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The Stress, the Press, the Test, and the Mess with the Lani Guinier Smear: A Proposal for Executive Confirmation Reform

Krista Helfferich

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**THE STRESS, THE PRESS, THE TEST, AND THE MESS
WITH THE LANI GUINIER SMEAR:
A PROPOSAL FOR EXECUTIVE
CONFIRMATION REFORM**

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I. INTRODUCTION

*Indeed the Idols I have loved so long
Have done my Credit in Men's Eye much wrong:
Have drown'd my Honour in a shallow Cup,
And sold my Reputation for a Song.¹*

A. Prologue

On April 29, 1993, President Clinton nominated his friend, Lani Guinier, to be Assistant Attorney General for the civil rights division in the Department of Justice.² On June 3, 1993, President Clinton *withdrew* her nomination.³

Within that small timeframe, conservative politicians and the press grossly distorted Lani Guinier's works and beliefs. The White House never offered an intelligent rebuttal. Lani Guinier could have addressed these mischaracterizations of her scholarship at her Senate confirmation hearing. Instead, the White House pleaded with Guinier to remain silent⁴ and pressured her to withdraw.⁵

The day Clinton nominated Guinier, the closely watched 100-day-mark polls netted him the lowest approval rating of any postwar President.⁶ Guinier's silencing was one of several damage-control strategies the President used to save a presidency in crisis.

The "borking"⁷ of Guinier clarifies the need to expand the scope of confirmation reform. Proposals must encompass not only those

1. OMAR KHAYYÁM, RUBÁIYÁT OF OMAR KHAYYÁM LXIX, at 21 (Edward Fitzgerald trans., J.M. Dent & Sons Ltd. 1948) (1859).

2. Bob Cohn, *So Long, Lani*, NEWSWEEK, June 14, 1993, at 26, 27.

3. Jeffrey H. Birnbaum & Joe Davidson, *Clinton Pulls Plug on Choice for Rights Post*, WALL ST. J., June 4, 1993, at A16.

4. Neil A. Lewis, *Aides Say Clinton Will Drop Nominee for Post on Rights*, N.Y. TIMES, June 3, 1993, at A1.

5. Birnbaum & Davidson, *supra* note 3, at A16.

6. Amy Bayer, *Clinton's Early Rating in Polls Ranks Lowest of Postwar Presidents*, SAN DIEGO UNION-TRIB., Apr. 29, 1993, at A14.

7. "Borking" refers to the strategy used by the Block Bork Coalition and others to doom the nomination of Judge Robert Bork to the United States Supreme Court in 1987. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 132-33 (1994). The goal was to arouse the American public's resistance to Bork's confirmation as quickly as possible and thus paralyze the Senate. *Id.* at 14. This in turn would buy the opposition time so that a more tempered and accurate case

drafted with Supreme Court Justiceships in mind—in our post-Bork and Thomas days—but also other Article II, Section 2⁸ nominees as well. Whatever opinion is formed about the desirability of Guinier's ideas and solutions, one conclusion is unavoidable: The executive confirmation process works to the detriment of the American people.

B. Reality Check

Lani Guinier's life's work has been "to try to find the rules that can best bring us together as a democratic society."⁹ Her work explores both rules used in the voting process to elect public officials and legislative rules used to determine the allocation of power once officials are seated.¹⁰ To understand Guinier's proposals, two related concepts must be defined.

The first is what she calls the "Madisonian Majority."¹¹ This ideal is what Madison envisioned necessary to achieve equal and fair representation of diverse interests.¹² It is premised upon the assumption that the majority is not a fixed group of individuals who always "win"; instead, it is composed of a constantly variable group of individuals who make up the majority on any given issue.¹³ Change the issue, change the composition of the majority. This "rule of shifting majorities"¹⁴ means that sometimes individuals will win and sometimes they will lose. But the participants' ability to take turns deepens faith in the fairness of the system.¹⁵

Majority tyranny arises, however, "[w]hen the majority is fixed and permanent."¹⁶ The majority then wields total power and need not answer to the minority's protestations when implementing its will be-

could be prepared against Bork's confirmation. *Id.* To achieve this difficult task, all arguments that successfully scared the American public into believing that Bork was not only wrong but *dangerous* in his world views were considered legitimate to advance, even if they were unfair. *See id.* at 133.

8. Article II, Section 2, Clause 2 of the United States Constitution states the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. CONST. art. II, § 2, cl. 2.

9. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 6 (1994) [hereinafter *TYRANNY OF THE MAJORITY*].

10. *See id.*

11. *Id.* at 4.

12. *See id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

cause this majority is always winner-take-all. As Guinier notes, "[t]he Golden Rule principle of reciprocity"¹⁷ is discarded and thus nothing is left "to check the tendency of a self-interested majority to act tyrannically."¹⁸

Fixed and permanent majorities arise when the rules of decision making do not protect the minority.¹⁹ The phenomenon of majority tyranny, and its obliteration of the ideal Madisonian Majority, is the evil that Guinier seeks to eradicate by uncovering the consequences of letting such a tyranny reign, and offering solutions to counteract its occurrence. One consequence of preserving fixed majorities may be the loss of "incentive to follow the Golden Rule principle of shifting majorities"²⁰ and subsequent refusal to "cooperate with the minority."²¹ When this occurs, "the minority never gets to take a turn."²² The overall solution to this problem is to "[s]tructur[e] decisionmaking to allow the minority 'a turn' [This] does not mean the minority gets to rule; what it does mean is that the minority gets to influence decisionmaking and the majority rules more legitimately."²³

The Voting Rights Act of 1965 and its amendments (the Act)²⁴ are the raw material with which Guinier works to suggest remedies for second, and now third, generation cases. The first generation of civil rights activism motivated the Act's passage. Various devices such as literacy tests, registration procedures, and actual physical resistance deprived black²⁵ voters of access to the ballot.²⁶ The Act outlawed these injustices and resulted in a significant increase in black registration.²⁷

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 5.

21. *Id.*

22. *Id.*

23. *Id.*

24. 42 U.S.C. § 1973 (1988).

25. Guinier prefers the term "black" over "African-American" because "[t]he term black succinctly describes a racial identity and status based on color that is shared, to some degree, by other people of color with different ancestral lineages." Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1078 n.1 (1991), reprinted in TYRANNY OF THE MAJORITY, *supra* note 9, at 202 n.1. Likewise "the black community is a convenient proxy for an insular group that is politically cohesive, historically stigmatized, economically depressed, and socially isolated." *Id.* at 203 n.1.

26. *Id.* at 7.

27. *Id.*

Second generation activism agitated for an end to " 'qualitative vote dilution.' " ²⁸ After blacks safely began to attend the polls in greater numbers, southern states and localities replaced neighborhood-based districts with representatives elected on a jurisdiction-wide at-large basis. ²⁹ This enabled bare majority-white voting blocs to continue to elect only white candidates. ³⁰ Thus, while all citizens, black and white, each had one vote, the black vote was diluted until it became ineffectual and, for all practical purposes, impotent to influence the results of any election. ³¹

The 1982 amendments to the Voting Rights Act acknowledged the fact that "[p]olitical empowerment means equal voting weight *and* equal voting power." ³² To that end, a violation was defined as "a denial of an equal opportunity to 'participate in the political process and to elect representatives of [the minority groups'] choice.' " ³³ Majority-black single-member districts replaced at-large districts, thus ensuring that "[e]ven if whites continued to refuse to vote for blacks, there would be a few districts in which whites were in the minority and powerless to veto black candidates." ³⁴

The third generation of activism confronts the reactive phenomenon of legislative rule changes made by incumbent whites. Such changes are intended to prevent duly elected minority representatives from wielding any actual legislative power once they take office. ³⁵ In Texas, for example, the first Latina ever elected to a local school board in that state showed up to find where once it took one vote to get an item on the agenda, now it took two. ³⁶ Similarly, newly elected black county commissioners went to work in Alabama only to find that their individual duties had been shifted to either the entire commission, voting by majority rule, or to an appointed administrator. ³⁷ This new crop of "ingenious strategies devised to enforce white supremacy," ³⁸ like their predecessors in the ballot access and vote eq-

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1422 (1991), reprinted in TYRANNY OF THE MAJORITY, *supra* note 9, at 72.

33. *Id.* (quoting 42 U.S.C. § 1973(b)).

34. *Id.* at 7-8.

35. *See id.* at 8.

36. *Id.* at 9.

37. *Id.* at 8 (citing *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 825-27 (1992)).

38. *Id.*

uity arenas, silences black voices and keeps minority interests invisible.

Because racist strategies are often procedural in execution, Guinier's solutions focus on procedure.³⁹ Her preferred solution is cumulative voting,⁴⁰ a process by which the number of votes each voter may cast depends upon the number of seats up for election. Thus, if three seats are open on the ballot, the voter has three votes. The voter may cast those votes as a bloc for one seat or split them between two or all three seats. Often, coalitions are formed between groups who then vote strategically as a bloc. This voting scheme may result in the election of minority candidates who otherwise would not have been elected had "straight" voting been the official procedure.⁴¹

Cumulative voting has often been used for a variety of elections⁴² "because it is more sensitive than simpler balloting methods to intensity of voter preference."⁴³ The idea of using cumulative voting as a remedy for racial discrimination in electoral schemes is new.⁴⁴ Yet the Equal Protection Clause guarantees fair and effective representation and commands that individuals be given an equal opportunity to participate in the voting process.⁴⁵ Cumulative voting achieves this constitutional mandate when illegal voting schemes have denied minority voters effective representation.

Another alternative Guinier "cautiously"⁴⁶ explores is supermajority voting.⁴⁷ It is important to note that Guinier's procedural suggestions are not proxies for suggested outcomes. As she explains, "[t]he purpose is not to guarantee 'equal legislative outcomes'; equal opportunity to *influence* legislative outcomes regardless of race is more like it."⁴⁸

39. *Id.* at 14.

40. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1595-96, 1632-42 (1993), reprinted in TYRANNY OF THE MAJORITY, *supra* note 9, at 123, 149-56; Guinier, *supra* note 32, at 1463, reprinted in TYRANNY OF THE MAJORITY, *supra*, at 94-95; see Guinier, *supra* note 25, at 1138-40.

41. TYRANNY OF THE MAJORITY, *supra* note 9, at 14-15.

42. Many corporations use cumulative voting to elect boards of directors. *Id.* at 15. Some local municipalities and county governments also use cumulative voting. *Id.* For example, Chilton County, Alabama, adopted cumulative voting in school board and county commission elections. *Id.*

43. CARTER, *supra* note 7, at 41.

44. *Id.*

45. *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

46. TYRANNY OF THE MAJORITY, *supra* note 9, at 16.

47. *Id.*

48. *Id.* at 14.

C. The Journey Toward Political Redemption

Lani Guinier was an outstanding candidate for Assistant Attorney General for Civil Rights but was denied the opportunity to serve her country for three principal reasons: a misrepresented paper trail, a media smear campaign, and irresponsible politics. The country needs to attract outstanding individuals to fill powerful executive branch positions. The federal government, the press, and the public should protect the country's ability to do so. Presently, the White House and the Senate encourage leading academes, who are often the nominees for these positions, to suppress their ideas in academic literature and public forums for fear that controversy will bar them from public service.⁴⁹

Even as the media distorted Guinier's ideas beyond recognition and used ugly racial code words to stir readers' deep prejudices,⁵⁰ the White House warned Guinier not to respond.⁵¹ She was never given a chance. With political strains building from other matters,⁵² President Clinton ultimately silenced Guinier by denying her a confirmation hearing.⁵³ Guinier could have set the record straight during her hearing and may have subsequently been confirmed. Similar seemingly doomed nominations have been cured in this manner, some at the same time Guinier was told to go home.⁵⁴

While debate continues to rage over what reforms should be implemented in the judicial confirmation process, the state of executive appointments is being ignored.⁵⁵ This is a mistake. We must return to the Founders' original approach to appointing Cabinet and sub-Cabinet positions—an approach rooted in the Advice and Consent Clause—representative of the hard-fought compromise in the struggle to define the separation of powers.⁵⁶

Therefore, this Comment frames a simple, realistic procedural rule reform that helps return us to a method of appointing executive branch officials consistent with both the Founders' original understanding and the first century of practice in this country. The proposal serves the bifurcated purpose of attracting good people to public ser-

49. See *infra* notes 90, 174-76, 243-46, 283-84 and accompanying text.

50. See *infra* part III.B-C.

51. See *infra* note 213 and accompanying text.

52. See *infra* part II.

53. See *infra* part IV.D.1.

54. See *infra* part V.A.1.

55. For a rare exception, see CARTER, *supra* note 7.

56. See *infra* part V.B.

vice and protecting their reputations by giving them an opportunity to rebut the portrayals offered of them by others. Implementation of this proposal will prevent other highly qualified individuals deserving of this country's consideration from getting "Guiniered"⁵⁷: Bipartisan politics and a collaborative press will not force the president to silence a nominee before giving the candidate a chance to speak for herself.

Our journey toward political redemption begins in Part II, which analyzes the political climate during the spring of 1993 and the key events that collaterally fueled President Clinton's decision to withdraw Guinier's nomination.

Part III examines Guinier's attacked writings and compares the conservative press's vicious "quota queen" accusation⁵⁸ with both Guinier's law review articles as originally published and their updated counterparts. Guinier collects the latter with new material specifically addressing her nomination experience in *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*.⁵⁹ This book is a consolation-prize rebuttal to the arguments made against her nomination. The media's pivotal collaboration in the Guinier smear campaign is then explored and criticized.

Part IV explores both the political and academic fallout endured by the Clinton Administration after withdrawing Guinier's name. The "'dumbing down of American politics,'"⁶⁰ exemplified by Guinier's silencing and the desecration of her respected legal scholarship, is discussed. The threatened relationship between legal scholarship and public service is exposed. The Senate's reaction to, and grasp of, utopian versus traditional scholarship is highlighted. Despite Boalt Hall law professor Robert Post's fascinating and helpful analysis on the impact that choice of scholarship style had on the Senate's treatment of

57. Getting "Guiniered" is more unfair than getting "borked." Opponents of nominees in both situations launch vehemently aggressive campaigns attacking the nominee's beliefs as dangerous to democracy as soon as the nomination is announced. Nominees are borked when they have the opportunity to respond to such concerns at their Senate confirmation hearings, but are nonetheless unsuccessful because they fail to persuade the Senate that confirmation is wise.

Nominees are "Guiniered" when they are denied a Senate confirmation hearing and any opportunity to respond to criticism; instead, such candidates are dumped by the President solely because of other people's characterizations of them. I thank law review member Mark Wiesenthal for coining the term "Guiniered" to describe this distinction.

58. The *Wall Street Journal* coined the phrase "quota queen" one day after Guinier's nomination. See Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12.

59. TYRANNY OF THE MAJORITY, *supra* note 9.

60. David Von Drehle, *Lani, We Hardly Knew Ye: The Lawyer Who Burned Briefly but Too Brightly for Her Own Good*, WASH. POST, June 4, 1993, at C1 (quoting Randall Kennedy, Harvard University professor of law).

Guinier,⁶¹ this Comment disputes his conclusion that she might have fared better by writing in one style rather than another. The choice of scholarship style will not thaw the chill currently felt in the academic world.

As a small denouement to Part IV, the ironic acceptance by a federal court of one of Guinier's most "controversial" voting restructuring proposals, days before her replacement was sworn in, is also noted.⁶² The court's holding illustrates the degree of distortion successfully perpetrated by the press and conservatives characterizing Guinier's work as being "out of the mainstream."⁶³

Part V then explores the consequences of silencing Guinier by first examining the differential treatment controversial predecessors and successors received. This Comment highlights the tumultuous and contemporaneous confirmation processes of Webster Hubbell, the nominee for Associate Attorney General, and Roberta Achtenberg, the nominee for Assistant Secretary for Housing and Urban Development. The obvious analogy to Judge Robert Bork's experiences is discussed, both during his successful confirmation as Solicitor General and his doomed candidacy for the United States Supreme Court. Senator Biden's self-serving compromise offer to Guinier is analyzed, as well as his hypocritical use of political office to further his version of the Constitution when confirming candidates to the United States Supreme Court. The remarks of Senator Biden on the scholarship issue are revealing and should disturb academics and anyone else interested in protecting the free flow of ideas in literature. They provide an additional illustration of why the current reform movement must encompass not only the judicial confirmation process, but also the executive one.

To identify an effective procedure, however, we must return to the most fundamental problem with the appointment process: the lack of focus on a nominee's qualifications.⁶⁴ The Senate has moved so far away from a focus on job qualifications that they appear to be almost irrelevant. A brief look is taken at what Yale law professor

61. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185 (1994).

62. Deval Patrick, who lacked a paper trail, was ultimately confirmed as Assistant Attorney General for the civil rights division and was a former colleague of Guinier's at the NAACP Legal Defense Fund (LDF). See *infra* part IV.E.

