum -- well, except  
8 that, Justice Scalia, it says -- it goes on to say that  
9 the quorum is actually two.

10 CHIEF JUSTICE ROBERTS: Let -- let's say the  
11 board delegates to a group the authority to act as the  
12 board until December 31st, 2010. And on December 30th,  
13 2010, the group delegates to itself because it's acting  
14 as the board the authority to act until December 31,  
15 2011. Is that valid?

16 MR. KATYAL: Well, if -- if the initial  
17 delegation did give any and all of the powers to the --

18 CHIEF JUSTICE ROBERTS: All the powers of  
19 the board until December 31st.

20 MR. KATYAL: And then -- then I take it,  
21 yes, they could exercise that delegation.

22 CHIEF JUSTICE ROBERTS: So a delegee can  
23 delegate to itself the full authority of the -- the  
24 master in the master -agent relationship?

25 MR. KATYAL: Under the statute. Now, there

1 may be other problems with it. So 153(a), which is  
2 found in our brief, in our government brief at page 10a,  
3 sets out, for example, removal for cause. And if some  
4 members of a group were somehow --

5 CHIEF JUSTICE ROBERTS: No, no; they are  
6 just -- you know, they make the distinction that the  
7 board should continue to function.

8 MR. KATYAL: Yes.

9 CHIEF JUSTICE ROBERTS: Even though their  
10 original delegation was limited to 2010 --

11 MR. KATYAL: Right.

12 CHIEF JUSTICE ROBERTS: -- they, acting as a  
13 board, get to delegate to themselves as the group the  
14 authority to go beyond that.

15 MR. KATYAL: Right. I suppose that -- I  
16 mean, it's not presented here but yes, I suppose that  
17 would be permissible.

18 CHIEF JUSTICE ROBERTS: Now, what if the  
19 board, consisting of five members -- let's say three  
20 Democrats and two Republicans -- the three Democrats  
21 delegate to a group the authority to act as a board.  
22 They designate themselves as the members of the group.  
23 They have at that point, authorized themselves to act as  
24 the board with as little as two members, even though  
25 they couldn't have done that as members of the board.

1 MR. KATYAL: I think that's right,  
2 Mr. Chief Justice, and it underscores that the statute  
3 itself can't control all of those problems and whether  
4 you set the quorum at three or two, even if you have a  
5 full board of five, you can have these machinations that  
6 are potentially --

7 CHIEF JUSTICE ROBERTS: Even though the  
8 whole -- even though the whole purpose of expanding from  
9 three to five was to ensure that more than two are  
10 required for the board to act?

11 MR. KATYAL: Well, I think that the purpose,  
12 as the legislative history reveals, and it's set out in  
13 our brief, was to increase efficiency and to have  
14 overlapping panels adjudicating cases. I do think that  
15 there's a -- there's ways to prevent your situation from  
16 happening; that, and they include not just removal for  
17 cause, which I think this would be the paradigmatic case  
18 if three members of the body were trying to cut out two  
19 members from doing their job.

20 CHIEF JUSTICE ROBERTS: Not trying to, but  
21 succeeding in doing so.

22 MR. KATYAL: Succeeding, absolutely. And I  
23 think --

24 CHIEF JUSTICE ROBERTS: Well, I mean, it  
25 depends upon who would remove them for cause.

1 MR. KATYAL: Absolutely.

2 CHIEF JUSTICE ROBERTS: Now, who would  
3 remove them?

4 MR. KATYAL: It would be the president.

5 CHIEF JUSTICE ROBERTS: Well, what if he's  
6 perfectly content to have two Democrats?

7 MR. KATYAL: And then you would have  
8 other -- you would have other checks as well. If you  
9 had one-party government and all of these factors  
10 aligning in the way you are suggesting, you would have  
11 the possibility that the circuit court's review under  
12 160(f) might come into play, I mean, because each board  
13 decision can be potentially appealed to a circuit court.  
14 There is budgetary processes and --

15 CHIEF JUSTICE ROBERTS: I just want to make  
16 sure there is nothing to constrain -- if you have three  
17 Democrats, three -- or two Republicans or, of course,  
18 the other way around, nothing to constrain them from  
19 acting fully as the board with only two -- two  
20 Democrats?

21 MR. KATYAL: I don't think the statute  
22 itself constrains it --

23 CHIEF JUSTICE ROBERTS: In the statute.

24 MR. KATYAL: -- under either my friend's  
25 reading or mine. I think that rather, it is a matter of

1 etiquette, practice, tradition, and all sorts of  
2 institutional checks that are laced into the way in  
3 which the board --

4 JUSTICE BREYER: Is there any other legal --  
5 this is what -- one thing, if I were thinking without  
6 the language for a moment, and I -- the Taft-Hartley  
7 Congress did, I think, want to limit the powers in a  
8 number of ways of the board, maybe expand the membership  
9 to be sure there would be both parties in larger  
10 numbers.

