Who's Afraid of Lani Guinier?

Far left: The Department of Justice, April 29. President Clinton introduced Lani Guinier to the press as his nominee for assistant attorney general, Civil Rights Division. The President's mood reflected his nominee's. Left: The Department of Justice, June 4. Guinier, who had been cast by the press as a "Quota Queen," held a news conference the day after the President withdrew her nomination. Her husband, Nolan Bowie, was at her side. The President did not attend. Opposite: Guinier in Philadelphia this month.

Here's what she thinks: The majority should rule, but even the minority sometimes gets a turn. What's so scary about that?
BY LANI GUINIER

For a late April day in Washington, the air was remarkably soft. The sun-splashed courtyard of the Department of Justice seemed a reflection of the glow surrounding Attorney General Janet Reno. She had just returned from a successful venture to Capitol Hill, where she faced down a committee upset about the recent confrontation with the Branch Davidians. I stood with six other Justice Department nominees to be presented to the public. In what we were told was a last-minute decision, the President himself was to make the presentations. We gathered in the hallway next to the courtyard stage and were lined up in the order we would be introduced. We were given our instructions, and then the President arrived.

The President had a regal bearing. I remember he was wearing a beautifully tailored blue suit. As he strode down the row of nervous nominees he greeted each of us in his typically physical style. He grasped my hand, congratulated me and kissed me lightly on the cheek. As he moved to the others I remember overhearing one of the nominees pass on a greeting from an old friend from Arkansas. The President stepped back and said, with a wistful look in his eye: “I remember Steve. That was when I had a real life.” And I remember the nominee’s response: “Mr. President, that was before I was born.”

As we were introduced there were cheers and signs saying “Atta girl, Janet!” and the like. I saw many old friends from the Civil Rights Division, where I had worked during the Carter Administration, giving the thumbs-up and smiling. I had not been back in the courtyard in 12 years, and now here I was accepting the nomination to head the Civil Rights Division.

I watched the President and the Attorney General work the crowd from the podium. They were experienced politicians, undaunted by the television cameras or reporters. Their skilled smoothness contrasted with our discomfort. One of the nominees, who had gone to the trouble of memorizing his prepared statement, griped a written text behind his back just in case.

Several friends who witnessed the ceremony on television tell me I looked radiant and self-possessed, with a beaming President in the background. I mostly remember the edginess in my voice, the formal tone designed to camouflage the butterflies in my stomach. I was a novice in this new world of “real life.”

We were each given 10, then 5, and finally only 2 minutes to speak. I tried to wedge several themes into my allotted time. I spoke briefly about my black father and my Jewish mother, both of whom had given me an appreciation for life’s complexity and the way race both matters and doesn’t matter in a person’s life. I wanted to tell more personal stories, like the one about the racial quota system that led my father, Robert Guinier, to leave Harvard College in 1931 — his application for financial assistance was denied — only to return years later as chairman of the Afro-American Studies department. Or how my mother taught me about the power of listening and the pain and pride of being Jewish.

I knew the importance of self-definition. As a child of a mixed marriage, I had fielded my share of questions from perfect strangers asking, “What are you?” I had acquired the trappings of privilege later in life, so I was also aware that things aren’t always as they seem. As Judge Damon Keith’s law clerk, I remember seeking to dispel an acquaintance’s assumption that I was wealthy, an impression formed from my Radcliffe College and Yale Law School education, and from my father’s status as a Harvard professor. This person didn’t know that my father had been unemployed or underemployed for most of my life or that I considered myself a child of Queens.

My personal identity as a black woman was forged in the working-class neighborhood of St. Albans and in the crucible of New York City public schools. My home address rooted me in the black community, but I also had many Jewish, Italian and Asian friends among the 6,000 students attending Andrew Jackson High School on triple session.

But there was no time for such stories. I spoke instead about enforcing the law, not making it. For four years I had been special assistant to the chief of the Civil Rights Division; I knew that the post was essentially a bureaucratic position, albeit an important one. My primary mission would be to play the role of Congress’s cop in civil rights. Just as I had when I litigated my cases and taught my classes, I would be tough, but fair.

I had training in communication. But my training was as a law professor who can take a semester to develop an idea, much less than an hour. The conversation was supposed to be ceremonial, not pedagogic. Others would see me as a “guerrilla fighter” for civil rights who had come to Washington to implement a radical new agenda.

