

Ilya Shapiro

What Happens Next – 06.26.2022

Ilya Shapiro:

My name is Ilya Shapiro, and I've just lived a surreal experience. It started back in January 26th, when news of Justice Breyer's retirement leaked. My phone was blowing up because I'm a Supreme Court expert, so people wanted my statement. So, throughout the day I was thinking about this particular confirmation and getting more and more upset about President Biden's restricting his pool of candidates by race and sex. He famously repeated his campaign pledge that he would be appointing a Black woman.

Now, there's nothing wrong with appointing a Black woman, but restricting it at the outset rubbed me the wrong way. That night having come back from a friend's celebratory dinner, I was feeling festive and feisty and not a best practice, I was doom scrolling through my Twitter feed, before going to bed in my hotel room. And in this kind of upset mood, and tweeted out my criticism of President Biden's posture. And I said, "You know, if I were a Democratic president I would pick Judge, Sri Srinivasan," who's the chief judge of the DC circuit, he happens to be an Indian American immigrant, very smart, very well reputed, was on the short list for the nomination that ended up going to Merrick Garland.

But, I said, given the current hierarchy of intersectionality, he's out and we'll end up with a "lesser Black woman." And it's those three words that got me into trouble. I, of course, meant a less qualified Black woman in the sense that if I'm determining that, this particular person, Judge Srinivasan, is the best, then everybody in the entire universe is less qualified or a worse choice. That's what I meant, given Biden's race and sex restrictions. And then I Tweeted that out, went to bed, and all hell broke loose overnight. I woke up, I saw that the Twitter mob, instigated by several of the usual suspects, was going after me. I thought, "This is not good. People are willfully misconstruing what I'm saying to make political points."

I took it down, I said, "If anyone's offended, I'm sorry, it was inartfully worded." But that was not the end of the matter. Things quickly moved from online to offline. The Dean of Georgetown Law School, Bill Treanor, where I had just taken a new job after nearly 15 years at the Cato Institute, the nation's foremost libertarian think tank. I was about to start a new job as executive director of the Georgetown Center for the Constitution, but that was February first, and I tweeted a few days before then. I had four days of hell, I thought I'd blown up my career, I thought I'd hurt my family. I mean, the dean came down on me, said I was appalling, and that what I said was antithetical to the work of the law school, et cetera.

Eventually, after a huge national public outcry, pro and against me, the dean determined that I would indeed be onboarded but would immediately be placed on paid administrative leave pending investigation into whether my social media commentary violated the university's policies on harassment and antidiscrimination.

It took them four months to conduct this investigation, which quickly became clear was a farce. They were just waiting for students to get off campus to quietly reinstate me. The dean said that, "we finally looked at a calendar and determined you were not an employee, so these policies didn't apply." But no vindication under the university's vaunted speech and expression policy. Nevertheless, I took the technical victory, I celebrated it in the pages of the Wall Street Journal, as one does, and I thought, "Okay, let's get to work."

But then the report from the Orwellian named Office of Inclusion, Diversity, Equity, and Affirmative Action, their 10-page report hit my email inbox. I spent some time with my lawyer, with my wife, who's a better lawyer than all of us, digesting this. And it became clear that the university was setting me up for a fall. What this report said and what the dean implied, was that had I been an employee I would not have been reinstated or exonerated in any way. And indeed, going forward any similar statement that caused someone offense or caused someone discomfort leading to a complaint would indeed subject me to discipline. And I can't work that way. I could not fulfill the duties I was hired to do. Some comment about a Supreme Court opinion, some analysis of a sensitive case or exercise I was conducting, in class would subject me to punishment.

That was an untenable situation, and I resigned, again, taking to the pages of the Wall Street Journal and releasing a four-page resignation letter. And then the next day I announced my career move on Tucker Carlson, as one does, that I'm moving to the Manhattan Institute, a think tank in New York to head up their Constitutional studies program.

So, in addition to my expertise in Constitutional law and the Supreme Court, has added this lived experience regarding cancel culture. Not exactly the way I planned my career transition, but man plans and God laughs.

Larry Bernstein:
What happened to acceptable academic discourse?

Ilya Shapiro:
What I've experienced is not the decades-old complaint that law schools, colleges, campuses have a left-wing bias. I graduated college nearly 25 years ago, graduated law school nearly 20 years ago. I doubt the ratio of progressive to conservative students or faculty members has changed all that much in that time. What has changed is permissible policy views to discuss, and administrators becoming spineless and placating, a radical, woke mob. There's the enforcement of a political orthodoxy that makes it very hard, if not impossible, to dissent from that narrow lefty skewed campus discourse.