63. See, e.g., Frank J. Murray & Nancy E. Roman, *Guinier Fights As She Falls; Clinton: Choice "Has No Future"*, WASH. TIMES, June 3, 1993, at A1.

64. See CARTER, *supra* note 7, at 9, 159.

Stephen L. Carter calls the "original misunderstanding"⁶⁵ regarding the Advice and Consent Clause to emphasize the proper level of Senate inquiry into good old-fashioned qualifications.

Part VI concludes that Guinier was the right person for the job but was unjustly silenced for no other reason than to facilitate the President's own political survival. To prevent these unfortunate circumstances from repeating themselves, this Comment proposes an easily implemented procedure for confirming executive nominees to Article II, Section 2 positions. This procedure's effectiveness in ensuring outstanding candidates, and the country, a fair shot at service is illustrated by placing it in the context of two potential "cures" available for nominees who, like Guinier, suffer a loss of public respect due to the erroneous distortion of their views. Professor Carter posits these cures in his book analyzing the Guinier nomination, *The Confirmation Mess: Cleaning Up the Federal Appointments Process*.⁶⁶ Although this Author disagrees with Professor Carter over the frequency with which such cures could, or should, be relied upon, the proposed procedure makes the cures more easily available should the president or the Senate choose to avail themselves of their existence. Finally, the procedure's probable effect on both the legislative and executive branches' actions, both before and after a formal announcement is made, and its effect on the press's future coverage of nominations, is explored through hypothetical scenarios using the Guinier nomination as a backdrop.

II. THE STRESS: THE POLITICAL SCENE AT THE TIME OF LANI GUINIER'S NOMINATION

*While the people retain their virtue and vigilance, no administration, by any extreme of wickedness or folly, can very seriously injure the government in the short space of four years.*⁶⁷

President Clinton's 100th day in office⁶⁸ coincided with his nomination of Lani Guinier on April 29, 1993. The reviews were not

65. *Id.* at 11.

66. *Id.* at 168-69.

67. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 579, 588 (Roy P. Basler ed., 1946).

68. See, e.g., Ann Devroy & Ruth Marcus, *President Clinton's First 100 Days; Ambitious Agenda and Interruptions Frustrate Efforts to Maintain Focus*, WASH. POST, Apr. 29, 1993, at A1.

kind.⁶⁹ Clinton endured tremendous criticism immediately before the Guinier nomination and the days after the announcement provided no relief.⁷⁰ His own budget director, Leon Panetta,⁷¹ publicly criticized Clinton, to the Administration's acute embarrassment, by intimating that, "virtually everything President Clinton has touched has turned to mud."⁷² The gays-in-the-military issue, among others, sparked criticism from both Republicans and Democrats.⁷³ Clinton's party feared the President was moving farther left from the centrist position he campaigned on and was not really the "New Democrat" he claimed to be.⁷⁴

In addition, the White House was in disarray, partially because so many members of Clinton's staff were young and inexperienced in the ways of presidential politics.⁷⁵ The green staff was christened with the acronym "TWACS," which stands for "Twentysomethings with a

69. For an excellent source quoting the best stories from the national press, see *The Clinton Administration—First Hundred Days: 100 Down, 1,360 to Go for Clinton*, AM. POL. NETWORK, Apr. 29, 1993, available in WL, APN-HO database; *The Clinton Administration—First Hundred Days: Beat Writers and Analyzers*, AM. POL. NETWORK, *supra*; *The Clinton Administration—First Hundred Days: Voices of Dissent*, AM. POL. NETWORK, *supra*.

70. The derision directed at President Clinton was fever pitched in the days before he withdrew Lani Guinier's nomination to help staunch the flow of criticism. The *Chicago Tribune* summed up Clinton's "crimes" with the following cartoon five days before the withdrawal:

(To the tune of the "Beverly Hillary-Billies"):
 Come and listen to my story 'bout a man named Bill
 Poor President, barely kept his critics still.
 Then one day he was lookin' what to do
 When in through the door come a bumblin' crew.
 Staff, that is . . . AMATOORS (kids really).
 Well once ol' Bill used to be a moderate.
 Friends of Bill said, "move away from that."
 They said, "California is the space you wanna be."
 So he loaded up the truck and moved to Beverly.
 Hills, that is . . . movie stars . . . slick haircuts.

The Clinton Administration—White House Shuffle, AM. POL. NETWORK, June 1, 1993, available in WL, APN-HO database (quoting May 29, 1993, *Chicago Tribune* cartoon by MacNelly).

71. Leon Panetta currently serves as White House Chief of Staff.

72. John McCaslin, *Nation; Inside the Beltway*, WASH. TIMES, Apr. 29, 1993, at A6.

73. See Melissa Healy, *Gays-in-Military Agreement Near, President Says*, L.A. TIMES, May 28, 1993, at A1.

74. See Major Garrett & Ronald A. Taylor, *Panetta Quote Bares Split in Clinton Ranks; Hill Democrats Cheer Candor*, WASH. TIMES, Apr. 28, 1993, at A1.

75. Susan Page, *The Kiddie Corps; Critics Say Youthful Clinton Staff Lacks Savvy*, *Statue*, NEWSDAY, May 23, 1993, at 5.

Cause.”⁷⁶ The relentless jokes exacerbated staffer frustration with “everyone making such a fuss over the fact that they simply exist,”⁷⁷ a complaint made the day Clinton withdrew Guinier’s nomination from Senate consideration.

Clinton was also making enemies with the kind of politicians and partisan opponents who hold a grudge. During his speech at the annual White House Correspondents Dinner, Clinton joked that the *Wall Street Journal* had reported that Senate Minority Leader Robert Dole was seeking \$23 million to convert a Wichita senior center into a boathouse while opposing the stimulus package.⁷⁸ Dole was outraged, spewing that there was “‘no truth coming from a White House staff that is ill-serving the President with these sophomoric attacks. . . . If the White House wants to play hardball, I’m ready to suit up.’”⁷⁹ George Stephanopoulos, White House Communications Director, quickly issued a statement assuring that “‘[t]he President regrets the misunderstanding that may have been caused by any hyperbole in his jokes at Saturday’s White House dinner.’”⁸⁰ Clinton also directed a little Rush Limbaugh-style humor at the radio and television talk show host by joking that Limbaugh had praised Attorney General Janet Reno for standing up to U.S. Representative John Conyers during a House hearing, but “only did [so] because she was attacked by a black guy.”⁸¹ Limbaugh responded, “‘It’s not funny.’”⁸²

The *Washington Post* dished out a little free advice to the White House following these political errors: “Until Washington loosens up, the White House will simply have to be on guard. Jokes must be screened with the same care given to sub-Cabinet appointees.”⁸³

76. *TV Monitor*, AM. POL. NETWORK, June 3, 1993, available in WL, APN-HO database (quoting reporter Ira Glass on *Morning Edition* (NPR radio broadcast, June 3, 1993)).

77. *Id.*

78. William J. Eaton, *Dole Ties White House to “\$23-Million Lie”*, L.A. TIMES, May 4, 1993, at A12.

79. *Id.* (quoting Senate Minority Leader Robert Dole).

80. *Id.* (quoting George Stephanopoulos).

81. Leslie Phillips, *Limbaugh: Clinton Joke Low Blow*, USA TODAY, May 4, 1993, at 1A.

82. *Id.* (quoting Rush Limbaugh).

83. Joel Achenbach, *A Gaffe a Minute; Suddenly Humor Is No Laughing Matter*, WASH. POST, May 5, 1993, at B1.

III. THE PRESS: "QUOTA" OR CONSENSUS "QUEEN"?

A. *The Announcement*

On April 29, 1993, President Clinton nominated Lani Guinier to the position of Assistant Attorney General for Civil Rights in the Department of Justice.⁸⁴ A successful elevation to the job would have been a coming home for Guinier, who served from 1977-1981 as Special Assistant to Assistant Attorney General Drew Days III in the same Justice Department division.⁸⁵ Her record as a litigator during her tenure at the NAACP Legal Defense Fund from 1981-1988 was widely respected.⁸⁶ In seven years, she only lost two cases.⁸⁷ In 1988 she decided to tackle the world of academia and accepted a teaching position at the University of Pennsylvania School of Law.⁸⁸

She appeared to be eminently qualified to serve in the Justice Department and was the "'consensus' choice of civil rights groups."⁸⁹ But the press's obsession with her law review articles preempted any reporting or analysis of these qualifications. New York University law professor Derrick Bell would later note the irony by commenting that "the most common complaint about affirmative action is the difficulty of finding 'qualified' blacks, but in this case 'you can't imagine anybody being more qualified than Lani Guinier . . . and, suddenly, qualifications mean nothing.'"⁹⁰

B. *Christening the "Quota Queen"*

*[W]riters are always selling somebody out.*⁹¹

Despite the fact that Guinier has rejected the use of quotas in voting rights processes,⁹² Clint Bolick⁹³ was the first to smear Guinier.

84. Michael Isikoff, *Clinton Nominates 7 to Justice; Housekeeper Issue Raised*, WASH. POST, Apr. 30, 1993, at A20.

85. Von Drehle, *supra* note 60, at C1. Drew Days III currently serves as Solicitor General in the Justice Department.

86. TYRANNY OF THE MAJORITY, *supra* note 9, at 189.

87. *Id.*

88. Von Drehle, *supra* note 60, at C1.

89. Ruth Marcus, *Clinton Withdraws Nomination of Guinier; Legal Writings Controversy Doooms Choice*, WASH. POST, June 4, 1993, at A1.

90. Laurel Leff, *From Legal Scholar to Quota Queen*, COLUM. JOURNALISM REV., Sept./Oct. 1993, at 36, 41 (quoting New York University law professor Derrick Bell).

91. JOAN DIDION, *SLOUCHING TOWARDS BETHLEHEM* at xvi (1968).

92. TYRANNY OF THE MAJORITY, *supra* note 9, at 19.

93. Bolick is vice president of the conservative Institute for Justice. Nancy E. Roman, *Clinton's Court List Leans to Moderates; President Seen Trying to Avoid Fight*, WASH. TIMES, May 21, 1993, at A1.

In a *Wall Street Journal* op-ed piece headlined "Clinton's Quota Queens,"⁹⁴ Bolick characterized Guinier as an extreme left-wing activist.⁹⁵ In addition to other errors, he attributed to Guinier statements made by others. He claimed, for example, that she "decries 'fundamental flaws in our democracy,' urging that 'certain social goods—health care, day care, job training, housing—must be recognized as basic entitlements.'"⁹⁶ What she actually wrote was a recommendation to President Bush suggesting he "endorse and coordinate support for those legislative initiatives which address fundamental flaws in our democracy."⁹⁷ As examples, she cited legislation relating to voting rights,⁹⁸ such as the Universal Voter Registration Act,⁹⁹ an ultimately unsuccessful measure that had been introduced earlier that year in the Senate, and section 5 of the Voting Rights Act of 1965.¹⁰⁰ It was another author, cited in one of Guinier's footnotes, who thought the country's political agenda should include the "basic entitlements" that Bolick listed.¹⁰¹

The conservative Bolick had never read any of Guinier's writings before he received a call from Abigail Thernstrom, a fellow conservative and a political science professor at Boston University "with whom Guinier has had an extended, antagonistic debate"¹⁰² in academic journals and treatises.¹⁰³ She tipped Bolick off about Guinier's liberal perspectives.¹⁰⁴ Once he did read the articles, Bolick may have taken

94. See *supra* note 58, at A12. The other "queen" referred to was Norma Cantu, the candidate for Assistant Secretary for Civil Rights in the Department of Education. *Id.* Bolick denies any responsibility for the "Quota Queen" headline. Stephen L. Carter, *Foreword to TYRANNY OF THE MAJORITY*, *supra* note 9, at xix.

95. Bolick, *supra* note 58, at A12.

96. Leff, *supra* note 90, at 40 (quoting Bolick, *supra* note 58, at A12).

97. Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 433 (1989), reprinted in *TYRANNY OF THE MAJORITY*, *supra* note 9, at 39.

98. Guinier, *supra* note 97, at 433.

99. Equal Access to Voting Act, S. 675, 101st Cong., 1st Sess. (1989).

100. 42 U.S.C. § 1973 (1988).

101. See Guinier, *supra* note 97, at 433 n.174 (citing Charles V. Hamilton, *Foreword to THE NEW BLACK POLITICS* at xix-xx (Michael B. Preston et al. eds., 1982)). This footnote does not appear in the article as updated in Guinier's book. Guinier may have omitted this reference either to clarify that her recommendation addressed only voting rights, not social welfare entitlements, or because her view on the relevancy of the footnote had changed over time.

102. Leff, *supra* note 90, at 41.

103. See, e.g., *TYRANNY OF THE MAJORITY*, *supra* note 9, at 57, 211 n.53, 217 n.97 (citing ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987)); Abigail Thernstrom, *Guinier Miss*, NEW REPUBLIC, June 14, 1993, at 16.

104. Leff, *supra* note 90, at 41.

a little personally Guinier's criticism of the Reagan Administration's record on civil rights law enforcement—and her consequent recommendations to the Bush Administration.¹⁰⁵ As a former official in the Justice Department during Reagan's tenure,¹⁰⁶ he shared responsibility for enforcing such laws.

Not content to distort Guinier's beliefs in print, Bolick hit the airwaves and proclaimed: "Lani Guinier's writings are profoundly anti-democratic . . . [T]hey amount to a racial apartheid system." ¹⁰⁷ He also appeared on television programs such as *The MacNeil/Lehrer NewsHour*¹⁰⁸ and *Crossfire*.¹⁰⁹ By doing so, Bolick reached an even larger audience while successfully keeping the scrutiny intense and skewed. After President Clinton withdrew Guinier's name, one respected journalist concluded, "The *Wall Street Journal* and Clint Bolick really went after her and managed to kill off this nomination." ¹¹⁰

The smear campaign escalated. Columnist Paul Gigot, in an article that appeared in the *Wall Street Journal* on May 7, 1993,¹¹¹ fed on a single footnote Guinier wrote in an article published in the *Michigan Law Review*.¹¹² Guinier's article critiqued the wisdom of complacently accepting the theory of "black electoral success" as the "ultimate empowerment goal of structural reform legislation and litigation."¹¹³ One reason is that an implicit assumption in the theory—that all elected black representatives are "authentic"¹¹⁴—is not true. The Voting Rights Act provides that minorities must be afforded an equal opportunity "to elect representatives of their choice." ¹¹⁵

105. The fact that Guinier addressed her proposals to an audience that included the Bush Administration prompted Laurel Leff to remark: "What kind of 'radical extremist,' by the way, offers recommendations to the Bush administration?" *Id.* at 40.

106. Clint Bolick, *The Legal Philosophy That Produced Lani Guinier*, WALL ST. J., June 2, 1993, at A15; Leff, *supra* note 90, at 40.

107. Carter, *supra* note 94, at ix (quoting Bolick on *Morning Edition* (NPR radio broadcast)).

108. See Leff, *supra* note 90, at 38.

109. *The Clinton Administration—Lani Guinier: Left Twisting in the Wind*, AM. POL. NETWORK, June 3, 1993, available in WL, APN-HO database [hereinafter *Guinier Left Twisting*] (quoting Bolick as saying "Lani Guinier is the flip-side of David Duke" on *Crossfire* (CNN television broadcast, June 2, 1993)).

110. Leff, *supra* note 90, at 37 (quoting *Los Angeles Times* reporter David G. Savage).

111. Paul Gigot, *Hillary's Choice on Civil Rights: Back to the Future*, WALL ST. J., May 7, 1993, at A14.

112. Guinier, *supra* note 25, reprinted in TYRANNY OF THE MAJORITY, *supra* note 9, at 41.

113. *Id.* at 54.

114. *Id.* at 55.

115. *Id.* at 12.

For Guinier, the question is: "Which candidates are the representatives of choice of black or Latino voters?"¹¹⁶

Guinier identifies "two related but competing views"¹¹⁷ observers rely on to answer the question. Guinier's preferred view focuses on voting behavior: Authentic representatives are "simply those truly chosen by the people."¹¹⁸ This means that "white candidates can legitimately represent nonwhite voters if those voters elected them."¹¹⁹ Similarly, black representatives are politically authentic when they are elected by "majority-black, single-member districts,"¹²⁰ as opposed to "officials who are handpicked by the 'establishment,' or who must appeal to white voters in order to get elected."¹²¹ The former are also psychologically and culturally authentic because they are "descriptively similar to their constituents."¹²²

The second view of authenticity assumes that elected officials who simply "look like" their constituents necessarily represent those constituents' interests.¹²³ But Guinier notes that "[j]ust because a candidate is black does not mean that he or she is the candidate of choice of the black community."¹²⁴ This is because black representatives elected in majority-white jurisdictions may not have enough power to respond to their black constituents.¹²⁵ For example, assume that a black candidate is elected primarily by white voters, but a significant amount of voter support also comes from black voters. The fact that white voters constitute the majority of support may obscure the "message" black voters sent regarding the "substantive policies"¹²⁶ that caused them to vote for the black representative in the first place. Thus, the reasons a black candidate is elected are obscured from the representative's view.¹²⁷ Guinier concludes that "even where black

116. *Id.* at 12-13.