FOUR MONTHS EARLIER, ON THE FIRST SATURDAY following his inauguration, President Clinton and I had shared a relaxed social evening at a small dinner party I helped give in northwest Washington. We were social friends, close enough to spend time together at Renaissance Weekend in South Carolina or for both Clintons to attend my wedding in 1986; yet there had been stretches of several years without any contact. That night the First Lady and the President stayed several hours longer than planned. The conversation was what you might expect at a gathering of old friends, although the reality of their new life intruded periodically. There was even a taster there. We roasted the President with a fake rubber hand and Perot ears; the First Lady’s gift was a witch’s hat.

The significance of the occasion did not escape those of us who were there. And so I was left feeling that there were no secrets between us — that this President had black friends who were also his peers. Indeed, for a brief moment, I could even imagine the President as he was at Yale Law School, when he would sit down with us — his classmates — in the law-school dining room. Back then, he stood out as a white student who was obviously comfortable sitting at a table in the company of more than one black person.

Now at the Justice Department I was grinning widely in response to the President’s humorous aside in his introductory remarks that one of his nominees had been his legal adversary. As assistant counsel for the NAACP Legal Defense Fund in 1984, I had brought a case challenging Arkansas’s voter registration laws. “I am the nominee who sued the President,” I admitted when it was my turn to speak. But I was a tenured law professor now, and deeply committed to consensus. In my closing remarks, I pledged to leave recriminations behind in the spirit of an Administration dedicated to change for all Americans.

Later, as we descended the courtyard stage, the President put his arm on my shoulder and whispered...
in my ear about that infamous lawsuit. "Thanks, Lani. I thought you were going to add, 'And I won!'" In fact, as I reminded him, we had settled the case.

The plan for my nomination, I realized later, was to present me as part of a package deal. If we were presented as a group, we could be confirmed as such. Unfortunately, within a day of that April announcement, the focus was only on me. A Wall Street Journal headline writer on April 30 conceived the killer epitaph: Clinton's "Quota Queen."

The attack was on. Columnists described me as "breathtakingly radical," a closet extremist with an "in your face" civil rights agenda. I had a "we-they" view of race relations. I would impose "a complex racial spoils system that would further polarize an already divided nation." I was "race-obsessed" and "divisive," "undemocratic" and "anticonstitutional." I demanded "equal legislative outcomes, requiring abandonment not only of the one-person-one-vote principle, but majority rule itself." Finally, the public was informed. I advocated quotas. I believed "blacks should have special rights," and I supported "racial vetoes of majority actions."

I was unprepared for the vehemence of this critical avalanche. Within the academic world, my articles had not been controversial. They had been widely circulated and warmly received even by dissenting conservative scholars who had substantive, legitimate disagreements with my ideas but nevertheless respected my efforts.

Moreover, despite the memorable phrase-making, the charges were not true. My scholarly project as a law professor had been to answer the question raised by cases I had litigated: why is it that in many city and county governing bodies, especially in the South, the interests of blacks still often lose? I wrote as a legal scholar about ways to remedy racial discrimination; I also wrote as a political theorist. Inspired by the work of James Madison, I explored ways to insure that even a self-interested majority could work with, rather than "tyrannize," a minority. As a matter of political philosophy, I imagined a more consensual, deliberative and participatory democracy for all voters, despite religious, political, racial or sex differences.

I never thought consensus would be easy to achieve. It wasn't lost on me that some rules divide us into winners and losers instead of joining us together. This idea was cogently expressed by my son, Nikolas, at the age of 4. Nikolas and I had a conversation about voting prompted by a Sesame Street Magazine exercise. The magazine pictured six children: four had raised their hands because they wanted to play tag; two had their hands down because they wanted to play hide-and-seek. The magazine asked its readers to count the number of children whose hands were raised and then decide what game the children would play.

Nikolas quite realistically replied: "They will play both. First they will play tag. Then they will play hide-and-seek." Despite the magazine's "rules," he was right. To children, it is natural to take turns. The winner may get to play first or more often, but even the "loser" gets something.

In a nutshell, Nikolas had expressed the goal of my work: to find voting rules that allow both winners and losers to play. In a way, my academic work could be characterized as a grown-up version of "taking turns."

I was startled to see it reduced to a derisive, inaccurate sound bite. Interviewed in The New York Times, Clint Bolick, the conservative lawyer who had fired the opening salvo in The Wall Street Journal, said, "Clinton has not had to expend any political capital on the issue of quotas and with her we believe we could inflict a heavy political cost."

The "Q" word stuck.

