

2-16-2022

Lost in the Bubble

Jethro K. Lieberman

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs



Part of the [First Amendment Commons](#)

Lost In The Bubble

February 16, 2022

1501 words



Offense of the Month, January 2022

Our designated offender of the month is Ilya Shapiro, the once-able-to-be-and-perhaps-future-executive director of the Georgetown Center for the Constitution, an arm of the law school at Georgetown University in Washington. He was placed on administrative leave one day before he was to start his job on February 1. In a tweet five days earlier, commenting on President Biden's statement that he would look to appoint a black woman to the Supreme Court seat being vacated by Justice Stephen G. Breyer retires this coming June, Shapiro hurled a thunderbolt:

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

Srinivasan is now chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, perhaps the most significant judicial post below the Supreme Court.

don't bother looking for Shapiro's tweet. It (and one or two that had been deleted (the London-based *Daily Mail* usefully posted the original here).

One day, Shapiro offered the ritual apology. The original offending tweet was, he said, "inartful." That's one way of putting it. It was inartful, anyone could have predicted the uproar that followed. How often do we see supposedly smart people give offense by being careless in craft? Is there something in the disposition to tweet that gets people in trouble or does Ilya Shapiro manage this effect wherever words land?

From his background, taken more or less directly from an online bio. In the past few years he was vice president of the Cato Institute, a libertarian think tank, where he directed the Robert A. Levy Center for Constitutional Studies and was publisher of the Cato Supreme Court Review. Anyone who studies constitutional law, and the legal bodies and personnel who embody it, knows that words and tone matter. Careless and inartful phrases can crash a plan, a law, a program, a policy, a job, a career. Certainly Shapiro must have been aware of this risk. He was about to take over a similar position at a more prominent institution deep in the Washington legal establishment. He was writing at a time of broad reckoning with the nation's racist past and a searching national focus on how to create a more just and fairer society. Yet into that maelstrom this graduate of Princeton and the University of Chicago Law School; this contributor to many prominent publications, including the *Wall Street Journal*, *The Washington Post*, *Today*, *The Los Angeles Times*, *National Review*, and *Newsweek*; this Fifth Circuit clerk; this consultant to CBS News; this lawyer who had led more than 400 *amicus* briefs in the Supreme Court and had testified numerous times before Congress and various state legislatures; this adjunct law professor at George Washington University Law School and the law school at the University of Mississippi—into this charged atmosphere stepped this obvious maverick with the brazen yet incautious challenge to the president of the United States to desist from appointing a "lesser black woman." How did he do it and dispatched before engaging the cerebral cortex? What did he think would happen?

What happened is that more than 1,000 students and others, so far, have petitioned Georgetown to rescind his appointment, the dean announced he'd be suspended pending an investigation into whether Shapiro's tweets violated the university's policies on professional conduct and discrimination, and Shapiro himself apologized for an "inartful" tweet that "undermined my anti-discrimination message." (A second tweet, also soon deleted, declared that the ultimate appointment will be "marked" and have an "asterisk attached" to her name.)

It appears that Shapiro is the author of a book on Supreme Court nominations. I haven't read it, but I expect if I picked it up I'd learn that

Throughout our history appointments to the Supreme Court almost always landed on a single, obvious, universally acclaimed candidate. Justice Benjamin N. Cardozo, in 1932, may have been the only exception, but I can't be sure because, as I say, I haven't read the record. But generally, appointments turn on personal and political considerations, friendships, politics, optics, regional representation, life experiences, and for the last century (dare this be admitted?), some concern for political balance along ethnic and related attributes. Well, so you say? That politics and all the rest of it have always been a part of the process doesn't make it right, and why shouldn't an objective point to the "objectively best pick"? Perhaps because there's no such thing.

Anyway, if you are willing to stick your neck out and proclaim your choice as the undeniably best choice of all the judges in America (and why does the next justice have to be a judge?), is it so difficult to go on record in a short blurt devoid of nuance to label the nominee from a class of publicly-identified front runners as a "lesser black woman"? Since no particular black woman has been named, his most obvious meaning is that all black women are objectively and necessarily inferior, that "the entire universe of Black female jurists" would be disdained, as Michelle Goldberg put it in *The New York Times*. Otherwise, why not just say "we'll get a lesser nominee"?

At least one prominent voice defended Shapiro from the charge that he meant to insult black women as a class. John McWhorter, Columbia University professor of linguistics and an occasional opinion writer for *Time*, supposed that Shapiro could not have meant what everyone has accused him of, because

If Shapiro had wanted to say that Black women are inherently lesser, would he actually have written it for all the world to see? This, after all, would paint him as not just obnoxious, but as someone severely socially impaired. Given how carefully policed so much of our language is these days, why would he deliberately type out a line saying, in essence, that Black women are inferior, somehow missing that this would likely put his new job in jeopardy and draw a wave of social opprobrium? . . . I find the idea of him writing "lesser black woman" in the meaning of "Black women are lesser" psychologically implausible. Shapiro is by all indications intelligent; writing "lesser" and intending it as a blanket judgment would be stupid.

Shapiro really meant, McWhorter suggests, is that

because Srinivasan is—in [Shapiro's] view—the “best” of the judges that a Democratic president would consider nominating, any other potential nominee, including any of the Black women on the president's short list, would be less qualified than Srinivasan. I don't think Shapiro meant to say that a Black woman would be less qualified because she is a Black woman.

s, of course, Shapiro is smart enough to have his cake and eat it smart enough to say what he means and then divert the sequences by adding, “But I could not have meant it, because that I be stupid and I'm smarter than that, which is why you have to ret what I said as being stupid.” What an excuse! Can you hear f McWhorter's students whimper: “But Professor, I couldn't have t what you think you understood from those words on my paper use to say that would be stupid and I'm smarter than that.” I ally agree with McWhorter, but I think he errs here. I think Ilya ro is not so smart or, as the evidence suggests, he *is* socially red and maybe even revels in his affliction.

assuming he meant to offend, most of his detractors, and for that r Shapiro himself, seem utterly convinced that however rable, his snark does not warrant rescinding his ntrment. Academic Freedom 101. Despite her tongue lashing of ro, Michelle Goldberg condemned Georgetown's move both on ds of principle and because punishing one who speaks, no matter offensively, “threatens to undermine the value of academic om at a time when that value is under sustained assault in many ates.”

t disagree, but in the curmudgeonly mood that occasionally akes me when writing about offenders of the month, I'd propose Shapiro be investigated, not for violating Georgetown's moral s but for objective administrative incompetence and fessionalism, for elevating his own brashness over prudence, and shing to judgment without regard to his prospective employer's erns. Would you want a guy like that on your payroll? But maybe just the sound of a fulminating former academic dean who, g it from all sides, used to fantasize that just because his igues had the right to be offensive didn't mean that they would exercise it. Anyway, unlike Shapiro or the dean, I no longer have igues I must placate or a paycheck to protect.