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Rock Bottom

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Now that another highly qualified judicial nominee has been left as road kill, the question is how much lower can the confirmation process sink.

I'm referring to the defeat, by filibuster, last week of Caitlin J. Halligan, President Obama's nominee to the United States Court of Appeals for the District of Columbia Circuit. I last wrote about Ms. Halligan back in April, at which point her nomination had been pending for more than six months. Now it's dead, on a nearly party-line vote, the Democratic leadership having fallen six votes short of the 60 needed to invoke cloture.

The only Republican to break ranks was Senator Lisa Murkowski of Alaska, who won re-election as a write-in candidate and so owes nothing to her Republican bosses. No such independence was shown by the two Republican senators from Maine, Olympia J. Snowe and Susan Collins, so-called moderates whose efforts to explain their votes against permitting Ms. Caitlin's nomination to come to a vote (a simple majority would have approved it) were so contorted as to be barely comprehensible. (Senator Collins mumbled something about needing to shrink the appeals court, failing to note that the Republicans invoked no such workload-related compunctions when they filled not only the ninth seat, to which Ms. Halligan was nominated, but the tenth as well. There are now three vacancies on the 11-member court.)

Back in May, Senator Murkowski was also the only Republican to vote to end the filibuster against Goodwin Liu, whom President Obama had nominated to the United States Court of Appeals for the Ninth Circuit, in San Francisco. (Now Justice Liu, the former Berkeley law professor may have the last laugh; Gov. Jerry Brown promptly named him to the California Supreme Court.) At 41, Mr. Liu, a Rhodes scholar and former Supreme Court law clerk, is a leading progressive legal scholar of his generation. Although the Republicans came up with other rationales for opposing him, including his Senate Judiciary Committee testimony six years ago against the Supreme Court confirmation of Samuel A. Alito Jr., the actual reason was that they couldn't stand the thought of a young, super smart, energetic liberal sitting on the appeals court, in the launch position to become the first Asian-American on the Supreme Court.

Mr. Liu is a friend of mine. I applauded his nomination and was distressed at its fate. But since I don't believe that judges are simply umpires who call balls and strikes, I get the role of ideology in evaluating judicial nominees. What I don't get is what happened to

Ms.Halligan, whom I've met only once or twice. She has no ideological markings other than those that identify her with the mainstream of the New York legal establishment, within which, following a clerkship with Justice Stephen G. Breyer, she has made a spectacularly successful career in both the public and private sectors. She was solicitor general of New York State; head of the appellate practice at a major law firm; and is now general counsel to the Manhattan district attorney. She has argued before the Supreme Court five times. Her 45th birthday was Dec. 14.

This was not a fight over ideology. It was an effort to keep the president from filling a seat on what is not just another appeals court. The D.C. Circuit is not just a federal court but a national one, with jurisdiction over federal regulatory initiatives and habeas corpus appeals by Guantánamo detainees. Next month, it will hear a potential landmark case on the constitutionality of the Voting Rights Act. Its caseload may not be huge, but its cases tend to be dense, tough and vitally important.

When pressed on their treatment of Ms. Halligan, Republicans typically invoke President George W. Bush's two nominees whom the Democrats blocked from the D. C. Circuit, Peter D. Keisler and Miguel A. Estrada, both highly qualified and both prominent conservatives. (The classy Mr. Estrada wrote to the Judiciary Committee in support of Ms. Halligan, as did two dozen other members of leading law firms.)

But it seems to me that this tit-for-tat goes only so far. President Bush succeeded in putting four decidedly conservative nominees on the D. C. Circuit. Three remain there today: Janice Rogers Brown, Thomas B. Griffith, and Brett M. Kavanaugh. The fourth was John G. Roberts Jr. It was his seat, which Chief Justice Roberts vacated on Sept. 29, 2005, to which Ms. Halligan was nominated. True, the Republicans didn't get everything they wanted. But they seem determined to make sure that President Obama gets nothing.

Across the federal judiciary, confirmation has been proceeding at a slow crawl. This week, the Judiciary Committee held a scheduled confirmation hearing that could have accommodated five nominees. But because Republican senators claimed not to be finished reading the F.B.I. files of four of the nominees, only one, Paul J. Watford, nominated for the Ninth Circuit, was able to appear for his hearing. Nominees who clear the committee without opposition have to wait months for a floor vote because the Republicans won't agree to a speedier schedule. Of 21 nominees now awaiting floor votes, 18 had no committee opposition, but only a handful, at most, will get a vote before the Senate recesses for the year.

Just when news on the judicial front could not get more discouraging, I came across something truly bizarre, a position paper by the new front-runner among Republican presidential candidates, Newt Gingrich. Under the title "Bringing the Courts Back Under the Constitution," Mr. Gingrich launches a 28-page attack on "lawless judges" who need to be reined in "if we are going to retain American freedoms and American identity."

The document, he writes, "serves as political notice to the public and to the legislative

and judicial branches that a Gingrich administration will reject the theory of judicial supremacy and will reject passivity as a response to Supreme Court rulings that ignore executive and legislative concerns and which seek to institute policy changes that more properly rest with Congress." By rejecting passivity, Mr. Gingrich means impeaching judges for "unconstitutional" rulings or, failing to muster the two-thirds majority necessary for impeachment, simply abolishing their positions.

Much of the document is a grab bag of long familiar right-wing talking points (Judges who acknowledge foreign law? A threat to "American sovereignty!") It is also just plain sloppy, misspelling Justice Ruth Bader Ginsburg's name throughout. But truly head-spinning is the tenuous hold that this screed, from a onetime history professor, has on American history.

Mr. Gingrich writes that the contemporary "power grab by the Supreme Court" is a "modern phenomenon and a dramatic break from all previous American history." (Anyone remember the court's response to the New Deal?) Rebuking the court for substituting its will for that of Congress is downright strange, given that it is the Republicans who have run to the federal courts, imploring judges to strike down the Congressionally enacted Affordable Care Act.

Perhaps strangest of all is Mr. Gingrich's attack on Cooper v. Aaron, the court's celebrated response to the Little Rock school crisis of 1958. The unanimous opinion, signed individually by all nine justices for emphasis, held that Arkansas and all other states were bound by the court's interpretation of the equal protection guarantee four years earlier in Brown v. Board of Education. Cooper v. Aaron was, as Justice Breyer writes in his recent book, "Making Our Democracy Work," essential in its time and part of the "hard-earned victory for the rule of law" that the Little Rock story became. Newt Gingrich is unmoved. Cooper v. Aaron's assertion of the Supreme Court's authority, he writes, was "factually and historically false."

Thinking back to Ms. Halligan's failed nomination, I actually don't disagree with everything in Mr. Gingrich's manifesto. Four words in boldface type on page 20 caught my attention: "Electing the right Senators."

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