THE ATTACKS ON ME WERE ALL THE more successful because the Administration began without a coherent explanation of why I had been nominated and proceeded without a clear statement of my actual views. My opponents were busy deriding me falsely as a Quota
Queen. My friends, including the President, were silent. I had become controversial. The President said as much during the annual dinner of the Leadership Conference on Civil Rights on May 11. The President’s presence, along with those of the Attorney General and the Vice President, seemed to mark the event: the movement to bring civil rights to all Americans was about to be revived.

The President and I had been backstage before his remarks and my introduction as the Administration’s nominee. He commented on the necklace I was wearing, but despite this rather personal observation he seemed remote. He lacked, somehow, the regal bearing he had had at our first official meeting, two weeks before. He seemed distracted.

To voice his support of me the President again reminded the audience that I had sued him when he was Governor of the state of Arkansas and hadn’t lost. He suggested that his graciousness in nominating someone who had been an adversary meant that the Senate “ought to be able to put up with a little controversy in the cause of civil rights and go on and confirm her.” It was hardly a ringing endorsement.

In an Administration that seemed to eschew avoiding controversy with governing by consensus, the President’s reaction made me uneasy. Frankly, I was worried. I could hardly open my morning newspaper without my hands trembling in anticipation of some new rhetorical torpedo launched in my direction. I was no longer a nominee appointed to carry out the President’s pledge to reinvigorate the Civil Rights Division. I was now being defined as a problem. And, as I slowly discovered, in this new, “real” world, problems are not solved. They are put on hold in the hope that they will go away.

S
O
F
A
R
T
H
E
O
L
Y
M
E
N
S
A
T
O
R
I had met was Arlen Specter of Pennsylvania, and even that lunch had happened without the help of anyone at the White House or the Justice Department. My long-time mentor, the former Secretary of Transportation William T. Coleman Jr., whose Republican establishment credentials were impeccable, had arranged the lunch. To demonstrate his good will, Senator Specter had us meet him in the Senators’ dining room, so I could be “seen.” Specter had three questions for me: How did I get the nomination? What did I want to do with the Civil Rights Division? And was what The Wall Street Journal saying about me true? I took his questions in reverse order.

First, I assured him that what The Wall Street Journal was saying was false. I was not a Quota Queen or a dangerous radical. I did not favor quotas. I did not even write about them. Second, I told him I would enforce the laws as passed by Congress. I also wanted to start a national conversation about civil rights in which we would openly debate the direction the country was taking. I was committed to building cross-racial coalitions. Finally, I told him that I was the consensus candidate of the civil rights community. I had known leaders of the major civil rights organizations since the 1970’s, when I worked at the Justice Department. In the 1980’s I had worked with them and members of Congress on several legislative matters. I also had enjoyed a reputation as an effective litigator for eight years at the Legal Defense Fund. Some said I had trained all my life for this job.

Privately, I was told afterward that Specter had been impressed. Publicly, he told the press that he found nothing troubling in what he had thus far read of my academic writings. I knew now that face-to-face meetings with Senators were crucial. Senators had to be pushed past stereotypes just like other Americans — black and white. I was confident that I could, through direct eye contact and the unflinching candor for which I was known, take advantage of a personal encounter to become more than a cartoon character. But I needed staff assistance to make it happen.

Finally, on May 26, 28 days after I was nominated, Eddie Correia, a Northeastern law professor, became the first and only paid Justice Department employee assigned full time to my nomination. Now I would finally be able to make the rounds. Eddie had been the well-respected staff counsel to the Ohio Democratic Senator Howard Metzenbaum. He knew little about the Voting Rights Act, which was the subject of my life’s work, but he was savvy about self-presentation. Plus, Eddie was a worrier who easily carried all my nervous energy as well as his own, freeing me to concentrate on my assigned task.

Under his tutelage, and with volunteer assistance from two lawyer friends, Carolyn Otseolink and Penda Hair, I readied myself for courtesy calls. I practiced not speaking the academic language of abstraction and nuance, trying instead to tell punchy stories about discrimination and racial healing. Two meetings stand out: one with the Wyoming Republican Alan Simpson; the other with Senator Metzenbaum.

I met with Senator Simpson in his office. The Senator sat behind his desk. I sat facing him. There was one staff person in the room who took notes but was mostly silent. The 45-minute meeting lasted almost an hour and a half. After a freewheeling, open exchange, Senator Simpson paused. He had a “bombshell question” to ask, which he had been inclined to save for the hearings. But in the interest of giving me a chance to prepare a response, he would lay it on me right there.

