

# Right-Wing Follows Deceptive Script on Supreme Court

*Right-wing leaders sacrifice claims to credibility with dishonest, discredited attacks on Obama and potential nominees*

## All you really need to know about the Right's credibility in ten words or less

A day after news of Justice Souter's planned resignation broke in the news, "dozens" of right-wing leaders representing more than 60 groups got together for a strategy call organized in part by the Judicial Confirmation Network to get everyone fired up and on message. All you need to know about the credibility of this campaign's leaders, and the credibility of their evaluations of potential nominees, is contained in this one sentence from the Judicial Confirmation Network's Wendy Long:

"The current Supreme Court is a liberal, judicial activist court." (RWW May 1)

Anyone who has remotely followed the steady rightward drift of the Court over the past couple of decades knows how ludicrous this statement is. If you really need some kind of rebuttal, here's a short response, and here's some more meat.

But who's Wendy Long and why should we care? Roll Call, a newspaper that covers Congress, reported on May 4 that "Republicans are also planning to coordinate closely with outside activist groups like the Judicial Confirmation Network."

And it's not just Long. Ed Whelan promoted the same line on National Review's Bench Memos blog: "Don't be fooled by the false claims that we have a conservative Supreme Court. The Court has a working majority of five living-constitutionalists."

In the same realm of reality is this gem from activist Kay Daly who claims to speak for the Coalition for a Fair Judiciary:

"Obama could conceivably put a justice onto the bench that literally would make Souter look like [Associate Justice Antonin] Scalia."

## We saw it coming

Back in February, we reported on the coordinated campaign of deceptive and distorted attacks on the qualifications, records, and fitness of President Obama's appointments to several important Justice Department positions. Right-wing leaders were launching over-the-top attacks on a group of highly qualified and widely respected nominees, people like Dawn Johnson, nominated to lead the Office of Legal Counsel. Johnson enjoys support from legal scholars across the spectrum, but that hasn't prevented right-wing activists from caricaturing her record and delaying her confirmation to this important job.

We said in February that the disinformation campaign against DOJ nominees was "less about stopping any of those nominees and more about getting right-wing activists, pundits, and lawmakers warmed up for similar attacks on eventual Obama nominees to the federal judiciary, and in particular to the U.S. Supreme Court." We thought the strategy was pretty clear. They hoped that their hyperventilating attacks on Obama and his Justice Department nominees would condition conservative activists and media (and, they hope, a broader public) to believe that:

- Obama is a dangerous radical who is using his appointment power to turn the government over to out-of-the-mainstream extremists; and

- his judicial nominees will be extremists who plan to rule based on their feelings and political beliefs rather than the law or the Constitution.

Since then, they've continued their campaign, and expanded it to people like Seventh Circuit judicial nominee David Hamilton. The President of the Indianapolis chapter of the Federalist Society has called Hamilton "an excellent jurist" whose "judicial philosophy is left of center, but well within the mainstream, between the 30-yard lines." But right-wing activists have maligned Hamilton as an extremist as a dry run for their campaign against the coming Supreme Court nominee.

### Trashing nominees as political posturing

From the moment that news of Justice David Souter's resignation plans leaked in the press, right-wing leaders have followed the script they laid out earlier this year with sad predictability, and right-wing pundits and politicians have played their assigned parts, even though their charges against Obama's Justice Department nominees haven't held up to serious scrutiny.

Now, Republican strategists are admitting that they aren't likely to prevent any Obama nominee from being seated — it's just part of the political positioning for 2010:

Movement conservatives are in a position to oppose the nomination of almost any nominee that the president puts forward. In conversation with [The Washington Independent], activists portrayed the coming confirmation hearings as a chance to peel the bark off of the president's bipartisan image, to unite the conservative movement, and to learn lessons for future hearings with higher stakes. Few imagined that the president could get a much more liberal pick than retiring Justice David Souter through the Senate. Their focus was not so much on defeating this pick

— an incredibly difficult task with only 40 Republican senators — but on carving out an election issue for the 2010 midterms and on building capital for a theoretical future battle to replace one of the court's conservatives.

"This can be an educational moment for the American people," said Gary Marx, the executive director of the Judicial Confirmation Network. "This is a chance to reaffirm the meaning of judicial restraint and explode the myth that Barack Obama is trans-partisan leader."

And just to make matters perfectly clear, Curt Levey of the Committee for Justice lobbed a not-very-veiled threat toward senators representing red- and purple states:

Remember the values of the regular folks who sent you to Washington. Don't vote for a Supreme Court nominee whose values are closer to those of the intellectual elite than to those of your constituents. Let President Obama know now that you will not appreciate being put in that position. While it's too early to know how much money will be spent on advertising to defeat an activist nominee, it is virtually certain that the money will be directed at red and purple state Democrats.

### The 'inevitability' of extremist nominees

Right-wing religious and legal activists have worked hard to set a tone for media coverage of President Obama's eventual nominee by insisting that whoever is eventually nominated will be an extremist by definition because Obama chose him or her — kind of a reverse twist on Bush administration claims that any action taken or ordered by President Bush was inherently legal.