11 If you could limit this to adjudications,  
12 you would say, well, then they can't set major policy  
13 with just two members. But I don't see a way to do  
14 that, particularly since the board has often set rules  
15 in adjudication which have broad application.

16 So am I right in thinking that we have to  
17 decide either, it is okay for two members to set the  
18 most major policies, or we have to say they can't even  
19 conduct adjudication, even the simplest adjudication,  
20 even the least significant?

21 MR. KATYAL: I think -- I think, Justice  
22 Breyer, that the board traditionally doesn't engage in  
23 much rulemaking. It does make its decisions --

24 JUSTICE BREYER: No, no. But that is a  
25 rule. They set a rule in the adjudication --

1           MR. KATYAL: And I do agree that -- that at  
2 stake here is the potential to decide cases. Now, when  
3 you mention the Taft-Hartley Act, I think that that  
4 legislative history is important for a different reason,  
5 which is up in -- from 1935 to 1947, and this is set out  
6 in footnote 1 of our brief, that board decided over  
7 460 cases as a two-member body. There was a vacant  
8 third position.

9           And there were 2 years of debate,  
10 contentious debate, as you alluded to before, about  
11 Taft-Hartley, and yet they left that piece intact. They  
12 permitted two-member bodies to decide these cases. And  
13 so to the extent legislative history is relevant for  
14 members of the Court, we suggest it strongly suggests  
15 that what the board did here, faced with this vacancy  
16 crisis, mirrors what happened between 1935 and --

17           JUSTICE ALITO: It begs the question --

18           JUSTICE KENNEDY: Suppose -- suppose our  
19 first inquiry were agency law, and we concluded that  
20 under agency law when the principal ceases to exist the  
21 agent may no longer function. Let's assume we conclude  
22 that under agency law. Could you then cite us a case or  
23 a rationale for saying that agency law should not apply  
24 to a government agency, to a problem of this type, and  
25 if so, what is your authority?

1                   MR. KATYAL:  Sir, they are set out at page  
2 28 of our brief.  They are United States v. Wyder, the  
3 two Donovan cases.  I think it is a long-established  
4 principle that principal/agent relationships, which we  
5 don't think necessarily apply to this case, but even did  
6 you -- even were you to disagree, as the premise of your  
7 question suggested, that government delegations survive  
8 the loss of that principal.

9                   JUSTICE GINSBURG:  Is your point that  
10 official acts done stay in effect even though the  
11 official is gone, until the official's successor in  
12 office is appointed and that successor can remand the  
13 instruction?

14                   MR. KATYAL:  That's -- that's precisely  
15 correct.

16                   JUSTICE KENNEDY:  But that is like the de  
17 facto officer doctrine.  It could be that, if the  
18 Petitioner prevails here, the de facto officer doctrine  
19 would leave in place everything that has been done.

20                   MR. KATYAL:  Justice Kennedy, those --  
21 that's a different --

22                   JUSTICE KENNEDY:  But it seems to me that's  
23 quite a different -- different point.

24                   MR. KATYAL:  Absolutely.  That's a different  
25 point.  What I'm saying and what these cases say is

1 that, for example, when an attorney general designates  
2 their power to -- the wiretap authority to a  
3 subordinate, an assistant attorney general, and then  
4 that attorney general leaves office, that wiretap  
5 authority nonetheless continues in the subordinate until  
6 it is revoked by a successor.

7 JUSTICE ALITO: But hasn't the situation  
8 that has prevailed now for some time changed the -- the  
9 decision-making process of the board in at least two  
10 important ways? First, there isn't any opportunity for  
11 full board review of cases. But more important, if you  
12 have only two members on the board and only two members  
13 on the panel, the process is very different from a panel  
14 in which there were three members, or in which two  
15 members can be supplemented with an additional member if  
16 they can't agree.

17 What are the two to do? They have to --  
18 they have to split the difference all the time. And  
19 there have been decisions in which the members have --  
20 basically have suggested that that's exactly what has  
21 happened.

22 MR. KATYAL: Justice Alito, I am not here  
23 suggesting that the two-member board is ideal or  
24 equivalent or optimal to a -- an optimal thing.  
25 Congress set out five. But faced with a vacancy crisis



1 and shutting down the board entirely, I think the board  
2 did the prudent thing here by continuing to operate,  
3 continuing for these 800 or so days to decide these  
4 cases.