“What,” he asked, “if the white minority in South Africa read your writings?” I smiled. The analogy to
South Africa had occurred to me, too, and in fact, I had been asked much the same question the year before on a panel in Philadelphia. "That would be great," I said matter-of-factly.

Senator Simpson looked stunned. He leaned toward me as if to make sure he'd heard me right. "You really mean it?" he asked quizically. "Of course," I answered. "It's a matter of principle. A government must appear legitimate in the eyes of all citizens, regardless of race." With that, Senator Simpson reached across his desk and handed me an outline someone had prepared of my so-called views. The Senator had been using it as his "script." He said: "You are going to need this. I don't know yet how I am going to vote. But you are not what I expected. I guess I am undecided."

The meeting with Alan Simpson took place quietly Wednesday. By the next day, as Eddie escorted me toward Senator Metzenbaum's office, television cameras and reporters preceded us. I smiled gamely, hoping to retreat quickly into the privacy of the Senator's office. But as I sat down, I realized that the cameras were there, too. Apparently Senator Metzenbaum had given permission to film the opening moments of our meeting. I felt awkward and stiff, but tried to loosen up the event with small talk.

The Senator and his staff were open and friendly. Their conviviality contrasted with the cordial but formal reception in Senator Simpson's outer office. Where Senator Simpson had queried me directly, Senator Metzenbaum deferred to his staff. About 20 minutes into the meeting, the Senator spoke up. "I have a problem," he said. "I have a problem with people identifying in groups rather than as Americans or members of the larger community. After all, Jews are only 1 or 2 percent of the population of Ohio. I couldn't get elected Senator if everyone in Ohio voted as an ethnic or racial bloc."

In his honest, down-to-earth way, Senator Metzenbaum raised a difficult issue. I was not in favor of quotas, so it had been easy to answer Senator Specter's question. Nor was I a racial separatist, as implied by Senator Simpson's question. I believed majority rule meant a coalition of shifting interests and not a permanent, fixed monopoly of any color, so I could ally Senator Simpson's concerns right away. But I was a longtime student of America's shameful racial history and a secondary architect of recent congressional efforts, like the 1982 amendments to the Voting Rights Act, designed to rectify the exclusion wrought quotations followed by a question mark. Others crowned me in their own words: I was "the czarina of Czeveritas." Even The New York Times reported inaccurately that I questioned such basic democratic principles as one person, one vote. Among some Democrats, the joke was, "Strange name, strange hair, strange writing, she's history."

While the attacks on me kept picking up steam, I was advised not to respond so as to avoid giving them "legitimacy." The Administration policy was that I not speak to the press until after I was confirmed. Nor was I to speak publicly, especially not to predominantly black organizations. It was important that I not appear too closely connected to any "special interests."

My nomination was languishing without either emotional or logistical support from my friends in the White House. I saw Hillary Rodham Clinton in the West Wing. It was the same day David Gergen signed on. She breezed by me with a casual "Hi, Kiddo." When somebody tried to tell her that we were in the White House to strategize on my nomination, she turned slightly and said, "Oh." She turned, full circle this time, and, to no one in particular, announced, "I'm 30 minutes late to a lunch."

There were no glowing smiles around me now, but I was determined to press forward. I desperately wanted a public forum. In 1988, Brad Reynolds, chief of the Civil Rights Division in the Reagan Administration, had openly declared that the policy of that Administration was to "polarize." "We must not seek consensus," he said. "We must confront." The American people needed to move beyond that era of racial polarization. We should not be afraid of speaking directly to the
continued problems that our racial history creates for the civic life of our country. Silence won’t make the problem go away.

O
n june 1, I returned from Washington, having met with several potentially sympathetic columnists for the first time. In response to Eddie Correia’s prodding, the White House had relented on its policy prohibiting contact with the news media. At about 8 P.M., my friend Aretha Marshall, who worked for a local television station, walked into the kitchen of my home in Philadelphia. Her eyes were wet, her expression grim. In a solemn tone she reported her news: Dan Rather had gone with a story on the evening news that my nomination was being withdrawn. And, she informed me, it was CBS policy not to report a story unless it had confirmation from reliable sources. I was stunned but not alarmed. I reassured Aretha that I had heard nothing from the White House; I could not believe they would deliver news to me that indirectly.