Larry Bernstein:
Do you feel that controversial statements made by conservatives are treated differently by academic administrators than similar comments by progressives?

Ilya Shapiro:

So, in the broader culture, our public discourse, there's cancel culture, political correctness, shrill attacks from all over the place. In academia the left wing is dominant. And no, professors who say outrageous, inflammatory things from a progressive perspective are rarely if ever punished. In my resignation letter, I noted the tweets just in the last few years of several professors, saying outrageous things. If my tweet can be perceived as ambiguous, and ill-worded to be misconstrued as being racist, and I don't think one reasonably can do that, but if you kind of squint and approach it with bad faith that could happen.

But these other tweets, going after supporters of Justice Kavanaugh during his confirmation hearing or supporting the mobs that are demonstrating and trying to intimidate justices after the leak of the recent Supreme Court opinion in the Dobbs abortion case. Or saying, Republicans are not a legitimate party. In none of these cases were these professors investigated, suspended, punished. And that was the right call by the university, I'm not saying they should have been. But it was compared to my circumstance, a case of free speech for thee, but not for me.

Larry Bernstein:

Do you think there is something unusual about the actions of Georgetown law school's academic leadership based on your recent experience?

Ilya Shapiro:

I'm sure it might have been worse maybe at Yale, hard to imagine many others where it could have been worse. It could have been better in many. My own Alma mater, the University of Chicago has long been known for its commitment to the freedom of speech, its speech policy has been held up as the gold standard nationwide. The Kalven Report in the late 60s, during the tumult of Vietnam, put in an official university policy of neutrality on political issues. So, administrators don't have to explain why they're not taking a position to support or oppose any particular political controversy.

There still have been some controversies in recent years as COVID and George Floyd has inflamed certain institutions. But I discovered, to my chagrin, Georgetown is one of the worst for this tendency of empowering the lefty illiberal mob.

Larry Bernstein:

Last week on our podcast, Northwestern law professor John McGinnis spoke about the increasing wokeness in the legal academy. He wrote an article on the topic in the Manhattan Institute's magazine the City Journal, do you know it?

Ilya Shapiro:

I read that piece by John. I think unfortunately he's right. Again, this is not a complaint that too many professors are left wing. Although there is a problem in hiring practices, discrimination by faculty committees, that it's much harder if you're a conservative. But what I've been talking about is not hiring practices in the faculty, it's administrators.

We've seen when deans, presidents, department heads stand up for the rights of the faculty members, even when they disagree at the outset, that generally dissipates the outrage mobs and these things clear up. It's when they feed the alligator, when they try to placate the mob that they get into trouble. And there are very few administrators and deans who are willing to show that kind of backbone and commitment to the free exchange of ideas or the grace to say, "Look, we're all fallible and occasionally we misspeak." And you have to accept people's apologies or that occasionally people say things that they wish they would've rephrased.

Larry Bernstein:

Georgetown Law School knew that you were a conservative when you came from the Cato Institute. Why did they hire you?

Ilya Shapiro:

The Dean celebrated my hiring in a community wide email just five days before he condemned me. Because he's taken some heat from some alumni who have criticized him for Georgetown's being so skewed to the left. There are three and a half faculty members on the faculty of about 150 who are not progressive. I would make it four and a half. But my inartful phrasing gave a tool to my political enemies to seize on something and foment the outrage.

And the dean despite having celebrated me and knowing full well what my views were did not stand up to that.

Larry Bernstein:

In the scheme of things, why would it matter to have one more conservative in Georgetown's law school faculty?

Ilya Shapiro:

Most students go through Georgetown without having one of these professors, so if they go away, it wouldn't make a difference to them. Other than through the existence of the center that I was supposed to lead, the Center for the Constitution, which Randy Barnett, one of the storied classical liberal legal scholars of our time founded 10 years ago. If the center went away, that's a place that generates originalist scholarship that has seminars for students, for judges, public lectures and other programming that punches way above its weight. I think Georgetown as an institution would be harmed without that center there.

You have to be that much better as a non-progressive to be hired by one of the elite law schools like Georgetown. So those three and a half professors really are superstars and, again the average student, maybe wouldn't have had the class anyway, but for Georgetown as an institution, it would take a hit.

