LANI GUINIER

By David J. Garrow

THE ***PROGRESSIVE*** INTERVIEW. Vol. 57, No. 9, September 1993, pp. 28-32.

'I was nominated--and then the rules were changed.'

When Lani Guinier was nominated in late April by President Bill Clinton to head the Civil Rights Division of the U.S. Justice Department, harsh attacks by right-wingers began immediately. Former Reagan Administration official Clint Bolick labeled Guinier an "ideologue," and a Wall Street Journal headline writer bestowed upon her the sobriquet **QUOTA QUEEN.** Bolick accused the forty-three-year-old law professor and voting-rights expert of advocating "racial quotas in judicial appointments" and favoring a "complex racial spoils system." The Washington Post reported that conservatives were vowing to do to Guinier what liberals did to Robert Bork.

The first week of June they succeeded, when President Clinton caved in to conservative pressure and withdrew her nomination without allowing her the chance to explain her views at a Senate hearing. She has returned to the University of Pennsylvania Law School.

In mid-June, we spoke in her Philadephia office about her life and education, and her treatment at the hands of President Clinton, a one-time from Yale Law School. We spoke at length about the misrepresentation of her views on voting rights. Much of the criticism had focused on two lengthy law review articles, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," published in the Michigan Law Review in March 1991, and "No Two Seats: The Elusive Quest for Political Equality," published in the Virginia Law Review in November 1991.

When I asked about the op-ed writers' comparisons of her case to those of Robert Bork, Zoe Baird, and Kimba Wood, she simply said, "I think I've learned from the experience to be very circumspect in commenting in public--on anything--and certainly not to write long law review articles about it. But each of these cases has to be judged on its own merits.

"Robert Bork got a hearing. I did not. My nomination was supported by a letter signed by more than 400 law professors, including the deans of twelve major law schools. That letter got no press. Robert Bork's nomination was opposed by more than 200 law professors. That letter got a lot of press."

Q: I know you were born in New York City, I know your parents ended up at Harvard. Tell me your family story.

Lani Guinier: I'm just sorry I didn't have a more timely opportunity to tell the story when it would have been relevant to the contemporary political scene, as opposed to telling it now, when it's helpful to historians, or to anthropologists trying to understand the culture of Washington.

I went to public school and graduated third in a high-school class of 1,447. I got a full-tuition scholarship to Radcliffe, one for outstanding "Negro" students sponsored by the National Merit Corporation and The New York Times. The Times apparently sponsored it because I had been an editor of my high-school newspaper. I don't believe they knew it, but my father had worked for The Times as an elevator operator back in the 1930s.

He was a student at Harvard in 1929-1930. The publisher of The Times came to visit the freshman class and greeted an assembly of Harvard students who had been editors of their high-school papers. He invited any of them to come to New York; he offered them jobs.

And my father took him up on this. He had to drop out of Harvard because they denied him any scholarship aid; they told him that he hadn't sent in a picture with his scholarship application, and that they had given a full-tuition scholarship to one black man already.

So my father took up this offer from the publisher of The New York Times. They didn't have any black people at the time who worked above the first floor, but my father made it to the publisher's office and reminded him of this meeting. The publisher said, "Well, I guess you're right, I did make an offer, but in your case it's as a freight-elevator operator. And you have to go back down to the basement."

And so he went back down and he ran the elevator for The New York Times and put himself through City College.

Q: By the time you entered school, what was he doing?

Guinier: When we lived in Queens, he was selling real estate and insurance.

I was admitted to Harvard-Radcliffe in 1967 and he was working then in New York for Columbia University, for the Urban Institute. When I got the admissions envelope, my father was even more proud than I was. For him, in some ways, this was a vindication of his aborted college career.

Q: What was your sense in junior high, in high school, of racial identity--of being the daughter of a black father and a white Jewish mother?

Guinier: I went to a "magnet" junior high school, a special program for academic achievers. And I had to take a bus. It was clear to me from the very first day that I was coming from the part of town where all the black kids lived. All of the school buses bringing students to this one school were coming from residentially segregated areas.

By the end of the first week, it was clear to me that we could all be friends at school, but that I was one of the black students, taking the bus with the other black students, and that the Jewish kids all lived in Rosedale or Laurelton and were coming on a different bus.

Q: Where you using the name Lani then?

Guinier: My mother named me Carol Lani after the woman who introduced my parents. My father was a warrant officer in an all-black troop in World War II and my mother was a Red Cross volunteer; they were stationed in Hawaii. They met through a woman named Iwalani, who was part Hawaiian and part black, but my mother was afraid Americans would have a hard time with Iwalani--the "w" is pronounced as a "v." And so they named me Carol Lani, but people were calling me Carolina and Caroluni, and so she just dropped the Carol; I've never used the Carol.