117. *Id.* at 13.

118. *Id.*

119. *Id.*

120. *Id.* at 56.

121. *Id.*

122. *Id.*

123. *Id.* at 13.

124. *Id.*

125. *Id.* at 58.

126. *Id.*

127. *Id.* Guinier notes that even if a majority of the electorate has sent a clear message, "the representative may have difficulty translating this message into substantive policy," because she (1) cannot "persuade her legislative colleagues"; (2) "feel[s] obliged to support initiatives opposed by those who elected her"; (3) is "pressure[d by] constituent groups"; or (4) her "incumbency . . . so insulate[s] her from electoral pressures that she feels little need to respond to constituent demands." *Id.* at 219 n.108.

support provides a critical margin, successful black candidates in majority-white electorates may not necessarily feel obligated to black voters.”¹²⁸

The footnote which Gigot focused on characterized Virginia Governor Douglas Wilder¹²⁹ as a representative who faces this limitation: “[G]iven the narrow margin of victory, Wilder’s ability to govern on other issues important to the black community is considerably vitiated.”¹³⁰ This was not the first time Wilder’s connection to his black “constituency” was analyzed and doubted in the literature. Just two footnotes up, Guinier quoted a *National Journal* article theorizing that Wilder might “‘become less accessible and less accountable politically to blacks whose demands will be competing for attention against those of Virginia’s white-majority constituency—and those of Wilder’s large campaign contributors.’”¹³¹ Even Wilder himself feels he is “‘a governor who happens to be black, not a black who happens to be governor.’”¹³²

Because of the limitations the electoral system can inadvertently impose upon black representatives, Guinier cautions that while “authentic black representation is [not] meaningless,” it “is a limited empowerment tool.”¹³³ Some members of the press, however, transformed this exploration of the authenticity assumption into the charge that “Guinier called Doug Wilder an Uncle Tom.”¹³⁴ The fact that other commentators shared her perspective, which was well represented in the literature on the subject,¹³⁵ and that Wilder’s own comments validated her concerns, was apparently irrelevant to people like Gigot.

128. *Id.* at 58 (footnote omitted).

129. Douglas Wilder, elected in 1989, is Virginia’s first black governor. B. Drummond Ayres, Jr., *Wilder’s Flier*, N.Y. TIMES, Jan. 12, 1992, § 6 (Magazine), at 31, 32.

130. Guinier, *supra* note 25, reprinted in TYRANNY OF THE MAJORITY, *supra* note 9, at 219 n.110.

131. *Id.* at 219 n.108 (quoting James A. Barnes, *Into the Mainstream*, NAT’L J., Feb. 3, 1990, at 262, 265 (1990) (interviewing Howard University professor Ron Walters)).

132. *Id.* at 219 n.110 (quoting B. Drummond Ayres, Jr., *Virginia Governor Baffles Democrats with Crusade for “New Mainstream”*, N.Y. TIMES, Oct. 14, 1990, at A22).

133. *Id.* at 58.

134. Leff, *supra* note 90, at 40. For additional articles distorting Guinier’s authenticity theory, see Thernstrom, *supra* note 103, at 16; George F. Will, *Sympathy for Guinier*, NEWSWEEK, June 14, 1993, at 78.

135. See TYRANNY OF THE MAJORITY, *supra* note 9, at 222 n.125 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 135 (1980)); Chandler Davidson, *Minority Vote Dilution*, in MINORITY VOTE DILUTION 1, 5-10 (Chandler Davidson ed., 1984).

C. *The Rest: Misquoting the Alleged Quota Queen*

And the betrayers of language
 . . . and the press gang
And those who had lied for hire;
the perverts, the perverters of language,
 the perverts, who have set money-lust
Before the pleasure of the senses;
howling, as of a hen-yard in a printing house,
 the clatter of presses,
the blowing of dry dust and stray paper,
*foetor, sweat, the stench of stale oranges . . .*¹³⁶

The politically loaded quota queen label was too catchy for other publishers to resist, and soon it appeared in the *Los Angeles Times*, *Newsweek*, and *U.S. News & World Report*, just to name a few.¹³⁷ Professor Stephen L. Carter later called the press "lazy or incompetent"¹³⁸ for carrying out the conservative smear campaign begun by the *Wall Street Journal* and continued by Stuart Taylor. Taylor, a columnist for the *American Lawyer*, was one of the few people who actually read Guinier's articles.¹³⁹ Unfortunately for the public, Taylor chose to distort her work, rather than accurately report it.¹⁴⁰

Newsweek's first article on the Guinier nomination boasted the title, "Crowning a 'Quota Queen'?"¹⁴¹ The author justified his aping of the phrase by noting "it wasn't in *Newsweek's* voice"¹⁴² but rather, "'around town.'"¹⁴³ Also "around town" and reprinted without independent research and analysis were specific law review passages quoted by Clint Bolick and others.¹⁴⁴

Why did these media powerhouses indulge in such tabloid journalism techniques? *The Washington Post's* Michael Isikoff offered the excuse that he was covering the controversy, not the articles, even

136. EZRA POUND, *THE CANTOS* (1-95) XIV, at 61-62 (1956).

137. Leff, *supra* note 90, at 38.

138. Carter, *supra* note 94, at x.

139. Leff, *supra* note 90, at 40 (citing *New York Times* reporter David Margolick). Stuart Taylor himself attests to "receiv[ing] several frantic calls from reporters asking for a quickie summary of Guinier's views." *Id.*

140. See Stuart Taylor, Jr., *DOJ Nominee's "Authentic" Black Views*, *LEGAL TIMES*, May 17, 1993, at 23 (erroneously arguing that Guinier proposes guaranteed seats and quotas to achieve proportional representation).

141. See Bob Cohn, *Crowning a "Quota Queen"?*, *NEWSWEEK*, May 24, 1993, at 67, 67.

142. Leff, *supra* note 90, at 38 (quoting *Newsweek* reporter Bob Cohn).

143. *Id.* (quoting *Newsweek* reporter Bob Cohn).

144. *Id.*

though he later admitted he did not provide balanced coverage of Guinier's views on the Voting Rights Act.¹⁴⁵ David G. Savage, a reporter for the *Los Angeles Times*, revealed his colleagues' reactions to the Guinier quotes at that time as "'we know this is about quotas.'" ¹⁴⁶

The knee-jerk jump to characterizing Guinier, a black woman, as a proponent of a reverse discrimination quota system was, in Savage's opinion, "'an attempt to fit Guinier into a preconceived view of what counts in debates about race.'" ¹⁴⁷ Georgetown law professor Mari Matsuda compared "the deeply racist and misogynist underpinnings of the pejorative label 'quota queen'" with "its linguistic predecessor, 'welfare queen.'" ¹⁴⁸ Both "evoke[] cultural stereotypes with the specific intent of substituting kneejerk prejudice for critical thought." ¹⁴⁹ The Senate, Matsuda posits, was afraid to question Guinier lest the ghost of Anita Hill return to haunt them, and so some pressured Clinton to drop her—"as though the lesson learned from their abysmal failure in the Clarence Thomas hearings was never to deal publicly with black women again." ¹⁵⁰ The result is that "an African-American woman is a political hot potato [Capitol Hill] won't touch." ¹⁵¹ University of Southern California law professor Erwin Chemerinsky echoed this sentiment by speculating, "'If she wasn't a black woman I'm not sure it would have come out that way.'" ¹⁵² Dean Geoffrey Stone of the University of Chicago was less generous in his appraisal, calling the media coverage a "'cartoon.'" ¹⁵³

The press coverage would have better served the public's interests by focusing on Guinier's qualifications and background. But only *The Washington Post* published a detailed resume of her career as a litigator—after her nomination was withdrawn.¹⁵⁴ Independent research on the subject matter of her writings, the Voting Rights Act of 1965,¹⁵⁵ and her goal, effectuating more effective minority representation under it, would have unearthed a key fact: Guinier's proposals

145. *Id.* (quoting *Washington Post* reporter Michael Isikoff).

146. *Id.* at 39 (quoting *Los Angeles Times* reporter David G. Savage).

147. *Id.* (quoting *Los Angeles Times* reporter David G. Savage).

148. Mari Matsuda, *The Baiting of Lani Guinier*, N.Y. *NEWSDAY*, June 7, 1993, at 9.

149. *Id.*

150. *Id.*

151. *Id.*

152. Leff, *supra* note 90, at 39 (quoting University of Southern California Law Center professor Erwin Chemerinsky).

153. *Id.* at 38 (quoting University of Chicago Law School Dean Geoffrey Stone).

154. See Von Drehle, *supra* note 60, at C1.

155. 42 U.S.C. § 1973 (1988).

were already the law. For example, one of her key proposals, cumulative voting,¹⁵⁶ was approved by both the Bush and Reagan Administrations pursuant to the Voting Rights Act "to protect the rights of racial- and language-minority voters."¹⁵⁷ The Reagan Administration likewise approved supermajority rules as a remedy in places like Mobile, Alabama.¹⁵⁸ Guinier's proposals thus reflected her deep commitment to enforcing, not undermining, the nation's civil rights statutes.¹⁵⁹

Rather than reporting these facts, *U.S. News and World Report* ran a story in which the reporter cribbed portraits of Guinier drawn by other journalists and then concluded:

These are very strange views for a civil-rights chief to have. . . . [I]t is safe to say that the Justice Department's division has not yet come under the sway of anyone who wants to toss out America's electoral system, replace it with race-based proportional representation and then, perhaps, settle down to splinter-group politics in which each tribe has its own political party.¹⁶⁰

To prevent the derailment of the next nominee with a paper trail who happens to "catch[] the eye of an activist opponent"¹⁶¹ in the press, freelance journalist Laurel Leff offers a simple solution. First, reporters should decide whether the nominee's philosophical views will impact their performance in the job.¹⁶² Second, reporters need to do their own homework rather than rely on their colleagues. This means they should read the articles in their entirety to determine their content, with the help of scholars if necessary.¹⁶³ Third, reporters must then present a balanced portrait of the nominee's views, not just

156. See *supra* notes 40-45 and accompanying text.

157. TYRANNY OF THE MAJORITY, *supra* note 9, at 15. In addition, since 1969 the Justice Department, under various presidents, has rejected as discriminatory over 100 sets of voting rules changes submitted by states. *Id.* at 9. Justice Clarence Thomas agrees with Guinier as well. See *Holder v. Hall*, 114 S. Ct. 2581, 2601-02 (1994) (Thomas & Scalia, JJ., concurring) (citing Guinier approvingly and asserting that "cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race.").

158. TYRANNY OF THE MAJORITY, *supra* note 9, at 17.

159. CARTER, *supra* note 7, at 42, 52.

160. John Leo, *A Controversial Choice at Justice*, *U.S. NEWS & WORLD REP.*, May 17, 1993, at 19, 19.

161. Leff, *supra* note 90, at 41.

162. *Id.*

163. *Id.*

the controversial aspects.¹⁶⁴ Finally, reporters must resist the impulse to perpetuate “code words,”¹⁶⁵ like the quota queen label, so they can “facilitate a real discussion about race”¹⁶⁶ or other topics of high-intensity national interest. This Author’s proposal, outlined below,¹⁶⁷ will most fully accomplish its purpose—filling executive branch positions with qualified, dedicated people, with or without paper trails in tow—when the press adheres to these simple guidelines.

IV. THE TEST

*I hear many condemn these men because they were so few.
When were the good and the brave ever in a majority?*¹⁶⁸

A. The Eleventh Hour Shutout

President Clinton ineffectively tried to assuage doubts that Guinier would not use the position as a vehicle to dismantle “one person-one vote” principles by stating: “I think she has every intention of following the law of the land as Congress writes it.”¹⁶⁹ But prior accusations from both Republicans and Democrats—that Clinton was not the “New Democrat” he said he was during his campaign¹⁷⁰—resurfaced now with regard to the Guinier nomination. One Democratic consultant opined, “[Clinton’s] moderate positions on cultural issues [were] a large reason why he was elected. When he [said] the words ‘new Democrat’ that’s what people heard. But his actions have run counter to the rhetoric of [his] campaign on these cultural issues.”¹⁷¹ An op-ed piece first mangled Guinier’s minority veto alternative by asserting “Guinier wants her caucus of ‘authentic blacks’ to have the right to kill any bill it doesn’t like,”¹⁷² and then concluded that “Guinier’s nomination goes well beyond Clinton misrepresenting

164. *Id.*

165. *Id.*

166. *Id.*

167. See *infra* part VI.

168. HENRY DAVID THOREAU, *A Plea for Captain John Brown*, in *GREAT SHORT WORKS OF HENRY DAVID THOREAU* 270, 287 (Wendell Glick ed., 1982) (1859).

169. *Excerpts from Clinton’s News Conference in the Rose Garden*, N.Y. TIMES, May 15, 1993, at A8 (quoting President Clinton).

170. See *supra* text accompanying notes 73-74.

171. Ronald Brownstein, *Nomination May Add Race Issue to Democrats’ Schism*, L.A. TIMES, May 26, 1993, at A1, A21 (quoting Democratic consultant Brian Lunde).

172. *The Clinton Administration—Job Board: Black Leaders Question Hubbell’s Sincerity*, AM. POL. NETWORK, May 11, 1993, available in WL, APN-HO database (quoting May 10, 1993, N.Y. Post editorial).

himself during the national campaign by pretending to oppose racial quotas in order to win over the mainstream Democrats."¹⁷³

Newspaper reporters also noted Senate Minority Leader Robert Dole's apparent "payback" mentality by extensively quoting his promise that Guinier's paper trail would be closely scrutinized "just as Robert Bork had a paper trail that finally did him in because of the Democrats' opposition."¹⁷⁴ Senate Judiciary Committee member Orrin Hatch echoed the warning, promising that Guinier would not enjoy the "mild treatment"¹⁷⁵ that Webster Hubbell had received during his recently concluded confirmation hearings for Associate Attorney General.¹⁷⁶ But *Newsweek* theorized that any payback strategy could backfire because a Republican attack on another black woman would stir "the ghost of Anita Hill."¹⁷⁷

Several weeks later the White House finally began "considering tactics to blunt the growing criticism in Congress."¹⁷⁸ One option was a Clinton-Guinier appearance "in some public forum in which [the President] would emphasize his support and make it clear that she would operate under the control" of himself and Attorney General Janet Reno.¹⁷⁹ This was an approach Clinton had used before.¹⁸⁰ Instead, on May 27 White House Congressional Liaison Howard Paster issued a letter to all senators urging that Guinier had been a victim of an "unfair and extreme attack,"¹⁸¹ openly fretting that "[w]e recognize that it is sometimes difficult to turn people away from big lies that gather momentum."¹⁸² Still, the letter was meant to address the "substantial misinformation"¹⁸³ about her views that had been per-

173. *Id.*

174. *The Clinton Administration—Names and Faces: Guinier Hearings to Be Full of "Fireworks"*, AM. POL. NETWORK, May 17, 1993, available in WL, APN-HO database (quoting Senate Minority Leader Robert Dole).

175. *The Clinton Administration—Hubbell: Not Caught in Any Webb; "Breezes" Through*, AM. POL. NETWORK, May 20, 1993, available in WL, APN-HO database [hereinafter *Hubbell: Not Caught in Any Webb*] (quoting Senator Orrin Hatch).

176. *Id.*; see *infra* notes 323-34.

177. Cohn, *supra* note 141, at 67 (citing unidentified Senate source).

178. Neil A. Lewis, *Clinton Faces Battle over a Civil Rights Nominee*, N.Y. TIMES, May 21, 1993, at B9.

179. *Id.* During this time, Benjamin Chavis, executive director of the NAACP, sought, and was given, assurances by Clinton that the "nomination [was] solid." Murray & Roman, *supra* note 63, at A1 (quoting Benjamin Chavis).

180. See *infra* text accompanying note 326.

181. John M. Broder, *White House Seeks to Save Rights Nominee*, L.A. TIMES, May 27, 1993, at A18 (quoting White House Congressional Liaison Howard Paster).

182. *Id.* (quoting White House Congressional Liaison Howard Paster).

183. *Id.* (quoting White House Congressional Liaison Howard Paster).

petrated and "dispel rumors that the White House was considering withdrawing the nomination in the face of attacks from conservative legal groups and questions from some Senate moderates about her ideas on quotas, voting rights and racial preferences."¹⁸⁴

The *Washington Times* simultaneously reported that no date had yet been set for the hearings, but that sources said White House strategy included "tim[ing] its long-awaited nomination of a new Supreme Court justice with the Guinier hearings in an effort to divert attention away from her."¹⁸⁵ In an effort to keep the nomination alive, supporters belatedly began voicing their support.¹⁸⁶ Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, tried to steer the focus back onto Guinier's record: "Throughout the country, she is acknowledged as one of the finest and most successful civil rights litigators."¹⁸⁷ Even some of her detractors, like the American Jewish Congress, called only for "careful scrutiny"¹⁸⁸ rather than premature withdrawal before the still-unscheduled Senate hearing. It seemed Guinier's fate would "come down to her performance at her confirmation hearing, in June or July,"¹⁸⁹ after all.

