

# Women Fight To Retain State Supreme Court Seats

By Stephanie B. Goldberg

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When Georgia State Supreme Court Justice Carol Hunstein ran for reelection in November 2006, a local tort reform group ran a commercial accusing her of “ignoring laws she doesn’t like” and voting “to free a savage rapist” and “throw out evidence against a convicted cocaine trafficker. . . . If liberal Carol Hunstein wants to make laws, she should run for the legislature instead of judge.”

The first hint of a negative campaign had come months earlier when the treasurer of the Atlanta-based organization Safety & Prosperity Coalition (SPC) sent an e-mail to the wife of Hunstein’s opponent, former Justice Department lawyer J. Michael Wiggins. Discussing Wiggins’ appearance at a forthcoming event, coalition treasurer Elizabeth Young in

her message described Hunstein as “a one-legged, Jewish female from DeKalb County with a lot of money in the bank and [former Gov.] Zell [Miller] as her campaign chair.”

Wiggins’ background included 20 years as a certified public accountant, a federal clerkship, a stint as a law firm associate, considerable experience in the Justice Department, an advisor to the Department of Homeland Security, and a longstanding association with the Federalist Society. Hunstein, who was not Jewish and who had lost a leg to cancer in her youth, had 14 years on the state supreme court and an inspirational life story as a single mother who attended law school on scholarship. After graduating, she opened a small practice, becoming a trial judge

in 1984 and being appointed as a supreme court justice in 1992.

Described by her campaign manager Linda Klein as “a very strong lady,” Hunstein steered clear of political affiliation, running as an independent and refusing to accept contributions from either political party. Hunstein’s total expenditure on political advertising was \$990,000, which Klein feared was inadequate. “We were so worried,” she says. “There were some counties where we just couldn’t afford to advertise.”

Wiggins, on the other hand, had a war chest of more than \$1 million from Georgia Gov. Sonny Perdue and seemingly unlimited assistance from SPC, an ad hoc organization with funding of \$1.6 million, according to the *Atlanta Journal Constitution*. While the SPC was sharply limited by law in what it could donate directly to Wiggins’ campaign, there was no ceiling on the amount of money it could spend on commercials on Wiggins’ behalf.

And so the charges flew back and forth. Wiggins’ supporters disputed claims that he had never tried a case and had physically threatened his sister. Klein, an Atlanta lawyer, says Hunstein’s campaign ran commercials to combat the impression she was soft on crime. These charges lost traction when a local legal newspaper studied Hunstein’s record and found she “sided with the government 39 percent more often than did the court as a whole.” Likewise, an *Albany Law Review* study of Georgia death penalty cases found Hunstein was pro-prosecution in 75 percent of the capital cases she heard from 1998 to 2003.

In an election where most people are in the dark about what the justices do or who to vote for, the many endorsements Hunstein received from legal associations and newspapers turned the tide, Klein says. She won every county in the state, capturing 68 percent of the vote.

While Klein sees the election as proof that “you can’t buy justice,” she is still offended by how hard the campaign had to fight to retain Hunstein’s seat. “It was the Georgia version of Swiftboating.”

### Fighting Stereotypes

Unfortunately, Hunstein is not the first woman state supreme court justice to be caught up in a highly contentious reelection campaign in which she was outspent and falsely characterized as soft on crime. Nor is she likely to be the last. Just as politicians discovered decades ago

Hunstein is not the first woman justice in a contentious reelection campaign to be outspent and falsely characterized.

that there is a symbolic as well as practical value to appointing women to the highest court in the state, tort reform groups in several Southern states appear to be targeting women for defeat because it’s easier to paint them as excessively liberal.

So says Penny White, former justice on the Tennessee Supreme Court and now a professor at the University of Tennessee College of Law and interim director of its Center for Advocacy and Dispute Resolution. “It’s easier to get rid of us because we have higher visibility,” she explains. “Also it’s easier to characterize the kind of woman who becomes a judge as ‘liberal’ because she’s been assertive to get where she is.”

There’s also the stereotype that women are more compassionate and shy from rendering tough verdicts. “The reality is that most judges set their personal feelings aside when they sit on the bench,” White notes.