The next day I met with two editorial boards and, with White House permission finally granted about 9:45 P.M., I went on “Nightline.” Propped up by this whirlwind of publicity, my nomination was still pending. Then, the day after that, I got the call. It was Mack McLarty. Could I please be at the southwest gate of the White House at 6:15? After I arrived, I sat on a sofa in a room outside the Oval Office with the Justice Department side who had accompanied me in the car, girded with up-to-the-minute instructions on where to arrive so as to avoid the crowds of reporters gathering, McLarty joined us. He brought me a glass of water. I had never met him before, and the conversation consisted of strained ruminations about his son who was in college. Suddenly, with little ceremony, I found myself in the Oval Office with the President.

The meeting lasted over an hour. The President listened attentively as I painstakingly described what I had written. His knuckles were white, his face ruddy. I found the meeting exhilarating. Trained as a trial lawyer, I could not have asked for a better “trial” record; I had written it myself. I thought I knew better than anyone what I said and what I meant. As a teacher, I was now getting to educate. After five weeks of enforced silence, I could finally speak. So when the President asked me whether this was one of the hardest meetings I had ever had, I replied, in all candor, “No.”

When I got back to the Justice Department, it was about 8:20. Eddie was waiting for me. I told him that the President had not made a decision, or at least had not informed me of any decision during our meeting. I described what had transpired so that Eddie could help me assess the likely results, and told him what the Justice Department staff member had overheard the President saying as I left the Oval Office: “That woman has character. Her character is stout.” We both laughed at this peculiar phrasing, chalking it up to Arkansas roots.

Eddie said the White House had scheduled a 9 P.M. news conference, but we still had no idea what the announcement might be. Just the night before, Eddie, my adviser Carolyn and I had broken open a bottle of Champagne in the hotel room that “Nightline” had arranged for me after my appearance there. It was 1 A.M. and we gallantly toasted the fact that we had earned my nomination a 24-hour reprieve. It was one of the only moments during this entire period when I actually felt giddy.

The day after my “Nightline” interview, the phones at the Justice Department rang off the hook. I spoke for the first time to Kwesi Mfume, the chairman of the Congressional Black Caucus, and thanked him for the caucus’s support. At the suggestion of the Rev. Jesse Jackson, I personally called Carol Moseley Braun, and this time her aides got her right on the phone. We agreed to meet early the next week. Civil Rights Division lawyers streamed into my temporary office, ebullient with the latest phone counts. Calls to the White House were running 8 to 1 in my favor; they reported. I was guardedly optimistic.

At 8:50, the phone rang. The President was calling. He said, “I have decided to withdraw the nomination.” I said nothing. I was probably in shock. He continued, “You made the best case I can imagine, but you didn’t change my mind.” Still I said nothing. The President continued speaking: “I’m sorry. I will take full responsibility. I hope to make it up to you.” I finally found the words to say I was disappointed but that I “appreciated the opportunity to serve, brief as it was.” “You’ll have another opportunity,” he reassured me.

I thanked him for his call and hung up.

The President called back. “Did you hang up on me?” he asked. “I thought you were finished. I’m sorry,” I said. Then he told me about his scheduled news conference. I had collected myself enough in the interim to ask him when he called back, “What would you like me to do now?” He responded that I should “coordinate a press statement.” That was my last conversation with the President. Since that second phone call I have not had any communication with the President or the First Lady, although I did get two identical, machine-signed White House Christmas cards in December.

I made a few phone calls and then turned on the television. I heard the President say with obvious emotion that some of my writings “clearly lend themselves to innuendo that didn’t represent the views he had expressed during his campaign.” With horror, I watched as the President then appeared to get personal, calling my ideas “anti-democratic” and “difficult to defend.” A distracted White House with no public relations strategy had enabled my opponents not only to define me, but to stir up fears about me as a person. Now the President was reinforcing those images with his choice of language. In this odd world of “real life,” misperception had become reality.

Like a four-inch tall Alice in Wonderland, I walked the long, empty corridor between my office and that of the Attorney General. I had met with Janet Reno immediately before my trip to the Oval Office. During that early evening meeting, the Attorney General sat comfortably on the couch, in her favorite spot opposite the portrait of Bobby Kennedy walking on the beach. She told me then that she did not know what the White House would do. In her typically straightforward manner, she repeated the advice she had given earlier: “If you stand on principle,” she said, “you can’t lose. Because even if you lose, you still have your principles.”