But it's a funny story because then, forty-three years later, there is the headline in the New York Post calling me "Loonie Lani." It reminded me of a Charlie Brown cartoon: "I'm always worrying about the wrong thing."

Q: Were you thinking of law school or a legal career in high school? Or when you first got to Radcliffe?

Guinier: In many ways my interest in being a lawyer was set in 1962 when I saw Constance Baker Motley, a strong black woman, playing such an important role in helping James Meredith get into the University of Mississippi. I always had a special fondness for her. When I went to Yale Law School, one of my greatest delights was to discover that the apartment I rented had been her home; she had grown up in New Haven.

I would say that my goal was to make a contribution, to do public service. I've always been something of a do-gooder. I used to love to trick-or-treat for UNICEF rather than to collect the candy. I've always been imbued with a sense of righting the wrong. I'd say that was it. And also, my father's experiences dealing with the indignity of racism were important.

Q: How formative, in retrospect, do you see either your four years at Harvard-Radcliffe or your three years at Yale Law School? Did you come out of either of those places decidedly different than you were going in?

Guinier: I don't think so.

When I left Yale, I clerked for a Federal judge in Detroit, and I loved Detroit. When I got there, I went to a dinner party and somebody discovered that I'd gone to Yale Law School and Radcliffe College, and they said something like I was the most aristocratic person they'd ever met. And I was really shocked because I did not and still don't think of myself as defined by my Ivy League connections. I think of myself as defined by growing up in Queens.

The Ivy League, for other people, seems to suggest a person of a different background, a person of a certain kind of "breeding." But that's not me.

Q: What were your reactions to Yale?

Guinier: I've actually written a law review article on my reactions to Yale Law School; it's in the Berkeley Women's Law Journal.

In it, I talk about going back to Yale ten years after I graduated and finding myself in a room in which I had studied corporations and feeling silenced by the memory of being in that room and having a law professor who addressed all of us as "gentlemen."

There were two or three women in the class. The first day, he acknowledged that there were ladies in the class and he would try to remember but he had been teaching for a long time and he just couldn't seem to get out of the habit of addressing the class as gentlemen.

I found that I hadn't focused on that memory, that experience, until almost ten years afterward. I was meeting with a group of black women law professors, and we were talking about our experiences in the context of legal academia. People were going around the room asking, "When did you have an experience that made you conscious of your gender as opposed to your race?"

I thought of that experience because I was there for a panel of mostly black alumni talking about the thirty years since Brown v. Board of Education. And the black men on the panel preceded their remarks with very fond and loving recollections of their time at Yale Law School. When I got up, I spoke with what I hope was great dignity, but also great formality, and made no reference to the fact that I'd been in that classroom before. The black woman to my left did exactly the same thing. It was only after the panel that the woman, the other black woman, and I talked. And it seemed that we had a very different set of experiences than the black men.

Now I also have to add that I was at Yale Law School in March of this year, and this time it was terrific. I went with my son. I was given an opportunity to lecture again in the same room, but the room had been refurbished. There's a picture of Judge Leon Higginbotham on the wall. I felt right at home. So my relationship with Yale Law School is still being negotiated.

Q: So then you went to Detroit to clerk for Judge Damon Keith.

Guinier: Right. I knew only one person in the city other than the judge. But after the second year of my clerkship, I did not want to leave Detroit. I looked for a job there so I could stay, because I found the Midwest to be so welcoming and so much less neurotic. I ended up as a referee in juvenile court, which is a quasi-judicial position.

Then I got a call from Drew Days, who invited me to come to Washington to be his special assistant--he was then Assistant Attorney General for Civil Rights--and I remember really debating whether I should do this because I was very unhappy about leaving Detroit. I recall a conversation with my mother, who said, "Lani, you're too young to be middle-aged. Go to Washington, take this job, and if you want to go back to Detroit, it will still be there."

Q: When you accepted Drew Days's offer to go the Civil Rights Division, was this your first encounter with Voting Rights Act enforcement?

Guinier: Yes. I worked with the first integrated law firm in North Carolina between my first and second years at law school--this was Chambers, Stein, Ferguson and Becton. We worked out of a hotel because their offices had been fire-bombed just the year before. And I worked on a number of civil-rights cases that summer. Then the following year, I got a grant to work at the NAACP

Legal Defense Fund and worked there with Elaine Jones that summer. And again, I worked on a number of civil-rights cases, but none of them involved the Voting Rights Act.