White speaks from experience. She was unseated in 1996 by attack ads and heated rhetoric designed to portray her as a jurist who coddled criminals. Unlike Hunstein, she ran unopposed, but the atmosphere surrounding the campaign was every bit as acrid. Political heavyweights Bill Frist and Fred Thompson, both U.S. senators at that time, denounced her for unpopular rulings in which she had not written the opinion but had voted in the majority. White recalls being shocked by the pointed attacks. “As soon as he cast his ballot, Thompson gave a press conference urging people not to vote for me,” she says.

In retrospect, White thinks she was done in by “Southern backroom politics” rather than the concerted efforts of a tort reform group, as many claim. “I was naïve,” she admits. “I didn’t fight back. I thought it would be undignified and a violation of judicial ethics to answer the charges. Even my father said, ‘Penny, you’ve got to show them what you are made of.’”

Even more dismaying was the criticism she received from other women for voting with the majority to allow a convicted rapist to be resentenced. “One woman said, ‘I hope you’re raped so that you know what it feels like,’” White recalls. “But I was not on the court to represent women, which is a misconception that many have. Like most jurists, I put my personal feelings aside.”

By her own admission, White was something of an outsider. “I was merit-selected by a Democratic governor to sit on the court.” That meant she didn’t have party backing to defend her against the Republican onslaught. She feels she was also at a disadvantage because the Supreme Court had not yet

decided *Republican Party of Minnesota v. White*, the 2002 case that relaxed restrictions on what judges could say during their election campaigns.

“I have a lot of calluses,” White says. “It was a horrible experience that affected my confidence in the system.”

Had White been reelected, she would have assumed the role of Tennessee’s first female chief justice. She had been selected in early spring, and the event was played up in the press. “I was too dumb to realize it, but that was probably why they targeted me,” says White ruefully.

#### Victor in an Uphill Battle

Alabama’s Sue Bell Cobb, the state’s first woman chief justice, is a veteran of the nation’s most expensive battle for a supreme court seat. Cobb, who has 25 years of experience as a trial and appellate judge, defeated incumbent Drayton Nabers in 2006 by a 4 percent margin, spending \$2.5 million to his \$4 million.

Cobb is not one to shy from a fight. She first ran for a trial judge’s spot in 1980 as a third-year student in law school. She won easily and was sworn in three weeks after she passed the bar. Nor did she drop out of the race after suffering a miscarriage in the midst of her 1994 campaign for a seat on the state’s court of criminal appeals or when her house was firebombed in 1998.

An ardent advocate of legislation to fund children’s programs, Cobb believes that the state’s judicial selection system needs a legislative fix. In November 2007, she announced that she would ask congressional representatives to introduce three bills to streamline and depoliticize the process.

The first bill would create a merit-selection process for every judge in Alabama. This system would use a bipartisan panel to select candidates for judicial

appointments. A second bill would limit campaign contributions to judicial campaigns to \$250. A third would establish noncontested elections for appellate judges.

Cobb has said the legislation is necessary to restore the public trust in the judicial system. If anyone is in a position to advocate for a depoliticized bench, it’s Cobb, who has been the lone Democrat on both the state supreme court and its criminal court of appeals and was cast as the darling of the trial lawyers’ bar in her last campaign. Cobb’s campaign commercials have been criticized for being less than substantive, featuring her playing piano for her daughter’s Sunday

school class. Her opponent aired spots in which he proudly declared his pro-life views, casting some doubt on how these candidates are being marketed to voters. Is it important that a judge is ardently pro-choice or against abortion if she is unlikely to decide these cases? Or, if she does confront these issues on the bench, should her personal and religious views compel a particular result or should she decide each case on its own facts?

