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Missing in Action

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Linda Greenhouse on the Supreme Court and the law.

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By this time a year ago, Justice John Paul Stevens had announced his intention to retire from the Supreme Court. A year earlier, Justice David H. Souter's retirement announcement was just days away. Those galvanizing mid-spring developments dominated thoughts about the future of the federal judiciary for two successive years.

This year, by contrast, all seems blissfully quiet on the Supreme Court vacancy front. (Of course, that observation comes with the caveat that I possess no inside information, and never did: on the afternoon of March 18, 1993, I assured my editors that no Supreme Court departures were imminent. Justice Byron R. White announced his retirement at nine o'clock the next morning.) It appears that for the first time in the life of the Obama administration, the White House will not face the all-consuming task of choosing a Supreme Court nominee and navigating the Senate confirmation process.

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That means, it seems to me, that there are no excuses either for the administration or for the Democratic leadership in the Senate not to get down to the business of filling the 92 vacancies that now exist on the federal district courts and courts of appeals (up from 54 vacancies when President Obama took office, or from six percent to more than 10 percent of the 857 authorized judgeships).

In his state of the judiciary message on New Year's Day, Chief Justice John G. Roberts Jr. gave a welcome shove to both parties and both branches when he said there was "an urgent need for the political branches to find a long-term solution" to filling the vacancies. Since then, though, not much has happened but a lot of finger pointing, a surprising amount of it between Senate Democrats and the White House. Each accuses the other of not making judicial nominations a sufficient priority. There is some kind of seriously baffling and dysfunctional shadow play going on here, which of course helps no

one except the Republicans.

It is the Republicans who have their priorities in order, and their strategy is perfectly obvious: to deprive President Obama and any future Democratic president of a bench of highly qualified judges who can be tapped when future Supreme Court vacancies occur. In other words, it's not about anything that the Republicans say or imply that it's about: not "judicial activism," nor about which nominee disrespected which Republican Supreme Court nominee at a confirmation hearing, nor about a nominee's insufficient commitment to permitting every man, woman and child in America to carry a gun.

It's about the bench. The judges named by President Bill Clinton during the 1990's are either approaching or have passed 60, the magic age at which Supreme Court prospects effectively disappear. It is their prospective replacements, those with clear Supreme Court potential, who are the current hostages. Goodwin Liu, the Berkeley law professor, Rhodes Scholar and former Supreme Court law clerk, nominated 14 months ago to the United States Court of Appeals for the Ninth Circuit, is the poster child for this strategy. He has been approved by the Judiciary Committee three times on a party-line vote but has yet to receive a vote on the Senate floor because of a threatened Republican filibuster.

While the Liu nomination has received a fair amount of attention, another nomination that is perhaps even more telling of the current state of affairs has remained largely under the radar. Last September, President Obama nominated a New York lawyer, Caitlin Halligan, to the seat on the United States Court of Appeals for the District of Columbia Circuit formerly occupied by John Roberts. The D.C. Circuit, to which judges are traditionally appointed from anywhere in the country, is a famous incubator of Supreme Court justices. In addition to Chief Justice Roberts, three other current justices, Antonin Scalia, Ruth Bader Ginsburg and Clarence Thomas, are D.C. Circuit veterans. So filling a vacancy on that court is a high-stakes matter, and the Obama administration took its time. Ms. Halligan's nomination occurred on the fifth anniversary of the vacancy.

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Her qualifications are beyond any possible doubt. A former Supreme Court law clerk, she has argued before the court five times, most recently last month. She headed the appellate practice of a major law firm after serving for six years as New York State's solicitor general, in charge of an office of 40 lawyers who represent the state in state and federal appellate courts. Currently, she is general counsel of the Manhattan district attorney's office, the place where Justice Sonia Sotomayor worked before becoming a judge. Ms. Halligan's nomination has won endorsements from leading members of the Supreme Court bar across the ideological spectrum. Oh, and did I mention that she is 44 years old?

As far as I know, Ms. Halligan has not been an activist for any cause. So what could Republican senators possibly hold against her? Nothing, it turns out, except excellence

and career potential. Conservative bloggers floundered around trying to come up with something. A National Review blogger was reduced to accusing her of "left-wing extremism" for having been one of three dozen members of a committee of the Association of the Bar of the City of New York that issued a report in early 2004 critical of the Bush administration's Guantanamo Bay detention policies.

As it happens, this report has been sitting on my shelf for the past seven years. Not having looked at it in quite a while, I turned to the conclusion on page 153 to see how exactly how extreme it was. Anyone who finds the concluding paragraphs to represent left-wing extremism has been living in a different universe:

> The Constitution is not a "suicide pact," as a Supreme Court justice once famously declared. But neither is it a mere compact of convenience, to be enforced only in times of civic tranquility. It should take far more than the monstrous brutality of a handful of terrorists to drive us to abandon our core constitutional values. We can effectively combat terrorism in the United States without jettisoning the core due process principles that form the essence of the rule of law underlying our system of government.
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> Insistence on the rule of law will not undermine our national security. Abandoning the rule of law will threaten our national identity.

Ms. Halligan's nomination was approved by the Judiciary Committee last month on a 10-8 party-line vote, and she now awaits action on the Senate floor. There is no reason I can think of why Senator Harry Reid, the majority leader, has not scheduled a vote that would dare the Republicans to state their objections to this nomination in public and sustain a filibuster if they can. The Senate has confirmed several judicial nominees recently, but none over Republican objections. As I said earlier, the Republican strategy is perfectly clear. It is the Democrats' behavior, both in the Senate and in the White House, that has progressives seething right now.

The administration is simply not nominating judges at an acceptable rate or making a public push for those it has nominated. For the current 17 vacancies on the federal appeals courts, there are only eight nominees. For 75 district court vacancies, there are 34 nominees. It's possible to come up with explanations for some of these missing nominees — recalcitrance on the part of home-state senators, tardiness by the American Bar Association committee that vets potential nominees — but these numbers are huge. As of this month, President Obama is 33 judicial nominations behind where President George W. Bush was at the comparable point in his presidency, and 41 nominations behind President Bill Clinton.

That judges are among a president's most important legacies is an observation so obvious as to be platitudinous. So here's another observation: you can't confirm someone who hasn't been nominated.