Still dazed by the President’s decision, and bewildered by the language he had used to explain that decision to the American people, I was ushered into the Attorney General’s office for the second time that evening. This time I found the Attorney General expressionless behind her desk. Her desk had neatly arranged piles of paper that she was reviewing. I sat down opposite her. She told me how sorry she was that things had turned out the way that they had. She asked me to think about names for possible replacements. And she agreed, after I told her the President had suggested I release a statement, that I should convene a news conference the following morning.

Looking back, it is remarkable how I could so easily be labeled a Quota Queen by so many, despite the complexity of my essays. It is less surprising, however, when I hear friends tell me that some in Congress now consider the benign phrase “equal opportunity to participate in the process” a euphemism for quotas. Over the last 12 years, opponents of traditional civil rights enforcement have successfully recast the debate with the same buzzword: quotas. A dense symbol, “quotas” has become shorthand for three separate criticisms of the modern civil rights movement.

First, the term “quotas” is most commonly used to refer to special pleading by — and rigid numerical preferences for — groups that no longer enjoy the moral authority to make any claims at all. Quotas in this first sense is a sound bite for affirmative action. Critics of quotas disparage the distribution or assignment of jobs, slots or districts based on the race, ethnicity or sex of the applicant.

Second, the term “quotas” sometimes refers to result-oriented jurisprudence, in which numbers and statistics are cited as evidence of discrimination. Quotas in this sense is a code word for Balkanization: two wrongs do not make a right. Those who seek to remedy group wrongs by acknowledging group interests or group identity are branded for society’s divisiveness.

Third, quotas represent the unspoken suspicion of an activist government working for those who have been left out. People who use the word in this sense view discrimination primarily as a lack of individual behavior and responsibility. Discrimination in the form of the belligerent police chief blocking the door to prevent blacks from registering to vote is now universally condemned. But that consensus collapses when civil rights becomes not just a right to vote, but a right to a voice in government. The use of government resources to insure full participation in democratic decision-making is another form of “quota.”

That much of this quota criticism had nothing to do with me was apparently irrelevant both to my enemies and to those who were called on to defend me. To dramatize their apparent dismay that the President might actually make good on his promise to reinvigorate civil rights enforcement, his opponents used me to personify the evils of racial politics. Their attacks resonated with racial stereotypes. Not only do all blacks “look alike”; apparently we all speak with one militant voice. Those of us exploring innovative ways to promote cross-racial coalition building are suspected of advocating racial preferences. By virtue of our race or our willingness to discard race, we are subconsciously tied to a monolithic racial agenda.

What was lost in the confusion was a basic distinction between my work and that of many of my former colleagues in the civil rights movement. Continued on page 54
movement. I agree, in part, with the first criticism of quotas. In fact, I was one of the few in the movement who believed that we must find race-neutral solutions to our continuing problems. Indeed, I have advocated the importance of one vote, one value for all voters.

I also have expressed interest in re-conceptualizing the civil rights agenda in response to the second quota criticism. I believe outcomes are relevant, but only according to existing law, and only when the results provide information about the process. In 1982, Congress told us results matter. That year, when Congress amended the Voting Rights Act by a huge bipartisan margin, conservatives like Robert Dole joined forces with those who hold the view that election outcomes are relevant evidence as to whether the process is rigged or corrupted by prejudice. Likewise, my focus is not on guaranteed equal results, but on an equal opportunity to influence these results. I want to know whether the electoral process is legitimate in the eyes of all participants.

Again, unlike some of my colleagues, I seek to discover alternatives that may minimize the disadvantage for all, not just carve out protection for some.

I reject the third quota criticism. I firmly disagree with the idea that the government has finished what it needs to do. Where people are excluded from meaningful participation in their government because of rules that appear neutral but operate unfairly, then sometimes the government should act. Indeed, the government must act, where Congress has authorized such action, as in the voting rights law itself.

Yet I don’t believe in the unlimited power of government to include previously disadvantaged groups or to remedy proven racial discrimination. Government can act only with statutory or constitutional authority. Nor do I believe that there is any universal panacea for unfairness. Each situation must be assessed independently, based on the local context and choices made by the voters themselves.

For these views I was “dis-appointed,” as if my departure from Washington might remove the stigma surrounding civil rights today. But the word quota remains, to be attached just as recklessly, I believe, to any action this Administration might take that significantly threatens the status quo. The word quota remains, an epithet for any messenger who dares to report the bad news about our existing racial situation. I was punished as the messenger, but we have not resolved how to handle the message: how do we make sure the rules enable everyone to play?