So it was not until I was working for Drew and he asked me to reorganize a unit of the Voting Section of the Division that I read the statute. On the other hand, I certainly watched television in 1965 and knew about the march from Selma to Montgomery and knew about President Johnson's speech before the joint session of Congress. So I had a historical, television awareness of the statute.

And I don't recall that we studied it in law school. I took a course on political and civil rights, but I don't think we covered the Voting Rights Act, and we certainly didn't cover it in any of my other courses.

Q: When you went to the Legal Defense Fund in 1981, did you have a voting-rights focus?

Guinier: Yes, it's the first thing I did. I worked with Elaine Jones on Voting Rights Act legislation, because it was up for extension in 1982. The Supreme Court had decided City of Mobile v. Bolden in 1980 (which held that an intent to discriminate must be shown to prove a violation). So there was an effort to amend the statute in response to that case. And other provisions were up for renewal.

I started work in the spring of 1981, at about the same time that the civil-rights community and the Congress were focusing on the legislative issue. I believe I was in on that from the very beginning.

Q: And out of that 1981-1982 experience, did your ongoing role at the Legal Defense Fund through 1987 or 1988 remain principally the Voting Rights Act?

Guinier: Yes. The period of legislative activity was a very intense one. The Reagan Administration opposed the amendments to the statute and this was the period of President Reagan's greatest popularity. So we were working night and day. And then, after the statute was extended in 1982, the challenge was to enforce the statute. So there were some of us, because of our activity in the Congress, who knew this new statute very well. I was a lawyer in two of the first cases to interpret the new statute.

Q: When you came here to Penn in 1988, was it foreordained that your academic writing would be oriented toward the Voting Rights Act?

Guinier: Well, not foreordained. But it was made clear to me that I published or perished, or and what the academy offered me was the opportunity to step out of the shoes of a litigator and into the shoes of a more reflective scholar. It was a transition that I made pretty easily, to the surprise, I might add, of many of my colleagues who thought when they hired me they were getting another civil-rights advocate. They were pleased to report that I really took to "the life of the mind" very naturally.

Q: Is it fair to think that at the end of the 1980s, most use of the Voting Rights Act was still oriented toward: How do you draw the map in order to maximize the number of single-member districts that can elect people of color? That that had become the main track, if not the exclusive track?

Guinier: I think that's a track that developed in response to the 1982 amendments, to language that suggested that the nature of a violation lay in depriving minority-group voters in some communities of the same opportunity as other members of the electorate to nominate or elect candidates of their choice. The statute was drafted in response to the phenomenon of at-large elections where you had a bloc-voting, racially organized white majority that decided the outcome of every election year after year after year-shutting out the minority community from participating in the electoral process in a meaningful way.

So the courts were able to see the unfairness of an at-large, winner-take-all system, and looked to the possibility of subdividing that at-large jurisdiction into single-member districts.

Q: Is it fair for a reader of your articles to come away believing that your number-one concern is to get thinking about the Voting Rights Act beyond this focus?

Guinier: I think it would be fair for a reader to take from my writing the genuine desire of a scholar and litigator to conceptualize the problem of voting discrimination. And to conceptualize it in a way that's consistent with the original vision of the civil-rights movement in 1965. My sense of that movement is that Dr. King and others were committed to voting rights not just because they wanted to have an integrated legislature--they certainly did, and I certainly do--but because they wanted to have an integrated legislature whose members would work together to pass laws in the interest of the common good, and to pass laws directly responsive to the needs of the people who were voting for them.

So it was not just an issue of electoral success but also responsiveness.

If you look at the original case law in the 1970s, responsiveness and the ability to demonstrate unresponsiveness was the linchpin of a vote-dilution claim. Those cases were basically saying that the reason there's a problem here, the reason we are still worried about voting discrimination, is not that blacks can't register and vote--they can--it's that they can register and vote without success in electing people who will be responsive to their interests.

The whole notion of racially polarized voting was an effort to measure why some members of the legislature were unresponsive to the needs of their minority constituents, although these constituents were exercising the franchise. And the reason, according to the courts, was that these legislators could get elected time and again without the necessity of any support from the black or Latino community.

It's that ideal of having a legislature that is integrated, but also responsive, that really animates my work.

Q: I sense that to some degree, you feel one of the movement's primary hopes circa 1965 was to produce a politics that was transformed, or transformative, rather than simply within a somewhat-larger pork barrel. Yet perhaps there's a tension between that and the implicit yardstick of proportionality that inescapably underlies all Voting Rights Act discussions from 1965 right up to the present.