- Jed Babbin writing for Human Events: "Obama will nominate someone who would be a hard-core hyper-liberal judicial activist. It would be impossible — unthinkable

- for this president to do otherwise.”
- The Traditional Values Coalition: From Obama’s public statements, it is clear that he will appoint a Justice who views the U.S. Constitution like a Wikipedia entry that can be edited, revised and distorted for the political agenda of the Justice.” RWW May 1
- The Southern Baptists’ Richard Land: President Obama’s ability to sell himself to the American people as a centrist will be hampered severely by his nomination of what will inevitably be a radically liberal justice.”
- American Center for Law and Justice Chief Counsel Jay Sekulow: “Based on the appointments at the Department of Justice, it’s clear that President Obama will name a Supreme Court nominee who will embrace an extremely liberal judicial philosophy. There’s no illusion here — President Obama is poised to reshape the nation’s highest court.” (RWW May 1)
- Ed Whelan, National Review Online Bench Memos blog: “Souter has been a terrible justice, but you can expect Obama’s nominee to be even worse”

### Recycled rhetorical attacks on potential nominees

The Judicial Confirmation Network’s Wendy Long told a reporter that the conservative activists who strategized last Friday “were planning to coordinate on ‘batting down some of his most extreme candidates’” before there’s even a nomination. In fact, that’s the strategy they started back in February with their attacks on the Justice Department nominees.

The Judicial Confirmation Network’s Wendy Long and Gary Marx claimed in a May 5 memo that three potential nominees, Elena Kagan, Sonia Sotomayor, and Diane Wood are “hard-left liberal judicial activists.” Curt Levey of the Committee for Justice said Sotomayor was “clearly committed to judicial activism.”

Right-wing legal activist Ed Whalen has been

a champion name-caller, branding popular Massachusetts Governor Deval Patrick “a racist extremist and judicial supremacist” and Yale Law School Dean Harold Koh a “champion of judicial transnationalism and judicial supremacist.” Of Seventh Circuit Judge Diane Wood, Whelan says, “her course of conduct signals the dangers of judicial lawlessness that inhere in Obama’s badly misguided standard for judging.” The Heritage Foundation’s Brian Darling calls Koh “very extreme.”

### Distortions of Obama’s comments about judges with ‘empathy’

Right-wing leaders have not been able to resist grossly distorting then-candidate and now President Obama’s call for judges who exhibit empathy for average citizens. They’ve been eager to suggest that Obama is looking for judges who pay no attention to the Constitution or law and simply make decisions based on their feelings. Once again, Wendy Long provides perhaps the most perfectly ridiculous example of this genre, writing for the *Washington Times*:

Obama “has boldly proclaimed that he intends to make sure his nominees to the Supreme Court don’t harbor any crusty fealty to the written Constitution, or the millenniums of Western law that undergird its principles, or to the timeless truths that underlie our Declaration of Independence.”

And in Human Events, Jed Babbin writes:

“Under Obama’s reasoning, the judge’s job isn’t to interpret the law: the judge should walk a mile in the appellant’s Birkenstocks.”

Glad we’re going to have a serious conversation about the Court. Unfortunately, these two have plenty of company:

- Concerned Women for America: “President Obama stated during the campaign that judges should rule according to ‘empathy’ for preferred classes of people, such as homosexuals and some ethnic groups, but not others.”

- Long again: “If Obama holds to his campaign promise to appoint a Justice who rules based on her own “deepest values” and what’s in her own ‘heart’ — instead of what is in the Constitution and laws — he will be the first American President who has made lawlessness an explicit standard for Supreme Court Justices.”
- Republican pollster Kellyanne Conway is also on the “lawless” message: “We tested ‘empathy’ the way that President Obama defined it, almost verbatim,” she said. “That is such a searing comment, and he even made it during the campaign — it might be the most extra-judicial, lawless comment that any candidate has ever made about the Supreme Court.”
- Curt Levey of the Committee for Justice: “[Obama] has said that he’s looking for a judicial activist. He didn’t use that actual word. He said he’s looking for a judge who shows empathy by favoring certain groups — pregnant women, minorities, so on, and so forth. That is the definition of judicial activism — outcome oriented judging.”
- Long again (sorry, she’s irresistible!), this time to the Washington Post: “He says he wants to appoint judges who show empathy, but what does that mean? Who do you have empathy for? If you have empathy for everybody, you have empathy for nobody.”

It should go without saying how bogus all these claims are. Media Matters has noted that Fox News correspondent Major Garrett showed a clip of Obama saying on May 1, “I view that quality of empathy, of understanding and identifying with people’s hopes and struggles and is an essential ingredient for arriving at just decisions and outcomes.” Garrett did not of course play Obama’s next sentence, which was “I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this

nation was founded, and who brings a thoughtful understanding of how to apply them in our time.”

Even Sen. Orrin Hatch was following the Right’s “empathy” script, at least until he got a phone call from the White House. On “This Week” on Sunday, Hatch said of Obama, “he’s also said that a judge has to be a person of empathy. What does that mean? Usually that’s a code word for an activist judge.”