To me, that’s what fair play is all about. The rules should reward those who win, but they must be acceptable to those who lose. The central theme of my academic writing is that not all seemingly democratic rules lead to elemental fair play. Some even commonplace rules work against it.

For example, a self-interested majority can govern fairly if it cooperates with the minority. If the self-interested majority worries that the minority may attract defectors from the majority and become the next governing majority, it will avoid acting tyrannically. However, as James Madison warned us two centuries ago, the problem of majority tyranny arises where the self-interested majority does not worry about defectors. Where the majority is fixed and permanent, there are no checks on its ability to be overbearing. A majority that does not worry about defectors is a majority with total power. This is precisely the danger presented by racism.

My point is simple: 51 percent of the
people should not always get 100 percent of the power; 51 percent of the people should certainly not get all the power if they use that power to exclude the 49 percent. In that case we do not have majority rule. We have majority tyranny.

The fundamentally important question of political stability is how to induce losers to continue to play the game. Political stability depends on the perception that the system is fair — to induce losers to continue to work within the system rather than to try to overthrow it. Where the minority experiences the alienation of complete and consistent defeat, it lacks incentive to respect laws passed by the majority over its opposition.

At first blush, the unfairness of 51 percent of the people winning 100 percent of the power may not seem obvious. Yet, as de Tocqueville recognized, "The power to do everything, which I should refuse to one of my equals, I will never grant to any number of them."

Or as Alexander Hamilton put it, when the many are given all the power "they will oppress the few." These original democrats understood that majoritarian systems do not necessarily create winners who share in power. Such systems can transform politics into a battle for total victory rather than a way of governing open to all significant groups.

For example, in Chilton County, Ala., a small, mostly white rural county, the county commission’s members were traditionally selected in one-on-one, majority-rule, county-wide elections. Not a single black had been elected in this century until 1988, after a voting suit was brought. In the Chilton County case, the black voters and the county asked the court to adopt a settlement proposal based on a new system of voting, called cumulative voting. Cumulative voting is a progressive, race-neutral solution to tyrannical majorities. It is a simple idea: instead of casting one vote in each of seven contests, county citizens now elect the entire county commission in one election, and they have seven votes to use however they like. They can put all seven on one candidate, or spread them thinly on two candidates, or thinly, by giving one to each of seven different candidates, or however.

Cumulative voting incorporates the principle of one-person-one-vote; each voter gets the same total number of votes as every other voter based on the number of open seats. It is not a particularly radical idea: many states either require or permit corporations to use this election system. Cumulative voting is certainly not antidemocratic, and it is neither liberal nor conservative. Both

Continued on page 66

ANSWERS TO PUZZLES

OF FEBRUARY 20, 1994

(JOHN) GIERACH. (SEX) DEATH AND FLY-FISHING — A mayfly ... lies on the surface ... in what fishermen call the "spent" position ... the insect has just had the ... only organ of its life and is now ... dying from it ... There's probably a silly look on his face, although it's hard to tell with insects.

Today's investors know they need more than Social Security, IRAs, 401(k)s and other traditional plans to provide for a comfortable retirement.

That's why we are introducing the Dreyfus/Transamerica Triple Advantage variable annuity. It offers:

1. Investment earnings which are currently tax-deferred for individuals until withdrawn or distributed. Choose from a wide array of mutual fund investments.

2. An insurance feature which protects your designated beneficiaries during the accumulation phase so they will never receive less than what was invested, less withdrawals and premium taxes.

3. A variety of payout options which can provide income for life.

To help you decide if this tax-advantaged variable annuity is right for you, call our annuity specialists for our free report today!

Dreyfus/Transamerica Triple Advantage™

1-800-922-7744
Ask for Extension 4405

The Dreyfus/Transamerica Triple Advantage may not be available in all states and this shall not be construed as an offer in those states. Tax deferral is not available for corporations and most trusts. Withdrawals and/or distributions are generally taxable and, if made prior to age 59 1/2, may be subject to IRS penalties. Ask for Prospectuses containing more complete information including sales charges and expenses. Please read them carefully before you invest. The annuity contracts are issued by Transamerica Occidental Life Insurance Company or, in New York, by First Transamerica Life Insurance Company. Transamerica Occidental Certificate Form GNC-33. First Transamerica Policy Form 3-501.

© 1994, Dreyfus Service Corporation, Distributor.
Lani Guinier
Continued from page 55

the Reagan and Bush Administrations approved cumulative-voting schemes.

