



## Georgetown Law's actions against Ilya Shapiro lack credibility

Criticizing racial discrimination is protected by the university's 'Speech and Expression Policy'

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Ilya Shapiro spoke out against racism in a tweet, and this week the Dean at Georgetown law school placed him on administrative leave, pending further investigation. The decision is disgraceful.

During the 2020 Democratic primaries, Joe Biden was granted the endorsement of South Carolina Rep. James Clyburn, in a quid pro quo exchange for Biden's promise to nominate a black woman to the Supreme Court. Many previous Supreme Court nominations have considered the political advantages of potential nominees' home state or region, ethnicity, religion, sex, race, or other biographical elements. Never before has a President announced such a narrow rule about who would be considered.

While reasonable people can differ, an ABC News/Ipsos poll found that 76% of Americans agree that Biden "should consider all possible nominees" rather than "only nominees who are Black women." Those who disagree with Biden's limit include 54% of Democrats and 72% of nonwhite Americans.

Ilya Shapiro, who was slated to join Georgetown Law as a senior lecturer on Feb. 1, agrees with the American majority. This is no surprise. He headed the Cato Institute's Center for Constitutional Studies. As Cato's Executive Vice President David Boaz has long made clear, Cato hires on merit alone. Thus, all Cato's employees—whatever their race, sex, religion, ethnicity, sexuality, or other identity—know that they were chosen because they were the best candidates for the job, and not because of favoritism.

Last week, Shapiro tweeted that on the merits, the "best" nominee for a Democratic president would be Sri Srinivasan. Serving on the D.C. Circuit Court of Appeals since 2013, Srinivasan is presently the Chief Judge. Previously he was Principal Deputy Solicitor General, and he has argued 25 Supreme Court cases. As Shapiro noted, Srinivasan is an immigrant from India, and would be the first Asian-American on the Supreme Court.

In Shapiro's view, anyone else nominated by a Democratic president would be less capable a justice than Srinivasan. Although it's possible to argue that some other potential nominee is even more capable than Srinivasan, Shapiro's view that Chief Judge Srinivasan is the "best" was reasonable.

Shapiro's analysis conflicted with that of *Slate's* legal commentator Mark Joseph Stern. Stern's fortes include the epithetical. He seems to sincerely believe that people who disagree with him are racist.

For example, a bill currently in Congress, H.R. 1, would forbid states to require photo identification for voting, as some states currently do. Polls consistently show that voter ID laws have strong support among the public in general, among a majority or plurality of Democrats, among people of color, and among blacks. See Monmouth Poll, NPR/PBS/Marist poll, Honest Elections Project poll, Politifact (NY polling), CNN analysis. But according to Stern, critiques of H.R. 1 "are not principled positions." "Rather, they are misleading at best, deliberate falsehoods at worst, and generally incoherent. . . . the same old Jim Crow mindset . . . dressed up in Federalist Society–approved legalese." The criticisms are a "bad-faith effort to kill large-scale democracy reform . . . another nihilist run at further undermining voter confidence . . . overt racialized vote suppression." Opposing H.R. 1 is "a ragtag mob of criminals, all of whom have succeeded in stealing elections or attempting to steal elections," and who believe "that democracy itself is the crime."

In Stern's imagination, if the Federalist Society had existed in 1965, it would have opposed the Voting Rights Act of 1965. Then "we'd get Volokh Conspiracy posts about how anyone who disagreed was a #resistance hack." Stern added three prayer emoticons to his tweet: "Law professors I am begging you to stop playing nice with colleagues who are committed to perpetuating minority rule and white supremacy through the faux neutrality of bunk constitutional theory, the time for blunt truths about this sanitized subversion of democracy is now."

Stern did not play nice with Ilya Shapiro.