184. *Id.*

185. Jerry Seper, *Guinier Backers, Foes Speak Out; Some Find Her Rights Stance Extreme*, WASH. TIMES, May 27, 1993, at A1.

186. Supporters included: Wade Henderson, Director of the NAACP's Washington office; Elaine Jones, NAACP Legal Defense Fund; Mario Moreno, Mexican-American Legal Defense and Education Fund; and Richard Womack, AFL-CIO. *Id.* In addition, only five of the 185 groups in the Leadership Conference on Civil Rights opposed Guinier's nomination. See *Correction*, WASH. TIMES, May 28, 1993 (final edition).

187. Carolyn Skorneck, *Guinier Gets Support of Coalition: Calling Attacks on Her Unfair, the White House Said It Would Press On*, PHILA. INQUIRER, May 27, 1993, at A13 (quoting Ralph G. Neas).

188. Seper, *supra* note 185, at A1 (quoting American Jewish Congress President Robert K. Lifton).

189. Lewis, *supra* note 178, at B9. One natural question is why Guinier's hearing date was still not set at this point. See Seper, *supra* note 185, at A1. After all, other nominees battling attacks just as contentious had their hearings scheduled quickly and were allowed to testify. See *infra* notes 314-31 and accompanying text. What difference can testifying make to a controversial nomination naysayers predict is doomed? The best recent example is undoubtedly Justice Clarence Thomas. See *infra* notes 434-38 and accompanying text. In the executive office context, Webster Hubbell, who went through the nomination process for the position of Associate Attorney General at approximately the same time as Guinier, won "top reviews" from the committee after he testified. Jerry Seper, *Confirmation of Top 3 at Justice Seems Assured*, WASH. TIMES, May 21, 1993, at A4; see *infra* notes 323-31 and accompanying text. Before he testified, press reports and senatorial comments regarding Hubbell's membership in a formally whites-only golf club had been extremely critical and ominously negative. See *infra* part notes 325-31 and accompanying text.

But a few days later, predictions on Guinier's future turned pessimistic.¹⁹⁰ Too much damage had been done. She had become "the Robert H. Bork of the left"¹⁹¹—with a difference: Lani Guinier would not get a hearing.

B. The Muzzling of Guinier

*[I]f I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country.*¹⁹²

The Clintons and Lani Guinier had been close friends since their days at Yale Law School.¹⁹³ As with some other friends Bill Clinton had nominated to Cabinet posts in his first term,¹⁹⁴ Guinier's nomination had sparked controversy. Clinton thus faced a choice he had confronted before: continue to support Guinier's nomination and face a "bruising fight in the Senate,"¹⁹⁵ or turn his back on her and come "under intense fire from civil rights groups and women's activists who will accuse him of buckling under pressure."¹⁹⁶ The press continued to report that Hillary Rodham Clinton "is believed to be [her] strong-

190. The *Wall Street Journal* could hardly contain its glee: "As the administration struggles to right itself, an early casualty may be Lani Guinier." Jeffrey H. Birnbaum & Michael K. Frisby, *Travel Office Mess, Other Blunders Hurt President on Eve of House Budget Vote*, WALL ST. J., May 26, 1993, at A3. Other predictions were made slightly tongue-in-cheek. Tim Russert said, "My guess is you are going to see [Clinton] move dramatically to be the New Democrat change agent. . . . My guess is that he will pull back on the nomination of Lani Guinier. . . . And if you're a white moderate judge, you probably got a pretty good chance to be on the Supreme Court this week." *The Clinton Administration—Job Board: Lani Too Controversial? How About Dagmar?*, AM. POL. NETWORK, May 26, 1993, available in WL, APN-HO database (quoting *NBC News* Washington bureau chief Tim Russert on *Today* (NBC television broadcast, May 26, 1993)).

191. David G. Savage, *Paper Trail Could Block Nominee for Justice Post*, L.A. TIMES, May 22, 1993, at A1.

192. E.M. FORSTER, *TWO CHEERS FOR DEMOCRACY* 78 (1951).

193. Marcus, *supra* note 89, at A1. The Clintons also attended Guinier's wedding in 1986 at Martha's Vineyard, *id.*, where the President would return for a vacation shortly after he withdrew her nomination, Mary Ann French, *The Vineyard's Oh-So-Cozy Allure*, WASH. POST, Aug. 19, 1993, at C1.

194. See *infra* notes 323-31 and accompanying text.

195. David Lauter, *Aides Say Clinton May Drop Rights Nominee*, L.A. TIMES, June 2, 1993, at A1.

196. *Id.* at A12. Although perhaps this last possibility would have been welcomed at the White House, as at least one Clinton adviser reportedly confessed, "it wouldn't hurt right about now to have some liberals screaming at Clinton." *The Clinton Administration—Guinier: Lani, We Hardly Knew Ye*, AM. POL. NETWORK, June 2, 1993, available in WL, APN-HO database (quoting news correspondent Jim Miklaszewski on *Today* (NBC television broadcast, June 2, 1993)).

est supporter,"¹⁹⁷ and that Janet Reno continued to endorse enthusiastically her nomination.¹⁹⁸ White House aides told reporters a slightly different story—that "Clinton, noted for his reluctance to cause pain to others, has not made up his mind to drop [Guinier]."¹⁹⁹ Nevertheless, aides "clearly were sending public messages to Guinier and her supporters that the nomination had become too hot and that she should pull out."²⁰⁰

Guinier was undeterred. Her supporters had finally organized and were calling on the press and interest groups to meet and interview her.²⁰¹ In addition, backers "were starting to denounce the White House for having failed to mount a proper defense of Guinier in the first place and for suggesting that the nomination be abandoned before Guinier has had [a] full opportunity to defend herself."²⁰² Some fingers pointed at White House Counsel Bernard Nussbaum,²⁰³ previously accused of botching the Zoe Baird and Kimba Wood nominations.²⁰⁴ Nussbaum allegedly gave the President the green light to announce the nomination, despite the fact that some aides sounded a warning signal about Guinier's work.²⁰⁵ White House infighting spurred the nomination on. The individuals expressing concern were former employees of Senate Democrats who feared controversy of

197. Neil A. Lewis, *Senate Democrats Urge Withdrawal of Rights Nominee*, N.Y. TIMES, June 2, 1993, at A1.

198. *See id.*

199. Lauter, *supra* note 195, at A1.

200. *Id.*

201. *Id.* On the Capitol Hill side, Guinier paid courtesy calls to several senators with some positive results. Lewis, *supra* note 197, at A1. For example, Senator Patrick J. Leahy, a member of the Judiciary Committee, met with Guinier and was so "impressed with her explanations," that his reservations about her evaporated. *Id.* (quoting Senator Patrick Leahy). He added that Guinier should be given the opportunity to share her explanations with everyone before a committee hearing. *Id.*

But it was too late. Some Senate Democrats had already told the White House "that it must withdraw the Guinier nomination because she was likely to win approval from only a small minority of the 18 members of the Senate Judiciary Committee." *Id.* Later, Howard Paster as executioner would tell Guinier that "many senators were telling the White House something they weren't always willing to tell [her] to her face: that they couldn't vote to confirm her. . . . But she didn't get the hint." Birnbaum & Davidson, *supra* note 3, at A16.

202. Lauter, *supra* note 195, at A1.

203. *Id.* at A12. Nussbaum admits he miscalculated the Guinier nomination by "assuming that any difficulties posed by her academic writing would be outweighed by her record as a civil rights litigator." David Margolick, *At the Bar; An All-Star New York Lawyer Disputes the Idea That He's Become a White House Bumbler*, N.Y. TIMES, June 11, 1993, at A26.

204. Margolick, *supra* note 203, at A26.

205. Cohn, *supra* note 2, at 27.

any kind; therefore, the objectivity of these insiders was doubted.²⁰⁶ After Administration lawyers and outside experts read Guinier's work, Nussbaum told Clinton that his friend " 'had written some articles, but they wouldn't pose a problem.' " ²⁰⁷

Ironically, members of the press began pointing fingers at each other:

In what might be called a conservative answer to "Borking," a volley launched by columnist Paul Gigot and conservative legal scholar Clint Bolick on the editorial page of the *Wall Street Journal* has stripped her complex, ponderous writings of their context and has downright distorted what's left, all to make [Guinier] sound like a flaming radical who intends to turn America's voting system on its head.²⁰⁸

Another press member felt Guinier had been "the target of the most effective smear campaign seen in Washington since Joe McCarthy's day."²⁰⁹ The press, perhaps seeking absolution, also urged Clinton to give Guinier a chance to speak at a Senate hearing: "Guinier's bad ideas outweigh the good ones, but so what? They are serious. Why not give them a hearing? . . . It would be an opportunity to debate the nature of civil rights and what government has done to promote them. That's a debate to be welcomed, not feared."²¹⁰

C. *The Battle to Be Heard*

*"I'm trying to play by the rules. . . .
They keep changing them."*²¹¹

Guinier, desperately trying to salvage her nomination, appeared on *Nightline* on the eve of her withdrawal,²¹² despite the White House's request that she remain silent.²¹³ But instead of discussing

206. *Id.*

207. *Id.* (quoting unidentified White House aide).

208. Clarence Page, *The Smearing of Lani Guinier*, CHI. TRIB., May 30, 1993, at A3.

209. Anthony Lewis, *Abroad at Home; Anatomy of a Smear*, N.Y. TIMES, June 4, 1993, at A31.

210. *Don't Withdraw Lani Guinier*, WASH. TIMES, June 2, 1993, at G2.

211. Michael Putzel, *Rights Pick Withdrawn; Clinton Says He Lacked Data on Guinier*, BOSTON GLOBE, June 4, 1993, at A1 (quoting Guinier).

212. Lewis, *supra* note 4, at A1.

213. *Id.* One White House official explained, " 'She wanted to go on [television]. . . . The general rule at the White House is that you don't go on television until you are confirmed.' " *Id.* (quoting unidentified White House official).

Guinier revealed, after her nomination was withdrawn, that the White House asked her " 'not to speak to the press, not to respond to these criticisms as part of the process.

her views, Ted Koppel repeatedly asked whether the White House had pressured her to withdraw.²¹⁴ She finally replied, "I, again, am here to talk about who I am, and I think that's what the American people would like to hear."²¹⁵ She made her case eloquently, stressing, "Judge Bork was given the opportunity to express his views before the Senate Judiciary Committee. . . . I would like that same opportunity."²¹⁶

Unfortunately, some felt "her self-defense came a couple of days too late."²¹⁷ Also tardy were public pleas by others asking the President to stick by Guinier. For example, on the day Jesse Jackson assured Guinier supporters that "[w]e're urging [President Clinton] to stand tall on an excellent nomination,"²¹⁸ Clinton withdrew her nomination. Likewise, many commentators who believed that withdrawing Guinier's nomination would be a political mistake only spoke out on the day of the President's announcement.²¹⁹

D. The Trouble with Getting "Guiniered"

1. Political fallout

*"She wasn't borked, she was Clintoned."*²²⁰

That was the administration's policy.' " *The Clinton Administration—Clinton and Blacks: Deep Re-evaluation Time*, AM. POL. NETWORK, June 11, 1993, available in WL, APN-HO database [hereinafter *Deep Re-evaluation Time*] (quoting Guinier during interview on *PrimeTime* (ABC television broadcast, June 10, 1993)).

214. Murray & Roman, *supra* note 63, at A1.

215. Guinier *Left Twisting*, *supra* note 109 (quoting Guinier on *Nightline* (ABC television broadcast, June 2, 1993)).

216. *Id.* (quoting Guinier on *Nightline* (ABC television broadcast, June 2, 1993)).

217. *Id.* (quoting *Good Morning America* (ABC television broadcast, June 3, 1993)).

218. Lewis, *supra* note 4, at A1 (quoting Jesse Jackson).

219. For example, *The Washington Post* predicted: "Clinton, were he to abandon this nomination at this preliminary stage, would appear not as a born-again centrist but as a president who doesn't know his own mind and runs from trouble." *The Guinier Nomination*, WASH. POST, June 3, 1993, at A24. *National Public Radio's* Nina Totenberg warned of potential backlash: "If, as now seems likely, the president pulls the plug, he is sending a signal he'll cave in any time there's pressure, and he's alienating perhaps the most loyal part of his coalition until now, the civil rights groups." *Guinier Left Twisting*, *supra* note 109 (quoting Nina Totenberg on *Morning Edition* (NPR radio broadcast, June 3, 1993)). U.S. Civil Rights Commission's Mary Frances Berry raised the character issue: "If for some political reasons he decided to back away, then it would raise serious questions about Bill Clinton's character. What kind of person fails to support his nominee? Can other people count on Bill Clinton to support them when times get tough?" *David Lauter & Sam Fulwood III, Clinton to Seek Senate Consultation on Justice Nominee*, L.A. TIMES, June 3, 1993, at A10 (quoting Mary Frances Berry).

220. Summary: *TV Soundbite*, AM. POL. NETWORK, June 7, 1993, available in WL, APN-HO database (quoting GOP strategist William Bennett during his appearance on *Inside Politics* (CNN television broadcast, June 4, 1993)).

On June 3, 1993, President Clinton withdrew Lani Guinier's nomination for Assistant Attorney General for the civil rights division.²²¹ Calling the fiasco the "worst day of his presidency,"²²² he explained,

"[a]t the time of the nomination, I had not read her writings. In retrospect, I wish I had. . . . They clearly lend themselves to interpretations that do not represent the views that I expressed on civil rights during my campaign . . . even though there is much in them with which I agree. I have to tell you that had I read them before I nominated her, I would not have done so. . . . She has been subject to a vicious series of willful distortions on many issues, including the quota issue. And that has made this decision all the more difficult. . . . And I want all of you to know that if this nomination could be fought out on her character or her record as a civil rights lawyer, I would stay with it to the end It is not the fear of defeat that has prompted this decision. It is the certainty that the battle would be carried on a ground that I could not defend.

. . . .

. . . The problem is that this battle will be waged based on her academic writings."²²³

Vice President Albert Gore, appearing on *Nightline* that evening, denied that the decision was politically motivated in any way.²²⁴

But although the Administration could deny that politics played a part in the decision, it could not deny the adverse political consequences following Clinton's withdrawal announcement. Black political groups were infuriated over Clinton's dumping of Guinier. Black leaders stirred up memories of Sister Souljah and Jesse Jackson's treatment during the presidential campaign.²²⁵ The criticism came fast and furious: "Any time Captain Marshmallow's political boat

221. Lewis, *supra* note 209, at A31.

222. Cohn, *supra* note 2, at 28.

223. *Transcript of President Clinton's Announcement*, N.Y. TIMES, June 4, 1993, at A19 (quoting President Clinton).

224. *The Clinton Administration—Lani Guinier: It's All Over but the Shouting*, AM. POL. NETWORK, June 4, 1993, available in WL, APN-HO database [hereinafter *It's All Over but the Shouting*] (citing Vice President Gore's statement on *Nightline* (ABC television broadcast, June 3, 1993)).

225. *Deep Re-evaluation Time*, *supra* note 213 (citing June 11, 1993, N.Y. Daily News interview with U.S. Representative Edolphus Towns).

runs into stormy waters, it looks like he will toss African-American cargo overboard."²²⁶

One group within the Congressional Black Caucus wanted to " 'make the President crawl and beg for mercy.' "²²⁷ In an article comparing Guinier with Secretary of Commerce Ron Brown,²²⁸ Ron Walters, chair of Howard University's Political Science Department and Jesse Jackson advisor, predicted that if Clinton did not " 'stick by Ron Brown, it will be politically untenable for [him].' "²²⁹ Congressman Craig Washington issued an ominous warning to President Clinton: " 'I've been out there for the [P]resident on some things when I've been asked to do it because I thought it was right. But don't come looking, and don't come calling, and don't count on my vote from now on.' "²³⁰

NAACP Executive Director Benjamin Chavis focused blame on the Senate Democrats as well: " 'What is the problem? . . . The problem is race. It is a litmus test for America. I want to place the blame where it belongs. I think that the Senate Democrats don't have the stomach to stand up to those right-wing Republicans.' "²³¹

For many "[t]he specter of Anita Hill loom[ed] large in this process,"²³² as well. One parallel was the shutout and lack of support both women suffered on Capitol Hill during their hours of need. After Guinier was officially dumped, she finally revealed that Clinton did not speak to her from the time she was nominated until the White

226. Barbara Reynolds, *Guinier's Supporters Could Mutiny on Clinton's Ship*, USA TODAY, June 11, 1993, at 13A.

227. Sam Fulwood III, *Congressional Black Caucus Turns Up Heat on Clinton*, L.A. TIMES, June 11, 1993, at A1, A16 (quoting unidentified source close to Caucus).