5 JUSTICE STEVENS: Well, not only is the  
6 two-member board not -- not ideal. Do you think it is  
7 reasonably possible that Congress back in 1947  
8 contemplated this particular problem and would have  
9 solved it the way you suggest?

10 MR. KATYAL: I do think that Congress had  
11 before it a well -- it was well-known that over 460  
12 times the board had decided cases with only two members,  
13 with the third being vacant. And I think that's what --

14 JUSTICE STEVENS: But that's always when  
15 there is -- there is in existence three people who could  
16 have served. But the particular problem we've got now,  
17 going on for 2 or 3 years: All the decisions by two  
18 members. Do you think Congress would have authorized  
19 this?

20 MR. KATYAL: As opposed to shutting down the  
21 entire board, yes, Justice Stevens. I think that's the  
22 purpose of the --

23 JUSTICE SCALIA: It depends. I mean, if  
24 shutting down is the only way to put pressure on  
25 Congress to -- I mean, you may have a Congress that is

1 just delighted to have only two Democratic members left  
2 on the board and all the cases decided by two Democratic  
3 members. What possible incentive does that Congress  
4 have to increase the board to -- to the level that it  
5 should be? None.

6 If you want to solve the crisis that you are  
7 so worried about, the only way to solve it is to say:  
8 Boy, you know, there is -- it's Armageddon coming; we  
9 are going to not be able to act at all. That would  
10 solve the crisis.

11 MR. KATYAL: Well, I think the politics in  
12 Armageddon could cut different ways, depending -- I  
13 mean, these are nomination battles that are focused on  
14 individual personalities. And, Justice Scalia, the only  
15 empirical evidence we have -- this is not the first time  
16 the board has done this, contrary to my friend's  
17 suggestion earlier.

18 In 2005, the board was faced with the exact  
19 same situation. The board was going to go down to two  
20 members. They decided to do the exact same delegation  
21 and give -- give all the powers to a group of three, and  
22 four days later, Congress fixed the problem with the  
23 president.

24 JUSTICE SCALIA: I'm much more impressed  
25 by -- by your opponent's assertion, which I don't think

1 you have contradicted, that for many years whenever  
2 there was a death in one of the three-member panels,  
3 that panel was reconstituted. A new person was  
4 appointed, instead of just letting it continue to  
5 operate with only two. Doesn't that mean something?  
6 Doesn't that suggest that these panels were viewed by  
7 the board as requiring three people?

8 MR. KATYAL: No, it suggests that they  
9 thought three was optimal, where it was -- where they  
10 could get three bodies. But here, when they only have  
11 two -- and again, faced with shutting down and not  
12 deciding the lion's share of cases, which aren't the  
13 controversial ones that give rise to the disagreement,  
14 Justice Alito, that you were positing -- they've decided  
15 to go and do it -- and do their business and try and  
16 resolve these.

17 And they have done, I think -- the corpus  
18 reveals a really remarkable job at reaching agreement in  
19 a large number of cases on the basis of existing  
20 precedent. Are these decisions --

21 JUSTICE GINSBURG: How -- how has it -- how  
22 has it worked? And I understand that they are not  
23 dealing with controversial decisions. How many  
24 decisions are there now?

25 MR. KATYAL: I believe that there is 586 or

1 so decisions that they have rendered, and of those they  
2 have set aside about approximately 70. It was 65 as of  
3 a few days ago and it's gone up, because they involve  
4 questions about overturning precedent or novel issues,  
5 and so they haven't reached agreement in those.

6 CHIEF JUSTICE ROBERTS: What actually  
7 happens on -- on the ground? Somebody complains about  
8 an unfair labor practice to the board, and let's say the  
9 petitioner prevails and the board can't function. What  
10 happens next? Is there -- I don't know if there would  
11 be a review or not, but can you go to the court of  
12 appeals?

13 MR. KATYAL: If -- if -- if the board is  
14 disabled?

15 CHIEF JUSTICE ROBERTS: Yes, assume there is  
16 no board. As you say, the -- the problem that would  
17 happen if you don't prevail?

18 MR. KATYAL: Well, if there is -- if there  
19 is no board, then I take it the cases would get stuck  
20 after the ALJ. There is nothing to take exception to,  
21 and so I'm not sure they could go directly to the court  
22 of appeals, because the statute, 160(f), I think,  
23 doesn't permit review from an ALJ decision directly up.  
24 It permits review only of the board's decisions. And if  
25 there is no board decision, then presumably these cases

1 get stuck until we have a three-member quorum.