Shapiro wrote that since Chief Judge Srinivasan would be the "best" nominee by a Democrat, any other nominee would not be as good. Because Biden has limited himself to considering only black women, then the non- Srinivasan that Biden will nominate will be "a lesser black woman." In Shapiro's view, every possible Democratic nominee—whether a white male, white female, black male, black female, and everyone else—is "lesser" than Srinivasan. Shapiro wrote:

Objectively best pick for Biden is Sri Srinivasan, who is solid prog & v smart. Even has identity politics benefit of being first Asian (Indian) American. But alas doesn't fit into the latest intersectionality hierarchy so we'll get lesser black woman. Thank heaven for small favors?

Because Biden said he's only consider black women for SCOTUS, his nominee will always have an asterisk attached. Fitting that the Court takes up affirmative action next term.

Stern told his readers: "Shapiro preemptively declared that Biden's nominee, whoever she is, will not be qualified." This is plainly false. Shapiro said that because Judge Srinivasan is the most

qualified nominee, anyone else would be less qualified. Shapiro did not say that Srinivasan was the *only* qualified potential nominee. At any given time, there are dozens of people may be qualified to become astronauts, but only one of them will be the "best."

Stern continued:

To Shapiro, the nomination of any woman of color is inherently suspect. He simply cannot see how such a candidate might have earned the position; he assumes she coasted, undeservedly, on affirmative action. And he doesn't see how this belief is colored by his own racism.

And:

No matter how qualified Biden's Supreme Court nominee is, Shapiro will accuse her of being unqualified. Why? Because he cannot accept that a woman of color deserves to sit on SCOTUS. His assessment of nominees is contaminated by his own racism. He has made this painfully clear.

Shapiro's supposed "overt and nauseating racism" made Stern "deeply ashamed of my alma mater."

Shapiro deleted the tweet, apologized, and said his wording had been "inartful." In a follow-up comment, he again apologized for "my poor choice of words, which undermined my message that nobody should be discriminated against for his or his skin color."

Stern, for his part, said that Shapiro never should have been hired, but he denied attempting to get Shapiro fired.

Georgetown Law's Dean, William Treanor, issued a statement denouncing Shapiro. Treanor claimed that Shapiro had suggested that "the best Supreme Court nominee could not be a Black woman." This is true only in the sense that Shapiro was explicitly discussing a 2022 nomination by a Democratic President, and since Shapiro thinks Sri Srinivasan is the "best" nominee for a Democratic President, then the "best" nominee could not be a black woman, a white man, a Native American, or anyone else.

In fact, Shapiro *has* said that the best nominee for the Supreme Court could be a black woman—namely D.C. Circuit Judge Janice Rogers Brown. In a 2016 event at the University of Chicago Law School, he listed Judge Brown as among several he would consider nominating, if he had the power. Judge Brown, who retired from the D.C. Circuit in 2017, is perhaps even more distinguished than Judge Srinivasan. She joined the D.C. Circuit in 2005, having served since 1996 on the California Supreme Court, and before that in several high-level legal roles in the California state government. But she is an originalist and therefore anathema to Biden, who led a filibuster against her nomination to the D.C. Circuit. When President Bush was considering nominating Brown to be the first black female Supreme Court Justice, Biden specifically threatened to filibuster her, and her alone.

On Monday, Dean Treanor placed Shapiro on administrative leave, citing the "pain and outrage" of Georgetown's black students, professors, staff, and alumni. He added, "Ilya Shapiro's tweets

are antithetical to the work that we do here every day to build inclusion, belonging, and respect for diversity."

The Dean's statement is true if "inclusion, belonging, and respect for diversity" means that racial preferences may never be criticized. Some people who favor racial preferences, or perceive themselves as having benefited from such preferences, are outraged at criticism of racial discrimination. However, law schools are supposed to be places where all ideas can be debated logically. Lawyers who cannot bear to hear ideas they don't like will be poor advocates for their clients in our adversarial legal system, and professors who can't tolerate criticism of their own ideology are poor role models for students.

Dean Treanor wrote: "Racial stereotypes about individual capabilities and qualifications remain a pernicious force in our society and our profession." Not a word Ilya Shapiro has written in his long career has indulged in racial stereotypes. Always, he has advocated against racial discrimination and in favor of meritocracy. As an immigrant whose Jewish family fled persecution in the Soviet Union, he well understands the evil that results when governments discriminate. He has spent his career defending the victims of government bullies and in affirming the rights of everyone to the equal protection of the law.