Guinier: Well, I think that's a tension in democratic theory. I mean, that's really a tension between pluralism and republicanism. And the republican notion of the common good and having people who deliberate beyond their special interests for the common good is an idea that coexists with the democratic pluralist view that you have different groups negotiating in their own self-interest and that part of the democratic process is to ensure that those groups are all playing by a fair set of rules, that they're playing on a level playing field.

And it really is that tension that I've tried to work with in my writing. On the one hand, I see a deliberative process as being the best way of encouraging cross-racial coalition-building. I think people need to be able to talk to each other, they need to have conversations that go beyond their own narrow interests. In part, we need to work toward consensus rather than up-and-down voting in which everything is "I win, you lose." And it's in part because of that move to consensus that I started looking at issues of simple-majority voting rules, where 51 per cent decides the outcome, where that 51 per cent is not admitting or is acting to shut out the 49 per cent in a way that's inconsistent with the notion of democratic fair play.

I suggest that we may want to reexamine the decisional rule that we're using, which is really not about anti-majoritarianism. It's about a different kind of majoritarianism. It's really about perfecting the Madisonian bargain, so you have shifting coalitions that make up the majority.

Q: Did the Philips County, Arkansas, case loom particularly large for you?

Guinier: Yes. That was a situation in which you had extraordinary racial polarization. We had testimony in that trial that no white person would publicly support a black candidate.

There was a three-way race in which the black candidate came in first. One white candidate came in second and this white farmer came in third. There would be a runoff to make sure that someone got a majority. That was the majority-vote requirement that we were challenging, the kind that John Dunne (Assistant Attorney General for Civil Rights in the Bush Administration) has called an electoral steroid for white candidates, because it can be used by a majority to gang up and shut out candidates supported by a minority.

The black candidate who had come in first went to the defeated candidate and asked for his support in the runoff. And he said, "I can't support you. I am a white farmer who lives in this county. My wife is a teacher and we just can't support a black candidate."

That's what is happening in this country. So I started thinking about the limits, or the need to investigate the limits, of majority rule as it plays out in a Phillips County.

Where you have an affluent and heterogeneous group of people who are fungible, who have shifting interests depending on the issue, very little of what I am writing has any applicability and, indeed, I thought I made it clear in my writings that this is not a manifesto for revamping American democracy but a specific response to a specific set of extreme circumstances.

And I'm not the only one who has described this phenomenon. (University of Texas law professor) Sam Issacharoff has written on racially polarized voting and says race is the fault line in American politics. It is the cue. It is what sends the signal as to how people are going to vote. So it's just amazing to me to read some of these post-mortems about the withdrawal of my nomination--take the piece by Steven Roberts in U.S. News & World Report--suggesting that the problem with my writing is that I assume that race is a critical aspect of politics in 1993.

Q: Do you find it amazing as well as surprising or depressing that people could ostensibly read one or more of your articles about voting rights and come away with the impression that you are "pro-quota"?

Guinier: I think that was just a political fabrication. I don't think there's anyone who has read anything I have written who genuinely suggests that I support quotas. And given the attention my articles have gotten, the way they have been dissected and embalmed--if there were anything in there, somebody would have found it. There's nothing in there about quotas.

The reason I was called "the Quota Queen" is: That was a headline looking for a person, and I walked in. And the reason I could be tagged with that headline is that I was writing about race. Unfortunately, the word "quota" has become meaningless except to signify that this is a person who is writing about race and is committed to racial fairness. Therefore, I must be supporting quotas.

But the remedies I was proposing are race-neutral remedies.

Q: Is it your impression that the attacks by Clint Bolick in The Wall Street Journal and Abigail Thernstrom in The New Republic were at all personally motivated?

Guinier: Well, I wouldn't actually put them in the same category. My sense is that Abigail Thernstrom does not like the Voting Rights Act. She has made it perfectly clear that she does not like the Act as it was amended in 1982 and as it has been interpreted by the Court. Her position predates anything that I have written and is independent of me. The failure of the media, in my view, was not to identify her as an opponent of the Voting Rights Act. So I don't think she has the credibility that she was accorded by the media to challenge my views.

Clint Bolick, on the other hand, is a self-described radical. He considers himself a libertarian. He doesn't like the legislative process. He doesn't think Brown v. Board overruled Plessy v. Ferguson. He doesn't think the Government has much of a role to play in civil rights. Again, he has an agenda independent of anything I have written, and yet the press never identified where he was coming from either.