228. Ron Brown was then under investigation for allegedly receiving funds from Vietnamese business executives and other illegal activities. David Johnston, *Inquiry on Commerce Secretary Finds Vietnam Bank Account Plan*, N.Y. TIMES, Oct. 2, 1993, at A7.

229. Susan B. Garland, *A Dilemma Called Ron Brown*, BUS. WK., Oct. 11, 1993, at 32, 32 (quoting Ron Walters).

230. *The Clinton Administration—Lani Guinier: Firestorm from Civil Rights, Women's Groups*, AM. POL. NETWORK, June 4, 1993, available in WL, APN-HO database (quoting Rep. Craig Washington on *NBC Nightly News* (NBC television broadcast, June 3, 1993)).

231. Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993, at A1 (quoting Benjamin Chavis).

232. Michael Putzel, *Rights Nominee Digs in As Clinton Backs Off; Justice Dept. Choice Demands a Hearing*, BOSTON GLOBE, June 3, 1993, at A1; see also Ruth Marcus & Michael Isikoff, *Administration Leaves Guinier in Limbo; Clinton May Withdraw Name; Nominee Presses for Senate Hearing*, WASH. POST, June 3, 1993, at A1 (women's groups compare treatment of Guinier with that of Anita Hill); Marcus, *supra* note 89, at A1 (civil rights groups compare treatment of Guinier with that of Anita Hill).

House meeting where he made his decision to withdraw her name.²³³ Even then, he did not extend her the routine formality of first asking her to withdraw.²³⁴ Later asked if she felt betrayed, Guinier stated with characteristic grace, "I feel that he made the wrong decision."²³⁵ As for her grade on Clinton's civil rights agenda, she said, "I think that we're still waiting for him to hand in his homework."²³⁶

The Washington Post said the White House "violated one of the cardinal rules for any big confirmation: define your nominee before the opposition does it for you."²³⁷ Guinier agreed: "I wouldn't vote for me either if all I knew about me was what I had read in the newspaper."²³⁸ Ironically, Judge Bork, who probably got better treatment from his foes, sympathized with Guinier: "If it weren't for the suffering that [she] went through, the thing would be a comedy."²³⁹

2. The fallout from academia

*If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*²⁴⁰

a. the impact of race

As Professor Stephen L. Carter said, "scholarship is a conversation."²⁴¹ Scholars try out theories in print partly to "provoke a re-

233. *Deep Re-evaluation Time*, *supra* note 213 (reporting Guinier interview on *PrimeTime* (ABC television broadcast, June 10, 1993)). Deputy White House Chief of Staff Roy Neel admitted that "[t]he President ha[d] not talked to Miss Guinier." *Guinier Left Twisting*, *supra* note 109 (quoting Roy Neel on *Today* (NBC television broadcast, June 3, 1993)).

234. *Deep Re-evaluation Time*, *supra* note 213 (reporting Guinier interview on *PrimeTime* (ABC television broadcast, June 10, 1993)).

235. *Id.* (quoting Guinier during interview on *PrimeTime* (ABC television broadcast, June 10, 1993)).

236. *National Briefing—Civil Rights: March Speakers Note Clinton's Absence*, AM. POL. NETWORK, Aug. 30, 1993, available in WL, APN-HO database (quoting Guinier during her appearance on *Face the Nation* (CBS television broadcast, Aug. 29, 1993)).

237. Marcus & Isikoff, *supra* note 232, at A1.

238. *Deep Re-evaluation Time*, *supra* note 213 (quoting Guinier during interview on *PrimeTime* (ABC television broadcast, June 10, 1993)).

239. *The Clinton Administration—The Guinier Nomination: There's an Opening at Justice*, AM. POL. NETWORK, June 7, 1993, available in WL, APN-HO database (quoting Judge Robert H. Bork on *Nightline* (ABC television broadcast, June 4, 1993)).

240. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

241. Leff, *supra* note 90, at 38 (quoting Yale law professor Stephen L. Carter).

sponse' ”²⁴² from other scholars. But when scholarship involving race is unnaturally transplanted to the mass media, response may involve more than counterpoint offered on an intellectual plane. Some scholars believed Guinier's treatment was traceable to her subject—race discrimination.²⁴³ University of Texas law professor Samuel Issacharoff posited: “ ‘Because Guinier spoke of race, of a divided society, it was almost as if those things were her fault, that it was improper to be speaking about this stuff.’ ”²⁴⁴ As illustrated earlier, the press perpetuated the quota queen label to such a degree that it paralyzed any meaningful discussion of the impact of race on one's ability to participate politically in our society.

After Guinier's treatment, the more general concern in academia is that scholars may be “punished for the sin of unconventional thinking”²⁴⁵ by finding the opportunity to serve their country denied them, without even being given a chance to explain themselves. The question now is whether the same fate that befell Guinier awaits other daring scholars who, instead, “may hesitate to propose innovative ideas for fear of being disqualified from ever serving in government, thus limiting the pool of academics eligible for top government appointments to the most timid and unoriginal scholars.”²⁴⁶

b. is utopianism to blame?

Boalt Hall law professor Robert Post thinks “that a misfortune like that which befell Lani Guinier was simply waiting to happen.”²⁴⁷ Post traces Guinier's misfortune to the *kind* of scholar she is, arguing that her specific ideas on race merely exacerbated the situation.²⁴⁸

242. *Id.* (quoting Yale law professor Stephen L. Carter).

243. *Id.* (interviewing University of Virginia law professor Pamela Karlan). Professor Karlan believes the Guinier debacle taught academics that, “ ‘It's impossible to write a 100-page article in which someone can't take something out which damages you, especially when the topic is race.’ ” *Id.* (quoting Professor Pamela Karlan); see *supra* text accompanying notes 146-53.

244. Leff, *supra* note 90, at 41 (quoting University of Texas law professor Samuel Issacharoff).

245. See *The Destruction of Lani Guinier*, CHI. TRIB., June 6, 1993, at A2 (editorial).

246. Leff, *supra* note 90, at 38. The very unfortunate forced withdrawal on January 20, 1995, of R. Samuel Paz's candidacy for a federal court judgeship proves that outstanding candidates for public service continue to be punished for daring to challenge the status quo. See R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 LOY. L.A. L. REV. 903 (1995).

247. Post, *supra* note 61, at 194.

248. See *id.*

Guinier is a utopian scholar as opposed to a traditional scholar.²⁴⁹ Traditional scholarship “tends to work within and to tinker at the margins of existing legal institutions.”²⁵⁰ It defers to the legitimacy of legal institutions themselves and respects precedent.²⁵¹ If Guinier was a traditionalist, she might have “framed her analysis as a frank proposal for legislative amendment of the Voting Rights Act.”²⁵² In this case, her work would in effect be a petition to Congress and her role as citizen-advocate, together with her proposals, would have become the focus of the debate rather than her actual scholarship.²⁵³ But Guinier, Post says, is a utopianist, in part because “[t]he fact that Congress did not and would not enact the statute Guinier had in mind was to her apparently irrelevant to the validity of her interpretation.”²⁵⁴ For Guinier, that interpretation was the *best* possible one for the Voting Rights Act.²⁵⁵

Utopianism rejects devotion to precedent and unquestioning respect for legal institutions as “weak and accommodationist.”²⁵⁶ The utopianist “conceives the truth of legal arrangements ultimately to be founded on the legitimacy of moral vision,”²⁵⁷ rather than on the “realistic possibilities of governance”²⁵⁸ which traditionalists see as the truth of legal arrangements. Therefore, Guinier’s work is not addressed to *Congress*, but to *judges*, who are “implicitly” invited to implement her interpretation of the Voting Rights Act.²⁵⁹ Post believes that some academes turn to utopian scholarship when “they feel increasingly oppressed and marginalized by the ambient culture [and] increasingly distrustful of the opportunities of ordinary politics,”²⁶⁰ and that “such alienation lies at the source of Guinier’s own work.”²⁶¹

249. *Id.* at 188.

250. *Id.* at 190.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 188.

255. 42 U.S.C. § 1973 (1988).

256. Post, *supra* note 61, at 190.

257. *Id.*

258. *Id.*

259. *Id.* at 191. Guinier, however, states that she does *not* explore possible remedies “primarily as judicial solutions.” TYRANNY OF THE MAJORITY, *supra* note 9, at 14. A court must first find a legal violation before adoption of her proposals is appropriate in a litigation context. *Id.* Furthermore, she only “propose[s] these approaches as *political* solutions if, depending on the local context, they better approximate the goals of democratic fair play.” *Id.* (emphasis added).

260. Post, *supra* note 61, at 192.

261. *Id.*

Professor Lani Guinier's "truth was literally unspeakable in the halls of Congress,"²⁶² a view Senator Biden clearly expressed when he made his political-expediency offer to her through the press.²⁶³ Post partially blames this state of affairs on the usurpation of utopian scholarship by academes, especially in the elite schools where "utopian accents have almost become *de rigueur*."²⁶⁴ Rather than sticking to "traditional scholarship [that] is fitting for 'normal lawmaking,'" ²⁶⁵ these academes have "turned *en masse*"²⁶⁶ to utopian scholarship. But because of utopianism's arduous dangerousness,²⁶⁷ Post believes it "ought not to be undertaken lightly,"²⁶⁸ instead, it should be "reserved for the far rarer moments of 'higher lawmaking.'" ²⁶⁹ This wholesale usurpation has in turn debased the reputation of utopian scholarship which "has all too often come to seem merely political petulance masquerading as academic expertise,"²⁷⁰ rather than the "high and serious effort to clarify and reform the purposes of law"²⁷¹ that informs Guinier's work. Consequently, "[t]he searching resonance of the genre is thus denied to those who are most legitimately pressed to invoke it"²⁷²—people like Guinier.

262. *Id.* at 187.

263. Senator Biden told the press one day before her name was withdrawn:

"If [Guinier] can come up here and explain herself, convince people that what she wrote was just a lot of academic musing, who knows? . . . I suppose it's conceivable that she could be confirmed. If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, not a shot."

Lewis, *supra* note 197, at A1 (quoting Senate Judiciary Committee Chair Joseph Biden); see *infra* part V.A.3.

264. Post, *supra* note 61, at 192.

265. *Id.*

266. *Id.*

267. Because utopian scholarship can "fulfill its promise of legal reformation only by radically remaking that political will through education or otherwise," *id.*, utopian scholarship exhibits several unique features which sets it apart from traditional scholarship:

[F]irst, . . . utopian scholarship is arduous. It sets itself the daunting task of fundamentally transforming the general political culture as that culture is expressed in already existing law. Second, utopian scholarship is dangerous because it is potentially filled with hubris. Its practitioners must be prepared to set themselves over and against the bulk of their political peers, and they thus stand in mortal danger of succumbing to the will to power. Third, to the extent that we have a stable political culture, utopian scholarship cannot be routinized and can only seldom be successful. It cannot be the stuff of ordinary, everyday scholarship.

Id.

268. *Id.*

269. *Id.*

270. *Id.* at 193.

271. *Id.* at 192-93.

272. *Id.* at 193.

But the excuse that posturing academes have given utopianism a bad name—offered as a reason why Guinier was effectively silenced—is unsatisfactory. Guinier's fate did not depend on her choice of scholarship style.²⁷³

If Guinier's work was in the form of the traditionalist's proposal for legislative amendment of the Act, in effect a petition to Congress, Biden would have probably dismissed her work just as quickly, and maybe even more emphatically, than he did. For example, if Guinier asserted that her proposal was consistent with established legislative intent, Biden may have justifiably told the press that "Guinier . . . got matters strikingly wrong. Her misapprehension seems so very fundamental as to be incomprehensible in so smart and perceptive a scholar."²⁷⁴ Depending on how alarmed he was by her proposals, Biden may not have even extended the following offer: Confess to Congress that your articles were mere "academic musing[s],"²⁷⁵ little daydreams scribbled on paper in the ivory tower—and we'll confirm you. Instead, her "misapprehension" of legislative intent could have been attacked as a sign she was not qualified for the job. Although this kind of attack may have had the *desired* consequence of spotlighting her qualifications, rather than her writings, her first battle would nonetheless have been to convince everyone that she did not "get it wrong" before she could move on to touting her successful litigation record and other accomplishments. Therefore, even if she had taken the traditionalist tack, the focus may well have remained on her scholarship because of the nature of the fight.

c. the impact of race, again

Guinier's subject matter—race—prevented the candidate from finding a senatorial audience willing to consider her nomination. At-

273. The theory that Senator Biden was reacting to a fear that Guinier, if confirmed, planned to bypass Congress and take her agenda straight to the courts is similarly flawed. There is no support for either the theory or the fear. Even if this was Guinier's intention, the Supreme Court's conservative voting rights jurisprudence would have doomed her chances for success. See *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993) (holding that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification"); *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 830 (1992) (holding that Voting Rights Act did not apply to "[c]hanges which affect only the distribution of power among officials").

274. Post, *supra* note 61, at 188.

275. Lewis, *supra* note 197, at A1 (quoting Senate Judiciary Committee Chair Joseph Biden).

tempting to explain why Judge Bork got a hearing while Guinier did not, Professor Post theorizes:

Guinier's proposed interpretation of the Voting Rights Act . . . was evidently too radical to provoke an analogous debate [like that involving Judge Bork's work]. Perhaps because issues of race are so highly explosive and because the margin of publicly acceptable positions is consequently quite constricted, Guinier's views were dismissed out of hand.²⁷⁶

Accepting this as true, one might agree with Post that "[g]iven the ambient political culture . . . Guinier's scholarship was that much more utopian,"²⁷⁷ and therefore, that much more likely to be dismissed. Moreover, because Guinier was a utopianist, she could not employ the shield of academic expertise to help sell her truth to Washington because utopianism "offers no justification for claiming scholarly expertise with respect to the ascertainment and advocacy of [political] purposes."²⁷⁸ Instead, it embraces "the kind of political perspective appropriate to the citizen."²⁷⁹ Since the Senate may believe the citizenry lacks the expertise to pronounce the truth about race relations, it could ignore Guinier's status as an expert on voting rights.

Nonetheless, Washington would have rejected Guinier's race-based scholarship had it been cloaked in a traditionalist format instead. First, Post admits that had Guinier been petitioning a congressional audience in the traditionalist vein, she would have been "regarded as a citizen advocating political change"²⁸⁰ from the beginning. This in turn would "have raised issues about the nature of her politics and her judgment."²⁸¹ Since citizen-advocates are not entitled to any special claims of expertise, Guinier's attempts to remind the Senate that she was a legal specialist would have fallen on deaf ears.

Second, Post completely overlooks the press's crucial role in defining Guinier and her views. The press did not attach any significance to whether Guinier was speaking in a utopian or traditionalist voice—most obviously because the vast majority of the press never

276. Post, *supra* note 61, at 191.

277. *Id.* I understand Post to mean that the "radical[] remaking [of] political will through education or otherwise," *id.* at 192, which is necessary to achieve the goal of legal reformation, is even more arduous and more dangerous when the law to be reformed involves race.

278. *Id.* at 194.

279. *Id.* at 195.

280. *Id.* at 190.

281. *Id.*

read her articles in the first place.²⁸² They simply lifted what other conservative journalists-with-agendas fed them and spit it back up in their own papers. But even if they had done their own homework and thought for themselves, it is unlikely they would have distilled the difference between the two approaches or attached much significance to it if they had. And depending on which scholar they relied upon to aid them in understanding the thrust of the articles, the approach a candidate used could be manipulated by the advising scholar—either for or against confirmation.

Lani Guinier, during the press conference she held upon President Clinton's withdrawal of her nomination, echoed the fears of fellow scholars when she stated:

"I hope that what has happened to my nomination does not mean that future nominees will not be allowed to explain their views as soon as any controversy arises. I hope that we are not witnessing that dawning of a new intellectual orthodoxy in which thoughtful people can no longer debate provocative ideas without denying the country their talents as public servants."²⁸³

Instead, she expressed hope that the aftermath of her interrupted confirmation process would yield some " 'positive lessons . . . about the importance of public dialogue on race in which all perspectives are represented and in which no one viewpoint monopolizes, distorts, caricatures or shapes the outcome.' "²⁸⁴

Candidates with paper trails composed of volatile subjects like Guinier's, however, will continue to suffer the same kind of end run around meaningful public discussion of their views unless a new procedure is adopted for their senate confirmation.

E. The Irony

*Public life is a situation of power and energy; he trespasses against his duty who sleeps upon his watch, as well as he that goes over to the enemy.*²⁸⁵

282. See *supra* text accompanying notes 137-44.

283. TYRANNY OF THE MAJORITY, *supra* note 9, at 190 (quoting Guinier speaking at June 4, 1993, Justice Department press conference upon withdrawal of her nomination).

284. *Id.* (quoting Guinier speaking at June 4, 1993, Justice Department press conference upon withdrawal of her nomination).