In Chilton County both blacks and Republicans benefited from this new system. The count
y commission now has four white Democrats, two white Republicans and one
black Democrat. Previously, when each seat was decided in a
winner-take-all contest, the ma-

ority not only ruled but mon-
opolized. In the decade before
the lawsuit, no blacks and no
white Republicans were elected.

Cumulative voting encourages cross-racial coalition building. Voters can enhance their
influence by forming coalitions to elect more than one repre-
sentative. A wider array of can-
didates tends to get elected. In
this way, cumulative voting
serves many of the same ends as
periodic elections or rotation in
office, a solution that James
Madison and others advocated as
a means of protecting against
permanent majority factions.

There is a final benefit from
cumulative voting. It eliminates

perrymandering. This could
moot the current debate over
race-conscious districting, since
any politically cohesive minority
could elect representatives of their choice without the need
to draw funny-shaped districts.

But — and here I come di-
rectly to the claims of my critics
— some apparently fear that
remedies for extreme voting
abuses, remedies like cumula-
tive voting, constitute “quo-
tas,” racial preferences to insure
minority rule. While cumulative
can be both conventional in
cases, and race-neutral, it
approximately opens up fearsome
possibilities of nonmajoritarianism.
But as George Will writes,
“The framers also understood
that stable, tyrannical majorities
are best prevented by the
multiplication of minority in-
terests, so the majority at any
moment will be just a transitory
coalition of minorities.” Or, as
Chief Justice Burger wrote for
the Supreme Court, “There is
nothing in the language of the
Constitution which makes it
our cases that requires that a
majority always prevail on every
issue.” In other words, there is
nothing inherent in democracy
that requires majority rule.

My ideas belong to a venera-
ble tradition. In 1964, the first
 generation of ballot access was
defended eloquently by Dr.
Martin Luther King Jr. and
Fannie Lou Hamer. In 1982,
redistricting was the consensus
solution to second-generation
electoral exclusion championed
by the N.A.A.C.P., the
League of Women Voters, the
Mexican-American Legal De-
Fense Fund and many others.
The “third generation” of vot-
ing problems occurs after mi-
norities win ballots and even
elect representatives, but the
majority changes the rules so
the minority still has no voice.

Between 1969 and 1993, both
Democratic and Republican
administrations challenged as
discriminatory more than 100
such rule changes. None of
these rules were unfair in the
abstract — but they were ex-
clusionary in practice. John
Dunne, President Bush’s chief
civil rights enforcer, declared
some of them to be “electoral
tests for white candidates”
because they manipulated the
election system to insure that
only white candidates won.

As part of my lifelong com-
mitment to democratic fair

play, I explore all three gener-
ations of majority tyranny. In
this project, one idea has re-
mained constant. I am a demo-
ocratic idealist, committed to
making American politics open
to genuine participation by all
voters. We can’t all talk at once,
but that doesn’t mean only one
group should get to speak. As
my son, Nikolas, suggests, we
can and ought to take turns.
The answer to majority tyranny
is more democracy, not less.

NOT LONG AGO, NI-
kolas introduced me
to a friend as his
mother, the one
President Clinton “dumped.”
He had seen the word on a
newspaper display as we
boarded the Philadelphi-
bound train at Union Station
following the June 4 news
conference. To his 6-year-old
eyes, the headline “Clinton Dumps
Guinier. What a Mess!” helped
make sense of this episode in
our lives. For me, the epiphany
arrived a few days later, when
I returned to my office at
Penn Law School. A normally
laconic colleague was effusive in
his welcome. I grinned. I then
blurted out something I never
thought I would say to anyone
in academia: “It’s so good to be
back in the real world!”

I knew then that my experi-
ence had a much larger mes-
sage. My “disappointment”
meant that the Government
had not changed sides — not
yet. The polarization around
issues of race had created a
leadership and policy vacuum
into which no one dared step. I
had no entitlement to the job
for which I had been nominat-
ed, or even to confirmation
hearings, but I could speak out
all the same. Besieged by
speaking requests from college
students, bar associations and
community groups, I seized
the chance to move beyond my
personal hurt to a discussion of
my ideas.

I idea matters. They’re not
sound bites; nor are they a
monologue. Although I can no
longer look forward to confir-
mation hearings to defend my
ideas, I can use my ideas, the
very same essays that got me
here. The polarization is the first phase to
expand the conversation. I hope
to participate in that conversa-
tion as a voice of conscience. I
am a woman with an issue, not a
grievance.