I was the only one with an agenda. And it wasn't even my agenda. It was an agenda these other people fabricated in advance of my nomination and then just presented to the press and the public. And for reasons I still don't fully understand, it resonated.

Q: When the Bolick piece first appeared--the day after your nomination if my memory is correct--did you believe it was anything other than a single person's screed in The Wall Street Journal?

Guinier: I have been told by various people in Washington that Clint Bolick had been quoted a month or two before my nomination as saying that if I was nominated, he would oppose me because I would take us back to the days of forced busing and quotas. And, obviously, that was bizarre since I had never had anything to do with education cases and have never supported forced busing in print, in public, or in court. So I perceived him to be on a hobbyhorse that really had little to do with who I was.

What alarmed me was when his views were recycled over and over and over. Newsweek published a piece crowning me the quota queen and made reference to this headline--QUOTA QUEEN-- in a paragraph that also referred to the welfare state. As if, conveniently enough, as a black woman, I wasn't a welfare queen so I must be a quota queen.

Q: Did some days or weeks go by after your nomination was announced before you began to realize that people were buying into this?

Guinier: I was concerned from the very beginning. I was not interested in waiting to find out whether people would buy into this. My position was that it was important to respond and respond immediately--that the media were describing someone who may have been using my name but hadn't written my articles and certainly had not lived my life. But the Administration's position at the time, and it's the Administration's policy, is that nominees should not speak to the press before they speak to the Senate, that the opportunity would come for me to defend my views and explain who I was, at my confirmation hearing.

Q: One word that kept coming up in all the op-ed pieces is "authenticity." Talk about authenticity.

Guinier: Authenticity is a word I use to mean "chosen by the community." An authentic representative can be black or white. The issue is not race but the choice of the voters to vote for that representative in an electoral system in which the voters' choice can be heard. It's in some ways another way of saying: an accountable representative. But I say, also, "I don't think authenticity is an adequate view of contemporary reality." And for some reason, no one was able to see what I was saying.

The most remarkable leaps were made in mainstream journalism. I saw the editorial in The New York Times and I was shocked that journalists who feel they are in a position to judge the quality of my writing also see themselves in the position to judge the substance of my writing, and yet they can't seem to read what I have in fact written. In some instances they are just repeating

something that Stuart Taylor said (in Legal Times) which he repeated from what Clint Bolick or someone else initially said. But it is not in my article itself.

There's either a time warp or a vocabulary problem; it's not a question of being lost in the translation; it's a question of really being a fabrication.

Q: When President Clinton said there were some things, at least in the Michigan article that he could not agree with, I think you said the following day at your press conference you believed that was based upon a misimpression or misreading.

Guinier: I haven't gone back and looked at his press statement, but I believe he said my article was subject to interpretations he could not agree with. And that may be true. I am not, however, responsible as a scholar for other people's interpretations of my writing, just as I don't think I'm responsible for The New York Times suggesting that I galled Douglas Wilder "inauthentic," when I did no such thing. The only way I would be responsible is if people made these allegations and then I didn't respond, if I simply, by my silence, acquiesced in their interpretation. But in part that's why I so wanted to have a hearing. I had been asked not to speak to the press, I had been asked not to defend my views. So perhaps some people interpreted my silence as acquiescence, but it was not.

Q: You don't sound at all like someone who's bruised. You sound like someone who's come through this with quite remarkable strength.

Guinier: Well, I'm very tired. I hope not to dissipate my strength in the period to come. But I certainly am committed to vindicating my reputation, to exploring in the most constructive way possible my ideas, to pursuing a public debate, not only about my ideas but about issues of racial justice and healing.

I do not think I was treated fairly. I am someone who has been committed to fundamental fairness, and to issues of democratic fair play all my life. So I think my nomination and the treatment of my nomination is an opportunity to pursue the very issues I attempted to address in my writing.

I suggested in my writing that sometimes when black representatives are elected, immediately the rules are changed. In some ways that's what happened to me. I was nominated--and then the rules were changed. All of a sudden, a nominee who has been accused of no particular indiscretion or character flaw or criminal activity is denied a public forum in which to respond to personal, sometimes vicious, attacks on her reputation.

And I guess it's an opportunity, not so much or not exclusively and not even primarily to vindicate my personal reputation, but to ensure or do the best I can to ensure that other scholars are not put in jeopardy and are not disqualified from public service in the future because they have dared to commit to paper thoughts or provocative ideas about issues of contemporary relevance. So this is not a personal crusade.

PHOTO: Drawing of Lani Guinier (JOSEPH CIARDIELLO)