And that's why I'm using this platform that I've been given to shine a light on the rot at the heart of Georgetown and academia more broadly. It's not good if people go to the very best

places and they don't learn what half the federal judiciary thinks about how to approach constitutional and statutory interpretation.

Larry Bernstein:

You are going to reemerge in a different institution articulating the same ideas to the public. You did it at Cato, and you're going to do it at the Manhattan Institute. Aren't think tanks the best platform to explore conservative ideas?

Ilya Shapiro:

That's certainly what's been happening in think tanks, like the American Enterprise Institute, the Heritage Foundation, Cato, they arose as opposition to the dominant political philosophy of academia. Leading scholars could not get jobs at universities and so they went to these other places. So, it's not that this is some new development. I was hoping for a new challenge, to have an opportunity to have an impact in a different way by being associated with the university rather than an ideologically identified think tank. But being affiliated with a university is effectively the same as being affiliated with an ideological institution.

Larry Bernstein:

Is free speech a problem outside of academia as well?

Ilya Shapiro:

Georgetown is a private institution, so this is not a matter of violating the First Amendment or the government censoring me or anybody else. Universities don't have to have any sort of protections for speech and expression, at least private ones. In the 21st century, challenges to speech and expression aren't necessarily coming from government. They're coming from private forces; they're coming from cultural forces. I'm seeing pushback in the broader culture, the pendulum may be swinging back, in terms of enforcing a woke orthodoxy. But in academia, I don't know, it might be irredeemable, I'm not sure.

Larry Bernstein:

Let's go back to what got you into the hot seat to begin with, why do you think it was a poor choice by Biden to limit his search for Supreme Court Justices to African American women only?

Ilya Shapiro:

He would've been better off if he wanted to appoint a black woman to say, I'm going to do a full search and find the best candidate and then stick with Ketanji Brown Jackson or whoever else. That would've been much more effective, that would've removed any possible asterisk from Justice-designate Jackson that would've prevented criticism, not just from me, but from a lot of people and indeed 76% of the American people in a survey conducted by ABC news, that he should have not limited his pool that way. Just as Chief Justice Roberts wrote in a school busing case 15 years ago, there's something sorted about this dividing us up by race. And I think the more you racialize things, especially hiring practices at the highest levels of government, it's not exactly something that helps social tensions.

Larry Bernstein:

Affirmative action cases will come before the Supreme Court in the near future. Will the court overturn the use of race preferences?

Ilya Shapiro:

The Supreme Court's taking up challenges to both Harvard and the University of North Carolina's use of racial preferences in admissions. And likelier than not, the court will invalidate the use of race. How broadly it goes in doing that, will it remove the idea of diversity as a compelling state interest that allows it to consider race, or will it simply say that the way that affirmative action is practiced in college settings is unconstitutional because race becomes the dispositive factor and much greater than any other qualification, that remains to be seen, but almost certainly that's the way it will end up.

I think that decision will be accepted quite well by American society where affirmative action is two to one against now. It won't seem that way because the elite is much more closely split and certainly Twitter will be aflame, but I think American society would accept and celebrate that decision.

Larry Bernstein:

Why do you think Biden would've been better off if he had been disingenuous about his Supreme Court hiring process?

Ilya Shapiro:

Well, political considerations have always been part of the nomination process, either to satisfy certain constituencies, or regional interests. Providing representation to the African American community has been thrown into that hopper. It's never been the case that pure merit was the only criterion for nominating justices.

President Biden could very well go through a proper process and then ultimately decide that Ketanji Jackson is the one he wants to go with, and that would be fine. And then celebrate African American woman. That's the nature of politics.

Larry Bernstein:

What is your assessment of these academic kangaroo courts, investigating speech, sexual impropriety, or other alleged student or faculty misbehavior?

Ilya Shapiro:

This comes up in lots of different contexts, with allegations of sexual impropriety by students where they're not allowed to confront their accuser or often even see any reports or have an advisor or lawyer present, these diversity equity inclusion officers, which have become a power unto themselves on a lot of campuses that don't allow for due process considerations. Universities are not well positioned to be courts. They're not the ones who should be investigating crimes and punishing people.

And so, when they engage in or levy severe punishments, they better have provided due process and had applied rules that were clear and applying them evenly. Otherwise, they open themselves up to all claims for a breach of contract and discrimination.

Larry Bernstein:

Were the attacks against you coordinated? And to what extent does this reflect the power of the woke in these institutions?