285. EDMUND BURKE, *Thoughts on the Cause of the Present Discontents*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 251, 320 (Paul Langford ed., 1981) (1770).

On February 1, 1994, President Clinton nominated Deval Patrick, a colleague of Guinier's from their days together at the NAACP Legal Defense Fund, to fill the still-vacant Assistant Attorney General for Civil Rights position.²⁸⁶ Some thought the nomination ironic by virtue of Patrick and Guinier's past work together at the NAACP.²⁸⁷ Guinier commented that the nomination of a fellow ideological colleague supported her contention that she was " 'in the mainstream of civil rights.' "²⁸⁸ Clint Bolick, however, labeled Patrick a "stealth Guinier."²⁸⁹ According to Bolick, anyone affiliated with the NAACP is suspect because the entire organization is outside the mainstream of civil rights.²⁹⁰ Bolick also lamented the lack of a paper trail to follow on Patrick.²⁹¹ Indeed, a confident attorney with the NAACP Legal Defense Fund noted that the absence of law review articles meant that Bolick had " 'nothing on Patrick.' "²⁹²

Less than two weeks after the Senate confirmed Deval Patrick,²⁹³ Senior Judge Joseph Young of the District of Maryland ordered Worcester County to use cumulative voting procedures in its election of county commissioners.²⁹⁴ Cumulative voting had been one of Guinier's "controversial" proposals.²⁹⁵

When Bill Clinton was running for the White House, he told Bill Moyers during an interview he would not compromise on racial equality.²⁹⁶ One hundred days into his presidency, the polls rated him B+ on race relations.²⁹⁷

But when he withdrew Guinier's nomination, he had his own political survival, not the country's interests, foremost in his mind.²⁹⁸

286. Lynne Duke, *Attorney Named to Rights Post; Ex-NAACP Litigator Deval Patrick to Fill Long-Vacant Position*, WASH. POST, Feb. 2, 1994, at A1.

287. *Id.*

288. *Id.* (quoting Guinier).

289. Clint Bolick, *Civil-Rights Nominee, Quota Clone*, WALL ST. J., Feb. 2, 1994, at A18.

290. *Id.*

291. *See id.*

292. Nancy E. Roman, *Clinton Names New Civil Rights Head*, WASH. TIMES, Feb. 2, 1994, at A4 (quoting Kerry Scanlon, assistant counsel to NAACP Legal Defense Fund).

293. *See 2 Justice Dept. Choices Gain Senate Approval*, N.Y. TIMES, Mar. 23, 1994, at A17.

294. *Cane v. Worcester County*, 847 F. Supp. 369, 373-74 (D. Md.), *aff'd in part, rev'd in part on other grounds*, 35 F.3d 921 (4th Cir. 1994).

295. *See supra* text accompanying notes 40-45.

296. TYRANNY OF THE MAJORITY, *supra* note 9, at 190.

297. Jim Norman, *Clinton: Room for Improvement*, USA TODAY, Apr. 28, 1993, at 13A.

298. One White House advisor lobbed a parting shot against Guinier's passionate withdrawal speech: " 'I think Lani forgot' the central point . . . 'She thought it was about her and not about the President. It's an unfortunate set of circumstances that he did not

What became of President Clinton's desire to further racial equality through a fully informed public discussion of the issues in which race plays a part? The President compromised himself, Guinier, and the country.²⁹⁹

V. THE MESS

*"The idea that an academic writes something that's controversial and that this should bar them from public office, this is insanity. Are we nominating her for the Supreme Court?"*³⁰⁰

A. What If Guinier Had Gotten a Senate Hearing?

1. Other controversial candidates

Lani Guinier was not the only candidate for an executive position in the spring of 1993 to endure what White House Budget Director Leon Panetta called "'confirmation hell.'"³⁰¹ Zoe Baird was Clinton's first nominee for Attorney General, the post ultimately given to Janet Reno. Baird, on her own initiative,³⁰² brought up the fact that she and her husband had hired an illegal immigrant to care for their children and failed to pay Social Security taxes on her wages.³⁰³ "Nannygate" fever struck Washington,³⁰⁴ and Baird withdrew her candidacy.³⁰⁵ The fact that many nominees had committed the same violation in the past, and been confirmed,³⁰⁶ was irrelevant. The fact that another just-confirmed member of Clinton's Cabinet had done the

need.'" Gwen Ifill, *The Guinier Battle: Anatomy of the Failure to Confirm a Nominee*, N.Y. TIMES, June 5, 1993, at A9 (quoting unidentified White House advisor).

299. In a *Wall Street Journal/NBC News* poll taken from June 4-8, 1993, people surveyed were evenly split on whether President Clinton "did the right thing" or "the wrong thing" by withdrawing Guinier's nomination. *Poll Update—W.S. Journal/NBC: Perot Has Econ. Edge, Clinton Leads 3-Way*, AM. POL. NETWORK, June 11, 1993, available in WL, APN-HO database.

300. Steve Goldstein, *Clinton's Friend from Yale Law School Days Asked for a Hearing, but She Was Denied One*, PHILA. INQUIRER, June 5, 1993, at A1 (quoting White House Counsel Bernard Nussbaum).

301. See CARTER, *supra* note 7, at xi (quoting Leon Panetta).

302. *Id.* at 185.

303. *Id.* at 7, 25-28.

304. See *id.* at 6, 17, 26-27.

305. *Id.* at 167.

306. See *id.* at 25.

same thing was also irrelevant.³⁰⁷ Subsequent nominees³⁰⁸ that spring would also pay for the mistake of hiring "the wrong babysitter."³⁰⁹

After the Baird withdrawal, Stuart Taylor, soon to distort Guinier's writings past recognizability,³¹⁰ reported the full story. Baird had consulted an attorney before hiring the worker and reported the hiring to the Immigration and Naturalization Service (INS).³¹¹ The INS issued an acknowledgment letter condoning the arrangement, so long as Baird agreed to aid the worker in obtaining documentation.³¹² She did not pay Social Security taxes on the worker's wages because her attorney had erroneously told her that the Internal Revenue Service would not accept payment until the worker received a green card and a Social Security number.³¹³ Baird never had a chance to explain this to the Senate.

San Francisco Supervisor Roberta Achtenberg almost lost the chance to serve her country in Washington as Assistant Secretary for Housing and Urban Development—because she was "the first openly gay person ever chosen for a high-level federal position."³¹⁴ The Senate Banking, Housing, and Urban Affairs Committee blocked the committee vote with the aid of member Jesse Helms,³¹⁵ who the next day said he did it " '[b]ecause she's a damn lesbian. I'm not going to put a lesbian in a position like that. If you want to call me a bigot, fine.' "³¹⁶ He clarified his reasons for pushing to block a full Senate vote a few days later by explaining that Achtenberg " 'is not your garden-variety lesbian. She is a militant-activist-mean lesbian.' "³¹⁷

307. *Id.* at 26.

308. Among them, United States Supreme Court Justice Stephen Breyer, who did not pay Social Security taxes on a formerly employed housekeeper and thus was not nominated to fill the seat ultimately given to Justice Ruth Bader Ginsburg, *id.* at 6, and Kimba Wood, who had not broken any laws, but was nonetheless never formally nominated for Attorney General because of her nanny problem, *id.* at 7 & 207 n.3.

309. *Id.* at 25.

310. *See supra* note 140 and accompanying text.

311. CARTER, *supra* note 7, at 27.

312. *Id.*

313. *Id.* at 28.

314. April Lynch, *GOP Senators Prevent Vote on Achtenberg—Opposition to Appointment Appears to Be Mobilizing*, S.F. CHRON., May 5, 1993, at A1.

315. *See id.*

316. Al Kamen, *Helms on Nominee—"She's a Damn Lesbian"*, WASH. POST, May 7, 1993, at A21 (quoting Senator Jesse Helms); J. Jennings Moss, *Achtenberg's Name Sent to Senate; Helms Awaits*, WASH. TIMES, May 6, 1993, at A3 (quoting Senator Jesse Helms).

317. April Lynch, *Helms Says He's Determined to Keep Achtenberg Out of HUD*, S.F. CHRON., May 8, 1993, at A3 (quoting Senator Jesse Helms).

Fortunately, Helms's hateful comments created a quiet backlash among some members in the Senate, who worked successfully to keep the nomination alive by setting a firm date for floor debate.³¹⁸ During the floor debate, however, Boy Scouts were brought into the visitor's gallery as Helms and other senators mentioned their organization repeatedly in the context of "what it means to be an American."³¹⁹ Another "visual aid" was a videotaped showing of the 1992 Lesbian and Gay Freedom Day parade, in which Achtenberg, participating as an elected official,³²⁰ reportedly kissed her lover.³²¹

This show-and-tell prompted Senator Claiborne Pell to reveal on the floor that he supported Achtenberg because his own daughter was a lesbian and president of the Rhode Island Alliance for Gay and Lesbian Civil Rights, and he did "'not want to see her barred from a government job merely because of her orientation.'"³²² Achtenberg was ultimately confirmed because of late-blooming senatorial support such as this.

Finally, there was Webster Hubbell. Hubbell, a longtime friend of the President and a former law partner of the First Lady, was nominated for Associate Attorney General, the number three spot in the Justice Department.³²³ Like Guinier, Hubbell was the subject of six *Wall Street Journal* editorials.³²⁴ Unlike Guinier, his nomination would end happily.

Shortly after President Clinton made the formal announcement, Hubbell's membership in the all-white Country Club of Little Rock

318. See *id.*; April Lynch & Carolyn Lochhead, *Fiery Achtenberg Senate Debate Expected Next Week*, S.F. CHRON., May 15, 1993, at A6.

319. April Lynch, *Stormy Debate Over Achtenberg—Helms Leads Attack in Senate Against Gay S.F. Supervisor*, S.F. CHRON., May 20, 1993, at A2. During the debate, the Scouts "nervously fiddled with their uniform neck scarves and looked puzzled upon hearing their organization mentioned over and over. A man who escorted them into the Senate, however, declined to comment as to how or why the Scouts got there." *Id.*

320. April Lynch, *Senators Watch Achtenberg in Video of Gay Freedom Parade*, S.F. CHRON., May 19, 1993, at A3.

321. Helen Dewar, *Impasse on Clinton Nominees Eases; 8 Confirmed After Mitchell Chides Senators for Delaying Tactics*, WASH. POST, May 19, 1993, at A13; Joyce Price, *Strident Activism Steps on Toes; Video Raises Questions of HUD Nominee's Values*, WASH. TIMES, May 24, 1993, at A1.

322. Michael Ross, *Pell, for Gay Nominee, Says Daughter Is Lesbian*, L.A. TIMES, May 22, 1993, at A10 (quoting Senator Claiborne Pell).

323. Jerry Seper, *Hubbell Lied, Says NAACP; Effort to Recruit Blacks Disputed*, WASH. TIMES, May 19, 1993, at A1.

324. *Summary Overlooked*, AM. POL. NETWORK, Mar. 15, 1994, available in WL, APN-HO database.

became known.³²⁵ The President rushed to Hubbell's defense and refused to consider withdrawing the nomination, despite protests to the contrary.³²⁶ Hubbell's hearing date before the Senate Judiciary Committee was set quickly and remained firm.³²⁷ Before his hearing, Hubbell was given permission to submit a written statement defending his membership to the Committee.³²⁸ But at the hearing, he unexpectedly announced his resignation from the club.³²⁹ After that, Hubbell "glided through the session with little tough questioning."³³⁰ The *New York Times* reported that the announcement "drained [the] hearing of the drama"³³¹ that might have otherwise occurred.

In a foreboding tone, Senate Judiciary Committee member Orrin Hatch promised that "'such mild treatment [would not] be repeated'"³³² for Guinier. Apparently, Hatch felt mild treatment was appropriate for a candidate who "relax[ed] in the company of those who would rather segregate";³³³ but not for a nominee who had devoted her professional life to ending racial discrimination, and who had once successfully sued Clinton when he was governor of Arkansas for Voting Rights Act violations.³³⁴

Guinier, like Hubbell, should have been allowed to make heartfelt reparations before the Committee. For example, if her articulated concerns made in a few law review articles about the authenticity of some black elected officials³³⁵ were offensive, she should have been allowed to apologize so the Senate could proceed with an analysis of her qualifications.³³⁶ Clarence Thomas was allowed to apologize at his first Senate confirmation hearing for commenting that civil rights

325. Al Kamen, *Using a (Country) Club Against Hubbell*, WASH. POST, May 10, 1993, at A15. The club did admit one nonwhite member in 1992. Seper, *supra* note 323, at A1.

326. Seper, *supra* note 323, at A1.

327. *See id.* In contrast, although almost one month had elapsed since Clinton nominated Guinier, no hearing date had yet been set for her hearing. *See* Seper, *supra* note 185, at A1.

328. *See* Michael Isikoff, *McLarty, Two Other Aides, Hubbell Quit Country Club*, WASH. POST, May 20, 1993, at A10.

329. *Hubbell: Not Caught in Any Webb*, *supra* note 175.

330. *Id.*

331. David Johnston, *Justice Post Nominee Says He Has Quit Golf Club*, N.Y. TIMES, May 20, 1993, at A16.

332. *Hubbell: Not Caught in Any Webb*, *supra* note 175 (quoting Senate Judiciary Committee member Orrin Hatch).

333. CARTER, *supra* note 7, at 44.

334. *Id.* at 37.

335. *See supra* text accompanying notes 111-35.

336. CARTER, *supra* note 7, at 43.

leaders " 'do nothing but bitch, bitch, bitch, moan and moan.' " ³³⁷ Upon doing so, most of the Senate dropped the matter. ³³⁸

2. Guinier vs. Bork: treated alike and differently for all the wrong reasons

The intense scrutiny Lani Guinier's academic writings received in the press was not unlike Judge Robert Bork's experience during his failed bid for a Supreme Court Justiceship. The press and partisan opponents succeeded in distorting the work of both nominees in order to increase the likelihood of blocking confirmation. ³³⁹ During Guinier's "media hearing," one newspaper issued a caveat to its colleagues to this effect while also noting the obvious differences between the two positions:

The error here—as in the case of Bork—is to assume that what a scholar suggests in an academic article is also what she will pursue in public office.

No one is about to give the civil rights division the green light to try and get a court to demand a minority veto over legislation. Guinier, even if she were so inclined, will not be allowed to push any radical agenda in litigation. ³⁴⁰

President Clinton himself remarked that Guinier would be under the direct supervision of both himself and Attorney General Janet Reno. ³⁴¹ In addition, even if she wanted to pursue some of the alternative voting rights remedies she had suggested in her role as a law professor, ³⁴² the Supreme Court's 1992 decision in *Presley v. Etowah County Commission*, ³⁴³ holding that the Voting Rights Act did not apply to legislative actions, ³⁴⁴ "may have rendered her most controversial remedies moot as a litigation tactic." ³⁴⁵

Guinier was the nominee for a sub-Cabinet position with limited authority, not a life-tenured Supreme Court Justiceship. It should have seemed ridiculous not to schedule and hold a hearing at the first reasonable opportunity. Instead, unlike Judge Bork, Lani Guinier never got her "day in court."

337. *Id.* at 43 (quoting Justice Clarence Thomas).

338. *Id.*

339. *Id.* at 45, 50-51.

340. *No Grounds to Reject This Nominee*, CHI. TRIB., May 27, 1993, at A30 (editorial).

341. Lewis, *supra* note 178, at B9.

342. See *supra* text accompanying notes 39-48.

343. 112 S. Ct. 820 (1992).

344. *Id.* at 830.

345. Leff, *supra* note 90, at 41.

After President Reagan nominated Bork, members of Congress scrutinized his views as formulated in academic writings, and some drew very negative conclusions.³⁴⁶ Judge Bork's nomination could have been discarded at this point. Instead, he was given a full opportunity to explain, in his own words, his work and his views. Lani Guinier was not provided the same opportunity; her hearing was held in the press.

Of course, timing is everything, especially in politics. If Guinier's nomination to the Justice Department had occurred two or three decades ago, she might have experienced something similar to what Bork experienced during his earlier confirmation to the powerful Solicitor General position. During those hearings, Bork's scholarship was not an issue. He was overwhelmingly confirmed even though many Senators strongly disagreed with his views because they realized that Bork "was serving as part of the President's team, not as a free agent."³⁴⁷

3. The Biden compromise

In the report filed on Judge Clarence Thomas, Senator Biden, chair of the Senate Judiciary Committee,³⁴⁸ warned that the " 'burden of proof' was on the nominee to demonstrate his or her suitability for the Court and clearly lay out for us his or her methodology for interpreting the Constitution."³⁴⁹ He noted that the Senate will normally defer to the president's selection if made "without regard to ideology."³⁵⁰ Since the Court has moved so far to the right in recent years, however, the nominee bears the responsibility of informing the Committee how he or she will "shape the current trend."³⁵¹ To do this adequately, the nominee must "be prepared to discuss with the Judiciary Committee, candidly and forthrightly, what [his or her] fundamental judicial philosophy is."³⁵² Thus, there is careful Senate scrutiny of

346. See *Nomination of Robert H. Bork to Be an Associate Justice of the United States Supreme Court*, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. vii (1987) [hereinafter *Bork Nomination Report*].