The Dean announced "an investigation into whether he violated our policies and expectations on professional conduct, non-discrimination, and anti-harassment." The statement lacks credibility, for there is nothing to "investigate." Shapiro's words are already in the record. So are Georgetown's legally binding written rules about academic freedom. Either Georgetown's existing rules forbid criticism of racial preferences, or they protect such criticism as part of academic freedom. Every document relevant to deciding the question already exists and is known to the Georgetown administration.

Georgetown is legally bound, for contractual purposes, by its Speech and Expression Policy, and by the University's formal adoption and incorporation of the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors. A letter from Foundation for Individual Rights in Education to Dean Treanor detailed the law.

The Georgetown Expression Policy guarantees students and teachers the right to express ideas "thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived."

For example, in 2018, Georgetown security studies professor Christine Fair tweeted against supporters of the confirmation of Justice Brett Kavanaugh:

Look at this chorus of entitled white men justifying a serial rapist's arrogated entitlement. All of them deserve miserable deaths while feminists laugh as they take their last gasps. Bonus: we castrate their corpses and feed them to swine? Yes.

Adhering to the Georgetown Expression Policy, the University did not fire her. Instead, the University affirmed that her speech was protected. The University also exercised its own free speech rights by criticizing her uncivil language: "Georgetown urges members of our community

to engage in robust but respectable dialogue. While we protect speech and expression, we condemn uncivil and disrespectful discourse that is inconsistent with our values."

Perhaps a closer case involved a member of the law faculty. In September 2020, law professor Heidi Li Feldman wrote that professors and deans should not support the applications of students to clerk for Trump-appointed judges. Further, legal employers should refuse to hire persons who have clerked for such judges.

This seems like harassment of Georgetown Law students who had clerked or wanted to clerk for a Trump-appointed judge. The specific purpose of the harassment was to prevent those students from being employed. Feldman's harassment might be considered to violate Georgetown's Non-Discrimination in Education policy, which "prohibits discrimination or harassment on the basis of any protected characteristic," including "age, color, disability, family responsibilities, familial status, gender identity or expression, genetic information, marital status, national origin, personal appearance, *political affiliation*, race, religion, sex, sexual orientation, source of income, veteran's status or any other factor prohibited by law in its educational programs and activities." (emphasis added).

However, Dean Treanor apparently believed that Feldman's comments, intended to deny employment opportunities to Georgetown Law graduates and students, and at least arguably in violation of the Non-Discrimination policy, were fully protected by the Georgetown Expression Policy. Feldman was not subjected to any University criticism or discipline.

Within the Georgetown Law student body, it is quietly admitted by some that the campaign about Shapiro's purported racism is really about his actual conservatism. Student Rafael Nunez—who didn't defend Shapiro but did defend the right of students to speak up for Shapiro—was kicked out of a discussion group and told that he was "privileged." He explained, "Like, my mom was undocumented for 35 years. I grew up on food stamps and welfare and had to dig myself out a hole to get to go to Georgetown Law. . . . And it just bothered me that these kids that didn't even know me—you know, a fellow person of color—were telling me that I'm privileged. Like, you don't know the things that I had to see growing up and what I had to do and struggle to get here." Then student Travis Nix was ejected from the same group for defending Nunez.

Perhaps Georgetown will fire Shapiro. In the meantime, the Foundation for Individual Rights in Education has named Georgetown one of the ten worst universities for free speech, largely because of Dean Treanor. Georgetown can now accurately say that it is on par with Stanford and Yale.

Students considering which law school to attend might have more confidence in a school whose dean has never libeled anyone. Donors to any law school might consider the state of the school's academic freedom.

If Georgetown University truly "prohibits discrimination or harassment on the basis of . . . race" and truly complies with the Georgetown Expression Policy, then it will welcome Ilya Shapiro, who has always spoken out against racism.

