

“R. Cushman” and Justices Kagan, Jackson, and Ginsburg

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On June 29, 2020, the Supreme Court of the United States announced its decision in *Seila Law LLC v. Consumer Finance Protection Bureau*.¹

The Consumer Finance Protection Bureau (“CFPB”), created by federal legislation in the wake of the 2008 U.S. financial crisis, is an independent regulatory agency located in the executive branch. The CFPB is charged with ensuring that consumer loan products are safe and transparent. It enforces an array of consumer protection laws, issues regulations, and adjudicates its enforcement personnel’s disputes with the businesses it regulates.

The CFPB is led by a single individual. That director, after nomination by the U.S. president and confirmation by the U.S. Senate, serves a five-year term. By statute, the president may remove the CFPB director only for “inefficiency, neglect of duty, or malfeasance in office.”

Unlike many other executive branch officials, The CFPB’s director is not someone whom the president may fire at will or, before it ever comes to that, influence politically with the possibility of exercising such unlimited removal power.

In *Seila Law*, the Supreme Court held, by a vote of 5-4, that the statutory limit on the president’s power to remove the CFPB’s director impermissibly curtails the president’s powers under the Constitution.

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¹ See ___ U.S. ___, 140 S. Ct. ___ (2020). The slip opinion: www.supremecourt.gov/opinions/19pdf/19-7_new_0pm1.pdf.

The Court also held, by a vote of 7-2, that this unconstitutional limitation on the president’s removal power is severable from the rest of the law that created the CFPB. The agency, in other words, continues to work as it was created, structured, and empowered to do, except that the president now may remove the CFPB’s director at will.

The *Seila Law* decision includes opinions by Chief Justice John G. Roberts, Jr., writing for the Court’s 5-justice majority holding unconstitutional the statutory limit on the president’s ability to remove the CFPB director at will, and by Associate Justice Elena Kagan, writing for the four dissenting justices who regarded that limit as constitutional.

In their opinions, Chief Justice Roberts and Justice Kagan disagree, with great smarts and eloquence and also with some heat, about the U.S. Constitution’s text, structure, and history with regard to presidential power to remove executive branch officials, about the meanings of prior Supreme Court decisions, and about many U.S. historical experiences with various agencies and limits on presidents’ powers to remove their leaders.

Of the many issues that the justices considered and debated in their opinions, one was whether, for a president to retain constitutionally-sufficient political control of an agency head, the president’s power to remove that official needs to be unlimited. For Chief Justice Roberts and the majority, the answer to that question was yes (except for past circumstances that these justices regarded as unlike the CFPB). They (the Court majority) decided that the Constitution requires presidents generally to have the control over agency heads that comes from being able to fire them at any time for any reason, even on a whim.

Justice Kagan and the three other dissenters disagreed. Among her many points, before turning at one point in her opinion to consider the practical effects that limited versus unlimited removal power have on a president’s control of an agency head, she considered as a baseline how much a president can control an individual who heads an agency versus how much a president can control a board that heads an agency.

In this particular matter, Justice Kagan explained that presidents have less political control over multi-member boards than they do over an individual agency head. In her view, this fact allayed any constitutional concern that the CFPB’s director might as a general matter be too independent of the president—because the director is one person, the

president always is in a powerful position to monitor, communicate with, and influence the director. And that degree of front-end control makes it less important that, turning to the formalities of removal, the president is not able to fire that director any time, including just for the hell of it—that threat is less important for presidential management power here than it might be in the context of an agency run by a board.

To prove this point, admittedly complex, quite internal to one of many arguments, and not at all decisive of the case, Justice Kagan considered the example of the U.S. Federal Reserve. Created in 1913, “the Fed” is governed by a board, not by a single official as the CFPB is. Justice Kagan wrote that the Fed’s history illustrates how presidents have less political power to control multi-member boards than they do to control single-director agencies. She proved the point by quoting from a 1941 scholarly study:

...Congress constructed the Federal Reserve as it did because it is “easier to protect a board from political control than to protect a single appointed official.” R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 153 (1941).²

* * *

² ____ U.S. at ____, 140 S. Ct. at ____, slip op. at 34.



1951: Dr. Robert E. Cushman, speaking at a podium.
(Photograph creator: C. Hadley Smith;
image from Cornell University Faculty Biographical Files, #47-10-3394,
Division of Rare & Manuscript Collections, Cornell University Library.)

The author of that 1941 book was Dr. Robert Eugene Cushman, Ph.D. He was a noted government professor at Cornell University. He also was a friend of his fellow Upstate New Yorker Robert H. Jackson, beginning in 1931 or 1932 when Jackson was serving on a New York State government commission, and continuing through the rest of Jackson’s life.³

³ See, at the end of this post, images of two Jackson-Cushman letters.