347. Leon Friedman & Burt Neuborne, *Attack on Civil Rights Nominee Is Unfair*, N.Y. TIMES, June 3, 1993, at A22 (letter to editor). Professor Friedman teaches law at Hofstra University and Professor Neuborne teaches law at New York University. *Id.*

348. *Nomination of Clarence Thomas to Be an Associate Justice of the United States Supreme Court*, S. EXEC. REP. NO. 15, 102d Cong., 1st Sess. (1991) [hereinafter *Thomas Nomination Report*].

349. *Id.* at 50.

350. *Id.* at 51.

351. *Id.*

352. *Id.*

paper trails, as in the cases of Bork, Thomas, and Ruth Bader Ginsburg.³⁵³

In recommending confirmation of David Souter to the United States Supreme Court, Senator Biden stated: "His vision of the Constitution is not mine—but it is clearly not that of the Court's hard-line conservatives, either. He is not a man whom I would nominate to the Court—but he is not a man whose nomination I will oppose."³⁵⁴ Professor Post might characterize this statement as utopian³⁵⁵ since it reveals Biden's perception of his own political relationship to the Constitution as one of "transparency."³⁵⁶

Biden appears deeply concerned that the majoritarian wishes of the people remain at center stage as the Supreme Court does its work. But he is flexible, as illustrated by his statement about Justice Souter.

Senator Biden, however, employed a different standard for Lani Guinier:

"If she can come up here and explain herself, convince people that what she wrote was just a lot of academic musing, who knows? . . . I suppose it's conceivable that she could be confirmed. If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, not a shot."³⁵⁷

Committee sources were quoted as saying the "'Democratic party's strategy probably will have Guinier testify that her writing was hypothetical, legal scholarship.'"³⁵⁸ Whether this strategy prompted Biden, a Democrat, to say what he did is unknown. But what is striking about this statement—aside from the political compromise it of-

353. See *Nomination of Ruth Bader Ginsburg to Be an Associate Justice of the United States Supreme Court*, S. EXEC. REP. NO. 6, 103d Cong., 1st Sess. (1993); *Thomas Nomination Report*, *supra* note 348; *Bork Nomination Report*, *supra* note 346.

354. *Nomination of David H. Souter to Be an Associate Justice of the United States Supreme Court*, S. EXEC. REP. NO. 32, 101st Cong., 2d Sess. 39 (1990) [hereinafter *Souter Nomination Report*] (emphasis omitted).

355. See *supra* part IV.D.2.b.

356. See Post, *supra* note 61, at 193. To illustrate the transparency concept, Post writes that while grading his students' constitutional law examinations he discovered he "had apparently succeeded only in making the law for [his] students utterly transparent to their own political will." *Id.* This was apparent because the students' exams revealed "no gap, no disjunction, between the Constitution and their own political perspective." *Id.*

357. Lewis, *supra* note 197, at A1 (quoting Senate Judiciary Committee Chair Joseph Biden).

358. *The Clinton Administration—Around the Job Board: Achtenberg Debate Begins*, AM. POL. NETWORK, May 20, 1993, available in WL, APN-HO database (quoting unidentified Committee source).

fers—is how inversely it reflects what Biden has said on other occasions when discussing *judicial* hearings.

Biden challenged Guinier from the perspective of a practitioner, who “experience[s] the law as textured and resistant, rather than . . . transparent,”³⁵⁹ as utopian scholars experience it. But perhaps the fact that Guinier was under consideration for an executive position, rather than a judicial one, is the point. If Biden believed Guinier’s proposals advocated a radical departure from our traditional democratic processes, at least where voting was concerned, he may have believed this conflicted with the principle that “even the sovereign is subject to the rule of law.”³⁶⁰ Guinier’s responsibilities as a law *enforcement* official is key to the relevancy Biden placed on this principle. Senator Biden has spoken consistently of his unselfconscious agenda to implement—or maintain—his political will by seeking to confirm Supreme Court nominees whose “vision of the Constitution”³⁶¹ he shares. He has unabashedly used the legal institution of the Senate to advance that agenda. In contradistinction, through his compromise offer to Guinier, he made it absolutely clear that Guinier could not use the Justice Department to accomplish the same thing.

If Biden made this statement because he believes law itself is a kind of “institution situated in a field of competing policies and purposes,”³⁶² and that the legal practices of the Justice Department should serve as “mechanisms designed to accommodate and reconcile these political differences,”³⁶³ one could sympathize with the cold ne-

359. Post, *supra* note 61, at 193.

360. *Id.* at 194.

361. *Souter Nomination Report*, *supra* note 354, at 39. In explaining why Judge Thomas had failed to earn Biden’s recommendation for confirmation by the full Senate, Biden said:

Just as the nominee must persuade the President that he or she is the “right person for the job” before winning the nomination, the nominee must persuade the Senate that he or she is the right person for the Court before receiving our votes for confirmation.

In my view, Judge Thomas has not met this burden. It is not that I know for certain that he will take the Court in troubling new directions; rather, it is that I have too many doubts about his judicial philosophy to be confident that he will not. Given what is at stake, and where the Court currently stands, it is a risk we cannot afford to take, in my view.

How did we arrive at this particular juncture? There is no question that the aggressive agenda of ultra-conservatives in the Reagan and Bush administrations—an agenda of remaking the Court’s protection for individual and property rights, and for fundamentally altering the balance of power between the branches of government—lies at the core of the dilemma. The result is that Judge Thomas is the seventh consecutive conservative Republican nominated to the Court over the past decade.

Thomas Nomination Report, *supra* note 348, at 50.

362. Post, *supra* note 61, at 193.

363. *Id.* at 193-94.

cessity of the message. But Biden's refusal to apply the "sovereign is subject to the rule of law"³⁶⁴ principle to the Senate, and his own work there, reveals his hypocrisy; therefore, this potential justification is inadequate to explain his differential treatment of Guinier.³⁶⁵

Professor Post offers another possible explanation when he makes the inevitable comparison between Guinier's views and those of Judge Bork.³⁶⁶ He characterizes Bork as an "aggressively radical"³⁶⁷ utopianist³⁶⁸ in his view of the Due Process Clause. The press and opponents, as in Guinier's case, immediately characterized Bork as dangerously "out of the mainstream."³⁶⁹ But as Post points out, "his views were apparently close enough to provoke a lively debate, the upshot of which was to relegate Bork's perspective to the periphery of the national political consensus about the meaning of the Clause."³⁷⁰ But if they ended up at the periphery when it was all over, how does that justify the differential treatment Guinier received in being denied a hearing at all? If both Bork and Guinier wrote their articles as utopianists, and were criticized as being "out of the mainstream" based on these articles, then the fact that Guinier was *like* Bork cannot explain the disparity. Conversely, this Comment argued earlier that Senator Biden would not have treated Guinier differently

364. *Id.* at 194.

365. Of course, Senator Biden is no stranger to the heightened scrutiny he promised Guinier if she had gone before the Senate. During this time, NBC ran a story on the intensity of personal scrutiny in politics, "featuring clips of politicians with 'less-than-perfect track records,'" including Joseph Biden and Lani Guinier. *National Briefing—Paula Jones: Pro-North Group to Raise Funds for Jones?*, AM. POL. NETWORK, May 11, 1994, available in WL, APN-HO database (quoting Katie Couric on *Today* (NBC television broadcast, May 11, 1994)).

Senator Biden withdrew from the 1988 presidential election when it became public that he had plagiarized a law review article while in law school. David S. Broder, *Biden Ends Presidential Campaign; Senator Vows to Rebuild Image, Focus on Bork Hearings*, WASH. POST, Sept. 24, 1987, at A1. Earlier, his candidacy was damaged when videotapes aired showing Biden giving campaign speeches composed of other people's orations and lying about his academic record and degrees on the campaign trail. *Id.* During his withdrawal speech, Biden said, "I have to tell you honestly . . . it makes me angry. . . . I am . . . frustrated at the environment of presidential politics that makes it so difficult to let the American people measure the whole Joe Biden and not just the misstatements that I have made." *Id.* (quoting Senator Joseph Biden).

366. See Post, *supra* note 61, at 191.

367. *Id.*

368. For a definition of utopianism and a discussion of Guinier's work as an example of this approach, see *supra* part IV.D.2.b.

369. See Post, *supra* note 61, at 191.

370. *Id.*

had she written her proposals from a traditionalist perspective rather than a utopianist one.³⁷¹

The real reason the President denied Guinier a hearing rests on several facts unique to Guinier's nomination. First, Guinier's subject matter is race. Second, the conservative press's organized smear campaign successfully occupied the field of her nomination and preempted the presentation of more balanced perspectives because the rest of the press engaged in wholesale reliance upon that version as the truth.³⁷² Third, no definite hearing date was ever set for Guinier. Fourth, the Clinton Administration lacked loyalty and organization in its support of Guinier—attributes that helped both Reagan and Bush³⁷³ get controversial candidates of their own confirmed. Finally, Guinier was a black woman.³⁷⁴

Senator Biden's comments about Guinier's law review articles, and his suggestion that she compromise her integrity by repudiating her work, is also heavily to blame for the premature withdrawal of Guinier's nomination. Certainly, his conduct, at the very least, encouraged the Senate to procrastinate in setting a hearing date. Perhaps political pragmatism alone motivated Biden's treatment of Guinier. After all, a hearing would have focused on affirmative action concepts, a topic that now sends Democrats running for cover.³⁷⁵

But the fact that Guinier's proposals involved the Voting Rights Act may have also prompted Biden to make the derisive statement he did.³⁷⁶ If Guinier's proposals were adopted, majoritarian politicians would have to share their power with minority representatives. Considering the Senate's refusal to pass legislation initiating campaign fi-

371. See *supra* notes 273-82 and accompanying text.

372. See *supra* part III.C.

373. See *infra* notes 434-38 and accompanying text.

374. Some commentators believe these personal characteristics played a role in the differential treatment she received in the press and from others. See *supra* notes 146-53, 243-44 and accompanying text.

375. Lewis, *supra* note 231, at A1.

376. Lani Guinier expressed this suspicion in a *Washington Post* article when she concluded:

In short, many incumbent politicians have learned to live with an interpretation of the Voting Rights Act in which black voters and their elected officials are seen but not really heard. The last thing they wanted was [a] debate over race-neutral alternatives to the current system that would threaten their incumbency. They apparently don't want to listen to the voices of minority constituents, and they certainly didn't want to listen to me.

Lani Guinier, *What I Would Have Told the Senate*, WASH. POST, June 13, 1993, at C7.

nance reform,³⁷⁷ mandating term limits,³⁷⁸ or prohibiting congresspersons from accepting gifts from lobbyists,³⁷⁹ it is not far-fetched to suggest that Biden was threatened by a scholar who challenged his continued existence in the Senate.

Professor Post sees the Biden comment as revealing the tension between truth—the goal of legal scholarship—and governance—the work of Washington officials.³⁸⁰ Because Guinier's truth was unacceptable to the world of politics,³⁸¹ "Biden in effect invited Guinier to convert her truth into a form of [political] expediency, and to recharacterize her writings as inauthentically constrained by the external requirements of academic life."³⁸² Thus, the Senate Judiciary Committee could reject her writings as "mere 'academic musings'"³⁸³ and possibly confirm her.³⁸⁴

It is highly unlikely that Guinier would have struck this bargain had she gotten a hearing. A few days after Clinton withdrew her nomination, Guinier penned an editorial in *The Washington Post* relating what she would have told the Senate.³⁸⁵ In the piece, she stated that she "would have applauded with [the Senate and the American people] the tremendous strides America has made since 1965, but [she] would have shown them that the Voting Rights Act has not yet completely succeeded in giving all Americans an equally effective voice in their government."³⁸⁶

B. Do Qualifications Matter?

The Advice and Consent Clause, found in Article II, Section 2, was a compromise.³⁸⁷ Members of the Constitutional Convention

377. See Dan Goodgame, *The High Price of Gridlock*, TIME, Oct. 10, 1994, at 28, 32.

378. See Kevin Merida, *Popular Term-Limits Proposal Faces Many Obstacles*, WASH. POST, Dec. 16, 1994, at A23.

379. See *Chronicles: The Week*, TIME, Oct. 17, 1994, at 17, 17.

380. Post, *supra* note 61, at 186.

381. See *supra* part IV.D.2.b-c.

382. Post, *supra* note 61, at 187.

383. *Id.*

384. At least Biden offered Guinier the choice of repudiating her vision of democracy in exchange for confirmation. He is less supportive today of President Clinton's nominations. Biden recently told the press that rather than explore the merits of a nomination, he will automatically oppose any nominee he feels the Administration failed to research adequately. *MacNeil/Lehrer NewsHour* (PBS television broadcast, Feb. 10, 1995) (televising Senator Biden's comments to press on nomination of Dr. Henry Foster to replace Dr. Jocelyn Elders as Surgeon General).

385. See Guinier, *supra* note 376, at C7.

386. *Id.*

387. CARTER, *supra* note 7, at 12.

feared that vesting too much appointment power in the president would violate the separation of power among the three branches.³⁸⁸ The solution was to ensure congressional participation in the appointment process by requiring the president to receive senatorial advice regarding potential nominees and senatorial confirmation of formally announced candidates.³⁸⁹ Since George Washington's Administration, however, debate has raged over what exactly constitutes advice.³⁹⁰ Until President Rutherford B. Hayes took office in 1877, Congress and the president negotiated the identity of the entire Cabinet before any formal nominations were made.³⁹¹ Thus, controversial candidates were virtually nonexistent,³⁹² and the bargained-for nominees were easily confirmed.

President Hayes abolished this system and replaced it with one of presidential prerogative.³⁹³ He refused to recognize Congress's right to contribute significantly to the nomination process; instead, he staffed the Cabinet with whom he pleased.³⁹⁴ This "accident[al]"³⁹⁵ interpretation of the congressional advice function has survived, in its basic form, today. The consequence is, as Professor Stephen L. Carter says, that "the President seeks advice principally from political counselors—all too rarely from the Senate—and then springs names on the nation like birthday gifts, only to grow sullen and snappish when the recipients (we the people) are ungrateful."³⁹⁶ Thus, Congress is left in a reactive, rather than an advisory, role.³⁹⁷ Worst of all, if the president and his or her staff fail to perform adequate research on the nominee, or fail to anticipate congressional concern over facets of the candidate's background, the candidate becomes the centerpiece in borking contests between the White House and Congress.³⁹⁸

Carter believes the current system corners Congress into a to-bork-or-not-to-bork role for executive confirmations, as opposed to an active role assessing the candidate's qualifications for the job, because protestations grounded on an absence of qualifications lack

388. *Id.*

389. *See id.*

390. *Id.*

391. *Id.* at 12-13, 34-35.

392. *Id.* at 35. Only four nominees for Cabinet positions were withdrawn in the nineteenth century. *Id.*

393. *See id.* at 34-35.

394. *Id.*

395. *Id.* at 14.

396. *Id.* at 13.

397. *Id.* at 35.

398. *See id.* at 13.

political credibility.³⁹⁹ In the rare instance when qualifications are brought up regarding a Cabinet nominee, it is really "code for something else."⁴⁰⁰ On the other hand, if concern exists that a nominee is actually unqualified, the relevant Senate committee launches a frantic stealth investigation into the nominee's life in an effort to dig up some dirt.⁴⁰¹

The appointment process has degenerated into a search for disqualifying factors that have no connection with a nominee's ability to do the job.⁴⁰² Roberta Achtenberg nearly suffered defeat because she was a lesbian;⁴⁰³ Zoe Baird was unfairly singled out and forced to withdraw because of nanny problems;⁴⁰⁴ and while Webster Hubbell's membership in a segregated country club was not severe enough to disqualify him,⁴⁰⁵ Lani Guinier's suggestions for voting rights remedies were enough to disqualify her.⁴⁰⁶

Guinier's nomination experience was unusual for a candidate to a sub-Cabinet position. Executive candidates are rarely subject to scrutiny about their substantive legal and policy views;⁴⁰⁷ this scrutiny is usually reserved for Supreme Court nominees.⁴⁰⁸ The operative philosophy underlying the confirmation process for both sets of candidates, however, is that serving the country is considered a reward, one that must be deserved, rather than a calling.⁴⁰⁹ This approach is a mistake. Professor Carter believes the country got stuck in this approach partly because "we the people" are aware that, in modern times, we lack any real control over how the federal government is run; thus, the confirmation process is our only chance to see who is actually running the country.⁴¹⁰ But since "[w]e as a nation, like the Senate as a body, share no consensus on what qualifications a nominee ought to have, for the Supreme Court or for anything else[] . . . we have to spend [our] time arguing over whether candidates are *disqualified* instead of whether they are *qualified*."⁴¹¹

399. *Id.* at 34.