The next day, after President Obama called him directly to explain what should have been clear from his public words, Hatch said of the president, “He assured me that’s not what he meant when he talks about empathy; he is talking about a judge who has a heart but still lives within the framework of the law. That was good.” It’s also exactly what Obama had said previously and publicly.

### **Distortions of Obama’s comments on the Warren Court**

Another right-wing talking point, one that fits nicely into the Republican Party’s efforts to terrify Americans with charges that Obama is leading America down the path to “socialism,” is based on a false headline posted by blogger Matt Drudge back in October 2008: “2001 Obama: Tragedy that ‘redistribution of wealth’ not pursued by Supreme Court.” His spin was picked up by a number of right-wing pundits, including Sean Hannity. In fact, Obama said something far different and nearly opposite in meaning. The tragedy he spoke of was that civil rights activists became too focused on the courts and less on achieving their goals through the kind of community organizing and coalition building that can lead to successful legislative action.

The Traditional Values Coalition’s Andrea Lafferty was among those recycling the charge more recently after news of Souter’s impending retirement broke:

“The President has stated that he believes the Courts should be used to promote ‘economic justice,’ - code for judge-ordered income distribution.”

## Dissing diversity and gay-baiting

Pundits like Lou Dobbs and Pat Buchanan have mocked the president's reported desire to nominate a woman for the high court, and for the speculation that he may seek to nominate the nation's first Hispanic or Asian-American justice. The cheap shots about "white men need not apply" seem to be premised on the notion that there must not be any women or people of color as qualified to serve as white men.

Right-wing media outlet One News Now reported critically on the potential for an "open lesbian" nominee. The New York Times reported that two lesbian women, Kathleen Sullivan and Pamela Karlan, both of Stanford University, are on President Obama's short list. The Family Research Council's Tony Perkins said of the possibility, "I think that would be a bridge too far for him, to be honest, because that would enter a whole new element into the debate that I don't think he's ready for."

People For the American Way President Michael Keegan responded quickly to insinuations from some on the Right that being gay was a disqualifying characteristic:

"Every American has a right to share their opinions. But people who argue that someone should be excluded from public service because they are gay are distancing themselves from core constitutional principles and the American public's strong opposition to discrimination."

## Anti-choice zealots flail against the election outcome

President Obama campaigned as a pro-choice candidate who believed that *Roe v. Wade* was correctly decided. And since elected he has reached out to anti-abortion activists to seek common ground on reducing the need for abortions through, for example, comprehensive sex education, access to birth control, and better access to health care for

pregnant women and mothers.

Anti-choice leaders have repeatedly engaged in double-speak about the administration's stated goal of reducing the need for abortion equating it with their goal of reducing the number of abortions by criminalizing them, a strategy that has been repeatedly exposed by Right Wing Watch. They're using the same strategy to imply, wrongly, that somehow Obama would be inconsistent or undermining his own stated goals if he nominates a justice who would uphold women's legal access to abortion:

Susan B. Anthony List: "Appointing an abortion extremist to replace Justice Souter on our nation's highest court will continue the trend of activist court decisions [and] do little to reduce abortion in our nation."

Americans United for Life: "Appointing an abortion radical to the Court — someone who believes social activism trumps the Constitution — further undermines efforts to reduce abortion."

To no one's surprise, Operation Rescue has announced it will oppose any nominee who would uphold *Roe*. One of the most gratuitously obnoxious bits of commentary to date comes from Frank Pavone, director of Priests for Life:

"If a racist or terrorist is unfit for the highest court in the land, why would a supporter of child killing be any more fit?"

## Demanding that the GOP follow the script

As noted at the beginning of this document, right-wing leaders and strategists see this nomination battle as an opportunity to portray Obama and his nominees as extremists, regardless of the truth about their records, in order to set up campaign attacks on Democrats who vote for the nominee. Ed Whalen, for example, has insisted that President Obama "should be made to pay a high price for appointing a liberal judicial activist who will do his dirty work for him."

Right-wing leaders are also making clear that they expect Republican senators to play along.

- Curt Levey of the Committee for Justice urged Republicans not to “roll over.”
- Former and potentially future presidential candidate Mitt Romney says the GOP needs to be prepared to “stand up and scream long and hard.”
- The National Review wrote that “Unless Obama does something truly shocking, such as appointing a liberal committed to following the original understanding of the Constitution and its amendments, the proper course for Republicans — inside and outside the Senate — is to build a case for saying no.”
- Gary Marx of the Judicial Confirmation Network: “We need to really be focused on putting wind in the sails of these Republican senators at this stage of the battle.”
- Wendy Long: “Never in history have senators had such a heavy responsibility to scrutinize a nominee to see if she intends to follow the president’s lawless standard of judging. If she does, they will have a responsibility to vote against her - and for the Constitution and rule of law.”
- Long again: “This is going to be one that separates the men from the boys, the wheat from the chaff.” She said activists will use votes on Obama’s nominee as a litmus test for whether to support Senators facing reelection.”