In 1950 and 1951, talent plus nepotism having the influence that they do, Justice Jackson employed Dr. Cushman’s son John F. Cushman, then a young lawyer, as one of his two law clerks at the Supreme Court.

Dr. Robert E. Cushman was a great scholar. He also was a great teacher. He had, in his career, what every teacher hopes for: important, beneficial effects on his students, in his classrooms and courses, in employing them as research assistants, and across their lives.

At Cornell, a star Cushman student was Ruth Bader ‘54. She started college, coincidentally, in the year when Dr. Cushman’s son was a Justice Jackson law clerk. She was deeply impressed by Dr. Cushman’s teaching of civil liberties, including his criticisms of Senator Joseph McCarthy (R-WI) and Cold War “McCarthyism.” She became one of Cushman’s research assistants, tracking that era’s “black lists” in the entertainment industry. He showed her, as she put it years later, “that lawyers could make a difference”—according to a biographer (of her, not of Dr. Cushman), he “showed her that even as the federal government was going after individuals in violation of their first amendment rights, the people who were defending them were the lawyers.”⁴ He influenced strongly her decision to become a lawyer. After Cornell, she excelled at Harvard Law School and then, in her third year, at Columbia Law School.

And you know the story from there.

* * *

The citations in *Seila Law* to Dr. Cushman’s scholarship seem to have originated in a prior, high-profile federal lawsuit challenging the constitutionality of the CFPB’s structure. That case, *PHH Corporation v. CFPB*, began when the CFPB director fined a company over \$100 million for allegedly illegally referring home-buyers to overcharging mortgage insurers in exchange for kickbacks. The company refused to pay the fine. Instead, it sued the CFPB, arguing that its director could not take action against the company because the federal law defining his powers as the head of an executive branch agency unconstitutionally limited the president’s

⁴ Amol Rajesh, *Author Highlights Cornell Roots of Justice Ruth Bader Ginsburg ‘54*, THE CORNELL DAILY SUN (Feb. 28, 2017) (quoting Irin Carmon, co-author of NOTORIOUS RBG: THE LIFE & TIMES OF RUTH BADER GINSBURG), available at <https://cornellsun.com/2017/02/28/author-highlights-cornell-justice-ruth-bader-ginsburgs-cornell-roots/>.

power to fire him at will. In the D.C. Circuit, Cushman’s work was cited.⁵ But that case never reached the Supreme Court—the CFPB, in the end, dismissed its enforcement action against the company, mooting the litigation.

In this Supreme Court term, the *Seila Law* case brought the same issue before the justices. Briefs on each side of the case cited to Dr. Cushman’s 1941 book about independent regulatory agencies, and also to a leading article that he wrote in 1939.⁶

Justice Kagan, writing her dissenting opinion, seems to have followed those briefs’ citations to Dr. Cushman’s book, and to his particular point about the Federal Reserve, an executive branch agency for more than a century, and long held to be consistent with the Constitution’s definition of presidential power.

In the complexity of the *Seila Law* decision, and in the flow of the justices’ lengthy opinions, Justice Kagan quoted Dr. Cushman to make a small-ish point. And her citation to Cushman is buried quite deep in her dissenting opinion.

I am skeptical that, after Justice Kagan circulated her proposed dissenting opinion in draft form to her colleagues, each of them read every word. I am even more doubtful that each justice really focused on her Cushman quotation and citation.

But I suspect that Justice Ruth Bader Ginsburg did spot it, and that it made her smile.

⁵ See *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (*en banc*) (opinions citing to and quoting Dr. Cushman’s book).

⁶ See Brief for the Respondent at 11 (filed Sept. 17, 2019) (quoting then-Judge Kavanaugh, dissenting in the D.C. Circuit’s *PHH Corporation* case, quoting Dr. Cushman’s book); Brief for the Petitioner at 27, 33 (filed Dec. 9, 2019) (citing Dr. Cushman’s book, and also his article, *The Constitutional Status of the Independent Regulatory Commission*, 24 CORNELL L. REV. 163 (1939)); Brief for Respondent Supporting Vacatur at 28 (filed Dec. 9, 2019) (citing Cushman’s book); Brief of Amici Curiae State National Bank of Big Spring, The Competitive Enterprise Institute, and The 60 Plus Association in Support of Petitioner (same) (filed Dec. 16, 2019); Brief for Amicus Curiae the United States House of Representatives in Support of the Judgment Below, at 21 (quoting from Dr. Cushman’s book) (filed Jan. 22, 2020). Each of these briefs is available at SCOTUSblog’s *Seila Law* case page, www.scotusblog.com/case-files/cases/seila-law-llc-v-consumer-financial-protection-bureau/.



September 18, 2014: Justice Ruth Bader Ginsburg speaking at the New York Historical Society.