400. *Id.* at 165.

401. *See id.*

402. *Id.* at 9, 20-22, 24, 163.

403. *See supra* text accompanying notes 314-22.

404. *See supra* text accompanying notes 302-13.

405. *See supra* text accompanying notes 323-34.

406. *See supra* part IV.A-B.

407. *See CARTER, supra* note 7, at 9, 29, 31-32.

408. *Id.* at 15, 19, 21-22, 29.

409. *Id.* at 29, 185.

410. *Id.* at 15.

411. *Id.* at 162-63.

Disqualifying factors tend to be private transgressions or facts which provide fertile opportunities for moral indignation to surface and thus defeat the nomination.⁴¹² Television becomes our "backyard fence,"⁴¹³ and scrutiny degenerates into "gossip."⁴¹⁴ But Professor Carter says our indignation is not unleashed consistently; instead, it "strikes, cancer-like, almost randomly."⁴¹⁵ This is one reason why the "disqualification game"⁴¹⁶ is such a poor substitute for meaningful analysis of a candidate's job qualifications. We must return to a system that more accurately reflects the intent of the Framers, a system where intelligent congressional involvement during the nomination phase complements an informed inquiry into a candidate's job qualifications during the confirmation phase.

VI. A PROPOSAL FOR EXECUTIVE CONFIRMATION REFORM

*The Republican form of government is the highest form of government; but because of this it requires the highest type of human nature—a type nowhere at present existing.*⁴¹⁷

While the controversy rages over whether and to what extent the judicial confirmation process needs reforming,⁴¹⁸ very little has been said about a parallel need to reform the process for executive branch

412. *See id.* at 8, 11 ("[T]he reason that opponents try to paint controversial nominees as sinners, as personally venal, is that they know the American people, the world's strongest supporters of capital punishment, like to see the sinful destroyed; we the people of the United States do not like to forgive.").

413. *See id.* at 18.

414. *See id.*

415. *Id.* at 29.

416. *Id.*

417. HERBERT SPENCER, *The Americans, in 2 ESSAYS: SCIENTIFIC, POLITICAL, AND SPECULATIVE* 471, 478-79 (library ed., D. Appleton & Co. 1904) (1883).

418. *See, e.g.,* CARTER, *supra* note 7; SENATOR PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985); Senator Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1 (1992); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992); John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); Mark C. Rahdert, *The Toughest Job Interview in the Land*, 2 TEMP. POL. & CIV. RTS. L. REV. 293 (1993) (reviewing SIMON, *supra*); Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559 (1988); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

positions.⁴¹⁹ Lani Guinier's experience, especially when contrasted with similar executive appointments that ended quite differently,⁴²⁰ cries out for a similar reform push for the executive confirmation process as well.

A. *The Basic Proposal*

To preserve the Senate's advice and consent function regarding candidates whom the president has seen fit to nominate, this Comment proposes that Congress adopt a new Senate Rule mandating that a hearing be set within a fixed, but reasonable, number of days after the president makes a formal announcement. The nominee is then "guaranteed" a Senate hearing, if the candidate so desires one. This procedure produces several results.

First, it protects the president's constitutional right to withdraw nominations from consideration by the Senate.⁴²¹ Second, it nonetheless discourages the president from taking such action before nominees have the opportunity to appear before the appropriate committee, for the reasons articulated below. Third, it aids the country's ability to attract outstanding individuals to public service. Fourth, it provides nominees both an appropriately respectful and formal forum to answer all questions and concerns regarding their qualifications and fitness for positions.⁴²² Fifth, it protects nominees from arbitrary sacrifice if their nominations proceed at a vulnerable time for the president. Finally, this process assures the American public that democratic principles so often referred to in presidential and senatorial speeches— notions of fair play, the chance for the individual to be heard, and tolerance for the exchange, rather than the suppression, of ideas—are principles that guide the speakers of such ideals.

Of course, the president may decide after nominating the candidate to withdraw the nomination, as occurred with Guinier. Nonetheless, a quickly set and firm hearing date may discourage the president from taking such action since withdrawal under these circumstances may provoke more public criticism of the president than the nomination itself. When President Clinton withdrew Lani Guinier's nomina-

419. For one such rare example, see CARTER, *supra* note 7.

420. See *supra* notes 314-31 and accompanying text.

421. See U.S. CONST. art. II, § 2, cl. 2.

422. This process is far more desirable than the humiliating, time-crunched forum that *Nightline* provided to Lani Guinier—the only public opportunity Guinier was given to defend herself before her nomination was withdrawn. See *supra* notes 211-16 and accompanying text.

tion before her hearing, he was widely criticized for his indecisiveness, skewed sense of fair play, and undemocratic stifling of ideas.⁴²³ Furthermore, fears surfaced that survival politics was turning the process into a bankrupt exercise, and that qualified candidates with paper trails would quickly become an endangered species.⁴²⁴ The reform proposed in this Comment encourages the president to stand by an outstanding nominee during the vulnerable period before the Senate hearings take place.

B. Encouraging More Frequent Use of Professor Stephen L. Carter's "Cures" When the Nominee Loses Public Respect

1. The "low-risk cure"⁴²⁵

Professor Carter believes that a nominee's supporters should have the burden of making the candidate's case for confirmation.⁴²⁶ If this approach is followed, the Senate could reject nominees solely because their supporters have not presented a persuasive and convincing case.⁴²⁷ Thus, opponents in the Senate, the press, and the public could get away from the current bad habit of "search[ing] for that single tantalizing disqualifier with which one hopes to spark a firestorm of criticism"⁴²⁸ because nominees would no longer enjoy presumptions of fitness. When a nominee's reputation is borked, however, and a loss of public respect ensues, the president should, in rare cases, effectuate a "low-risk cure" by personally making the case for the nominee.⁴²⁹ Such a cure would have benefitted both Professor Guinier and Judge Bork.⁴³⁰ Of course, as Professor Carter points out, Presidents Clinton and Reagan may have decided against spending limited political capital in this manner because each felt he had "more important fish to fry."⁴³¹ Yet, President Clinton stood by Webster Hubbell during the same time period for a much less defensible problem.⁴³² Simi-

423. See *supra* notes 219, 225-39 and accompanying text.

424. See *supra* notes 90, 243-46 283-84 and accompanying text.

425. CARTER, *supra* note 7, at 168.

426. *Id.* at 159. Senatorial support for presidential nominations can be difficult to come by, even when the president's own party controls the White House. See *supra* note 384. Instead, partisan senators may wait to see if any problems emerge with the nomination; if so, they can refuse to support the nominee and preserve their own political survival.

427. CARTER, *supra* note 7, at 159.

428. *Id.*

429. See *id.* at 168.

430. See *id.*

431. *Id.*

432. See *supra* text accompanying notes 325-26.

lar support for Guinier would have increased her chance for confirmation.⁴³³

Presidential support of his or her nominee can be decisive. Compare President Clinton's handling of the Guinier nomination with President Bush's unflinching support of Clarence Thomas. Bush's relentless public support of Judge Thomas throughout the confirmation process—both before and after the Anita Hill scandal⁴³⁴—involved a personal risk to the credibility of Bush's political and presidential judgment. Thomas's nomination was clearly in jeopardy and confirmation victory was not assured.⁴³⁵ But Bush's unwavering support, along with a well-orchestrated White House offensive strategy,⁴³⁶ played a critical role in raising doubts about Thomas's critics and the allegations lodged against him and inspired the public's demand for senatorial fair play and a second hearing.⁴³⁷ Thomas was subsequently confirmed.⁴³⁸

2. The "high-risk cure"⁴³⁹

Assuming the president is sufficiently deterred from prematurely withdrawing the nomination, adopting the "guaranteed" hearing procedure also assures the nominee a chance to articulate his or her policy and jurisprudential views before the Senate. The Senate, the press, and the citizenry will then be given the crucial "other side" as the nominee is allowed to personally counter the biased interpretations of partisan opponents and reporters in the press. This creates the potential for Professor Carter's senatorial "high-risk cure"⁴⁴⁰ to work its

433. After the withdrawal, Jesse Jackson argued, "If President Clinton and Senate Democrats had stood by Lani as President Bush and the Republicans stood by Clarence Thomas, she would be confirmed." Lewis, *supra* note 231, at A1 (quoting Jesse Jackson). But see CARTER, *supra* note 7, at 167 ("[D]espite the anguish it created in Lani Guinier's supporters (myself included), President Clinton may have been correct when he made the choice to withdraw her nomination if he thought the vicious campaign against her had made it impossible for her to do the job effectively.").

434. See Jack Nelson, *Democrats Failed to Protect Hill from GOP*, L.A. TIMES, Oct. 15, 1991, at A7, A9; David G. Savage & Douglas Jehl, *Bush Confident on Thomas Vote; Key Senators Silent*, L.A. TIMES, Oct. 15, 1991, at A1, A6.

435. See Edwin Chen & Douglas Frantz, *Support for Thomas Holds Despite Charges*, L.A. TIMES, Oct. 8, 1991, at A1, A16; Savage & Jehl, *supra* note 434, at A1, A6.

436. Nelson, *supra* note 434, at A7, A9.

437. See CARTER, *supra* note 7, at 13-14.

438. Justice Clarence Thomas was confirmed on October 15, 1991, by a vote of 52 to 48. Melissa Healy & Edwin Chen, *Thomas Confirmed, 52 to 48: It Is Now a "Time for Healing," the New Justice Says*, L.A. TIMES, Oct. 16, 1991, at A1. The vote was the closest in this century. *Id.*

439. CARTER, *supra* note 7, at 168.

440. *Id.*

magic. If the nominee suffers a loss of public respect due to distortion of her views,⁴⁴¹ senators might "invest their own political capital by voting to confirm the nominee because of a faith that the nominee's performance will be so spectacular that the public will quickly regain the faith it has lost."⁴⁴² Some senators relied on exactly this in voting to confirm Clarence Thomas.⁴⁴³ Lani Guinier was a much more deserving candidate for such a cure,⁴⁴⁴ and she should have been given the opportunity to obtain it.

C. *The Effect on Executive and Legislative Players*

Critics of this proposal may argue that what is best for the country is maximum flexibility for the president and that this proposal restricts this "presidential prerogative."⁴⁴⁵ As argued above, however, the problem with our current presidential prerogative model is that the Senate is left in a reactive, rather than an advisory, role. This is antithetical to the original and historical understanding of the Senate's advisory function.⁴⁴⁶ The model also perpetuates borking contests between the White House and Congress.⁴⁴⁷

Supporters of a new Senate Rule implementing a hearing date mechanism may nonetheless contend that the rule will fail to eradicate any of the problems highlighted by the Guinier events. The president could simply leak a name to the Senate before any formal announcement is made. If the name generates strong negative reaction, the president simply discards the potential nominee and floats another name. This would circumvent the required hearing date and deny the discarded nominee a formal hearing.

Several factors counter this criticism. First, leaking a name to test the waters before a formal announcement is not something new. This occurs regularly and can be viewed as fulfilling the senatorial "advice" function.⁴⁴⁸ Second, an increase in leaks from the White House is not inherently bad.

441. *Id.* at 168-69.

442. *Id.*

443. *Id.* at 169.

444. Lani Guinier *never* suffered from criticism that she lacked the basic tools necessary for the job, as Thomas did. *See id.* at 137. Nor was Guinier accused of having committed morally repugnant acts, as Thomas was accused of sexual harassment. Most importantly, the legitimacy of an entire institution like the Supreme Court was not at stake. *See id.* at 168.

445. *See supra* note 393 and accompanying text.

446. *See supra* notes 387-97 and accompanying text.

447. *See supra* text accompanying notes 398-406.

448. *See supra* notes 387-92 and accompanying text.

Consider a scenario that could have resulted from a leak in the Guinier case. Assume that some members of Congress were familiar with Guinier's writings and proposals. Opponents could have immediately presented their reservations to the President, who could have reviewed Guinier's works before the press distorted the facts.⁴⁴⁹ The President's supporters on Capitol Hill would also have the initiative to study her articles. An unbiased reading would have undoubtedly generated supporters, who could then provide critical assistance to Guinier.⁴⁵⁰ The existence of alternative interpretations of Guinier's ideas might have compelled the President to consult Guinier personally, a courtesy denied her. If consulted, Guinier could have precisely explained her views. If not consulted, the mere existence of more positive interpretations may have motivated the President to nominate her. The White House could then take the offensive and anticipate attacks by the conservative press and other partisan opponents. By flooding the media with Guinier's true views upon the announcement, the Administration would succeed in defining the nominee before its enemies did.⁴⁵¹

449. It is unclear how thoroughly President Clinton read Guinier's writings. During the press conference announcing his withdrawal of her nomination, he stated he had not read her work before nominating her. *Transcript of President Clinton's Announcement*, *supra* note 223, at A19. He asserted later in the speech he had carefully reread her articles that day. *Id.* What is clear is that neither Clinton nor the White House staff ever understood Guinier's proposals. During the same press conference, the President stated he was dropping Guinier because she advocated "principles of proportional representation and minority veto as general remedies that I think inappropriate as general remedies and anti-democratic, very difficult to defend." Marcus, *supra* note 89, at A1 (quoting President Clinton).

Guinier does *not* advocate these solutions as general remedies. Instead, her remedies are limited "to extreme cases of racial discrimination at the local level." *TYRANNY OF THE MAJORITY*, *supra* note 9, at 109. Furthermore, Guinier proposes adoption of her solutions on a legislative level only if "*depending on the local context*, they better approximate the goals of democratic fair play." *Id.* at 14 (emphasis added). Allowing congressional participation at the informal consideration stage by discussing possible nominees with members of the Senate will increase the possibility that the White House will accurately interpret a nominee's views.

450. One commentator later compared Clarence Thomas, who "had a staunch, unflinching champion in Senator Jack Danforth and a supportive White House," with Guinier, who "had nobody on Capitol Hill for her, and the White House was distracted, disorganized, and in disarray." Carter, *supra* note 94, at xi (quoting political commentator Mark Shields).

451. See *supra* text accompanying note 237. The crucial difference between leaking the name of a possible nominee and making a formal nomination is that the president controls the timetable in the first case, but not in the second. By floating the name of a nominee, the president can take as much time as he or she wants to further research the nominee without fighting an attack by opponents. But once a formal nomination is made, the president may be under pressure to act, possibly by withdrawing the nominee's name, before

If the President, after speaking with Senate members, believed he could not support Guinier because he did not agree with her views or lacked enough congressional support, the White House could simply float another name. Testing the waters would have saved both the President and Guinier great humiliation and embarrassment.

D. *The Effect on the Press*

Assume a different situation. None of the parties privileged to the leak know about Guinier's writings or their potential for controversy. The President decides to make a formal announcement and the Senate sets a hearing date within a few days, as mandated by the new Rule. Some writers in the press then begin their smear campaign. But the fixed hearing date motivates other members of the press—and the Senate—to evaluate the nominee's work, aware that the hearing is on its way and that blind reliance on the *Wall Street Journal's* interpretation will not suffice. The press will realize they are now expected to independently cover the articles—not just report the controversy⁴⁵²—since the nominee's writings will most likely be scrutinized carefully at the upcoming hearing. Instead, the lack of any definite hearing date gave opposition newspapers immense confidence to skewer as many of Guinier's views as they liked, *secure in their knowledge that if they created enough controversy, there would be no hearing at all*. A fixed hearing date should encourage a dialogue both in the press and between partisans in the days leading up to the hearing while taking some of the heat off the president.

Adoption of this easily implemented proposal will stave off repeats of the Guinier fiasco. Conservatives in the press initiated a smear campaign to brand Guinier unacceptable for office.⁴⁵³ Major national newspapers repeated the attacks verbatim.⁴⁵⁴ Partisan opponents reiterated the charges on a daily basis.⁴⁵⁵ An inexperienced White House staff, caught off guard, accidentally furthered the damage and legitimized Guinier's betrayal by the President who was also her friend—first, through the confession that he was not familiar with

the Senate can hold a hearing to vote on confirmation or rejection. In these cases, as in Guinier's, the "hearing" will be held in the press.

452. See *supra* text accompanying notes 145. For one high court reporter's view of the press's critical role in the confirmation process, see Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

453. See *supra* part III.B.

454. See *supra* part III.C.

455. See *supra* text accompanying notes 174-78.

her work, and second, by admitting he could not endorse her nomination after he had ostensibly read her articles.⁴⁵⁶

VII. CONCLUSION

A procedure fixing firm hearing dates shortly after nominees are announced will give candidates a better chance of retaining their outstanding professional and personal reputations, regardless of whether they are ultimately confirmed. The chilling effect on academic speech currently felt in the law schools will thaw. Scholars will continue to take risks in their writing, seeing that criticism of a candidate's ideas during the confirmation process is routinely rebutted with the candidate's own speech. Most importantly, we the people will benefit by attracting, and getting, the best and the brightest public servants this country has to offer.

*Krista Helfferich**

456. See *supra* notes 223, 449 and accompanying text.

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