

MODULE 5A

Appointment and Removal

Who is an officer · who appoints · recess appointments · Myers to Slaughter

Constitutional Law · Fall 2026 · Professor Jorge R. Roig

The appointment process

Four steps for a principal officer. Congress can shorten the path for inferior ones.

1 NOMINATION

The President, alone.

2 ADVICE & CONSENT

The Senate.

3 APPOINTMENT

The President again.

4 COMMISSION

The proof.

PRINCIPAL OFFICERS

- All four steps.
- The Senate is always in.

INFERIOR OFFICERS

- Congress may vest the appointment in the President alone, the courts of law, or the heads of departments.
- Or keep the Senate in.

Recess appointments expire at the end of the Senate's next session.

Who is an officer?

The Appointments Clause covers officers. Employees are hired like anyone else.

BUCKLEY, 1976: THE TEST

- An officer exercises “significant authority pursuant to the laws of the United States.”
- Everyone else is an employee.

LUCIA, 2018: THE ALJs

- SEC judges hired by staff are officers.
- So they were never validly appointed.

THE REMEDY

A new hearing, before a different and properly appointed judge.

Officer or employee comes first. Principal or inferior comes second.

Principal or inferior?

Only inferior officers can be appointed without the Senate.

MORRISON, 1988: WHAT YOU DO

1. Removable by a higher executive officer.
2. Limited duties.
3. Limited jurisdiction.
4. Limited tenure.

EDMOND, 1997: WHO SUPERVISES YOU

- Inferior officers are those whose work is “directed and supervised at some level” by Senate-confirmed officers.
- Whether you are inferior “depends on whether [you have] a superior.”

SINCE EDMOND

- Arthrex, 2021: a Senate-confirmed officer must be able to review the final decision.
- Braidwood, 2025: removable at will and output reviewable — inferior, whatever the statute calls it.

My board: principal officers formulate policy and answer directly to the President.

What Congress cannot do

Congress creates the office and the Senate confirms. Congress cannot fill it or keep the power to fire.

BUCKLEY, 1976: NO APPOINTING

- Congressional leaders named four of the six FEC members.
- So the FEC could not enforce, make rules, or sue.

BOWSHER, 1986: NO FIRING

- Congress could remove the Comptroller General.
- So he could not execute the budget law.
- Removal by Congress: impeachment only.

Chadha kept Congress from legislating alone. These keep it from executing.

Recess appointments: NLRB v. Noel Canning

Three NLRB appointments, made during a three-day break between pro forma sessions.

1 WHAT IS “THE RECESS”?

- Between sessions, or within one.
- Ten days or more, presumptively.

2 WHICH VACANCIES?

- Any vacancy.
- It need not arise during the recess.

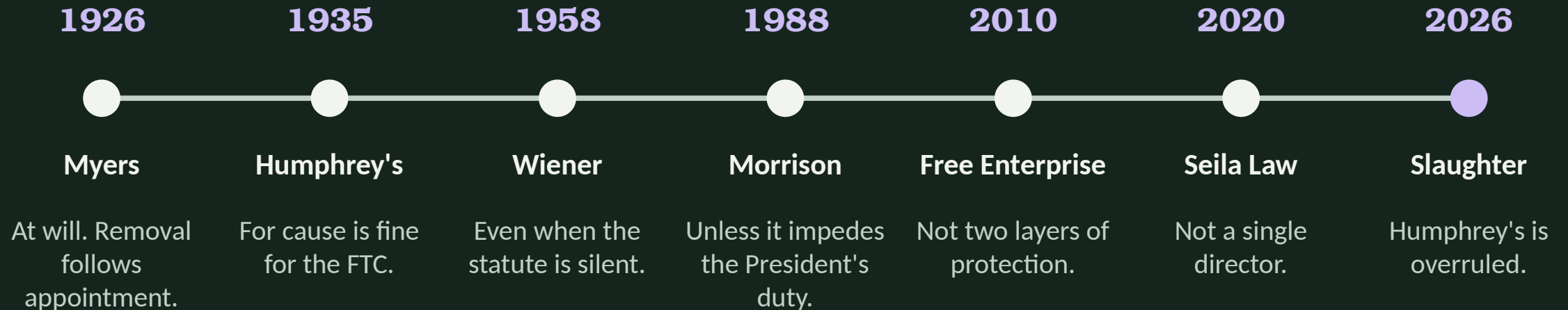
3 PRO FORMA SESSIONS?

- They count.
- The Senate is in session when it says it is — if it can do business.

The appointments fell: three days is not a recess. Unanimous in result, 5–4 on why.

Removal: from Myers to Slaughter

A hundred years, seven cases, one question: can the President fire this officer at will?



Away from Myers until 1988. Back toward it ever since.

Myers and Humphrey's Executor

Nine years apart. The first says the President may fire at will. The second says: not everyone.

MYERS, 1926 (TAFT)

- A postmaster, removable only with the Senate's consent.
- Unconstitutional.
- Removal follows appointment. The President fires at will.

HUMPHREY'S, 1935 (SUTHERLAND)

- An FTC commissioner, removable only for cause.
- Valid: the FTC is “quasi-legislative” and “quasi-judicial.”
- Myers covers purely executive officers only.