Justice Ginsburg has always been quick to credit Dr. Robert E. Cushman for doing very much to launch her on her life path.

We all owe Dr. Cushman (his memory) credit and thanks for his impact on Ruth Bader Ginsburg as a person and on her careers as lawyer, law professor, U.S. Court of Appeals judge, and U.S. Supreme Court justice.

* * *

May 11, 1945.

Mr. Robert E. Cushman,
224 Boardman Hall,
Cornell University,
Ithaca, New York.

My dear Cushman:

I would be very glad to see Professor Carr. My present assignment is apt to carry me to Europe almost any time after the first of June and I would suggest that he call the office for an appointment the first time he is in town and we will work out something.

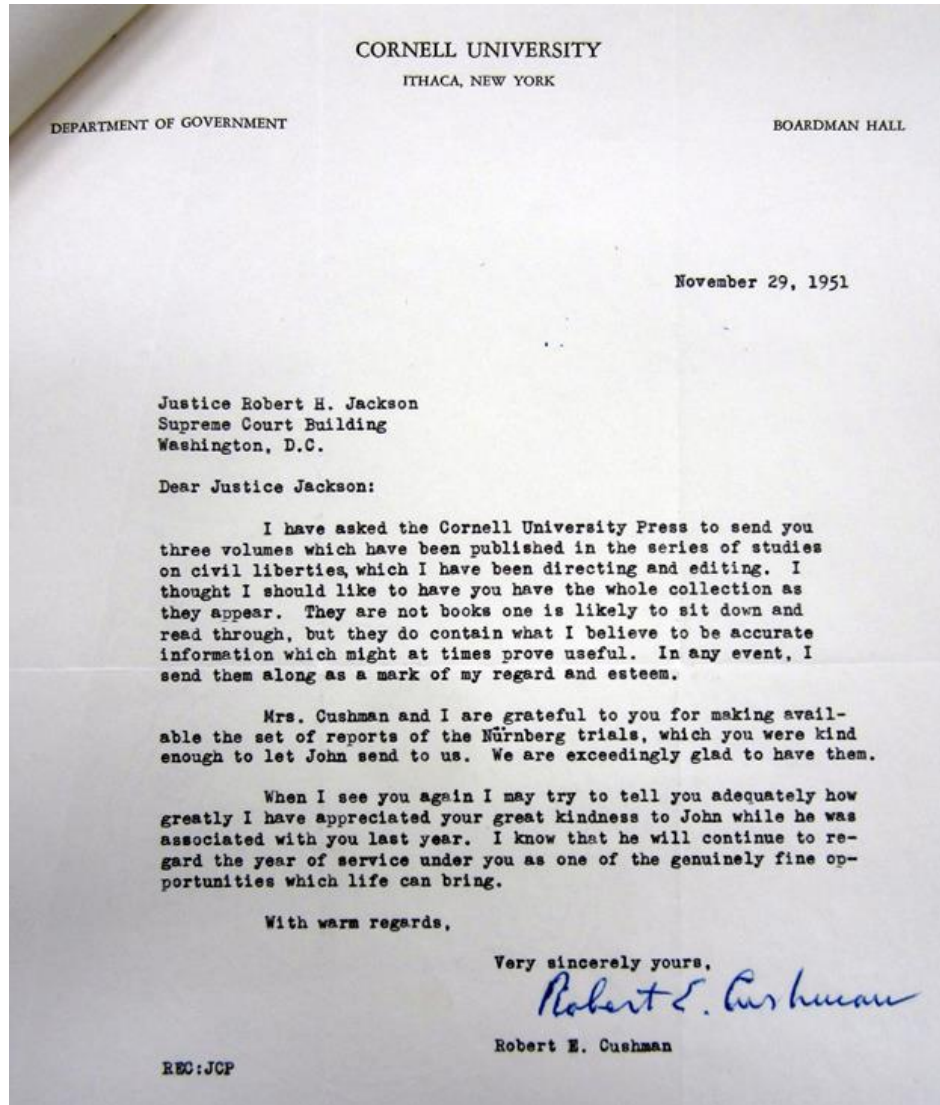
I have not forgotten our meetings when I was on the New York State Commission on the Administration of Justice and I am often reminded of them when I see your writings. I am glad you are giving the subject of Civil Liberties your attention. As you know, I have some concern that the friends of civil liberties at times may do more damage than the avowed enemies. Like everything else, it can become over-professionalized.

With all good wishes,

Sincerely yours,

Letter from Justice Robert H. Jackson to Dr. Robert E. Cushman, May 11, 1945 (unsigned carbon copy), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 10, Folder 9.

"R. Cushman" and Justices Kagan, Jackson, and Ginsburg



Letter from Dr. Robert E. Cushman to Justice Robert H. Jackson, Nov. 29, 1951 (original), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 10, Folder 9.