#### Elections vs. Appointments

If judicial elections devolve from mistaken assumptions about what judges do and who they ought to be, is there any point in

## Hail to the Chief

18 State Supreme Courts currently have women chief justices

State	Chief	No. of Justices	No. of Women
Ala.	Sue Bell Cobb*	9	3
Alaska	Dana Fabe*	5	1
Ariz.	Ruth McGregor	5	2
Colo.	Mary Mullarkey*	7	3
Conn.	Chase T. Rogers	7	3
Ga.	Leah Ward Sears*	7	2
Iowa	Marsha K. Ternus*	7	1
Kans.	Kay McFarland*	7	3
Maine	Leigh Ingalls Saufley*	7	2
Mass.	Margaret Marshall*	7	3
Mo.	Laura Denvir Stith	7	3
Mont.	Karla M. Gray*	7	2
N.Y.	Judith Kaye*	7	4
N.C.	Sarah Parker	7	3
S.C.	Jean Hoefler Toal*	5	1
Utah	Christine Durham*	5	2
W.Va.	Robin Jean Davis	5	1
Wisc.	Shirley S. Abrahamson*	7	4

\*State’s first woman chief justice  
Source: National Center for State Courts ([www.ncsonline.org](http://www.ncsonline.org))

having judges run for office? Lynn Hecht Schafran, a senior vice president of New York–based Legal Momentum and director of its national judicial education program, is not ready to abandon the process. “The older women who sit on the bench in New York are adamant that they would never have had the opportunity to be judges without the elective process,” she points out. The problem with an appointment system is that it’s too pliable. She notes that Gov. Arnold Schwarzenegger appointed 18 women to the bench in California only after being heavily criticized for leaving women out in a previous round of appointments. “It shows that we have to keep the pressure on regardless of who’s in office,” Schafran says. “Even though the pool of qualified women candidates has grown considerably, we can’t assume that momentum is going to carry them to the top. We have to keep the pressure on.”

Fortunately, the National Association of Women Judges has been doing just that, extracting a promise in the 1980 election from both presidential candidates to nominate a woman to the U.S. Supreme Court, notes NAWJ Executive Director Drucilla Ramey. But why does that pressure seem to be less effective 28 years later, when women have clearly lost ground in terms of their representation in the federal judiciary? According to *The Washington Post*, President George W. Bush’s rate of appointment of women to the federal court of appeals in his first term was only 21 percent, while approximately one-third of President Bill Clinton’s nominees in the same time frame were women.

“That’s an absolute loss of more than a third,” notes Schafran, who believes it will be very difficult for Bush’s successor to restore the pace to what it was during the Clinton and Carter years.

In the meantime, the loss of a woman justice on the U.S. Supreme Court seems like a giant step backward, while the scorn that was heaped upon the brief candidacy of

**Older women on the bench in New York believe they would never have become judges without the elective process.**

Harriet Miers disheartens many women who do not share her political philosophy. “I felt a great deal of sympathy for Miers and read a lot . . . about her competence and experience,” White notes. “It’s horrible for America to have one woman justice on the court. Just the loneliness of being the only woman is unbearable, and it is so unbelievably communicative about what we think of equality.”

“CNN legal commentator Jeffrey Toobin [author of *The Nine: Inside the Secret World of the Supreme Court* (Doubleday 2007)] thinks Miers would have been just fine as a justice had conservatives not revolted,” Schafran points out. “There really is no way of knowing.”

The picture in state courts is far more confusing: In some states, women justices are only a token presence—or totally absent, as is the case in Indiana and Idaho—while in Wisconsin, for example, four of the seven justices are women.

Women tend to be concentrated in lower courts of limited jurisdiction and are not very prevalent at the appellate level, Ramey notes. “We have concerns about the current

systems of judicial evaluations. Some very serious issues have been raised [in political science research] about whether those systems have a disparate impact on women of color,” she says. “It’s shocking how much the numbers can vary according to who the appointing authority is.”

As someone who, for years, debunked the myth of a “shallow pool of qualified applicants,” Schafran now believes there really is a dearth of women lawyers who can pass the Bush administration’s litmus test to qualify as judges. “There just aren’t that many women who believe in going back to the 18th century.”

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### States with Highest Percentage of Women Justices

N.Y.	57%
Wisc.	57%
D.C.	56%
Wash.	44%
Calif.	43%
Colo.	43%
Conn.	43%
Kans.	43%
La.	43%
Mass.	43%
Mich.	43%
N.J.	43%
N.C.	43%
Ohio	43%
Ariz.	40%
N.Mex.	40%
N.Dak.	40%
Tenn.	40%
Utah	40%

Source: National Center for State Courts ([www.ncsonline.org](http://www.ncsonline.org))