Ilya Shapiro:

The Twitter mob was instigated by a writer at Slate named Mark Joseph Stern. He's long not liked what I've had to say in terms of constitutional analysis. And screen capped my tweets before I deleted them, and what's known as snitch-tagged Georgetown Law. Racked up tens of thousands of likes, and away we went. The Black Law Students Association took the lead in preparing a letter. In some ways, it's a form letter, they kind of had their standard demands that they always want. And they plug them into whatever the facts of a given controversy might be. And I think ultimately, something like a thousand people signed that letter between students and staff and others.

I've heard that students were pressured to sign. Various organizations assigned that institutionally, and there were complaints from officers within those organizations that they didn't want to be held to join that. But there was also a counter letter for that matter, led by the Conservative and Libertarian Students Association and various alumni groups. But there was definitely coordination by students, by faculty members, by various constituencies.

Larry Bernstein:

Do you expect the use of academic kangaroo courts to spread in society, whether that be corporate HR departments, the government, or otherwise?

Ilya Shapiro:

When you get into the public sphere when government is involved it really can't, unless courts are corrupted. So far, courts are holding. In corporate America you see similar dynamics in HR offices with the explosion of diversity officials. So that similar dynamic as we see in academia. Because college students are younger, more emotional, and have more free time.

They are after all, learning and debating constantly. If you're making widgets, it's probably improper to be criticized for something you say. But it's not something that happens a whole lot. Although there are chilling effects against diversion from orthodoxy there too. So, there are lawsuits that arise when you get out into the real world, outside of academia even more than you do in lawsuits suing educational institutions.

So, we do have some legal protections, I don't know if kangaroo courts really exist to the same extent anywhere outside academia.

Larry Bernstein:

What advice would you give a young conservative who wishes to be a law professor at a top 10 law school?

Ilya Shapiro:

Don't write in the areas of race and sex, those are the most conducive to inflammation. Bend over backwards to be respectful and kind to people, do very good scholarship, because you're going to have to be that much better than those who agree with the prevailing orthodoxy. Seek out good mentors, senior scholars who you agree with or whose career path you'd like to emulate. Don't tweet, there's no value in tweeting for academics anyway, as I see it. To the extent you write op-eds before you get tenure, be very judicious and only on dry subjects that can never be in the center of political controversy.

Larry Bernstein:

So, young scholars should shy away from engaging with culture war issues?

Ilya Shapiro:

Each time you do something like that, you make it that much harder for yourself. It's much easier for you to succeed if you're studying anti-trust or securities regulation or something like that. Now sometimes it's hard to avoid these fights because there are votes in faculty on things that could be a wedge issue that separates you from your progressive peers. At that point though, the wise course might be to skip that faculty meeting.

Larry Bernstein:

What have you taken away from this experience, and what should my audience take away from it? This audience is wealthier than most and gives a lot to universities. Is this a good way for them to target their philanthropy?

Ilya Shapiro:

Yeah, don't do that. (laughs) that's my advice.

Be strategic about your philanthropy. Make sure that the targets of your philanthropy really do match your goals. We've seen many examples of people endowing things and once they're gone, that funding goes to support things that are completely antithetical to what the donor wanted. So, think hard about what you want to accomplish. Most of the time, you won't be able to accomplish that within a university institution.

My favorite with my soon to be employer Manhattan Institute, is the FIRE, the Foundation for Individual Rights and Expression, now. They just rebranded last week, to broaden their mission beyond education. It used to be Foundation for Individual Rights in Education, but they're going beyond that to cancel culture more broadly. And this organization has filled the shoes of the ACLU, which has become just another progressive activist group.

FIRE supports faculty, students, and others in educational settings, regardless of where they come from ideologically. Even in cases that have nothing to do with ideology, where people are persecuted for their speech. They're just a wonderful group, Greg Lukianoff is the president, and his organization supported me with crisis management and public relations help, and finding me a lawyer and paying for that lawyer through their Academic Freedom Legal Funds, just invaluable to me personally. They do fantastic work. But in any event, really think about what it is you want to accomplish with your money.

Princeton, my undergraduate alma mater, had the James Madison Program. Robby George who founded and directed it can tell you that there are ways of making sure that you're funding in perpetuity only goes to the program not to the University general fund or even any University account. They set up separate funding mechanisms. So, you have to be savvy to make sure that you don't end up funding things that are antithetical to what you believe in.