2 JUSTICE BREYER: And is it -- is it correct  
3 numerically that, in fact, under identical language  
4 except the word "and" changes to "except for," the --  
5 from 1935 to 1947, there were two-member panels and they  
6 decided about 400 cases, and then they took the same  
7 language, and now since 1947, roughly, what are the  
8 figures? How many cases? Has it only been this  
9 instance where it has been two members or have there  
10 been other instances?

11 MR. KATYAL: Well, the -- the board only  
12 went down to two members as a whole starting in 1993.  
13 It has happened four times: In 1993 for 2 months; in  
14 2001, I believe for 1 month; in 2005 for only a few  
15 days.

16 JUSTICE BREYER: Is that when the 400 cases  
17 that you are talking about were?

18 MR. KATYAL: The 460 cases were between 1935  
19 and 1947.

20 JUSTICE BREYER: And 1947. And how many  
21 cases were decided by two members about, I'm not asking  
22 for -- during the times you are talking about before the  
23 present two-member boards?

24 MR. KATYAL: In -- in -- in 1993 and in  
25 2001, the board didn't do this, because those were short

1 periods of time. In 2005, they did do precisely what  
2 they did here, but Congress resolved the situation, so  
3 there are only about 6 cases decided in that 4-day  
4 period. And now from 2007 to now, approximately  
5 586 cases or so have been decided.

6 JUSTICE SCALIA: But they never did it when  
7 they had a full board?

8 MR. KATYAL: They never delegated --

9 JUSTICE SCALIA: Whenever there was a death  
10 of one of the members of a three-judge panel or a  
11 three-member panel, they filled it and the panel did not  
12 operate with two?

13 MR. KATYAL: Absolutely. We are not  
14 standing --

15 JUSTICE SCALIA: Even though it could have,  
16 even though the quorum provision was just as it is here.

17 MR. KATYAL: It could have, but it's not --

18 JUSTICE SCALIA: Those panels did not  
19 operate with two?

20 MR. KATYAL: Absolutely. It's not optimal,  
21 Justice Scalia, to have two. But if -- if the choice is  
22 shutting down or going with two, the board made the  
23 choice in this circumstance to go with more.

24 And, Justice Breyer, you had mentioned  
25 before the change in the word "except that," and I do

1 think that that is crucial language, because that is a  
2 subordinating conjunction. And what it does is  
3 essentially modify that. The two-member quorum language  
4 modifies what happens before, the "at all times" --

5 JUSTICE BREYER: Well, you need the "except  
6 that" once you have language. You need it because now  
7 you have a bigger board and it says there is a  
8 three-member quorum.

9 MR. KATYAL: Precisely.

10 JUSTICE BREYER: I thought they -- they  
11 simply are taking the earlier phrase, the earlier  
12 statutory phrase, and they are changing those words  
13 because grammatically you now need it?

14 MR. KATYAL: Precisely correct. You need it  
15 grammatically because otherwise if you didn't have  
16 something like that, it would suggest that the panel  
17 quorum would be three as well. But -- but the language  
18 is quite specific on this and, contrary to what the D.C.  
19 Circuit found, "at all times" is modified by that  
20 subordinating conjunction in the phrase that follows.

21 JUSTICE KENNEDY: What -- what authority  
22 does an ALJ purport and in fact exercise? He's not  
23 acting or she's not acting for the board?

24 MR. KATYAL: The -- the ALJ is appointed by  
25 the board and they essentially write tentative decisions

1 that the board, as I understand it, can approve or  
2 disapprove. Exceptions can be taken by litigants up to  
3 the board.

4 JUSTICE KENNEDY: Under the Petitioner's  
5 theory, if there is no quorum would those appointments  
6 then be invalidated, too?

7 MR. KATYAL: Well, I -- and this goes to  
8 Justice Scalia's first question of the argument, I -- I  
9 think that it's possible. I think that there is -- the  
10 D.C. Circuit's reasoning is -- potentially could be read  
11 so broadly as to say that the entire board goes poof and  
12 everything under it, including the salaries.

13 I think if the Court were inclined to -- to  
14 write a decision like that, we would try to look to, as  
15 you mentioned before, the de facto officer doctrine and  
16 the specific language of the delegations to the ALJ's  
17 and the specific language to the general counsels, to  
18 try to see if there is a way to preserve all of the  
19 board's action in this circumstance.

20 Of course, that isn't before the Court at  
21 this point, but I understand that the dramatic  
22 consequences, potentially dramatic consequences of the  
23 D.C. Circuit's ruling, may inform the judgment.

24 JUSTICE SCALIA: Do -- do we have any notion  
25 when -- when the board will reduce to one?



1 (Laughter.)