Wiener, 1958: the same protection, even where the statute says nothing.

Morrison v. Olson, 1988

An independent counsel, appointed by a court, removable by the Attorney General only for good cause.

THE COURT (REHNQUIST), 7-1

- An inferior officer: a court may appoint her.
- Good-cause removal is valid unless it would “impede the President's ability to perform his constitutional duty.”

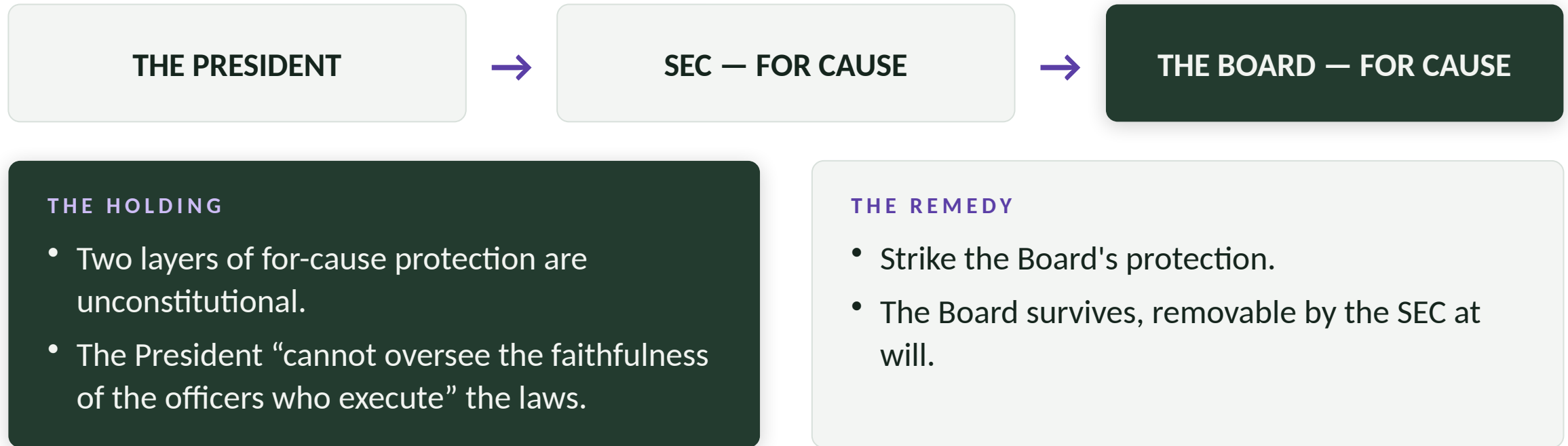
SCALIA, ALONE

- Prosecution is purely executive power.
- All of it belongs to the President.
- “But this wolf comes as a wolf.”

Slaughter overrules Humphrey's. It does not overrule Morrison.

Free Enterprise Fund, 2010: two layers

Two layers of for-cause protection between the President and the Board.



One layer survived. Two did not.

Seila Law, 2020, and Collins, 2021

One director, a five-year term, removable only for cause. Compare the FTC.

SEILA LAW: THE CFPB

- The removal protection is unconstitutional.
- Two exceptions only: multimember expert bodies, and inferior officers with narrow duties.
- Strike the clause; the agency survives.

COLLINS: THE FHFA

- Same structure, same result.
- The agency's size does not matter.
- But its actions are not void. Show the clause caused your harm.

My board's question mark: do multimember boards still get protection?

The current case: Trump v. Slaughter, 2026

The President fired an FTC commissioner. The statute said: only for cause.

THE HOLDING, 6-3 (ROBERTS)

- The FTC's for-cause protection is unconstitutional.
- Humphrey's Executor is overruled.
- Morrison is not.

RESERVED — THE PART THOMAS DID NOT JOIN

- The Federal Reserve.
- Judges of non-Article III courts: the Tax Court, the Court of Federal Claims.

Sotomayor, dissenting: it “rewinds the clock nearly 150 years.”

Questions for discussion: the Data Commission

Your client was fined \$2 million by a federal commission.

THE FACTS

- Five commissioners, removable only for cause.
- Rules, enforcement, penalties.
- Its judges are hired by staff.
- A judge fines your client.
- The President fires a commissioner over policy.

QUESTIONS FOR DISCUSSION

1. Is the judge an officer? What does your client get?
2. Principal or inferior?
3. After Slaughter, is the for-cause clause valid?
4. Is the fine void?
5. Would it matter if the Commission set interest rates?

Module 5A on one slide

One line per question.

THE LINE, ONE QUESTION AT A TIME

- Officer: “significant authority” under federal law. Agency judges count.
- Inferior: supervised by a Senate-confirmed officer who can review the final word.
- Congress may not appoint, and may not keep the power to fire.
- Recess: ten days or more. The Senate is in session when it says it is.
- Removal: Myers → Humphrey's → Morrison → Free Enterprise → Seila → Slaughter.
- Remedy: a bad appointment undoes the act. A bad removal clause does not.

Next — Module 6: foreign affairs, war, and immigration.

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