2 JUSTICE SCALIA: When -- when -- when is one  
3 of the two's term over?

4 MR. KATYAL: In the absence of any further  
5 confirmations or other appointments, one of the members,  
6 Member Schaumber, will leave on August 27th of this  
7 year.

8 JUSTICE SCALIA: Of this year. At which  
9 point there will be some pressure on Congress, I guess,  
10 right?

11 MR. KATYAL: There will.

12 JUSTICE GINSBURG: There are -- there are  
13 two nominees, are there not?

14 MR. KATYAL: There are three nominees  
15 pending right now.

16 JUSTICE GINSBURG: Three?

17 MR. KATYAL: Yes. And they have been  
18 pending. They were named in July of last year. They  
19 were voted out of committee in October. One of them had  
20 a hold and had to be renominated. That renomination  
21 took place. There was a failed quorum -- a failed  
22 cloture vote in February. And so all three nominations  
23 are pending. And I think that underscores the general  
24 contentious nature of the appointment process with  
25 respect to this set of issues.

1 CHIEF JUSTICE ROBERTS: And the recess  
2 appointment power doesn't work why?

3 MR. KATYAL: The -- the recess appointment  
4 power can work in -- in a recess. I think our office  
5 has opined the recess has to be longer than 3 days.  
6 And -- and so, it is potentially available to avert the  
7 future crisis that -- that could -- that could take  
8 place with respect to the board.

9 If there are no other questions --

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Richie, you have 3 minutes remaining.

12 REBUTTAL ARGUMENT OF SHELDON E. RICHIE

13 ON BEHALF OF THE PETITIONER

14 MR. RICHIE: First, let me address the --  
15 the issue of what happens if we prevail, how will the  
16 problem be fixed. There are two types of cases. There  
17 are representation cases, and then there are cases  
18 dealing with unfair labor practices.

19 The unfair labor practices,  
20 Mr. Chief Justice, have a limitations period to them.  
21 The -- the issues -- the issues with respect to  
22 representation have no limitations. So in response to  
23 Justice Ginsburg's comment -- I believe it was  
24 Justice Ginsburg -- there's a -- when a successor comes  
25 on board, these issues, if these -- if we prevail and

1 our decision is vacated, those are -- can be reheard by  
2 the board when a successor is in place.

3 The D.C. Circuit --

4 JUSTICE SCALIA: Excuse me. Just the --  
5 just the representation cases, not the unfair labor  
6 practice cases?

7 MR. RICHIE: That's correct.

8 JUSTICE SCALIA: Wouldn't the --

9 MR. RICHIE: Well, except to the extent,  
10 Justice Scalia, that the statute of limitations has not  
11 run on those unfair labor --

12 JUSTICE SCALIA: Yes, I understand.

13 MR. RICHIE: -- cases.

14 CHIEF JUSTICE ROBERTS: Wouldn't -- wouldn't  
15 the statute of limitations at least be told during the  
16 period when they can't do anything? I suppose that's a  
17 different case.

18 MR. RICHIE: That's an argument. That's a  
19 different case. I don't know the answer. And I'm sure  
20 the litigants would argue that.

21 With respect to the issue of the -- whether  
22 it's three members that are required on both the board  
23 and the group, the D.C. Circuit didn't deal with that,  
24 but they did deal with the exception issue. And they  
25 said -- I'm reading from the appendix page 89 of our

1 petition: The board forum requirement therefore must be  
2 satisfied regardless of whether the board's authority is  
3 delegated to a group of its members.

4 A modifying phrase such as -- as this,  
5 talking about the "at all times three members" denotes  
6 that there is no instance in which the board forum  
7 requirement may be disregarded.

8 And then the court said: "It therefore  
9 defies logic as well as the text of the statute to argue  
10 as the board does that a Congress which explicitly  
11 imposed a requirement for a three-member quorum at all  
12 times would in the same sentence allow the board to  
13 reduce its operative quorum to two without further  
14 congressional authorization."

15 JUSTICE GINSBURG: Except that it said  
16 "except."

17 (Laughter.)

18 JUSTICE GINSBURG: At all times "except."

19 MR. RICHIE: And, Justice Ginsburg, that was  
20 what the D.C. Circuit was referring to was the "except  
21 that" language, and saying in that same sentence, where  
22 there is a requirement at all times of a three-member  
23 quorum of the board, that it is -- it defies logic that  
24 Congress would in that same sentence state except when  
25 there is three that falls to two.

1                   And I think the other thing I would like to  
2 conclude is that the -- my time's up. Thank you.

3                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4                   The case is submitted.

5                   (Whereupon at 11:03 a.m., the case in the  
6 above-entitled matter was submitted.)

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